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- Stirling, Lillie E. (39 L. D., 346); overruled, 46 L. D., 110.
- *St. Paul, Minneapolis and Manitoba Ry. Co. (3 L. D., 255); modified, 13 L. D., 354. (See 32 L. D., 21.)
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DECISIONS
RELATING TO
THE PUBLIC LANDS.

MATTHEWS v. DRUMMOND.

Decided February 15, 1921.

SETTLEMENT—PREFERENCE RIGHT—ADVERSE CLAIM.

Only unoccupied and unimproved public lands are subject to settlement and entry under the homestead laws, and one who, without the consent of the owner of the adjoining surveyed lands, settles upon and occupies unsurveyed lands that were erroneously or fraudulently omitted from survey, and which, at date of said settlement, were in the possession of the latter, does not acquire any preference right of entry; the fact that the initiation of the claim was peaceful and without force is immaterial.

VOGELSANG, *First Assistant Secretary*:

Edgar I. Matthews has appealed from a decision of the Commissioner of the General Land Office dated July 27, 1920, which affirmed the action of the local officers in rejecting his homestead application to enter lots 7, 8, 10, 11, and 12, Sec. 11 and lots 2 (erroneously described, should be lot 2, Sec. 13), 5, 6, 8, and 9, Sec. 14 (158.66 acres), T. 4 S., R. 15 W., T. M., Gainesville, Florida, land district, for conflict with allotments made to J. H. Drummond and Lydia E. Ware, pursuant to a resurvey of the township.

The lands involved herein are portions of a peninsula comprising fractional Ts. 3 and 4 S., R. 15 W., situated between two arms or branches of St. Andrews Bay, which was originally surveyed in 1847 and the plats thereof were approved May 22, 1849. The records of the General Land Office show that all of the lands comprising the peninsula were disposed of by the Government in accordance with the original survey about thirty years ago.

It had been quite generally understood for some time that there was a larger acreage of lands on the peninsula than that shown on the original plats. In fact the owners of the patented lands several times unsuccessfully applied for a resurvey with the view to having their titles readjusted to conform to the true conditions. The Land Department denied their requests, giving as the reason therefor that there were no undisposed of lands in those townships. However, an extension survey was made during 1914 and 1915, as a result of which

it was found that the present area of the peninsula is considerably larger than that originally returned. New plats showing the additional acreage were approved November 19, 1915. Certain of the patented lands were designated as tracts to which numbers were given. Those tracts included both lands shown upon the original plats and additional lands shown only upon the later plats.

When the new plats were filed in the local land office on March 6, 1916, a large number of applications to make homestead entry were filed by persons who alleged preference rights by virtue of settlement upon the newly surveyed lands prior to their survey. Some of those applications conflicted not only with applications filed by the private land owners to have their patented claims adjusted, but also with each other and with a pending swamp claim of the State. On December 12, 1917, the Commissioner of the General Land Office rendered a decision in which an attempt was made to adjudicate the conflicting claims. The matter came to the Department on appeal and on September 28, 1918 (D. 36378), a decision was rendered, which modified the decision of the Commissioner.

In the departmental decision of September 28, 1918, it was recognized that the original survey of the peninsula had been erroneous or fraudulent, in that large areas were omitted from the survey that should have been surveyed, but it was held with respect to the conflicting claims, that if, as contended, the original patentees and their transferees had been in possession of the unsurveyed lands under color of title or claim of right, believing in good faith that said lands belonged to them as portions of their patented claims, such possession must be held to bar any adverse claim attempted to be initiated by settlement or entry. In that event the owners of the patented claims would have the right under the provisions of section 2372, Revised Statutes, as amended by the act of February 24, 1909 (35 Stat., 645), to apply for the amendment of their claims. After considering the various conflicting claims, including that of Edgar I. Matthews, it was concluded that the homestead applicants who alleged prior settlement should be accorded an opportunity of submitting proper evidence at a hearing. The matter was accordingly remanded to the General Land Office for the purpose of determining after hearing whether or not the settlement claims should be entitled to preference over the adjustment claims of the private land owners or the swamp land claim of the State.

It appears that the State of Florida specifically waived all claims that it had asserted to any of the lands involved in this case.

A hearing was held before the Clerk of the Circuit Court at Panama City, Florida, and all the interested parties appeared in person and with counsel and witnesses and submitted a large amount of testimony, documentary evidence and exhibits. The issue was

correctly stated in the hearing notice which had previously been served by the local land office. Thereupon the register and receiver rendered a joint decision, April 24, 1920, in which they reviewed the testimony somewhat at length and from it found that the rights of those claiming through the original patentees are superior to those of Matthews for the reason that the shore line of St. Andrews Bay is well defined and that almost invariably the improvements of said patentees were made near the waters' edge and that possession had since been maintained by the transferees themselves or through their tenants.

In the decision appealed from the Commissioner set forth his findings in the following language:

The evidence in this record shows that each of the original homestead entry-men named herein built his or her house, and established residence, on that part of the land entered which fronted upon St. Andrews Bay, the houses having been located from seventy-five to one hundred and fifty yards from the water's edge, and that some of said houses, or others built at later dates, were yet standing in such positions and actually occupied at the date when Matthews alleges he made settlement. All of the lands in controversy here were claimed by Drummond and Ware. * * *

The evidence in the record clearly shows that the parties named were in possession of all of the lands applied for by Matthews at the date of his alleged settlement thereon, and that he knew or might have known of such possession at that time.

The action of the local officers was affirmed and the application of Matthews was held for rejection.

The appeal contends that the Commissioner erred in holding that the settler's right of Matthews was not superior to the claim of Drummond and Ware and that the latter mentioned parties were entitled by virtue of the purchase of surveyed lands to secure title to unsurveyed lands, notwithstanding the fact that it was generally understood that large bodies of land had been omitted from the survey. A brief supportive of the appeal was submitted, in which particular attention was called to certain portions of the testimony given at the hearing, which, it is argued, conclusively establishes the validity of the claimed settlement preference right. The cases of *The Pacific Live Stock Company v. Armack* (30 L. D., 521), *John McClennen* (30 L. D., 527), and *Lee Wilson and Company v. United States* (245 U. S., 24), were cited as authority in support of the contention that the title to lands erroneously omitted from a Government survey is vested in the United States and that such unsurveyed lands, irrespective of the claims of the abutting land owners, are subject to settlement by qualified homesteaders.

The departmental decision of September 28, 1918, disposed of all questions other than that of the question of whether or not the homestead applicant had by his settlement upon the lands acquired a pref-

erence right of entry which defeats the right of the private land owners to include within their holdings the lands which he is seeking to enter. It is, therefore, primarily a question of fact as to whether or not the settler invaded the possession of prior occupants of the lands.

The facts as disclosed from the testimony taken at the hearing show that prior to the recent survey, Matthews employed a surveyor to survey the boundaries of his claim and that he then posted his claim, constructed a house at a cost of about \$600, established residence, and fenced, cleared and cultivated some of the land. Later his house was burned and he constructed a new house estimated to be worth approximately \$2000. It was also shown that continuous residence since November, 1911, was maintained by Matthews or by some member of his family.

Notwithstanding the showing made by Matthews, the Commissioner has held that at the time that the settlement claim was first asserted, the owners of the adjoining originally surveyed lands were in possession of the unsurveyed areas and that they were not, therefore, subject to settlement or entry at that time. This Department is of the opinion that the evidence sustains the Commissioner's holding in that respect. The present claimants opposed to Matthews, have submitted properly authenticated copies of the deeds showing the unbroken series of transfers by which they deraign title and it is a matter of record that the original patentees took possession of and considered that the unsurveyed lands were portions of their claims and treated them as subject to sale and transfer. It also appears according to a statement in the Commissioner's decision that at the time that the recent survey was ordered an understanding was had between the Land Department and the then owners of the lands entered under the original survey, to the effect that titles should not be disturbed by the extension survey, and that the areas and positions of such tracts should remain intact, or as nearly so as possible.

It has been a well established principle of law ever since the United States Supreme Court rendered its decision in *Atherton v. Fowler* (96 U. S., 513), that only unoccupied and unimproved lands of the United States are subject to settlement and entry under the homestead laws, and that principle holds true even when the possession of the prior occupant was wrongful as against the United States. *Harvey v. Holles* (160 Fed., 531). Nor can the settlement claim be held valid where the settler, without consent of the prior occupant, entered and took possession of the premises during the temporary absence of the latter, and the fact that the entry was peaceful and without force is immaterial. *Tidwell v. Chiricahua Cattle Company* (5 Ariz., 365, 53 Pac., 192). The rule has been so universally adhered to by the courts and the decisions are so numerous that fur-

ther citation of authorities in substantiation of it appears unnecessary.

The decisions cited in the brief of the appellant are not in point and are inapplicable to a situation such as that presented in this case. The Pacific Live Stock Company and McClennen cases hold in effect that the Government, by the approval of a survey, does not part title to lands erroneously omitted therefrom by the disposal of the surveyed lands, and that it has authority to cause the erroneous survey to be corrected. In *Lee Wilson and Company v. United States*, the court held that the riparian claimants had no legal title to the so-called lake lands involved in that suit. Those holdings are not in conflict with the doctrine enunciated in *Atherton v. Fowler, supra*. In the case under consideration none of the parties is disputing the title of the United States. The question at issue is which of the claimants has the superior equity to become a preferred claimant in acquiring title from the Government.

The Commissioner stated in his decision that when final action shall have been taken by the Department thereupon, proper action will be taken upon the petition of J. H. Drummond and Lydia E. Ware in the matter of cancellation of outstanding patents and the issuance of new patents in lieu thereof for the lands in controversy in this case.

After careful consideration of all that has been presented, the Department finds no error in the decision appealed from and the same is, therefore, affirmed. The General Land Office will act upon the adjustment application of the appellees with the view to issuing supplemental patent upon payment of the requisite sums and fees, as provided by section 2372, Revised Statutes, as amended by the act of February 24, 1909 (35 Stat., 645).

HENRY W. POLLOCK.

Decided February 15, 1921.

MINERAL LANDS—ACT OF JULY 17, 1914.

The act of July 17, 1914, did not repeal the provisions of the mining laws and after the passage of said act, lands of the open public domain containing the minerals named therein, not covered by Executive withdrawals or reservations, were subject to exploitation and location under the same conditions as theretofore.

MINERAL LANDS—LAND DEPARTMENT—CLASSIFICATION.

Section 2319, Revised Statutes, proclaimed that all valuable mineral deposits in the public lands were free and open to exploration and purchase, and classification or designation of lands as mineral by the Land Department was not a prerequisite to the right to make a mining location.

MINERAL LANDS—ACT OF OCTOBER 2, 1917.

A valid subsisting mining location antedating the act of October 2, 1917, which authorizes exploration for and disposition of potassium reserved under the act of July 17, 1914, vested the claimant with a substantial property right and the beneficial ownership and control of the land, such as to constitute a bar to the granting of a lease for the potash deposits.

MINERAL LANDS—LAND DEPARTMENT—JURISDICTION.

The Land Department, as a specially constituted tribunal, has jurisdiction to determine in accordance with the facts and the appropriate law, after due notice and hearing, the validity or invalidity of mining locations.

MINERAL LANDS—ACT OF JULY 17, 1914.

The term "such deposits," as used in section 2 of the act of July 17, 1914, has reference only to those deposits that are reserved in a nonmineral patent issued pursuant to that act and not to all deposits of the named minerals wherever found upon the public domain.

VOGELSANG, *First Assistant Secretary*:

Henry W. Pollock who, on May 18, 1920, filed his application 019439 for a potash lease upon the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 33, T. 24 N., R. 44 W., 6th P. M., Alliance, Nebraska, land district, pursuant to the act of October 2, 1917 (40 Stat., 297), has appealed from decision of the Commissioner of the General Land Office, dated November 18, 1920, holding his application for rejection upon the ground that the tract was included in the valid placer mining location of Howard S. Blackledge and his wife. The applicant was granted thirty days within which to show that the placer claim had been abandoned and was not being held or worked by the locators, or under their authority. He made no such showing but instead has appealed.

In support of his appeal Pollock contends in substance that the asserted location of Blackledge is wholly invalid because made subsequently to the date of the passage of the act of July 17, 1914 (38 Stat., 509), under which potash deposits were definitely withdrawn from exploitation or appropriation and that therefore lands valuable for potash could be disposed of only under the nonmineral land laws as prescribed in said act. It is further urged that the Department had no jurisdiction to pronounce the Blackledge location valid and that in any event, before any mineral location could properly be made upon the land, it was necessary for the Department to designate the area as mineral.

In connection with this land and the adjoining NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 34, the following filings appear:

October 26, 1916, 018036, homestead entry of Blackledge, canceled 1920.

January 4, 1918, 018420, application for permit, Pollock and Snyder, rejected May 24, 1918.

January 14, 1919, 018613, application for lease, Pollock, suspended February 26, 1919.

May 18, 1920, 019439, application for lease here involved.

January 10, 1921, 020009, application for lease of NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, Pollock, pending.

From the records it is made to appear that when application 018420 for the Blackledge 80 acres, and other lands, was filed, and while Pollock and Snyder were, by letters and telegrams, seeking early action thereon, they, at the same time, held an option for a lease which recognized Blackledge's placer claim, which option was not abandoned and released by them until January 16, 1918. On March 18, 1918, Pollock's mineral protest against Blackledge's homestead entry was filed which led to a hearing and the departmental decision later mentioned.

The suggestion that this Department must designate as mineral any area of the public domain before valid mining location can be made thereon is decidedly novel. Section 2319, Revised Statutes, declares that all valuable mineral deposits in the public lands are free and open to exploration and purchase and the lands themselves to occupation and purchase by citizens of the United States.

The Department is not aware of any law, regulations or practice requiring a mineral classification or designation by the Land Department before a mining claim can be properly located on the open public domain.

The Land Department, as a specially constituted tribunal, has jurisdiction over mining locations enabling it to declare them valid as well as invalid in accordance with the facts and the appropriate law as found and determined by it after due notice and hearing. *Clipper Mining Company v. Eli Mining and Land Company* (194 U. S., 220); *Cameron v. United States* (252 U. S., 450); *Lane v. Cameron* (45 App. D. C., 404); *H. H. Yard, et al.* (38 L. D., 59); and *J. B. Nichols and Cy Smith* (46 L. D., 20).

The main contention of counsel for appellant is founded on a misconception of the scope and effect of the act of July 17, 1914, *supra*. That legislation is entitled

An Act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas or asphaltic minerals.

That act was partly remedial in character and enabled those who had, in good faith, initiated claims under the nonmineral land laws, upon tracts subsequently withdrawn, classified, or reported as being valuable for the mineral substances specified, to perfect their claims and receive patent thereon, with a reservation of the minerals to the United States. Without such saving legislation their filings and entries in general were exposed to outright cancellation if the lands were determined to be mineral in character. Further, the act specifically extended the nonmineral land laws over lands withdrawn,

classified or valuable for the deposits mentioned, provided the non-mineral applicant sought the land exclusive of the mineral and the right to mine and remove the same.

In sections 2 and 3 thereof, Congress expressly provided that the nonmineral patent under the act

* * * shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law, * * * nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character. * * * That any person who has in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.

The term "such deposits" refers only to the deposits *reserved in the nonmineral patent* and not to all deposits of the named minerals wherever found upon the public domain, as is the contention of counsel. The general mining laws were not available or appropriate to permit the disposition of such reserved deposits. Further legislation was essential and so the deposits reserved in said patent were to be subject to disposal only as thereafter expressly directed by law.

The above excerpt did not work a repeal of the provisions of the mining laws where such laws could otherwise operate, nor did the act itself effect such a repeal, and no such purpose nor intent can be properly gathered from the language used. After the passage of the act, oil, potash, phosphate, and the other minerals mentioned in the public domain, in areas not covered by Executive withdrawals or reservations, were subject to exploitation and location under the same conditions and with the same facility as theretofore. The specific repeal of the mining laws, as to the mineral deposits mentioned was accomplished by later acts; as to potash by the act of October 2, 1917 (40 Stat., 297); as to phosphate, oil and gas, oil shale and nitrate of sodium, by the act of February 25, 1920 (41 Stat., 437), each act expressly providing that valid claims existent at the passage thereof and thereafter maintained in compliance with the laws under

which initiated, might be perfected under such laws, even including discovery, under the last mentioned act.

There is no more room for contending that the surface act of July 17, 1914, *supra*, of itself, repealed or superseded the mining laws, than there is for urging that the coal surface acts of March 3, 1909 (35 Stat., 844), and June 22, 1910 (36 Stat., 583), operated to repeal the coal land laws (sections 2347, *et seq.*, Revised Statutes), or that the special surface acts of August 24, 1912 (37 Stat., 496), providing for certain agricultural entries and selections on oil and gas lands in the State of Utah and of February 27, 1913 (37 Stat., 687), authorizing selections by the State of Idaho of phosphate and oil lands in that State, superseded the general oil and gas, and phosphate and gas mining laws respectively in those States.

It was not the purpose or policy of legislation in 1914 to completely tie up and withhold from further exploitation or operation the potash resources of the United States at a time when, owing to the outbreak of the World War, the importations of potash from Germany were cut off. There has never been any general and sweeping Executive withdrawal of potash lands. The only two potash withdrawals of limited area, made by Executive order, were in California and Nevada. The result of the surface act of July 17, 1914, was to throw into a state of reservation only those potash deposits falling within the scope and operation of that portion of the act hereinabove quoted, and so far as that act was concerned potash deposits upon the open public domain, were still subject to location under the general mining laws unless specifically reserved by Executive order. The fact that Blackledge, on October 26, 1916, made homestead entry 018036 for the tract here involved and the adjoining forty, and that subsequently the land was claimed, reported and adjudicated to be valuable for potash, did not bring the deposit within the reservation of said act of July 17, 1914. It is true that in the decision in the case of Pollock *v.* Blackledge the scope and operation of the act of July 17, 1914, was not considered or discussed, possibly for the reason that the Department deemed that the act had no essential bearing upon the disposition of that case. In the course of the decision of October 20, 1919, the Department said:

* * * Under the circumstances disclosed the Department is inclined to the view that by his consenting to and making of placer locations in September, 1917, based on potash discoveries and the continued assertion and maintenance of such claims, Blackledge in legal effect waived and abandoned any claim or rights accruing to him by reason of his homestead entry and settlement, and that now he should not be heard before the Land Department to assert or maintain rights thereunder. * * * In view of the foregoing and upon the record here presented so far as is made to appear, the placer claims initiated September 5, 1917, are good and sufficient. The protestant, Pollock, can not well complain of this holding for the reason that through his agent, Snyder,

he had actual notice of the placer claims and the work done thereunder and recognized their existence in the options taken December 17, 1917, and subsequently released and abandoned. * * * The Department holds that Blackledge by his acts with respect to the land virtually waived and abandoned his claim as a homestead entryman, and that his entry therefore should be canceled. It is so ordered. * * *

Said decision was, on March 10, 1920, adhered to on motion for rehearing. To a certain extent the present appeal is an attempt to reopen issues as to the validity of Blackledge's placer claim heretofore decided. In that proceeding this Department determined and adjudged, after due hearing, that the placer location antedated the act of October 2, 1917, *supra*, was not barred by Blackledge's homestead entry (which entry has since been canceled and expunged from the records of the Land Department), and was a good and sufficient mining claim.

The appellant recites in his application that he makes his present application for a lease pursuant to rights claimed by him as a protestant in the proceedings of Pollock *v.* Blackledge, and without waiver of his rights of priority to a lease under his former application to which the present application is amendatory.

The Department does not find it necessary to pass upon the question as to whether a successful mineral protestant against a homestead entry gains any inceptive rights to the land which he may assert as a preferred lessee in connection with said act of October 2, 1917. For present considerations, it is sufficient that the Department has found and adjudicated that the land was included in a valid subsisting mining location which antedated said leasing act of October 2, 1917, Pollock's and Snyder's application 018420 for a prospecting permit, filed January 4, 1918, Pollock's protest of March 18, 1918, his lease application 018613, filed January 14, 1919, his present application filed May 18, 1920, and his later application filed January 10, 1921. In its further consideration the Department finds no reason to change its views with respect to the validity of the placer mining claim. Said placer location vested the claimants with a substantial property right and the beneficial ownership, possession and control of the land. While such claim continues to exist the Land Department can not, with propriety, recognize any other disposition or appropriation of the land unless and until it be shown that the mining claim has been abandoned.

It would appear that Pollock's suspended application 018613, covering the eighty-acre tract and his recent application 020009 for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, for the reasons herein set forth, should also be rejected, unless it be shown that the placer mining claims found to cover the land have been abandoned. It is so ordered. This action is taken in the interest of expedition and due disposition of the several applications.

It is concluded that the Commissioner's adjudication holding application 019439 for rejection, in the absence of any showing of abandonment of the placer claim, is correct, and the same is hereby affirmed.

HENRY W. POLLOCK.

Motion for rehearing of departmental decision of February 15, 1921 (48 L. D., 5), denied by First Assistant Secretary Finney, May 5, 1921.

UNITED STATES v. STATE OF NEW MEXICO (ON REHEARING).

Decided February 15, 1921.

SCHOOL LAND—MINERAL LANDS—DETERMINATION OF CHARACTER.

The grant to New Mexico of additional school lands, sections 2 and 32, by section 6 of the act of June 20, 1910, took effect on January 6, 1912, the date on which the State was admitted into the Union, and to except lands therefrom, on account of their known value for coal, the determination of their character must be made as of the latter date.

SCHOOL LAND—MINERAL LANDS—NOTICE.

It is not essential in order to declare a tract of land to be mineral in character that actual notice of the existence of mineral deposits be brought home to the interested party, if the physical facts are sufficient to charge the public generally with the knowledge of the presence of minerals.

DEPARTMENTAL DECISIONS CITED AND FOLLOWED.

Cases of *Warren v. State of Colorado* (14 L. D., 681), and *Don C. Roberts* (41 L. D., 639), cited and followed.

VOGELSLANG, *First Assistant Secretary*:

By decision of December 6, 1919, the Department affirmed the decision of the Commissioner of the General Land Office of April 14, 1919, which found and held as the result of a hearing had on adverse proceedings instituted by the Government that Secs. 32, Ts. 19, 20, and 21, R. 1 W., Sec. 32, T. 19 N., R. 2 W., Sec. 2, T. 17 N., R. 3 W., Secs. 2 and 32, T. 17 N., R. 4 W., Sec. 32, T. 15 N., R. 6 W., Sec. 2, T. 16 N., R. 6 W., Sec. 2, T. 14 N., R. 7 W., Sec. 32, T. 15 N., R. 7 W., and Sec. 32, T. 18 N., R. 7 W., claimed by the State of New Mexico under its additional school land grant by section 6 of the act of June 20, 1910 (36 Stat., 557, 561), were known to have been coal in character at the date of said act, which date is given in the decision of the Department as that upon which the grant under the act took effect.

The case is again before the Department on a motion for rehearing filed by the State of New Mexico. Said motion challenges the cor-

rectness of the departmental action complained of in taking into consideration for the purpose of determining the State's title to the land involved certain portions of United States Geological Survey bulletins, Nos. 285, 341, and 381, which were submitted on behalf of the Government in evidence at the hearing had in said adverse proceedings. It is urged in the motion that said reports should not have been offered in evidence for the reason that they are in no sense competent legal evidence; that neither the editor nor the geologists who submitted the data upon which said reports were based were called to the stand; that the publications themselves were not authenticated in the manner required by law; that the data contained in said reports are *ex parte* in the sense that the publications themselves were not cross-examinable nor verified under oath by the editor thereof or the geologists whose data they purport to contain.

Before passing upon the points urged in the motion, the Department deems it important to again consider the question as to the date the grant made by the act took effect and in this connection it is to be noted that the State of New Mexico was admitted into the Union by the President's Proclamation of January 6, 1912 (37 Stat., 1723), pursuant to the provisions of joint resolution of August 21, 1911 (37 Stat., 39). By section 6 of said act of June 20, 1910, known as the enabling act, it is provided—

That in addition to sections sixteen and thirty-six, heretofore granted to the Territory of New Mexico, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: * * *

The terms of the grant of said sections 2 and 32 to the State of New Mexico do not differ materially from those employed by the act of March 3, 1875 (18 Stat., 474), known as the Colorado enabling act, in the grant to that State of Secs. 16 and 36, section 7 of which act provides:

That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not more than one quarter section, and as contiguous as may be, are hereby granted to said State for the support of common schools.

And by section 15 of that act it is provided "that all mineral lands shall be excepted from the operation and grants of this act." Construing said provisions the Department in *Warren et al. v. State of Colorado* (14 L. D., 681, 683), said:

Colorado was admitted as a State on the first day of August, 1876, by proclamation of the President (19 Stats., 665), and subject to the exceptions contained in the seventh and fifteenth sections, *supra*, the grant became effective on that date as to all surveyed lands.

The same rule previously announced by the Commissioner in *Townsite of Silver Cliff v. Colorado* (6 C. L. O., 152), and *Colorado School Sections* (16 C. L. O., 242), had been recognized and applied by the Department in *Boulder and Buffalo Mining Company* (7 L. D., 54), and *Fleetwood Lode* (12 L. D., 604).

The Department is of opinion that the same rule is applicable to the grant of sections 2 and 32 made by the said act of 1910 to the State of New Mexico, and that the determination of the character of the said sections should be made as of January 6, 1912, the date of the admission of New Mexico as a State, instead of June 20, 1910, the date of the act. To this extent the decision of the Department of December 6, 1919, is hereby modified.

The portions of said Geological Survey bulletins, to the admission of which in evidence, exception is taken in a motion for rehearing, were based upon geological field investigation and examinations of the land in question, including coal outcrops surrounding the same, made from four to seven years prior to the admission of the State, by geologists of the Geological Survey and said bulletins were published in, respectively, the years 1906 and 1909 and 1910. Their admission in evidence at the hearing was objected to by the State at that time only on the asserted ground that the matters therein contained were immaterial. That objection was not sustainable and no further objection to their admissibility was interposed by the State until a motion for rehearing under consideration was filed. On the other hand they were at the hearing made the basis of cross-examination by the State of one of the Government's witnesses, and in a brief filed by the State in connection with its appeal from the decision of the Commissioner of the General Land Office, free reference was made thereto in support of certain of the State's contentions. No evidence was adduced on behalf of the State to refute any of the matters of fact contained in said reports. Under all the circumstances the Department is clearly of opinion that the portions of the reports now objected to were properly admitted as evidence to establish *prima facie* the geological facts therein set forth.

Some question has been raised as to whether actual notice of the character of the land must have been brought to the party interested.

This is not essential. The law in this respect is stated in the case of Don C. Roberts (41 L. D., 639, 641), as follows:

The fact that an entryman who seeks a tract of public land under nonmineral law is so inexpert as to be unable to determine the existence of mineral upon land does not warrant the United States in disposing of mineral lands under nonmineral laws, nor is it necessary in order to declare a tract mineral in character that personal knowledge of the existence of the mineral deposits be brought home to the entryman. In this particular case the land lying as it does in a region well known for its coal deposits, within a few miles of working mines in which the dip of the coal beds was disclosed, was sufficient to charge the public generally with the knowledge of the coal character involved. Whether the entryman had sufficiently exerted himself to acquire this information is immaterial. It was his duty to be familiar with facts of common knowledge and he can not escape the consequences by pleading personal ignorance of facts.

Other questions are raised in the motion but these were presented and considered when the case was before the Department on appeal.

Upon a careful review of the case the Department sees no reason to disturb its previous decision to the effect that the land was known to be coal in character at the time the grant to the State of said sections took effect which, as herein held, was on January 6, 1912, the date of the admission of the State into the Union. The motion for rehearing is accordingly denied.

GEORGE C. BAUER.

Decided February 17, 1921.

REPAYMENT—HOMESTEAD—INDIAN LANDS.

The forfeiture clause, as contained in section 9 of the act of May 30, 1908, is a complete bar to repayment of moneys paid for Fort Peck Indian lands entered pursuant to section 8 of that act and subsequently relinquished, except as to that class of irrigable lands specified in section 2 of said act.

REPAYMENT—HOMESTEAD—INDIAN LANDS.

The repayment provision contained in paragraph 6, section 2, is a limitation upon the general forfeiture clause of section 9 of the act of May 30, 1908, and pertains exclusively to such entered lands as are found to be irrigable by any system constructed pursuant to said act and that are thereafter resold.

DEPARTMENTAL DECISIONS DISTINGUISHED.

Cases of William F. Earnheart (44 L. D., 3), and Virnand C. Walters (46 L. D., 282), cited and distinguished.

VOGELSANG, *First Assistant Secretary*:

George C. Bauer has appealed from decision of the Commissioner of the General Land Office rendered August 28, 1920, denying repayment of the initial instalment of purchase money upon Fort Peck

Indian land paid pursuant to section 8 of the act of May 30, 1908 (35 Stat., 558), in connection with homestead entry 028040 allowed May 16, 1914, for the NE. $\frac{1}{4}$, Sec. 26, T. 32 N., R. 46 E., M. M., Glasgow land district, Montana.

Charles R. Cover filed affidavit of contest against said entry May 18, 1916, charging entryman failed to establish or maintain residence on the land, and that said entry had been wholly abandoned for more than six months last past. The entry was thereafter canceled upon relinquishment filed in the local land office June 28, 1916.

Adverse action taken herein by the Commissioner was based upon section 9 of the act of May 30, 1908, *supra*, providing:

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.

It is contended, in support of the appeal, that the act of May 30, 1908, *supra*, makes ample provision for repayment of the initial purchase money paid by Bauer as well as of the instalments of purchase moneys paid in other cases also pending before the Department on appeal and specifically referred to in the brief filed in the instant case.

Reversal of the decision below is urged upon the following ground: That the land after cancellation of appellant's entry was re-entered and paid for in full by second entryman as the result of which there have been placed to the credit of the Indian fund moneys in excess of the lawful purchase price of the land so entered; and, this being true, statutory authority for the return of the surplus money to the first entryman is found in paragraph 6 of section 2 of the act of May 30, 1908, *supra*, which provides as follows:

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 Department, after having carefully considered the issues presented in the light of the contentions urged and the cases cited in support thereof, is clearly of the opinion, as held by the Commissioner's decision on appeal herein, that paragraph 6 of section 2 of the act of May 30, 1908, *supra*, pertains exclusively to such

entered lands as are found to be irrigable by any system constructed under the provisions of said act, and thereafter resold.

The forfeiture clause, as contained in section 9 of the act of May 30, 1908, *supra*, is a complete bar to repayment of moneys paid upon lands entered under said act, with the exception of the irrigable class of lands hereinbefore mentioned and specifically described in section 2 thereof. This conclusion of law, or construction of the act, is obviously sound, and the Department is without authority of law to hold otherwise. When considering the act of May 30, 1908, as a whole it is manifest that by the very wording of paragraph 6 of section 2 thereof an exception was made in cases involving irrigable lands as distinguished from other lands; and a limitation was placed by section 2 thereof upon the general forfeiture provisions of section 9, in order to make possible reimbursement of surplus moneys, under certain circumstances, upon resale of irrigable lands only. If, as contended upon this appeal, section 2 of said act affords authority of law for repayment upon all classes of lands entered under the act of May 30, 1908, then the forfeiture clause as contained in section 9 thereof is meaningless. The act, as stated, warrants no such construction.

The ruling of the Department in the case of William F. Earnheart (44 L. D., 3), urged as authority for repayment in this case, and which involved the question of repayment under the Umatilla act of March 3, 1885 (23 Stat., 340), has no application to claims arising under the Fort Peck act of May 30, 1908, *supra*. The act of March 3, 1885, cited, contains no forfeiture clause such as that embodied in the act of May 30, 1908. Furthermore, the Umatilla act of March 3, 1885, *supra*, makes no distinction as to classes of lands entered thereunder in so far as the right to repayment is concerned, but, on the other hand, as distinguished from the Fort Peck act of May 30, 1908, *supra*, specifically authorizes the Department to repay all moneys paid thereunder by the first entryman in the event the land is re-entered and payments therefor made in full.

In the case of Virnand C. Walters (46 L. D., 282), involving Fort Peck lands, the Department ruled that there is no authority of law under which an instalment of purchase money paid for such lands may be returned. In so holding, however, the Department allowed credit for moneys paid upon a portion of the entry relinquished by Walters by applying the same to the remainder of the entry which was held intact. In the case at bar the entry was relinquished *in toto*, and it is an impossibility, therefore, to adjust the claim here presented in the same manner as in the Walters case cited.

Repayment was properly denied, and the decision appealed from is affirmed.

AN ACT AUTHORIZING THE CUTTING OF TIMBER BY CORPORATIONS ORGANIZED IN ONE STATE AND CONDUCTING BUSINESS IN ANOTHER.

INSTRUCTIONS.

[Circular No. 737.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 21, 1921.

TO CHIEFS OF FIELD DIVISIONS:

On January 11, 1921, there became effective an act of Congress (41 Stat., 1088), which provides as follows:

That section 1 of an act entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes," approved June 3, 1878, chapter 150, page 88, volume 20, United States Statutes at Large, and section 8 of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891, as amended by an act approved March 3, 1891, chapter 559, page 1093, volume 26, United States Statutes at Large, and the several acts amendatory thereof, be, and the same are hereby, extended so that it shall be lawful for the Secretary of the Interior to grant permits to corporations incorporated under a Federal law of the United States or incorporated under the laws of a State or Territory of the United States, other than the State in which the privilege is requested, said permits to confer the same rights and benefits upon such corporations as are conferred by the aforesaid acts upon corporations incorporated in the State in which the privilege is to be exercised: *Provided*, That all such corporations shall first have complied with the laws of that State so as to entitle them to do business therein; but nothing herein shall operate to enlarge the rights of any railway company to cut timber on the public domain.

The cutting of timber under the provisions of this act must be done in conformity with the rules and regulations issued March 25, 1913, Circulars Nos. 222 and 223 (42 L. D., 22 and 30).

The departmental holding in the case of Centerville Mining and Milling Company rendered July 9, 1910 (39 L. D., 80), by reason of the passage of said act, is no longer controlling.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

CLEVELAND JOHNSON (ON REHEARING).

Decided February 21, 1921.

HOMESTEAD ENTRY—FINAL PROOF—WITHDRAWAL—PATENT.

An equitable title in land does not accrue to a homestead claimant until he has done all that the law and the authoritative regulations prescribe, and one submitting final proof, after the creation of a petroleum reserve, upon lands entered under the homestead laws prior to their withdrawal, must, unless he proves that the lands are in fact nonmineral, apply for a restricted patent as provided by the act of July 17, 1914, or suffer cancellation of his entry.

HOMESTEAD ENTRY—MINERAL LANDS—STATUTES.

Since title to known mineral lands can not be earned or secured under the homestead laws, section 2302, Revised Statutes, section 3 of the act of July 17, 1914, is applicable to entries made prior to the date of the act where equitable title has not vested before withdrawal or discovery of mineral, and said section is not void because broader than the title to the act for the reason that it is not required that the title to an act of Congress shall indicate the scope of the statute.

HOMESTEAD ENTRY—PATENT—MINERAL LANDS—BURDEN OF PROOF.

An oil withdrawal is deemed *prima facie* evidence of the mineral character of the land, and one who seeks to obtain an unrestricted patent under the homestead laws for lands within a petroleum reserve created prior to submission of proof, must sustain the burden of proving that the land is in fact nonmineral.

HOMESTEAD ENTRY—LAND DEPARTMENT—DURESS.

In adjudicating cases in connection with Presidential withdrawals expressly authorized by Congress and in applying the controlling statutes and authoritative regulations and decisions thereunder, officials of the Land Department can not be properly charged with exercising duress or coercion against claimants.

VOGELSAANG, *First Assistant Secretary:*

Cleveland Johnson has filed a motion for rehearing in this matter in which the Department on April 27, 1920, affirmed the decision of the Commissioner of the General Land Office dated November 13, 1919, wherein the claimant's application for the reissuance of a patent without reservation of oil and gas deposits in lieu of restricted patent No 601037 issued September 20, 1917, upon his homestead entries 020298 for NW. $\frac{1}{4}$, and 025129 for lots 1 and 2, and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 7 N., R. 21 E., M. P. M., Lewistown, Montana, land district, was denied.

It is contended on behalf of the claimant that the Department erred in its construction of the surface act of July 17, 1914 (38 Stat., 509), and in applying with retroactive effect section 3 thereof to his entries which were made prior to the date of that act and the petroleum withdrawal and that it is unjust to deprive the claimant of a fee

patent or require him to assume the burden of showing that the land is nonoil in character in order to avoid the effect of the withdrawal. Moreover, counsel argues that section 3 of said act is broader than the title thereof and therefore is void. There is nothing of merit in this suggestion, for there is no requirement that the title of a Congressional act shall cover or indicate the scope of the measure enacted. The provisions of the act were not applied retroactively to divest any title or vested right of the claimant. No vested equitable title in land accrues to a homestead claimant until after he has done all that the law and the authoritative regulations prescribe. It is well established that a mineral classification or a discovery of mineral prior to the vesting of equitable title, defeats the homestead claim except where the same may be saved under the provisions of the various surface acts. In general, title to known mineral lands can not be earned or secured pursuant to the homestead laws. See sections 2302 and 2318, Revised Statutes.

The claimant's original entry was made April 7, 1913, and his additional enlarged homestead entry on April 27, 1914. By the Presidential order of September 14, 1916, these tracts, with other lands were included within the outboundaries of Petroleum Reserve No. 49, created pursuant to the act of June 25, 1910 (36 Stat., 847), as amended. His final proof was filed November 23, 1916. On the next day the local officers erroneously issued final certificate without reservation of oil or gas. On June 27, 1917, the Commissioner granted the claimant 30 days within which to apply for a classification of the land as nonoil and nongas or to file his consent to an amendment of the final certificate so as to reserve oil and gas or suffer cancellation of his entries. On July 6, 1917, the entryman in a letter set forth his objections to the requirements. On July 27, 1917, the Commissioner advised the claimant directly as to the laws and regulations controlling. On August 10, 1917, there was filed the claimant's written consent duly witnessed to an amendment of his original entry so as to subject it to the provisions and reservations of said act of July 17, 1914, *supra*. Both his entries being covered by the final certificate, the same was thereupon noted that patent would contain the reservations and limitations of said surface act as to oil and gas deposits. The final proof and entry were approved on August 28, 1917, and patent No. 601037 with reservations issued September 20, 1917, and was transmitted on September 27, 1917, to the local officers for delivery. In due course, as would appear, the patent was delivered to the claimant and received and held by him for almost two years without objection. On September 18, 1919, he filed his petition for the reissuance of patent, setting up that the oil withdrawal was without notice to him, that his waiver

was executed by mistake, under false impression and through coercion and duress, and that he was not in a position to say that there was oil under the land entered or that there was not. The Commissioner, as before stated, on November 13, 1919, gave the petition exhaustive consideration and denied it. Upon appeal the Department, on April 27, 1920, affirmed that action in its decision now called in question.

The claimant undertakes to assert that a vested right in the land accrued to him prior to his final proof and entry. Such is not the law. The homestead statute expressly provides, section 2302, Revised Statutes, "nor shall any mineral land be liable to entry and settlement under its provisions." The act of July 17, 1914, *supra*, provided for agricultural entries on classified or withdrawn oil lands. The proviso in section 2 stated that any person who had entered lands subsequently withdrawn or classified should have the privilege of showing at any time before final entry that the entered lands were in fact nonmineral in character. Section 3 in substance prescribed that any person who had theretofore entered, or should thereafter enter, under the nonmineral laws, any lands which were subsequently withdrawn or classified for oil or gas, might upon making application therefor, and the submission of proper proof, receive a patent with reservations. To facilitate the administration of said act, the regulations of March 20, 1915 (44 L. D., 32), and the amendment of April 28, 1916 (45 L. D., 77, 79), were promulgated. Under the practice prevailing before said amendment, claimant's failure to act led to the issuance of a restricted patent, but thereafter such failure resulted in the cancellation of the entry. The regulations state that a withdrawal will be deemed *prima facie* evidence of the character of the land for the purposes of the act. Any one asserting the contrary must sustain the burden of showing that the land is in fact nonmineral. Geological evidence and deductions and any other facts germane to the matter are considered in that connection. See cases of George W. Ozbun (45 L. D., 77), and James Rankine (46 L. D., 4 and 46).

The officials of the Land Department in adjudicating cases in connection with Presidential withdrawals expressly authorized by Congress and in applying the controlling statutes and authoritative regulations and decisions thereunder, can not be properly charged with exercising "duress" or "coercion" against claimants. Such a plea on the part of counsel is uncalled for, however strongly it may be believed that the adverse adjudication is erroneous.

The tracts here involved are on the Woman's Pocket Anticline, the axis of which as mapped passes directly through the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, said Sec. 12. The data upon which the withdrawal of September

14, 1916, was recommended were largely gathered in the field during the preceding summer. In bulletin 691-F issued by the Geological Survey in 1918, at page 203, *et seq.* the Woman's Pocket Anticline is described. It is there stated to be a closed structure about 18 miles long from northwest to southeast and little less than four miles wide. It is also reported, page 204, as follows:

Looked at as an isolated anticline it seems a very favorable one for oil accumulation, as the possible productive sands in the Colorado are covered and sealed above. Viewed in relation to its surroundings, however, the anticline does not seem so favorable, because it has no large collecting area.

The Survey in its special report of September 13, 1920, to this Department, upon these and other lands in the region states as follows:

The Woman's Pocket Anticline is a perfectly definite closed structure in central Montana. The sands within the lower part of the Colorado shale which are so productive in many parts of the Rocky Mountain region are sealed at moderate depths beneath the axis of the fold, and a few hundred feet lower, but within easy reach of the drill, is the horizon of the Kootenai sands which yield the high grade oil of the recently developed Cat Creek field near Mosby, about 60 miles to the northeast. A dark oil of lower grade has also been struck in the Devil's Basin Anticline in Sec. 24, T. 11 N., R. 24 E., in rocks that underlie the Woman's Pocket Anticline. The Devil's Basin wells are about 30 miles northeast of the Woman's Pocket.

The Department is informed that upon this anticline exploration by the drill has been under way. Press reports have indicated an oil strike. It is reported that in a well in Sec. 29, T. 8 N., R. 21 E., drilled to a depth of about 2500 feet, several showings of oil were disclosed, drilling being abandoned because of bad casing prior to midsummer 1920. Drilling was proceeding in Sec. 26 of the same township at a depth of about 1600 feet.

The well above referred to is about five miles northwest of Johnson's land and upon a tract not more favorably located than is his. The information available instead of showing any impropriety in the withdrawal justifies the creation of the petroleum reserve. The claimant has called attention to no specific facts or concrete evidence that point to the nonmineral character of the land. The earnestness of the homesteader's contention that an unlimited patent should issue may possibly be in direct proportion to a hope and belief that oil exists in the land. The Land Department is not authorized to pass title to valuable mineral deposits under the agricultural land laws.

The case of Washburn *v.* Lane (258 Fed., 524, 525), decided May 5, 1919, by the Court of Appeals of the District of Columbia, is here in point. A forest lieu selection was tendered in 1911. In 1914, the land was included in a petroleum reserve. The Geological Survey reported that the land within the reserve "is mineral land prospec-

tively valuable for deposits of oil and gas." When the Department came to act, the fact appeared that the land was withdrawn, and that *prima facie* at least, it was mineral. The selector was called upon to make a nonmineral showing or apply for surface patent. He contended that his rights had become fixed prior to the act of 1914, and prior to the order of withdrawal. The court said:

The act under which appellant's entry was made required that the land selected should be nonmineral in character. Before final action was taken on appellant's selection, this land was withdrawn because of a showing to the satisfaction of the Department that it was mineral in character, and hence not subject to entry. If the land was mineral land when the Department was asked to approve the selection, it was of the same character when the application was filed originally, and appellant could acquire no vested rights in violation of the statute. We think the case ruled by our decision in *Central Pac. R. Co. v. Lane*, 46 App. D. C., 372, Ann. Cas. 1918C, 1002. There, as here, an attempt was made to review a finding of the Department based upon evidence that selected land was mineral in character.

It appearing that the Department has not exceeded its authority under the law, the decree is affirmed, with costs.

So here it does not appear that the Department has exceeded its authority under the law. If any error has crept in, it is one in favor of the claimant as the Department does not find with the record any waiver by the claimant as to his additional entry for the NE. $\frac{1}{4}$, Sec. 12. If such waiver or election was not filed, the Commissioner would have been justified in canceling the final certificate as to said land; however the limited patent was issued.

Counsel also calls attention to the fact that unrestricted patents have been issued to certain claimants for lands in the immediate neighborhood. In its consideration of this matter the Department has not overlooked that fact. The importance of the question involved both to the claimant and to the Government has been weighed. If in other cases unrestricted patents have been issued either inadvertently or otherwise, that fact will not justify the issuance of an unlimited patent in this case.

Congress has enacted the oil and gas leasing law of February 25, 1920 (41 Stat., 437), providing not only for the disposition of lands containing such deposits, but of the reserved deposits also in cases like this and has therein granted recognition to certain equities in homestead claimants situated as is Johnson, by giving to them a preference right under section 20 of the act to apply for a prospecting permit. Moreover, numerous applications for prospecting permits in the vicinity and exploratory work which the Department is advised has been undertaken on these withdrawn lands, lends support to the theory upon which the withdrawal was made, namely, that the lands do contain deposits of oil and gas.

After mature consideration of this case, the Department finds that no grounds are made to appear for the issuance of an unlimited patent as is requested. The Commissioner's denial of the petition, therefore, is sustained. The decision upon appeal is adhered to and the claimant's motion for rehearing is denied.

WALES v. WILLIAMS.

Decided February 24, 1921.

STOCK-RAISING HOMESTEAD—EQUITABLE DIVISION—CONTIGUOUS LANDS.

Under section 8 of the act of December 29, 1916, equitable division of designated lands between two or more applicants entitled to preferential rights to make additional entries is not limited to an equal division of the subdivisions in conflict, but all the tracts applied for contiguous to the original entry of either of the parties must be taken into consideration!

STOCK-RAISING HOMESTEAD—EQUITABLE DIVISION—INCONTIGUOUS LANDS.

In making equitable division between two or more applicants entitled to preferential rights under section 8 of the act of December 29, 1916, the area of incontiguous tracts applied for by either party is not to be computed.

Vogelsang, First Assistant Secretary:

Fred L. Wales has appealed from a decision of the Commissioner of the General Land Office, dated August 4, 1920, awarding to Sydney Williams the right to make entry under the stock-raising homestead act for S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 9, T. 49 N., R. 101 W., 6th P. M., Lander, Wyoming, land district.

The original entries of the parties each embrace 320 acres of land. Wales applied to make an additional entry under the stock-raising homestead act for eight 40-acre subdivisions contiguous to his original entry, and Williams applied for four legal subdivisions of 40 acres each. The two applications conflicted as to SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 9, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10. The decision appealed from awarded to Williams the right to make entry for the three subdivisions last described and one subdivision not in conflict, and Wales's application was held allowable as to the five subdivisions not in conflict. The appeal contends that the Commissioner erred in awarding all the subdivisions in conflict to Williams.

Section 8 of the stock-raising homestead act provides that where designated lands are applied for by two or more persons who are entitled to preferential rights to make additional entries therefor the Secretary of the Interior is authorized to make an equitable division of the lands among the several entrymen or patentees, applying to exercise preferential rights, such divisions to be in tracts of not less than 40 acres; or other legal subdivisions, and so made as to equalize as nearly as possible the area which such entrymen or patentees will acquire by adding the tracts embraced in additional entries to the lands originally held or owned by them.

Under the division appealed from, the holdings of Wales aggregate 520 acres, while those of Williams total 480 acres.

Under the provisions of the law above quoted, the Department would not be warranted in taking into consideration only the subdivisions in conflict between two or more applicants, but is bound to consider all the land contiguous to his original entry applied for by either of the parties.

The local officers, under date of September 13, 1920, reported that Williams had filed a supplemental application, describing, in addition to the four subdivisions described in his first application, 160 acres in Sec. 35, T. 45 N., R. 101 W., 6th P. M., within 20 miles of the land embraced in his original entry. As the provisions of section 8 of the stock-raising homestead act apply only to lands involved in preferential claims thereunder, the area of any incontiguous tracts applied for will not be computed in making the equitable division directed by said section. The correctness of such a rule is emphasized in the present case, wherein it appears that the 160 acres described in Williams's supplemental application have not all been designated under the act; hence, it can not be determined, at this time, whether the application here in question can be amended to the extent desired.

The decision appealed from is correct and is affirmed.

BUXTON v. BREWER.

Decided February 26, 1921.

STOCK-RAISING HOMESTEAD—ADDITIONAL—PREFERENCE RIGHT.

Where one of two claimants for the same tract of land applies to make an additional entry of land contiguous to his patented entry, under section 5 of the act of December 29, 1916, and asserts a preference right under section 8 of that act, he must show that he owned and resided upon the patented lands at the time that he applied to make the additional and that he was qualified to make entry during the preference right period.

VOGELSANG, First Assistant Secretary:

On February 6, 1917, Gerald H. Buxton filed stock-raising homestead application 030866, Santa Fe land district, New Mexico, for the S. $\frac{1}{2}$ N. $\frac{1}{2}$, Sec. 25, T. 13 N., R. 23 E., N. M. M., containing 160 acres, as additional to his patented entry 06441 for the NW. $\frac{1}{4}$, Sec. 31, T. 13 N., R. 24 E., containing 161.04 acres, and his additional entry 016968 under the enlarged homestead act for the SW. $\frac{1}{4}$, Sec. 30, same township, containing 161.24 acres. On September 20, 1917, he filed petition for the designation of all the land above mentioned under the stock-raising homestead law.

On March 15, 1917, Andrew M. Brewer, filed stock-raising homestead application 031753 for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 25, E. $\frac{1}{4}$.

SW. $\frac{1}{4}$, Sec. 26, T. 13 N., R. 23 E., N. M. M., containing 240 acres, as additional to his patented entries 02162 and 010139 under the enlarged homestead act for the SW. $\frac{1}{4}$, Sec. 25, and SE. $\frac{1}{4}$, Sec. 26, respectively, accompanied by his petition for the designation of the land.

All the land was designated under the stock-raising homestead act June 10, 1918. The two applications conflict as to the S. $\frac{1}{2}$ N. $\frac{1}{2}$, Sec. 25. Buxton's application was allowed September 20, 1918, and on September 24, 1918, Brewer's application was rejected as to the land in conflict. He appealed. The Commissioner of the General Land Office by decision of January 31, 1920, found that the land in conflict adjoins Brewer's patented land, whereas it only corners on Buxton's land, and held that Brewer has a preference right of entry provided he is qualified under section 5 of the stock-raising homestead act, and called on him to file showing as to his qualifications. Said decision was served on both claimants. Brewer filed his showing March 9, 1920.

Buxton appealed from the Commissioner's decision, claiming that Brewer is not qualified under section 5 of the act to make an additional entry, and that he is not entitled to a preference right. Buxton says that he had no notice of any adverse claim until he received a copy of the Commissioner's decision on March 17, 1920, and that since the allowance of his entry he has made valuable improvements on the land including fencing, ridding the land of prairie dogs, and has contracted for the erection of a dam. He also attacks Brewer's good faith by a showing corroborated by several affidavits that Brewer over three years ago stated that he did not intend to exercise his preference right as to the land in conflict. Brewer by affidavit denies it.

The land was designated June 10, 1918. Brewer shows that he owned and resided upon the land covered by his patented entry from March 16, 1917, to November 13, 1917. He does not show that he was residing on said land during the preference right period, when the land was subject to entry. Section 5 of the stock-raising homestead act (39 Stat., 862) provides:

That persons who have submitted final proof upon, or received patent for, lands of the character herein described under the homestead laws, and who own and reside upon the land so acquired, may, subject to the provisions of this act, make additional entry for and obtain patent to contiguous lands designated for entry under the provisions of this act, which, together with the area theretofore acquired under the homestead law, shall not exceed six hundred and forty acres, on proof of the expenditure required by this act on account of permanent improvements upon the additional entry.

The land is not subject to entry, and no rights attach under the act until the land is designated. The entryman must own and reside on the land covered by his patented entry at the time he makes

entry and in order to be entitled to a preference right he must be qualified to make entry during the preference right period.

Buxton's application was allowed September 20, 1918, after the ninety-day preference right period had expired. After the allowance of his entry he proceeded to make valuable improvements. His rights have attached, and his entry will remain intact. Brewer does not show that he has the qualifications of a preference right claimant under section 5 of the act. His application is rejected as to the land in conflict.

The Commissioner's decision is reversed.

LOVINA SHADICK.

Decided February 28, 1921.

RELINQUISHMENT—DESERT LAND ENTRY.

An unperfected desert land entry is personal property which, upon the death of the entryman, passes to the executor or administrator of the decedent's estate, and a relinquishment executed by an executor or administrator must be in strict accord with the rules governing the administration of estates of deceased persons.

VOGELSANG, First Assistant Secretary:

March 3, 1914, Lovina Shadick made desert land entry for lots 3, 4, S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 1, T. 8 S., R. 6 E., G. & S. R. M., Phoenix, Arizona, land district.

February 9, 1920, relinquishment of said entry signed by Della Lusk as sole heir and administratrix of the estate of Lovina Shadick, deceased, was filed but by decision of May 25, 1920, the Commissioner of the General Land Office declined to recognize the relinquishment as valid in the absence of approval of that action by a proper court. He accordingly allowed Lusk 60 days within which to furnish such order or approval of the relinquishment by the court having jurisdiction of the decedent's estate. Appeal from that action has brought the case before the Department for consideration.

The desert land laws do not by express provision declare the method by which an unperfected desert land entry may be completed or relinquished upon the death of the entryman. The right of the entryman to make assignment is granted and the assignee is permitted to make final proof, but assignment by operation of law during the lifetime of the entryman, except in pursuance of some voluntary act in that connection by him, is not recognized. *Young v. Trumble et al.* (35 L. D., 515), *Evans v. Neal* (46 L. D., 82). However, such entry has been generally recognized as property, and in 13 L. D., 49, the Department instructed the Commissioner of the General Land Office in part as follows:

While it is true that the desert land act of March 3, 1877, does not specifically state to whom the fee shall inure in case of an entryman's death, still the

law of descent provides generally that any estate belonging to a man at the time of his death shall inure to his legal heirs, and it is not doubted that this Department will protect the heirs of a deceased desert-land entryman who has complied with the law up to the time of his death; and, by complying with the law after his death, they may reap the reward which he might have procured had he lived. If a desert-land entryman has a valid entry at the time of his death, it goes without saying that his heirs may receive the benefit thereof by complying with law and take unto themselves the patent.

It was further directed in said instructions that in case the heirs submit final proof the patent should issue to the heirs of the deceased entryman generally, without specifically naming them. This would seem to be a safe and proper practice even though it be held that such unperfected claim is property belonging to the decedent's estate and of a character subject to administration. That such unperfected entry does become an asset of the decedent's estate seems to admit of little question. It may be and often is valuable property, partially developed by considerable expenditures for material and labor looking toward reclamation from its arid condition. Such expenditures would ordinarily be for canals, reservoirs, clearing and breaking the land, or similar improvements which find their value only in connection with the use or ownership of the land upon which they are placed. The law permits the entryman during his life to do any one of three things in connection with such unperfected entry: 1. He may make the requisite annual and final proof and obtain patent; 2. He may assign the claim to another person who, if qualified, may complete the necessary improvements, submit final proof and obtain patent; 3. He may relinquish the entry, whereupon the lands revert to the United States free from his claim. This right or interest could not be considered as real property until title has been earned. Prior thereto, it is personal property and would pass as other personal property to the executor or administrator of the decedent's estate. No reason is perceived why such administrator may not, acting by authority of and subject to approval of a proper court, do any of the things which the entryman could have done had he lived, in connection with the entry. The administrator is but the agent of the proper heirs or devisees. He acts under bond and is responsible to them for any dereliction of duty in the administration of the estate and proper accounting of the proceeds. In the absence of statutory direction it seems unescapable that such property must upon death of the entryman pass as other personal property, and hence is subject to payment of his debts, if any. Therefore, it would be unsafe to recognize relinquishment or assignment thereof except in strict accord with the rules governing administration of estates of deceased persons. But in the matter of making final proof, it would seem to be immaterial whether such proof be submitted by an heir or by the ad-

ministrator, for in either event the property could still be reached, if needed for the satisfaction of debts of the decedent.

The right of an administrator to act with reference to such unperfected desert land entry is recognized in section 46 of the regulations of May 18, 1916 (45 L. D., 345, 373), which reads in part as follows:

If an entryman dies before being authorized to exercise the rights conferred by the second and third paragraphs, or after such authorization but before he has perfected his entry, his rights will pass to those persons who would inherit his lands according to the laws of the State wherein the entry is located or, if he leaves a will, to those to whom he devises such rights. Applications for the benefits of the new law may be filed, and proofs thereunder may be submitted either by one of the heirs in behalf of all, by a guardian of the heirs' estate if they themselves are minors, or by the entryman's executor or administrator, acting under the supervision of the proper probate court.

In the unpublished decision of October 5, 1912, involving an unperfected desert land entry (George F. Bruington, administrator of the estate of Marion A. Young) it was said:

It appears that a court of competent jurisdiction has passed upon the right of an administrator to sell the interest of the entryman in the property involved in this appeal, and has directed that the right of the decedent in the land in question be sold for the benefit of his creditors and heirs. Thus, there appears no reason why the Department should go behind the judgment of a court of competent jurisdiction, nor why, under the circumstances shown, the relinquishment should not be accepted.

In the case of Adah Williams, administrator of the estate of Joseph B. Williams, in which a relinquishment of a desert land entry had been tendered by the administrator pursuant to an order of court having jurisdiction of decedent's estate, the Department in its unpublished decision of April 17, 1912, said:

The federal statute does not provide for succession to the rights of a desert land entryman in the event of his death. Such succession is, therefore, controlled by the laws of the State in which the land embraced in the entry is situated, and the disposition in the Land Department of cases such as this must, therefore, in each instance, rest upon the peculiar statute of the State in question.

No reason being seen for disturbing the action appealed from, it is accordingly affirmed.

ENTRIES UNDER THE STOCK-RAISING HOMESTEAD ACT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 2, 1921.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

You have informally requested instructions as to two questions which have arisen in connection with the administration of the stock-raising homestead act. You are advised as follows:

1. One who has made an additional entry under either section 4 or 5 of the act is qualified to make an additional entry for such a quantity of designated land within 20 miles of the original entry as, when added to the area formerly acquired, will not exceed approximately 640 acres.

2. The question of whether a person who has made an entry under section 7 of the enlarged homestead act is entitled to a preferential claim to land contiguous to the additional entry presents some difficulties, but when the history of the legislation is studied it becomes apparent that Congress did not intend by section 8 to grant preferential rights to such entymen. The act of July 3, 1916 (39 Stat., 344), adding a seventh section to the enlarged homestead act, was enacted by Congress during the pendency of the legislation which later became the stock-raising homestead act; and to hold that one who makes an additional entry for land incontiguous to his original entry is entitled to a preferential right to land contiguous thereto would be to hold that he is entitled to the right as to two separate and distinct tracts of land—and the Department is of opinion that Congress did not so intend. However, one who has made an additional entry under section 3 of the enlarged homestead act, thus adding contiguous land to his original entry and being authorized by the act to treat the two entries as a combined entry, is entitled to claim a preferential right as to tracts contiguous to any part of such combined entry.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

EMMETT K. OLSON.

Decided March 3, 1921.

COAL LANDS—PROSPECTING PERMIT—LEASE—PREFERENCE RIGHT.

A claim of priority under an application for a coal prospecting permit over a subsequent application for a lease, will not preclude the Secretary of the Interior from determining, in his discretionary authority under the act of February 25, 1920, that exploration is unnecessary, and proclaiming the land subject to lease in the first instance.

VOGELSANG, *First Assistant Secretary:*

Emmett K. Olson has appealed from a decision of the Commissioner of the General Land Office dated December 15, 1920, rejecting his application for a coal prospecting permit embracing S. $\frac{1}{2}$, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 26, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 27, T. 12 S., R. 9 E., S. L. M., Salt Lake City, Utah, land district, for the reason that the United States Geological Survey had recommended that the lands be included in a leasing unit.

It appears from the record that Olson first filed an application in the local office at Salt Lake City, Utah, February 25, 1920, but not

being according to required form, he was accorded the privilege of filing another application, which he did on August 3, 1920. The second application was substantially in the form prescribed by the regulations of April 1, 1920, relating to coal mining leases and permits. On August 6, 1920, the application was transmitted to the General Land Office with a statement to the effect that it was in conflict with an application for lease filed by the Cameron Coal Company.

On May 17, 1920, the Cameron Coal Company filed an application (Salt Lake City 026287), for a lease of the coal in all of the above described tracts except NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 27. All of the tracts are embraced within indemnity school selections, with the coal reserved to the United States as provided by the act of June 22, 1910 (36 Stat., 583).

On September 11, 1920, and October 12, 1920, respectively, the applications of the Cameron Coal Company and of Olson were submitted by the General Land Office to the Geological Survey with a request for a report concerning the propriety and desirability of the issuance of a coal prospecting permit.

On November 24, 1920, the Geological Survey reported to the Commissioner of the General Land Office that the lands lie in the well known Book Cliffs coal field of north-central Utah; that the Cameron Coal Company has an operating mine in Sec. 35 in which the existence and workability of at least two beds of coal about six feet in thickness and lying at moderate depths have been completely demonstrated; that the coal is of a high quality, bituminous for which there is a ready market; that other large mines exist within one or two miles of said lands; that the fact that the Cameron Coal Company, owner of a going mine on adjacent lands, considers the presence, character, and quality of the coal in the lands in question sufficient to justify it to apply to have them defined as a leasing block and offered for lease, without additional prospecting, seems to establish convincing evidence that prospecting operations are not necessary to prove the existence and workability of coal of commercial value. It was recommended that a prospecting permit be denied and that the lands be offered for lease.

In the decision appealed from the Commissioner relied upon the findings of the Geological Survey and concluded that under the circumstances the creation of a leasing unit is warranted. He, therefore, held the Olson application for rejection.

The records show that four applications have been filed embracing public coal lands in T. 12 S., R. 9 E. Emmett K. Olson and Culbert L. Olson applied for coal prospecting permits (Salt Lake City 025425 and 026843) and the Cameron Coal Company and the Beehive Coal Company filed applications for leases (Salt Lake City

026287 and 026857). The Culbert L. Olson application included lands which were partially in conflict with those in the leasing applications. A decision has been rendered by the Department this date upon that application (A 776-b) and no further reference need be made to it herein. There was also a conflict as to certain of the lands between the applications of the Cameron Coal Company and the Beehive Coal Company. On account of that conflict the Geological Survey on February 3, 1921, recommended that the leasing unit applied for by the former company be changed so as to embrace all of Sec. 27, but to eliminate the E. $\frac{1}{2}$ E. $\frac{1}{2}$, Sec. 26, and the S. $\frac{1}{2}$, Sec. 25, which, the Survey recommended be included within the leasing unit applied for by the latter company. Thus by the change that has been recommended all of the lands included in the prospecting permit application of Emmett K. Olson are embraced within the proposed leasing units recommended by the Geological Survey at the instance of the applications of the Cameron Coal Company and the Beehive Coal Company.

In the appeal, the appellant sets up as assignments of error that the Commissioner erred: (1) in accepting the recommendation of the Geological Survey in favor of a subsequent applicant for a lease; (2) in failing to grant the prior applicant a hearing for the purpose of determining the propriety of issuing a prospecting permit; and (3) in ignoring the prior application until a subsequent application had been filed by another, and then in holding that the lands should be included within a leasing unit without first ordering a hearing upon the conflict.

The question placed at issue by the appeal is whether or not an application for a prospecting permit should be given preference over a subsequent application for a lease. It seems to have been assumed by the appellant that, at least, the application should not have been denied without a hearing.

The statute law applicable to this case is found in section 2, act of February 25, 1920 (41 Stat., 437). The second proviso provides:

That where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue to applicants qualified under this act, prospecting permits for a term of two years, for not exceeding two thousand five hundred and sixty acres; and if within said period of two years thereafter, the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this act for all or part of the land in his permit.

Under this section the Secretary of the Interior issues permits to prospect unclaimed, undeveloped lands where prospecting or exploratory work is necessary to determine the existence or workability of the coal deposits.

Primarily the Secretary of the Interior must determine whether or not exploration is first necessary to ascertain whether a tract of public coal land should be placed within a leasing unit. If he becomes satisfied from the evidence within his possession that exploration is unnecessary, it is within his discretionary authority to proclaim the land subject to lease in the first instance. The question of priority between two applicants, one an applicant for a prospecting permit, the other for a lease, does not have any controlling influence in such event. The petition of an applicant for lease, if favorably acted upon, merely serves, under present procedure, to cause the lands to be offered to the highest bidder, and the prospecting permit applicant is accorded an opportunity to become a competitor. It is not contemplated, however, that the Secretary shall abuse his discretionary authority by creating leasing units of lands not economically minable.

In the case under consideration the recommendations of the Geological Survey and of the General Land Office are in harmony and the Department finds no reason to differ from them. Inasmuch as those recommendations are not contrary to any law and do not violate any statutory right of the prospecting permit applicant, the decision appealed from is hereby affirmed and the case is closed.

ROMERO v. WIDOW OF WILLIAM T. KNOX.

Decided March 3, 1921.

STOCK-RAISING HOMESTEAD ENTRY—PREFERENCE RIGHT.

The exercise of the preferential right privilege under section 8 of the act of December 29, 1916, is limited thereby to lands contiguous to the original entry and can not be extended to include lands contiguous to an additional entry which does not adjoin the original entry.

STOCK-RAISING HOMESTEAD ENTRIES—FORMER ENTRY—EXISTING ENTRY.

The terms "former entry" and "existing entry," as used in the proviso to section 3, and in section 4, respectively, of the stock-raising homestead act, mean an original or first entry, and not merely a prior entry.

VOGELSANG, *First Assistant Secretary:*

Roman Romero has appealed from a decision of the Commissioner of the General Land Office, dated July 19, 1920, rejecting his application to make an additional entry under the stock-raising homestead act in so far as it conflicted with the prior application of William T. Knox, and holding that he could not be allowed to make an additional entry under the stock-raising homestead act unless he showed the qualifications prescribed by section 5 of the act. Said decision allowed him the alternative of applying to change the character of

his present additional entry under section 7 of the enlarged homestead act to an original entry under the stock-raising homestead act, with the privilege of amending the same to embrace such subdivisions applied for as are not in conflict with the application of Knox.

After perfecting a homestead entry for approximately 160 acres in Secs. 4 and 5, T. 28 S., R. 62 W., 6th P. M., Pueblo, Colorado, land district, Romero, on September 28, 1916, made an additional entry under section 7 of the enlarged homestead act for NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 13, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 14, T. 28 S., R. 64 W., 6th P. M. On August 19, 1918, he applied to make an additional entry under the stock-raising homestead act for E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 13, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, T. 28 S., R. 62 W., 6th P. M. The application conflicts as to E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 13, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 14, with the prior application of said Knox to make an original entry under the stock-raising homestead act.

The appellant contends that the additional entry is an original entry within the meaning of the stock-raising homestead act, and that he should be allowed to make an additional entry thereunder without any further showing.

One of the questions presented by the appeal is whether a person holding an entry under section 7 of the enlarged homestead act (for a tract incontiguous to the land embraced in his original) is entitled to a preferential claim under section 8 of the stock-raising homestead act as to land contiguous to such additional entry.

The land involved was designated May 11, 1918, effective June 4, 1918. At the date the designation of the land became effective, and when Romero's application was filed, sections 4 and 5 of the stock-raising homestead act did not contain any provision for the making of an additional entry of lands incontiguous to the original entry. It was not until said sections were amended by the act of September 29, 1919 (41 Stat., 287), that one could make an additional entry within 20 miles of his original entry. Any entry made by Romero under the stock-raising homestead act for the land involved could have been made only under the first proviso to section 3, "subject to the requirements of law as to residence and improvements"—that is, would have been to all intents and purposes an *original* entry under the act.

Said proviso as originally enacted read as follows:

That a former homestead entry of land of the character described in section 2 hereof shall not be a bar to the entry of a tract within a radius of twenty miles from such former entry under the provisions of this act, subject to the requirements of law as to residence and improvements, which together with the former entry shall not exceed 640 acres.

The act of October 25, 1918 (40 Stat., 1016), amended the proviso by inserting, after "improvements," "except that no residence shall be required on such additional entry if the entryman owns and is residing on his entry."

Section 4 of the act grants the right of additional entry to one who has not submitted final proof upon his "existing entry," and section 5 provides for the making of an additional entry by persons who own and reside upon the land already acquired under the homestead law.

That the expressions "former entry," in the proviso to section 3, and "existing entry," in section 4, mean a first homestead entry, and not a prior entry merely, clearly appears from the fact that section 4, in prescribing how an entry thereunder may be perfected, specifically refers to the earlier entry as "the original entry." In the terminology employed in public-land matters, "original entry" means the entry first made.

Section 8 of the stock-raising homestead act clearly limits the preferential right provided for therein to lands contiguous to original entries, and does not contemplate that such right shall be extended to land contiguous to additional entries which do not adjoin the original entries. To hold otherwise would grant to persons in the position of Romero a preferential claim to land adjoining two separate bodies of land.

Romero's application can not be allowed even to the extent that it is free from conflict with Knox's application unless he shows that he owns and resides upon his original entry, or that he so owned and resided upon the original entry on September 29, 1919, when section 5 of the stock-raising homestead act was amended so as to permit the making of an additional entry for lands incontiguous to the original entry. If he is unable to make such showing, he can not make the entry applied for, but may be allowed to change the character of his existing entry to an original entry under the stock-raising homestead act and amend the same to embrace such subdivisions as are free from conflict with Knox's application. The date of such amended entry would be the date of the amendment, and entryman could be given credit for all compliance with the provisions of the stock-raising homestead act which had been performed since the designation of the land became effective—June 4, 1918.

The application of Knox was prior in time to that of Romero, and the latter can not be accorded a preferential right as to any portion of the land involved.

The decision appealed from is affirmed.

**FORT ASSINNIBOINE LANDS—EXTENSION OF TIME FOR
PAYMENT.****INSTRUCTIONS.**

[Circular No. 739.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 11, 1921.

REGISTER AND RECEIVER,
HAVRE, MONTANA:

Your attention is directed to Public Resolution No. 292, approved January 6, 1921 (41 Stat., 1086), which reads as follows:

That any person who has made homestead entry under the provisions of the Act of Congress approved February 11, 1915 (Thirty-eighth Statutes at Large, page 807), entitled "An Act authorizing the Secretary of the Interior to survey the lands of the abandoned Fort Assiniboine Military Reservation and open the same to settlement," may obtain an extension of time for one year from the anniversary of the date of entry last preceding the passage of this Act within which to pay all of the installment then due or any part of any preceding installment, where payment has not yet been made and where an extension of time therefor is not authorized by any Act of Congress by paying interest at the rate of 5 per centum per annum on the sums to be extended from the maturity of the unpaid installments to the expiration of the period of extension, the interest to be paid to the receiver of the land office for the district in which the lands are situated, within such time as may be prescribed for that purpose by the Secretary of the Interior: *Provided*, That any installment which becomes due within one year from the passage of this Act and for which an extension of time for payment is not otherwise authorized may also be extended for a period of one year by paying interest thereon in advance at the said rate: *Provided further*, That any payment so extended may thereafter in the discretion of the Secretary of the Interior be extended for a further period of one year in like manner: *And provided further*, That if commutation proof is submitted, all the unpaid payments must be made at that time.

SEC. 2. That the failure of any entryman to make any payment that may be due, unless the same be extended, or to make any payment extended either under the provisions hereof or other Act of Congress, at or before the time to which such payment has been extended, shall forfeit the entry and the same shall be canceled, and any and all payments theretofore made shall be forfeited.

You will promptly serve notice on all persons whose payments are in arrears that they will be allowed thirty days from receipt of notice within which to pay the sums due, without interest, or, where an extension of time in which to make such payments is not authorized by any act of Congress, they may obtain an extension for one year from the anniversary of the entry last preceding the passage of this act within which to pay the installment due on the date of such anniversary, or any part of any preceding installment, where payment thereof has not yet been made, by paying to the receiver interest in advance at the rate of 5 per cent per annum, on the installment

due and unpaid, from the maturity of the unpaid installments to the expiration of the period of extension, and that, in the event of their failure, within the time allowed, to make any payment that may be due or to make the interest payment requisite and necessary to obtain the extension provided for in this act, where their right to such extension is dependent upon the provisions of this act, you will report their entries to this office for cancellation and for forfeiture of all payments theretofore paid.

You will note that said act provides that in the event of any installment becoming due within one year from the passage of this act and for which an extension of time for payment has not been otherwise authorized, the time for paying such installment may also be extended for a period of one year by paying interest thereon in advance at the said rate of 5 per centum per annum. Advise interested parties hereof.

You will also note that any payment which has been extended under this act may thereafter at the discretion of the Secretary of the Interior be extended for a further period of one year in like manner. This act further provides that where commutation proof is submitted all of the unpaid installments must be paid at that time.

Amounts paid as interest should be noted on the records and abstracts of moneys received with the fact that they were paid in conformity with this act.

Final certificate and patent will not issue under any entry until full payments have been made.

After extensions of time for payments on account of military or naval service, further extensions may be granted under this act, and in the granting of such further extensions you will observe the discretion given in Circular No. 647, dated June 9, 1919 (47 L. D., 191), that the period of military or naval service should not be considered a part of the time originally allowed for the completion of the payments.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

JAMES L. TOBEY.

Decided March 15, 1921.

ENLARGED HOMESTEAD—ORIGINAL—LIMIT OF LENGTH.

An original entry may be allowed under the act of February 19, 1909, as amended by the act of July 3, 1916, for lands exceeding one and one-half miles in extreme length, provided that they are located in as compact a

body as the availability of the public lands, subject to entry, will permit; but the general rule as to limit of length must be adhered to where sufficient lands remain subject to entry.

PRIOR RULING EXTENDED—CONTRARY REGULATIONS AMENDED.

Rule in the case of George G. Vance (47 L. D., 370), extended; and all regulations not in harmony herewith amended.

VOGELSANG, *First Assistant Secretary*:

On September 12, 1919, James L. Tobey filed homestead application 026622 Lamar land district, Colorado, under the enlarged homestead law for lots 24, 26, and 29, Sec. 35, and lots 19, 22, 24, and 26, Sec. 36, T. 31 S., R. 47 W., and lots 8, 14, 15, and 20, Sec. 31, T. 31 S., R. 46 W., 6th P. M., containing 250.74 acres. The application was rejected by the register and receiver because the land extends more than $1\frac{1}{2}$ miles in length.

The applicant appealed to the Commissioner of the General Land Office who by decision of August 30, 1920, affirmed the decision of the local officers and further advised that if the applicant eliminates sufficient area to reduce the length the entry may be allowed. Tobey has prosecuted his appeal to the Secretary of the Interior and the record is now before the Department.

Section 1 of the enlarged homestead act (35 Stat., 639), declares that lands entered thereunder shall be "located in a reasonably compact body and not over one and one-half miles in extreme length."

This Department can not concur in the Commissioner's interpretation of the provisions of the enlarged homestead law applicable to cases like this one.

Tobey shows in his appeal that all the lands surrounding the tracts applied for are covered by other entries and that he has applied for the only vacant land available that is contiguous to any tract in his application. It would seem, therefore, to be impossible for him to have made application for land in a more compact form by eliminating any of the tracts and including others.

The limitation made in the original enlarged homestead act that the land should not extend more than one and one-half miles in extreme length was for the purpose of enforcing its further requirement that the lands covered by an entry should embrace contiguous tracts and be in one "reasonably compact body." If that law had remained unchanged this application made under section 1 of the original act could not be allowed in its present form. But after that act had been in operation for more than seven years it was found that its general objects and purposes were in many cases being defeated by its requirement that the entered lands should be in one compact body, and to overcome that hindrance and afford homeseekers larger opportunity to secure the benefits of the act, Congress in effect nullified the original provision as to compactness through

the amendment of July 3, 1916 (39 Stat., 344), which by adding section 7 to that act authorized additional entries for incontiguous lands located within twenty miles of the land covered by original entries.

Having thus in effect abandoned the requirement of compactness, it is reasonable to assume that Congress did not intend that the limitation as to length made in support of compactness should continue as a mandatory requirement, and particularly in cases like the present one where all the adjoining lands had already been entered by others. To so hold would not only be unreasonable but it would in effect defeat the primary purposes of the enlarged homestead law by preventing entrymen situated like the appellant in this case from exercising their full right under said law.

This Department is, therefore, of opinion that entries such as the one here involved should be permitted and sustained in all cases where the entry is as compact as the availability of public lands will permit, notwithstanding the general rule which must be still adhered to that under other and permissible circumstances entries must be made in a compact form and can not exceed the prescribed length in cases where there are sufficient adjacent lands subject to entry.

This conclusion is in harmony with and is supported by the decision in the case of George G. Vance (47 L. D., 370), wherein the Department held that the limitation of one and one-half miles in extreme length does not apply to the length of the combined areas, where an entryman makes an additional entry for contiguous land and is unable to make entry in a more compact form. The holding here extends that rule and does away with the necessity of entering the land under two applications. All regulations not in harmony herewith are hereby amended.

The Commissioner's decision is reversed.

ENTRIES UNDER SECTIONS 4 AND 5 OF THE STOCK-RAISING HOMESTEAD ACT.

INSTRUCTIONS.

[Circular No. 740.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 16, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Your attention is invited to the following instructions, in connection with the stock-raising homestead act of December 29, 1916

(39 Stat., 862), recently received by this office from the Secretary of the Interior:

One who has made an additional entry under either section 4 or section 5 of the act is qualified to make an additional entry for such a quantity of designated land within twenty miles of the original entry as, when added to the area formerly acquired, will not exceed approximately 640 acres.

CLAY TALLMAN,
Commissioner.

HARRIS v. COIL.

Decided March 16, 1921.

PREFERENCE RIGHT—HOMESTEAD ENTRY—CONTESTANT—MILITARY SERVICE.

The act of March 8, 1918, relieving public-land claimants from penalty for forfeiture for failure to perform any material acts required by law under which the claims were asserted, during the period of their military service, suspends the running of the time within which preference right must be exercised; where a successful contestant enters the military service prior to the expiration of the preference right period, without having exercised his right; but the time commences to run again immediately upon his discharge.

VOGELSANG, First Assistant Secretary:

Morris E. Coil has appealed from decision of the Commissioner of the General Land Office, dated May 25, 1920, holding for cancellation homestead entry for the W. $\frac{1}{2}$, Sec. 34, T. 15 N., R. 29 E., M. M., Miles City, Montana, land district.

The land above described was formerly embraced in a homestead entry made by Elmer R. Stewart, which was contested by Milford R. Harris, February 25, 1918, on allegation of abandonment and default in residence, cultivation and improvements. In his contest affidavit Harris stated his intention to make entry under the homestead law in the exercise of his preferred right if successful in the contest. The contestee defaulted and Harris was notified of his right to make application, which notice was received by him May 8, 1918.

The land was entered by Mary E. Coil September 24, 1918, which latter entry was relinquished June 11, 1919, and Morris E. Coil made homestead entry thereof.

It appears that Harris entered the military service May 27, 1918, and was discharged therefrom February 17, 1919. He filed homestead application for the land involved October 11, 1919, stating that he was the head of a family, unmarried and over twenty-one years of age. The application was suspended by the local officers because of conflict with the prior entry of Coil.

Under date of May 25, 1920, the Commissioner of the General Land Office held the entry of Coil for cancellation because of the application of Harris under his claimed preferred right of entry awarded under the Stewart contest.

In support of his appeal Coil urges that Harris was under twenty-one years of age, when he brought the contest against Stewart's entry, and would not be twenty-one years of age until October, 1920; that the thirty day preference right began to run May 8, 1918, and expired before Harris had been in the military service for fourteen days, and hence, before Harris was qualified to make homestead entry; that the attorney for Harris endeavored to get him to make application for entry and sent papers to him for that purpose but Harris failed to apply, and the said attorney then assisted Mary E. Coil to make entry in the full belief that Harris had abandoned the case; that the preferred right of Harris had fully expired; that appellant has established residence on the land, built a house 14 by 22 feet, a barn 20 by 18 feet, chicken house 12 by 8 feet, well 40 feet deep, broke and put in crop 12 acres, dug post-holes for one mile of fence, and has material on the ground for fencing a large portion of the tract.

In response to the appeal it is said in behalf of Harris, that Coil should not be allowed to claim equities on account of the improvements made on the land because he was informed of Harris's claim before making them. It is also said that Harris did not have money enough to take up this matter when he was discharged from the army. It is admitted that he was not twenty-one years of age when he filed the contest, but his exact age is not stated. A certified copy of the certificate of discharge from the military service states that Harris enlisted May 27, 1918; that he was eighteen years of age when he enlisted, and that he was discharged February 17, 1919.

Little need be said on the question of Harris's qualifications to make entry. The preferred right commenced to run on May 8, 1918. At that time Harris was not twenty-one years of age. He could not have made homestead entry except upon showing that he was the head of a family. No showing of the facts sufficient to constitute him a head of a family has been made. When he had served fourteen days in the army he was qualified regardless of minority under section 2300, Revised Statutes, but that occurred more than thirty days after he received notice of his preferred right.

Proceeding, however, upon the theory that he may have been qualified as head of a family, the time did not run during the period of military service. See section 501, act of March 8, 1918 (40 Stat., 440, 448). Also the case of *Wise v. Scott* (47 L. D., 301), wherein it was held that a preferred right is within the protection of said act

during the period of military service. But the running of the preference right period was merely halted during the period of military service, and immediately commenced to run again when the soldier was discharged from the service. Nineteen days of the period had run when he entered the service and only eleven remained after discharge. It was nearly eight months before he filed his application. Certain prior correspondence is mentioned, but neither the date nor purport thereof can be determined from the record, and there is nothing to indicate that Harris took timely action toward claiming his preferred right of entry.

The decision appealed from is accordingly reversed.

HARRIS v. COIL.

Motion for rehearing of departmental decision of March 16, 1921 (48 L. D., 39), denied by First Assistant Secretary Finney, April 28, 1921.

FOURTH SECTION ALLOTMENT ON THE CAMP MCGARRY ABANDONED MILITARY RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., March 24, 1921.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

The Department is in receipt of your letter of February 26, 1921, in reference to three allotment applications of the Carson City, Nevada, series under the fourth section of the general allotment law, with request for instructions as to whether patent should issue thereon as follows:

No. 502 of George Miller, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 35.

No. 503 of Louise Miller, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 35.

No. 504 of James Miller, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 35, T. 42 N., R. 25 E., M. D. M.

These applications were filed August 21, 1893, by Dick Miller for his minor children above named, and were approved by the Department June 9, 1897, in regular course, apparently no question being raised or suggested by the record as to the legal status of the lands although they are embraced within the Camp McGarry abandoned military reservation.

Your question is prompted by the decision of the Department, dated August 11, 1913, in the case of Evans Sam, which held that an allotment of land could not be made to an Indian within the said abandoned military reservation, and decision of February 2, 1918,

in the case of *Bililik Izhi v. Phelps* (46 L. D., 283), which while not involving the direct question appears to make for a different conclusion.

The lands within the Camp McGarry abandoned military reservation were surrendered to the Department of the Interior March 25, 1871, for disposition at public vendue under the provisions of the act of February 24, 1871 (16 Stat., 430). Not having been disposed of they come under the provisions of the act of October 1, 1890 (26 Stat., 561), which provides:

That all the agricultural lands embraced within a military reservation in the State of Nevada, which have been placed under the control of the Secretary of the Interior for disposition, be disposed of under the homestead laws, and not otherwise.

This act was supplemented by the act of August 21, 1916 (39 Stat., 518), which provided that said lands should be disposed of under the homestead and desert land laws and not otherwise.

The case of *Evans Sam*, above referred to, involved the direct question whether lands within the said abandoned military reservation, which were then subject to disposal only under the act of October 1, 1890, *supra*, were properly subject to appropriation under the fourth section of the general allotment act of February 8, 1887 (24 Stat., 388), as amended, and it was therein held:

In view of this legislation, the only possible way that nonmineral land could be validly disposed of in this area under the fourth section of the allotment act of 1887 (24 Stat., 388), would be to hold that such allotment act belongs among "the homestead laws" referred to in the act of October 1, 1890.

In 32 L. D., page 19, the Department held that said act of February 8, 1887—

"is, in its essential elements, a settlement law; and that 'to make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as applicable, like any other law based upon settlement.' Indian Lands—Allotments. (8 L. D., 647). When the evident purpose of the act is considered, the term 'settlement' therein, must inevitably be construed to mean practically the same it does under the homestead law, where the essential requirement is actual inhabitancy of the land to the exclusion of a home elsewhere."

But holding that this act is a settlement law, to be administered like any other law based on settlement, or even that "settlement" should be construed to mean the same as settlement in the homestead law, is far from deciding that this allotment act itself is one of "the homestead laws," with their explicit requirements as to cultivation as well as residence.

Subsequently in the case of *Bililik Izhi v. Phelps*, *supra*, the Department had occasion to construe section 31 of the act of June 25, 1910 (36 Stat., 855), authorizing allotments to Indians having improvements or occupying or living upon lands within national forests, in conformity with the provisions of the general allotment laws, and it was therein held that national forest lands listed and

designated as subject to entry only under the forest homestead law of June 11, 1906 (34 Stat., 233), were not thereby excepted from allotment to an Indian under the provisions of section 31 of the act of June 25, 1910, *supra*; that the two acts were not inconsistent, one with the other; on the contrary that the forest allotment act is the concomitant of the forest homestead act, the object in both being the same, that is to permit agricultural use of lands suitable for that purpose, and gives Indians, as well as whites, the right to secure homes upon these lands.

It was held further that, inasmuch as section 4 of the general allotment law of February 8, 1887, *supra*, is in its essential elements a settlement law partaking much of the nature of the homestead right and intended to afford Indian settlers upon public lands the same privileges of entry as white settlers, an allotment of coal lands within a national forest was allowable and came within the purview of the act of June 22, 1910 (36 Stat., 583), which authorizes agricultural entries and surface patents for such lands. The latter act in section 1 provides:

That from and after the passage of this act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only * * * with a reservation to the United States of the coal in such lands. * * *

Here provision is made for the entry of withdrawn or classified coal lands "under the homestead law by actual settlers only" and manifestly the decision proceeds upon the theory that an Indian settler claiming the right to allotment under the general allotment laws, is practically on the same footing with the white settler on the public domain under the homestead law, and keeping in mind his habits and customs and the nomadic instincts of his race, should be treated and dealt with in all respects as any other homestead settler or claimant. The effect of this decision was and is to impress an allotment on the public domain under the fourth section with the character of an Indian homestead entry and in the administration of the law to make one the equivalent of the other, which, to all intents and purposes, had been previously done in the case of Jim Crow (32 L. D., 657, 659), and broadly speaking, to accord to such Indian allottees the privileges and benefits of the laws relating to homestead settlers generally upon the public domain. In the case of Jim Crow the Department said, first referring to the Indian homestead acts of March 3, 1875 (18 Stat., 402, 420), and July 4, 1884 (23 Stat., 76, 96):

The general allotment act, so far as it affects public lands, and the preceding Indian homestead provisions, are so clearly connected that they should be construed *in pari materia* as relating to the same subject matter. The later allotment act but carries forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.

* * * The objects of the laws relating to Indian homesteads are the same as those relating to Indian allotments on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the Government are the same. Both the legislative and the executive branches of the government have recognized these similarities of purpose in the laws, standing of claimants thereunder, and obligations of the government.

This doctrine was reaffirmed and applied in the case of Toss Weaxta, decided September 29, 1920 (47 L. D., 574), wherein it was stated:

The Department all along has considered Indian homesteads and Indian allotments upon the public domain as being upon practically the same footing, and Congress has recognized the similarity. An Indian allottee, by virtue of the approval of his allotment by the Secretary of the Interior, acquires equitable title in the land but the legal title remains in the Government. This is equally true of an Indian homesteader under the act of 1884.

In this connection it is observed that in the Turtle Mountain act of April 21, 1904 (33 Stat., 189, 195), the selections to which Indians are entitled thereunder, both on the reservation and public domain, are characterized as "homesteads", and in the opinion of the Assistant Attorney General dated January 24, 1905 (19 Opinion Assistant Attorney General, 40, 45), it is said:

It is apparently a matter of form rather than of substance whether the land awarded to the members of this tribe, or the claim thereto, be designated as an "allotment" or as a "homestead." The purpose is to secure to each member land for his individual use and occupation and eventually to vest in him the full title of such land. No condition as to residence or improvement is imposed and in this respect the claim partakes of the nature of an allotment rather than of a homestead.

It is interesting and of advantage in considering this question to go back to the original homestead act of May 20, 1862 (12 Stat., 392), and note the development of the congressional policy relating to Indian allotments on the public domain. Under this act the right to enter a homestead was limited to citizens of the United States, or those who had filed their declaration of intention to become such. Indians were not citizens and could not be naturalized except by act of Congress. *Elk v. Wilkins* (112 U. S., 94). And no such authority had been generally granted at the time of the homestead act. Consequently an Indian could not originally enter a homestead. On March 3, 1865 (13 Stat., 541, 562), Congress extended the benefits of the homestead act of 1862, *supra*, to "each of the chiefs, warriors, and heads of families" of the Stockbridge and Munsee tribe in Wisconsin, exempting the homestead thus secured from "any tax, levy or sale whatever," except as therein stipulated. The act further provided a method by which these Indians might attain citizenship. By the act of March 3, 1875, *supra*, it was declared that any Indian or head of a family of twenty-one

years of age, who shall have abandoned his tribal relations, shall be entitled to the benefits of the homestead law of May 20, 1862, *supra*, with a provision that the title of lands thus acquired shall not be subject to alienation or encumbrance for a period of five years from the date the patent issued therefor. The act of January 18, 1881 (21 Stat., 315), extends the period of nonalienation as to the Winnebago Indians of Wisconsin making it twenty years instead of five, as fixed in the act of March 3, 1875. Then came the act of July 4, 1884, *supra*, a general law which granted to Indians, whether they had abandoned their tribal relations or not, rights to homesteads subject to restrictions for twenty-five years on alienation. *United States v. Hemmer* (241 U. S., 379). Subsequently Congress enacted legislation known as the general allotment act of February 8, 1887 (24 Stat., 388), by section 4 thereof authorizing the allotment of homesteads upon the public domain and providing—

That where any Indian not residing upon a reservation * * * shall make settlement upon * * * any lands of the United States, he shall be entitled * * * 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.

This act, as said by the Department in the *Jim Crow* case, *supra*, “but carries forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.”

True the general allotment law imposes no specific conditions respecting residence, cultivation and improvements as in the case of a regular homestead by a white settler. It is required of the Indian only that he make settlement and his right to a homestead is made to arise from and depend upon such occupation and use of the land, as an Indian considering his habits and customs of life, would in the nature of things, subject it to. In the legislative mind the essential thing was that the Indian evince a purpose to attach himself to the land and conform in some measure to the habits and pursuits of civilized life, and upon proof of this he became entitled to a patent. In this connection it is stated in regulations of April 15, 1918 (46 L. D., 344) :

While the act contains no specific requirements as to what shall constitute settlement, it is evident that the Indian must definitely assert a claim to the land based upon the reasonable use or occupation thereof consistent with his mode of life and the character of the land and climate.

Considering the manifest policy of Congress, as revealed in the various enactments herein discussed, to grant permanent homes to Indians on the public domain as freely as to white people, and giving a broad and liberal interpretation, rather than a technical signification to the words “homestead laws” as used in the act of October

1, 1890, *supra*, the Department is convinced that a fourth section allotment comes within the purview of those laws and that the lands within the Camp McGarry abandoned military reservation may properly be held subject to allotment under said fourth section. Taken in a limited or technical sense the words "homestead laws" are usually intended to describe the right defined by the public land laws as a homestead; but the homestead law must be regarded as a whole, and its different sections and provisions must be so construed as not only to harmonize with each other but to carry out the obvious purpose of the law, and the intent of Congress in its enactment. Manifestly there is nothing in the true nature of a fourth section allotment on the public domain incompatible with the homestead law. On the contrary it is fully within the spirit of that law, and being within the spirit "it is as much within the statute as if it were within the letter."

In the absence of other objections, therefore, patent should issue on the three applications here involved. The decision of August 11, 1913, in the case of Evans Sam will no longer be followed.

E. C. FINNEY,
First Assistant Secretary.

OIL PROSPECTING PERMITS IN ALASKA—PARAGRAPH (a), SECTION 10 OF THE REGULATIONS OF MARCH 11, 1920, MODIFIED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 28, 1921.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Section 13 of the act of February 25, 1920 (41 Stat., 437, 441), authorizes the Secretary of the Interior to grant a permit "to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land * * * not within any known geological structure of a producing oil or gas field," with the proviso that "in the Territory of Alaska prospecting permits not more than five in number may be granted." The proviso also grants longer periods for beginning and completing prospecting than in the States.

In order to encourage exploration and development in Alaska, provisos to section 22 of the act permit the Secretary of the Interior to fix rentals and royalties and to waive payment of any rentals or royalties for not exceeding the first five years of any lease.

Section 27 limits an individual to holding at one time more than three oil or gas leases "in any one State," and not more than one lease within the geologic structure of the same *producing* oil or gas.

field. As under the proviso to section 13 five permits may be granted to an individual, corporation, or association in Alaska, it follows that upon discovery of oil or gas within areas so permitted, five leases may be granted.

In the original instructions issued under said act it was held (section 10, paragraph (a), relating to permits in Alaska), that a person, association, or corporation is authorized to hold five permits at one time in said territory, but only one permit in the geologic structure of any one producing oil field.

To the extent that it was suggested that any prospecting permit could issue under the act, either in Alaska or elsewhere, for lands in the geologic structure of a *producing* oil field, this was manifestly error; and to correct that error, the words "of any one producing oil field" were stricken from the paragraph quoted, and "any one" substituted for "the" before "geologic structure," so that it now reads:

a person, association, or corporation is authorized to hold five permits at one time in said territory, but only one permit in any one geologic structure.

As thus amended, the instructions are open to the objection that there is no provision of law placing the restriction upon gas and oil permits in Alaska contained in the last clause of the sentence just quoted.

There are, with the exception of a small area near Katalla, no producing structures or areas in Alaska, and with that exception, and possibly the Yakata field, the boundaries or possible structures of fields have not been ascertained or defined.

The evident intent of the act is to prevent monopoly, but to also encourage development. Exceptionally liberal provision is made with respect to Alaska.

As stated in the last clause of paragraph 2 of the regulations, the granting of a prospecting permit is discretionary with the Secretary, and this is true of the approval of assignments of permits.

Having in mind the intent of the act above outlined, it is held that one individual, corporation, or association may locate and obtain but one permit in a geologic structure of a nonproducing field, but for development purposes assignments to a qualified individual, corporation, or association, outside producing oil or gas fields, for not exceeding five permits in Alaska, whether contiguous or noncontiguous, may be presented for the consideration of the Secretary of the Interior, and his approval, if he shall find same to be in the public interest.

To the extent of its conflict with the foregoing, section 10, paragraph (a) is modified.

ALBERT B. FALL,
Secretary.

WIEGERT v. NORTHERN PACIFIC RAILWAY COMPANY (ON RE-HEARING).

Decided March 30, 1921.

SURVEY—LAND DEPARTMENT—PATENT—SETTLEMENT.

When a patentee acquiesces in an adjustment made by the Land Department incidental to the resurvey of a township, a settler who has not acquired any vested interest in the lands affected by the resurvey is not in a position to raise an objection that the tract shown by said resurvey as having been patented is not, in fact, the identical tract that was patented.

SURVEY—WITHDRAWAL—SETTLEMENT.

Where lands are withdrawn from entry and disposition pending the resurvey of a township, the proviso to the act of March 3, 1909, does not except from the operation of the statute a settlement made subsequently to withdrawal, but the right to initiate the claim, which must conform to the plat of resurvey, is postponed until vacation of the withdrawal order.

FINNEY, *First Assistant Secretary:*

Elizabeth F. Wiegert has filed a motion for rehearing in the above entitled case in which this Department by its decision of January 27, 1921, affirmed the decision rendered by the General Land Office on July 21, 1920, sustaining the action of the local office in rejecting her homestead entry application, Lewistown 041635, for partial conflict with an indemnity railroad selection previously patented to the Northern Pacific Railway Company.

The main point at issue presented by the appeal from the General Land Office was as to the validity of a governmental resurvey by which various claims of patentees were adjusted in such manner as to embrace within one of the patented claims certain lands upon which the appellant had placed improvements with the expectation of including those lands in a homestead entry.

The motion raises a contention to the effect that the Government has no authority to make a retracement or resurvey of lands that have been patented and that the Land Department has no jurisdiction to adjust the boundaries of patentees; that consequently its action in adopting as an official survey, a resurvey which locates a tract that was shown upon the original plat as an odd numbered section, in such position as to include a portion of a tract originally shown as an even numbered section, and to exclude a portion of said odd numbered section, is invalid. It is urged that the plat shows the so-called resurvey was neither a retracement nor a resurvey. Reference is made to certain court decisions cited in the Departmental decision and it is argued that of those decisions, two only are in point, namely *Hess v. Meyer* (73 Mich., 259, 41 N. W., 422) and *Washington Rock Company v. Young* (29 Utah, 108, 80 Pac., 382), and that they sustain the contentions of the appellant.

The motion does not raise any issue that was not considered in the Departmental decision. *Hess v. Meyer* and *Washington Rock Company v. Young* were cases involving disputes over location of boundaries between patented claims. The rights of the litigants had become vested prior to the making of the resurveys and the courts held, and correctly so, that private rights that had already become vested could not be disturbed by a resurvey made by government or county surveyor. These decisions are in point in so far as the patented lands affected by the resurvey under attack are concerned. If the patentees had refused to acquiesce in the correctness of that resurvey, they were privileged to resort to the courts in order that they might have their boundaries adjusted and their disputes adjudicated. But the patentees having acquiesced in the action of the Land Department in making the resurvey and the adjustments under it, without resort to the courts, such acquiescence amounted to a determination that the tract shown as the selection patented to the Northern Pacific Railway Company on the plat of resurvey was the tract which it selected in accordance with the plat of the original survey. That company was in a position to complain, if it was not satisfied. But one who had never acquired a vested interest in any of the public lands affected by the resurvey had no right to object.

The determination of what lands remain to be disposed of by the Government is one of the results of the resurvey of a township in which portions of the lands have been patented and other portions are unappropriated. It has long been the custom to cause all public lands in a township that is to be resurveyed to be withdrawn pending the resurvey, as a protection to those who may have an intention of initiating claims to the unappropriated lands. The Land Department is charged with the duty of surveying the public lands and must primarily determine what are public lands subject to survey and disposal under the public land laws, what lands have been surveyed, what have been disposed of, and what are reserved, and its exercise of jurisdiction can not be questioned by the courts before it has taken final action. *Kirwan v. Murphy* (189 U. S., 35). In the case at bar the lands in the township that was to be resurveyed were withdrawn. At the date of that withdrawal the appellant had not acquired any vested interest in public lands in that township. The withdrawal remained in effect until the plat of resurvey was approved. Consequently she could not bring her claim within the proviso to the act of March 3, 1909 (35 Stat., 845). Her right to even initiate a claim was postponed until the vacation of the withdrawal order, and then any claim initiated by her must conform to the plat of resurvey. The principles enunciated in *Hess v. Meyer* and *Washington Rock Company v. Young* are inapplicable to her case.

It is alleged in the motion that the Northern Pacific Railway Company is inclined to recognize that the resurvey as made is illegal and it is suggested that much future trouble may be avoided in the courts if an adjustment of the matter can be effected between said company and the appellant. Inasmuch as the Land Department has no authority to enforce the railway company to make or submit to an exchange of lands for the benefit of the homestead entry applicant, it is obvious that any negotiations aiming toward an adjustment of the matter should be had between the interested parties.

The motion is, therefore, denied, and the decision adhered to.

REGULATIONS GOVERNING COAL PROSPECTING PERMITS IN ALASKA.

[Circular No. 744.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 30, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES IN ALASKA:

By act approved March 4, 1921 (41 Stat., 1363), the act of October 20, 1914 (38 Stat., 741), entitled, "An Act to provide for the leasing of coal lands in the Territory of Alaska, and for other purposes," was amended by adding to Section 3 thereof the following:

And provided further, That where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area in Alaska, the Secretary of the Interior may issue prospecting permits for a term of not to exceed four years, under such rules and regulations and conditions as to development as he may prescribe, to applicants qualified under this Act, for not to exceed two thousand five hundred and sixty acres, and if within the time specified in said permit the permittee shows to the Secretary of the Interior that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this Act, for all or any part of the land in his permit.

Under said amendment the following regulations are hereby adopted:

1. *Character of Lands.*—Permits may be issued to prospect unclaimed, undeveloped areas in Alaska where prospecting or exploratory work is necessary to determine the existence or workability of the coal deposits.

2. *To Whom Permits May Issue.*—Permits may be issued to any person above the age of twenty-one years who is a citizen of the United States, or to any association of such persons, or to any corporation or municipality organized under the laws of the United States

or any State or Territory thereof, provided that a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States.

3. *Area.*—Permits may be issued for tracts of not exceeding two thousand five hundred and sixty acres of contiguous lands in reasonably compact form.

4. *Rights Conferred.*—A permit will entitle the permittee to the exclusive right to prospect for coal on the land described therein. In the exercise of this right the permittee shall be authorized to remove from the premises only such coal as may be necessary in order to determine the workability and commercial value of the coal deposits in the land.

5. *Application for Permit.*—Applications for permits shall be filed in the proper district land office, and after due notice thereof on the records, forwarded to the General Land Office with report of status of the land affected. No specific form of application is required and no blanks will be furnished, but it should cover in substance the following points:

(a) Applicant's name and address.

(b) Proof of citizenship, and qualification as to stock ownership, if a corporation.

(c) Description of land for which a permit is desired, by legal subdivisions, if surveyed, and by metes and bounds and such other description as will identify the land, if unsurveyed. If unsurveyed, a survey sufficient to identify more fully and segregate the land may be required before permit is granted.

(d) Condition of coal occurrences, so far as determined, description of workings, and outcrops of coal beds if any, and reason why the land is believed to offer a favorable field for prospecting for coal.

(e) Detailed plan and method of conducting prospecting or exploratory operations on the land, estimated cost of carrying out such proposed prospecting operations and the diligence with which such operations will be prosecuted.

(f) A brief statement of applicant's experience in coal mining operations, if any, together with one or more references as to his reputation and business standing.

The application must be under oath of the applicant or his attorney-in-fact or, if a corporation, of one of its officers theretofore duly authorized.

(6) *Form of Permit.*—On receipt of the application, if found sufficient and the lands subject thereto, a permit will be issued, of which the district land office will be advised. Permits will be in substantially the following form:

UNITED STATES LAND OFFICE AT _____

SERIAL NO. _____

THE UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR.

COAL PROSPECTING PERMIT.

Know All Men by These Presents, That the Secretary of the Interior, under and by virtue of Section 3, as amended March 4, 1921 (41 Stat., 1363), of the Act of Congress, entitled "An Act to provide for the leasing of coal lands in the Territory of Alaska, and for other purposes," approved October 20, 1914 (38 Stat., 741), has granted, and does hereby grant, a permit to _____ of the exclusive right for a period of four years from date hereof to prospect for coal the following described lands: _____ but for no other purpose, under the provisions of said act and upon the following express conditions, to wit:

1. To begin prospecting work within 90 days from date hereof and to diligently prosecute the same during the period of such permit in accordance with the following plan: _____

2. To remove from said premises only such coal or other material as may be necessary to prospecting work, and to keep a record of all coal mined and disposed of, payment of a royalty thereon of 10 cents per ton of 2,000 pounds to be made to the receiver of the district land office not later than during the calendar month succeeding that during which such coal was disposed of.

3. To afford all facilities for inspection of the prospecting work on behalf of the Secretary of the Interior, and to make report on demand of all matters pertaining to the character, progress, and results of such work.

4. To observe such conditions as to the use and occupancy of the surface of the land as provided by law, in case any of said lands may be entered or patented with a reservation of the coal deposits to the United States.

Expressly reserving to the Secretary of the Interior the right to permit for joint or several use such easements or rights of way upon, through or in the land embraced herein as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in said act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes; also reserving to the United States the right to lease, sell or otherwise dispose of the surface of said lands under laws hereafter enacted in so far as said surface is not necessary for the use of the permittee in prospecting hereunder, and *further reserving* the right and authority to cancel this instrument for failure of the permittee to comply with any of the conditions hereof, after 30 days' notice of the reasons for such cancellation.

Valid existing rights acquired prior hereto on the lands described herein will not be adversely affected hereby.

Dated this _____ day of _____, 19__.

Secretary of the Interior.

7. *Leases to Permittees.*—A qualified permittee who has shown, within the period of the permit, that the land included therein contains coal in commercial quantities, will be entitled to a lease for such land, or part thereof as the permittee may desire, upon due

application and publication of notice thereof. The application for lease should be filed in the proper district land office before the expiration of the period of the permit. An application for lease under this section should describe the land desired, and set forth fully and in detail the extent and mode of occurrence of the coal deposits as disclosed by the prospecting work performed under the permit. Such leases will be granted without competitive bidding, on rents and royalties to be fixed by the Secretary of the Interior, and otherwise substantially in the form of lease provided in regulations governing coal land leases in Alaska, approved May 18, 1916 (45 L. D., 113).

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

PAYMENT OF PER DIEM TO SURVEYORS WHEN ON TRAVEL STATUS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 1, 1921.

THE HONORABLE THE SECRETARY OF THE INTERIOR:

Referring to letter of the First Assistant Secretary, under date of March 21, 1921, in the matter of the modification of existing regulations (paragraphs 239 and 244, 46 L. D., 513, 569, 570), so as to provide that per diem may be allowed to surveyors temporarily detailed to the General Land Office, I have the honor to recommend amendments as follows:

(1) Supplemental to paragraph 239:

(a) Each surveyor will be assigned to one of the regularly organized surveying districts, and attached to the headquarters office of the district.

(b) No allowance will be made for subsistence while engaged at official headquarters, nor when absent on leave.

(c) Surveyors will be placed on travel status when assigned to field duty and will be allowed subsistence during such periods as they may be officially employed away from their designated headquarters, subject to the limitations prescribed by law and existing regulations: (1) reimbursement for actual and necessary expense within prescribed limits; (2) meals furnished in a Government-maintained camp; or (3) a per diem in lieu of subsistence, when provision therefor is made in the travel instructions.

(2) Supplemental to paragraph 244:

(a) Surveyors temporarily detailed to the District of Columbia, or to the headquarters office of another surveying district, by proper authority (but not

upon the application of the surveyor), will be placed upon continuous travel status, and will be allowed subsistence accordingly, unless, by such authority the temporary detail be changed to that of a permanent transfer.

In view of the very full discussion given to the subject in recent conferences, it appears to be unnecessary to dwell at length on the purpose and advisability of amending the regulations as suggested, though, as a matter of record, at this time, the point of the proposed change is to make possible a consistent, uniform and fair distinction between travel and nontravel status of the surveyors, in harmony with the general governmental practice.

The matter of travel status will be clearly defined under the proposed amendments, except that a temporary detail may sometimes merge into that of a more or less permanent transfer, when it becomes manifest that allowance of subsistence should be terminated. It seems to be only fair to determine the question by reference to whether a surveyor is engaged at his own regular headquarters, or away therefrom, as in the field, or on temporary detail to the District of Columbia, or to the headquarters office of another surveying district.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

PROOFS ON HOMESTEADS BY INCAPACITATED SOLDIERS—ACT OF MARCH 1, 1921.

INSTRUCTIONS.

[Circular No. 745.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 2, 1921.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

Your attention is directed to the act of March 1, 1921 (41 Stat., 1202), which provides:

That any settler or entryman under the homestead laws of the United States, who, after settlement, application, or entry and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the war with Germany, who has been honorably discharged and because of physical incapacities due to service is unable to return to the land, may make proof, without further residence, improvement, or cultivation, at such

time and place as may be authorized by the Secretary of the Interior, and receive patent to the land by him so entered or settled upon: *Provided*, That no such patent shall issue prior to the survey of the land.

2. The benefits of this act extend to persons who, prior to November 11, 1918, and during the war with Germany, were actually engaged in the United States Army, Navy, or Marine Corps, regardless of the dates of their enlistments, provided they entered the service after making settlement upon the land claimed or after filing an allowable application for entry thereof.

3. If the land involved be unsurveyed, and entry be not yet allowed, the proof may nevertheless be submitted and accepted, the current serial number being given the case; but final certificate will not issue unless and until all moneys properly due shall have been paid and entry by the soldier shall have been allowed, according to an approved survey.

4. Notice of intention to submit proof must be given in the usual manner by posting and publication; and, in case of unsurveyed land, affidavit evidence must be filed, showing posting of the notice in a conspicuous place on the land.

5. The proof shall consist (a) of affidavit of the homesteader (taken before any officer at any place who is authorized to administer oaths and who uses an official seal) showing that he is unable to return to the land on account of physical incapacity due to service in the United States Army, Navy, or Marine Corps during the war with Germany, and describing the nature and extent of such disability; (b) of the testimony of two witnesses taken in similar manner corroborating the statements in that regard and of these witnesses at least one must be a practicing physician; (c) of the copy of his discharge from the Army, Navy, or Marine Corps, or an affidavit showing all the facts regarding his service and discharge. In each case the facts will be verified so far as possible from the records of the War Department.

Where no application for entry had been filed prior to claimant's entrance into the service and the benefits of the act are claimed on account of settlement before the beginning of his service, the proof must also include the affidavit of the soldier showing that he had resided upon the land in a habitable house before his entrance into the service, and, besides the other witnesses, there must be the testimony of two witnesses taken in the usual manner in the county or land district in which the land is situated, showing the facts as to claimant's compliance with the law before entrance into the service.

6. Where the proof appears satisfactory and entry for the land has already been allowed, the register and receiver will issue final certificate, provided the proper sums are paid. In cases where entry

has not yet been allowed, all the papers will be forwarded to the General Land Office for consideration.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

CASPER W. COLE.

Decided April 2, 1921.

MILITARY SERVICE—HOMESTEAD ENTRY.

The benefits of the act of July 28, 1917, are conferred only upon those settlers and homestead entrymen who initiated homestead claims, by filing applications or making settlements on public land, prior to entering the military or naval service.

FINNEY, *First Assistant Secretary:*

Casper W. Cole, Lieutenant Colonel, Cavalry, United States Army, has appealed from the decision of the Commissioner of the General Land Office dated August 25, 1920, holding for cancellation his homestead entry 030467 made April 23, 1915, for the NW. $\frac{1}{4}$, Sec. 10, T. 26 S., R. 18 E., N. M. P. M., containing 160 acres, Roswell land district, New Mexico.

It appears that appellant, who was a captain in the Regular Army of the United States at the time entry was made, never established residence on the land, made no improvements, and has not cultivated any part of same as required by the homestead laws, and that considerably more than five years have elapsed since the entry was allowed.

Appellant bases his appeal upon the ground that at the time he made entry he was in the military service, and as he is still in that service he has been unable to comply with the requirements of the homestead law, stating, however, that it is his intention to perfect title to the claim upon leaving the Army.

The act of July 28, 1917 (40 Stat., 248), provides, among other things:

That any settler upon the public lands of the United States or any entryman whose application has been allowed or any person who has made application for public lands, which thereafter may be allowed under the homestead laws, who after such settlement, entry or application, enlists or is actively engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman or member of any other organization for offense or defense, authorized by Congress * * * shall, in the administration of the homestead laws have his services therein construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled.

It is clear that the benefits of said act are conferred only upon those settlers and homestead entrymen who initiated homestead claims by filing applications or by making settlements on public land, prior to entering the military or naval service.

Construing said act the Department by instructions of August 22, 1917 (Circular 564, 46 L. D., 174, 176), ruled as follows:

Neither this act nor any other legislation contains a provision by which a person who initiates a homestead claim, by filing application or by making settlement on public land, *after* entering the Army, Navy, or Marine Corps, or other organization in the present war, may obtain credit in connection therewith on account of his service.

A soldier is entitled to credit for the period of his service in the recent World War and in the Spanish American War in the matter of residence and cultivation required by the homestead law, and in the event of discharge because of disability incurred in the line of duty or wounds received, he is entitled to credit for the entire term of his enlistment. But notwithstanding the length of his service or discharge on one of the grounds indicated, he must have resided upon, improved, and cultivated his homestead for a period of at least one year. The several acts of Congress with respect to military and naval service in the more recent wars of the United States, and service rendered in connection with operations in Mexico, or along the borders thereof, all contain the proviso requiring at least one year's residence and cultivation in connection with the entry of the soldier or sailor.

In the case under consideration, Colonel Cole admits that he not only never established residence on his entry, but that he has only been on it once since it was made more than five years ago.

Accordingly the decision appealed from is hereby affirmed.

**VALIDATION OF ENLARGED HOMESTEAD ENTRIES — ACT OF
MARCH 4, 1921.**

INSTRUCTIONS.

[Circular No. 746.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 4, 1921.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES, ARIZONA, CALIFORNIA, COLORADO, IDAHO, KANSAS, MONTANA, NEVADA, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH DAKOTA, UTAH, WASHINGTON, AND WYOMING:

In order that you may be properly informed, and in view of entries now pending in your offices, which may be validated thereby,

your attention is invited to section 1 of the act of Congress approved March 4, 1921 (41 Stat., 1433), which reads as follows:

That all pending homestead entries made in good faith prior to January 1, 1916, under the provisions of the enlarged homestead laws, and all rights to enter land under said laws, based on settlement made thereon in good faith before said date, and while the land was unsurveyed, by persons who, before making such enlarged homestead entry, had acquired title to land under the homestead laws, and therefore were not qualified to make an enlarged homestead entry, or such settlement, be, and the same are hereby, validated, if in all other respects regular, in all cases where the original homestead entry was for less than one hundred and sixty acres of land: *Provided*, That no settlement claim shall be validated hereby where adverse claim for the land has been initiated before the passage of this act.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

CENTRAL PACIFIC RAILROAD GRANT—DEPARTMENTAL INSTRUCTIONS OF MARCH 8, 1900, MODIFIED.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 5, 1921.

THE HONORABLE THE SECRETARY OF THE INTERIOR:

In the case of the Central Pacific Railway Company *et al.* (29 L. D., 589), by Departmental letter dated March 8, 1900, directions were given in the matter of the issuance of patents to the Central Pacific Railway Company and the Central Pacific Railroad Company, under the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356). On July 29, 1899, the Central Pacific Railroad Company, by its deed, properly executed, conveyed to the Central Pacific Railway Company all its property, including portions of the land grants above described, excepting from the conveyance, however, all lands sold prior to the execution of a certain mortgage from the Central Pacific Railroad Company to Charles Croker and Silas W. Sanderson, dated October 1, 1870, and all such parts and parcels of said lands as had, since that time, been released from said mortgage, in accordance with the provisions thereof.

By letter dated February 15, 1921, Mr. A. A. Hoehling, Jr., attorney for the railway company above mentioned, filed a certified copy of a deed of conveyance from the Central Pacific Railroad Company to the Central Pacific Railway Company, dated July 22, 1920, and requested that, in the future, based on the showing made therein,

all patents covering lands which might otherwise have been patented to the Central Pacific Railroad Company may be patented to the Central Pacific Railway Company.

Said deed dated July 22, 1920, recites the coming expiration of the charter of the Central Pacific Railroad Company, which was incorporated August 22, 1870, for a period of fifty years, and the provision of the laws of the State of California, by which said charter cannot be extended and renewed, and that, for the consideration therein expressed, the railroad company mentioned conveyed to the railway company all of its property, real, personal or mixed, including particularly all the lands and land rights which may have inured to it under the provisions of said acts of July 1, 1862, July 2, 1864, above cited, and the act of July 25, 1866 (14 Stat., 239); and the various amendments and extensions of these various acts. Said deed also contained a covenant, reading as follows:

"Central Pacific Railway Company hereby covenants and agrees to and with Central Pacific Railroad Company that, in any cases which may be found wherein Central Pacific Railroad Company has heretofore sold and conveyed or become obligated to convey to others any property, real, personal or mixed, the legal or equitable title to which shall by this conveyance be vested in Central Pacific Railway Company, but which through inadvertence, or otherwise, shall not have been properly, accurately or at all conveyed to the real owners thereof, either by Central Pacific Railroad Company or by any of the predecessor companies which were, on August 22, 1870, consolidated with and into said Central Pacific Railroad Company, that it, as grantee hereunder will make, execute and deliver good and sufficient deeds to such real owners, conveying to them respectively the property or properties to which they may be lawfully entitled."

The letter of Mr. Hoehling and the certified copy of the deed accompanying the same are herewith submitted, and it is recommended that said Departmental instructions of March 8, 1900, *supra*, be modified so that in the future, all patents issued under the grants therein referred to be issued to the Central Pacific Railway Company.

WILLIAM SPRY,
Commissioner.

Approved April 13, 1921:

E. C. FINNEY,

First Assistant Secretary.

JOHN B. ELIE.

Decided April 6, 1921.

INDIAN LANDS—HOMESTEAD ENTRY.

Section 29 of the act of June 25, 1910, authorizing the Secretary of the Interior to classify and appraise the vacant, unallotted and unreserved lands in the former Flathead Indian Reservation, not theretofore classi-

fied and appraised, did not contemplate that there should be any departure from the classification and appraisals of lands of the same class, previously made by the commission appointed under authority of the act of April 23, 1904.

INDIAN LANDS—SETTLEMENT—HOMESTEAD ENTRY.

One who, prior to restoration, settled upon unclassified and unappraised lands of the former Flathead Indian Reservation at the invitation of the Government and with the assurance of the local land officials that he would not be required to pay more than the price charged others for appraised lands of the same class, is entitled to enter them at the price fixed for lands of like character by the original commission, notwithstanding that another commission had subsequently appraised them at a higher price.

FINNEY, *First Assistant Secretary*:

John B. Elie has appealed from the decision of the Commissioner of the General Land Office of October 18, 1919, requiring payment for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32, T. 22 N., R. 20 W., M. M., at the rate of \$15.00 per acre, and the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section at \$4.00 per acre.

Elie's homestead application under section 2289, Revised Statutes, and the act of April 23, 1904 (33 Stat., 302), was filed in the Kalispell, Montana, land office November 17, 1910, for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 31, and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 32, T. 22 N., R. 20 E., M. M. The SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 31, had been classified as agricultural lands of the second class, and appraised at \$3.50 per acre, but the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 32, had been neither classified nor appraised. In an affidavit accompanying said application, Elie swore that he settled upon the land embraced therein immediately after midnight October 31, 1910; that he had constructed a house on the land, and was then residing thereon. Conformable to the practice then obtaining, his application was accepted by the register and receiver, and suspended to await the classification and appraisal of the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 32. October 13, 1913, the Department approved a list classifying the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32, as agricultural land of the second class, and the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, said section as grazing land, and appraising said tracts at \$15.00 and \$4.00 per acre, respectively. In a sworn statement made a part of his appeal, executed November 4, 1919, Elie declared that he had resided on the land from November 17, 1910, to the date thereof; that his settlement was made with the understanding that the President's proclamation restoring said lands to entry provided that all the lands affected thereby would be opened to settlement upon the same terms and conditions, and that when he filed his application to enter he was assured at the local land office that in due time the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 32, would be classified and appraised in the same proportion that other lands in the vicinity had been classified and appraised theretofore. He insists that he should not be required to pay more than was charged other settlers on lands of the

same class appraised prior to their restoration. If his contention is sustained, the appraisal of the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32, must be reduced from \$15.00 to \$3.50, and that of the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ from \$4.00 to \$1.50 per acre.

The lands involved are situated in the former Flathead Indian Reservation, in the State of Montana, were restored to settlement by the President's proclamation of May 22, 1909 (36 Stat., Part 2, page 2494), pursuant to the provisions of the act of April 23, 1904 (33 Stat., 302), and were classified and appraised under the authority of the act of April 23, 1904, as supplemented by the act of June 25, 1910 (36 Stat., 855).

The act of April 23, 1904 (33 Stat., 302), directed that all the lands opened to settlement should be classified and appraised prior to the restoration thereof, by a commission appointed by the President, but it was found impracticable by the commission to place a portion of the lands into any of the several classes provided by the statute, and owing to change of allotments, and other causes, a number of tracts were neither classified nor appraised.

It was not deemed advisable to withhold the disposition of the lands that had been regularly appraised, and classified, to await the classification and appraisal of the remaining areas, or authority of Congress for disposing of the lands classified in a manner not authorized. Accordingly, the President, by his proclamation issued May 22, 1909, restored such lands to disposition under the laws applicable thereto, and the Congress, in Section 29 of the act approved June 25, 1910 (36 Stat., 855, 863), authorized the Secretary of the Interior to classify and appraise the vacant, unallotted and unreserved lands in said Flathead Reservation not theretofore classified and appraised, as provided for by the act of April 23, 1904, and prescribed that "the classification and appraisement made hereunder shall be of the same effect as provided for in said act," and further authorized the Secretary to dispose of the lands not classified in the manner provided for in the act of 1904, under such rules and regulations as he might adopt, at not less than their appraised value.

The unclassified and unappraised lands were not listed as subject to entry in the schedule issued but the Commissioner of the General Land Office under date of August 26, 1910, directed the registers and receivers at Kalispell and Missoula, Montana, to receive and suspend applications to enter such unappraised and unclassified tracts in the said reservation. The Commissioner, June 14, 1911, revoked and recalled the letter of August 26, 1910, and thereafter applications were not received for such unclassified and unappraised lands. Following the Commissioner's letter of August 26, 1910, and before its revocation, June 14, 1911, a large number of persons settled upon

these unclassified and unappraised lands, and filed applications therefor, which were suspended as directed.

The designation by the Secretary of the commission to supplement and complete the work of that appointed by the President was considerably delayed. The examinations were not made in the field until the years 1912 and 1913, and the list of classifications and appraisements made by said commission was not approved until October 13, 1913. While adopting like classifications, the latter commission failed to follow the schedule of prices fixed by the original commission for lands of the same class, but greatly increased such prices. The maximum prices fixed by the original commission were, \$1.50 per acre for grazing lands, and \$7.00 for agricultural lands of the first class, while those of the latter commission were as high as \$6.00 per acre for grazing lands, and \$30.00 for agricultural lands of the first class. These appraisals caused widespread dissatisfaction, numerous protests have been made in connection therewith, and much correspondence between the Department, the Indian Office, the General Land Office, and the committees of Congress has resulted.

The acts of April 23, 1904, June 25, 1910, the proclamation of the President, and the letter of the Commissioner of the General Land Office, were considered as assuring the settlers who went upon these unclassified and unappraised lands that prompt action would be taken looking to classification, and that the appraisals would conform to those made by the original commission.

The conditions on the Flathead Reservation were made the subject of an investigation by the Board of Indian Commissioners, through one of its members, Rev. William H. Ketcham. Father Ketcham visited the reservation, held hearings, and submitted a detailed report. He states that the settlers on the unclassified and unappraised lands of the Flathead Reservation who made suspended applications, believed that the classification and appraisal of the lands entered by them would be prompt; that the prices would not exceed those fixed for similar lands by the first commission; and that the letter of the Commissioner of the General Land Office of August 26, 1910, was sufficient to induce this belief on the part of the settlers. He expresses the opinion that such settlers should be permitted to make payment on the basis of the prices fixed by the first commission on lands of the same class. See Senate Report No. 948, 63rd Congress, in connection with Senate Bill 6373.

The Commissioner of Indian Affairs, under date of August 2, 1917, submitted a report finding that the settlers who applied to enter the unclassified and unappraised Flathead lands between August 26, 1910, and June 14, 1911, were led to believe that the reappraisements when made would be similar to the values fixed by the original Flat-

head Commission, and recommended that the appraisements covered by subsisting entries made during the period mentioned be adjusted to conform to the values fixed by the original commission, and cited as authority for the proposed reduction in prices, the act of June 6, 1912 (37 Stat., 125).

The settlers upon such unclassified and unappraised lands went upon them at the invitation of the Government, and were assured by the local land officials that they would not be required to pay more than was charged their neighbors for appraised lands of the same class. They were among the first into this Indian country; they assisted in converting a waste into a prosperous community, and have been charged with the values they themselves created. Their good faith is unquestioned, their equities are unchallenged; but it remains to consider the law.

The controlling statutes are the act of April 23, 1904 (33 Stat., 302), June 25, 1910 (36 Stat., 855), and June 6, 1912 (37 Stat., 125). The act of April 23, 1904, is a comprehensive measure for the distribution and disposition of the lands within the Flathead Indian Reservation. Prior thereto, such lands had been held in common by the tribes. The tribal title was annulled by such act, and provision made for allotment of a portion of the land in severalty to the Indians entitled thereto, and for the disposition of the surplus for their benefit. As considerable areas were to be disposed of to settlers, specific provision was made for determining the character and fixing the values of such lands. A commission of five members was to be appointed by the President, two of whom should be persons holding tribal relations with the Indians, two resident citizens of Montana, and one an Indian agent or inspector. Before any of the lands were to be opened to entry, this commission was required to examine all such lands, arrange them into classes, and fix a price for each tract. The act clearly contemplated that the Indians should receive for the lands the values thereof at the time they vacated the reservation, as all of such lands were to be appraised before any of them were to be disposed of. The commission on classification and appraisal was to be, in every respect, representative. The lands were to pass from common Indian ownership to individual settlers, and there was to be no question as to the amounts the Indians would receive, or the settlers pay.

After providing in detail the several steps to be taken, and the order thereof, from the survey of the land to the issuance of patents to the settlers, it was declared:

"That the price of said lands shall be the appraised value thereof as fixed by the said commission * * * and no further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry."

As a portion of the lands had been restored prior to the classification and appraisal of a number of the tracts, Congress, by the act of June 25, 1910, authorized the Secretary to classify and appraise such lands, but it was declared: "The classification and appraisal made hereunder shall be of the same effect as provided for in said act (April 23, 1904)." It is evident that Congress, by the use of said language, intended to assure that there would be no departure from the classifications and appraisals made under the act of April 23, 1904; that the Indians should receive for such lands the values fixed by the former commission; and that the settlers should pay for such lands the amounts therein fixed and no more.

The commission appointed by the President had adopted the following values for the several classes named: Lands east of the Flathead River, agricultural lands of the first class, \$7.00 per acre; agricultural lands of the second class, \$3.50 per acre; grazing lands, \$1.50 per acre; and for lands west of the Flathead River, first class agricultural lands, \$5.00 per acre; second class agricultural lands, \$2.50 per acre; and grazing lands, \$1.25 per acre.

As Elie's settlement made November 1, and his homestead application filed November 17, 1910, were under the authority of the act of April 23, 1904, the President's proclamation of May 22, 1909, the act of June 25, 1910, and the Commissioner's letter of August 26, 1910, he was entitled to complete his application under the same terms and conditions as other settlers on appraised lands of the same class. The appraisal, therefore, of the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32, agricultural lands of the second class, at \$15.00 per acre; and the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, said section, grazing lands at \$4.00 per acre, was not in accordance with the acts under which his claim was initiated, was therefore erroneous, and is hereby vacated and set aside. The lands are situated east of the Flathead River, and in harmony with the values adopted by the commission appointed by the President for lands of the same class, such tracts are, pursuant to the provisions of the act of June 6, 1912 (37 Stat., 125), reappraised as follows: The SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32, T. 22 N., R. 20. W., M. M., agricultural lands of the second class at \$3.50 per acre; and the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section, grazing lands at \$1.50 per acre.

The decision of October 18, 1919, is therefore reversed, and Elie will be allowed to perfect his application in the manner herein directed.

**SECOND HOMESTEAD ENTRY—FIRST ENTRY PERFECTED UNDER
ACT OF JUNE 15, 1880—VALIDATION BY ACT OF MARCH 4, 1921.**

INSTRUCTIONS.

[Circular No. 748.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 12, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Your attention is invited to section 2 of the act of Congress approved March 4, 1921 (41 Stat., 1433), which reads as follows:

That no homestead entry heretofore made under the provisions of section 2 of the act of Congress entitled "An act for the relief of the Colorado Cooperative Colony, to permit homestead entries in certain cases, and for other purposes," approved June 5, 1900, shall be canceled for the reason that the former entry made by the entryman was commuted under the provisions of an act entitled "An act relating to the public lands of the United States," approved June 15, 1880 (Twenty-first Statutes, page 237). And all entries heretofore canceled on the ground that an entryman who commuted under the provisions of said act of June 15, 1880, is not entitled to the benefits of the act of June 5, 1900, shall be reinstated upon a showing by the entryman or his heirs within one year from the approval of this act, that there were no valid grounds for the cancellation of such entries, except that a former entry was perfected under the act of June 15, 1880, in all cases where valid adverse rights have not attached to the lands covered by such second entries since the date of their cancellation.

2. Said section validates all uncanceled entries made prior to March 4, 1921, under section 2, act of June 5, 1900 (31 Stat., 267), by persons who had purchased under section 2 of the act of June 15, 1880 (21 Stat., 237), and authorizes the reinstatement of canceled entries of that kind in cases where valid adverse rights have not attached; but this act will not prevent the cancellation of such entries on any other proper grounds.

3. An entryman, or his heirs, seeking reinstatement of a canceled entry, must, on or before March 4, 1922, file at the local land office a sworn application for such reinstatement. Therein it must be shown that the law was complied with as to said entry until the initiation of proceedings against it, and that there is no valid adverse claim for any part of the land involved. The register and receiver will at once forward the application with their report as to the status of the tract and their recommendation.

WILLIAM SPRY,

Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

MARIE FLORENCE GILBERT.

Decided April 14, 1921.

HOMESTEAD ENTRY—CITIZENSHIP.

A child born in the United States of Canadian parents domiciled here becomes at birth a "citizen" of the United States under the first clause of the Fourteenth Amendment to the Constitution, and one thus born an American citizen retains his citizenship, notwithstanding that he moves, during his minority, with his parents, to the country of their nativity, unless he voluntarily expatriates himself subsequent to his attaining his majority.

HOMESTEAD ENTRY—CITIZENSHIP—FINAL PROOF.

A Canadian woman, married to a citizen of the United States, domiciled in the Dominion of Canada, becomes herself a citizen of the United States, although not residing here, and as such is entitled to submit proof under the enlarged homestead act of February 19, 1909, as heir and next of kin of an intestate deceased entryman, who prior to his death had declared his intention to become a citizen.

FINNEY, First Assistant Secretary:

In the above entitled case, Joseph L. Caron, deceased brother of Marie Florence Gilbert, made homestead entry 026854 August 28, 1914, under the act of February 19, 1909 (35 Stat., 639), for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 7, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$, NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, NW. $\frac{1}{4}$, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 18, T. 36 N., R. 47 E., M. P. M., containing 321.30 acres, Glasgow land district, Montana. The entry is subject to the provisions and reservations of the act of June 22, 1910 (36 Stat., 583), and has been designated under the enlarged homestead act.

It appears that the deceased entryman, Joseph L. Caron, made declaration of his intention to become a citizen of the United States December 22, 1913, being at that time a citizen of the Dominion of Canada, and that he died intestate on or about October 23, 1918.

It further appears that on November 12, 1918, a short time after entryman's death, the entry was contested by one Alvin O. Olafson, who charged in substance, that Caron died intestate leaving no wife, child or children, and that his only heirs were his father and mother, neither of whom were citizens of the United States but were residents and citizens of the Dominion of Canada, and that he left no surviving heir or heirs competent to succeed to his homestead right.

It further appears that on January 23, 1919, the Citizens State Bank of Scobey, Montana, filed a petition for a writ of certiorari, alleging in substance, that the deceased entryman had executed and delivered a mortgage to the bank in the sum of \$2,455, with interest as therein provided, on account of money loaned him with which to improve his homestead; that said mortgage was wholly unpaid and, as entryman had met every requirement of the homestead laws prior

to his decease, in the matter of residence, improvements and cultivation, having fully earned a patent thereto, in default of proof by any qualified heir, it was asked that said contest be dismissed and the bank be permitted to submit proof as mortgagee on behalf of the deceased entryman.

Contestant demurred to the petition, and upon the pleadings the local officers transmitted the record to the Commissioner of the General Land Office for consideration and instructions. The Commissioner by decision dated March 11, 1919, dismissed the contest, holding in substance, that the charges against the entry, if admitted, would not warrant its disturbance at this time, for the reason that title had been fully earned by the entryman at the time of his death, and that all the requirements of the homestead law would be fully met if an heir or heirs competent to do so appear and make satisfactory final proof within five years from date of entry, when, if he or they are then shown to be citizens of the United States and the proof is otherwise satisfactory, patent will issue. It was also said in this connection that if it should be shown that any heir of the entryman has made declaration of his intention to become a citizen but is unable to effectuate the same within such five-year period, upon application made in his behalf, the entry will be suspended awaiting such action. It was also held that there was no authority for allowing the bank to make proof, for the reason that patent could not be issued in the deceased entryman's name as he was not a citizen, and there was no authority for its issuance to the mortgagee.

Upon appeal, the Department by decision dated September 2, 1919, affirmed the action of the Commissioner and directed that the entry remain intact until after the expiration of the period within which final proof could be submitted. In so holding it was observed that the entryman had not only complied with the law, but it was also shown that he encumbered the land with a mortgage with which to make his improvements, giving rise to very great equities upon the part of the bank from which the money was obtained. The record discloses that the decision of the Department became final on November 8, 1919. In the meantime, on October 24, 1919, Marie Florence Gilbert, sister of Joseph L. Caron, deceased entryman, and appellant in the present proceeding, submitted final proof for the heirs of said entryman. With the final proof papers, and in support of same, she filed her corroborated affidavit, alleging as follows:

That affiant is the sister of Joseph L. Caron, deceased, who made homestead entry 026584, and is the heir of said entryman; that she is entitled to succeed to and perfect his entry under the provisions of section 2291, Revised Statutes, and to make proof upon said entry as the heir of said Joseph L. Caron; that affiant was born in the Dominion of Canada in 1895; that the father and mother of the affiant and Joseph L. Caron, deceased, were, and now are, citizens of

the Dominion of Canada; that the brothers and sisters of said Joseph L. Caron, deceased, are citizens of the Dominion of Canada; that this affiant was, on or about February 9, 1915, married to Louis Ferdinand Gilbert, who is a native born citizen of the United States, and that by reason of said marriage she became a citizen; that at all times since said marriage, said Louis Ferdinand Gilbert, and this affiant, have remained, and now are, citizens of the United States.

It appears from the proof submitted by appellant that 75 to 125 acres had been cultivated during 1916, 1917 and 1918, and that the total value of the improvements amounted to \$2,100. The proof was suspended by the local officers upon the ground that no cultivation was had in 1919 and that it was not made within the five-year period. Upon appeal the Commissioner by decision dated October 16, 1920, after quoting in part the above affidavit of appellant said:

This office is in possession of information indicating that claimant's husband is not a citizen of the United States. Pending formal action in the matter, it is required that evidence be furnished showing where the husband has resided during the period since his birth; what steps, if any, he has ever taken to claim the rights of a citizen of the United States, and whether, and in what respects, he has availed himself of the rights of a citizen of Canada. You will notify the parties in interest that if they fail to furnish the evidence as above required, the office will act on the record as it now stands.

Further appeal brings the matter here for consideration. It is insisted that the Commissioner erred in not holding Marie Florence Gilbert to be a citizen of the United States, citing sections 1992 and 1994 of the Revised Statutes, which provide as follows:

Section 1992.—All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.

Section 1994.—Any woman who is now or may hereafter be married to a citizen of the United States and who might herself be lawfully naturalized, shall be deemed a citizen.

In further support of the claim of appellant to be a citizen of the United States, there is filed with the appeal papers the birth certificate of Louis Ferdinand Gilbert, husband of appellant, showing him to have been born at Waterville in the State of Maine September 23, 1887, and a certificate of identity of said Gilbert issued July 28, 1919, by an immigrant inspector of the Department of Labor.

Pending the appeal, a special agent of the General Land Office made investigation and incorporated in his report a statement of Gilbert to the effect that when he was three years old his parents moved back to the Province of Quebec, where he had lived since then, but that he had never become a Canadian citizen and had never voted in Canada.

The question presented by the record is whether the said Louis Ferdinand Gilbert, having been born in the United States of Cana-

dian parents who resided here about three years after his birth, and then moved back to Canada, where said Gilbert has since resided, is in fact, a citizen of this country, so that his wife, who makes no claim to citizenship except through her husband, shall be qualified to take the homestead here involved, as heir and next of kin of her brother, it having been shown that the father and mother and other brothers and sisters of the deceased entryman are all residents and citizens of the Dominion of Canada. The Supreme Court in the leading case of *United States v. Wong Kim Ark* (169 U. S., 649, 693), held as follows:

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in *Calvin's Case*, 7 Rep. 6a, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle."

Again, at page 704 of the same decision it was said:

Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." Rev. Stat. section 1999, reenacting act of July 27, 1868, c. 249, section 1; 15 Stat. 223, 224. Whether any act of himself, or his parents, during his minority, could have the same effect, is at least doubtful.

The Circuit Court of Appeals in the case of *Louie Lit and Louie Fong v. United States* (238 Fed., 75), held that (Syllabus):

A child born in the United States of Chinese parents domiciled here becomes at birth a "citizen" of the United States, under the first clause of the Fourteenth Amendment to the Constitution.

In the similar case to the one under consideration of *State v. Jackson* (79 Vt., 504, 2nd Dec. Dig., Vol. 5, 166), the Supreme Court of Vermont held:

One born an American citizen cannot be deprived of such citizenship by any act, subsequent to his birth, of his father:

The removal to Canada, during his minority, of one born an American citizen, does not divest him of such citizenship; but he can lose it only by his voluntary act subsequent to his attaining his majority.

Concerning the status of an alien woman married to a citizen, under section 1994, Revised Statutes, *supra*, see the case of *Leonard v. Grant*, (6 Sawy., U. S., 603; 5 Fed., 11; 7 Cyc., 141), where it was held:

An alien woman marrying a citizen becomes herself a citizen and the clause "might herself be lawfully naturalized" does not require that she shall have the qualifications of residence, good character, etc., as in case of admission to citizenship in a judicial proceeding, but it is sufficient that she is of the class or race of persons who may be naturalized under existing laws.

In view of the authority cited, and under the facts disclosed in this case, considered in connection with the former decision of the Department, it must be held that the said Marie Florence Gilbert is the legal heir of said deceased entryman, Joseph L. Caron, and as such heir is qualified to take the homestead right herein involved.

The decision appealed from is accordingly reversed. The final proof, submitted by the said Marie Florence Gilbert, will be accepted if no other good and sufficient objection appears.

ALLOTMENTS TO INDIANS AND ESKIMOS IN ALASKA—ACT OF MAY 17, 1906.

INSTRUCTIONS.

[Circular No. 749.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 16, 1921.

REGISTERS AND RECEIVERS, UNITED STATES SURVEYOR GENERAL, AND
CHIEF OF FIELD DIVISION, TERRITORY OF ALASKA:

The act of May 17, 1906 (34 Stat., 197), provides:

That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the District of Alaska to any Indian or Eskimo of full or mixed blood, who resides in and is a native of said District, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise

provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him, not exceeding one hundred and sixty acres.

1. This proceeding will be initiated by a written application to the register and receiver, signed by the applicant and describing the location and extent of the tract applied for, and, if unsurveyed, by as accurate a description as possible by metes and bounds, and natural objects, 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 accurately 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. Notice of the application should be posted upon the land, describing the tract applied for, in the terms employed in the application, and a copy of such notice should accompany the application. If the applicant is unable to write his signature, it is desired that his thumb print to the application be obtained, in preference to his signature by mark, his thumb print to be witnessed by two persons. Allotments will not be made on tracts reserved by the United States as shore spaces under the act of March 3, 1903 (32 Stat., 1028), or within national forests, unless founded on actual occupancy prior to the establishment of the forest. Reserved shore spaces eliminated under the provisions of the act of June 5, 1920 (41 Stat., 1059), may, in the discretion of the Secretary of the Interior, be allotted under the terms of said act of May 17, 1906, and these regulations, and the terms and provisions of said act of June 5, 1920, and instructions thereunder.

2. The applicant must also file his or her affidavit of qualification under the statute, and if claiming under the preference-right clause, the date of the beginning of his occupancy must be given, and its continuous nature stated.

3. This must be corroborated by an affidavit of two witnesses, who may be Indians or Eskimos. A nonmineral affidavit must also be filed by the applicant, sworn to only on personal knowledge and not on information and belief.

4. The affidavits may be sworn to before the proper register or receiver, or any officer authorized to administer oaths and having a seal. If the application is made by a woman, she must state in her affidavit whether she is single or married, and if married must show what constitutes her the head of a family, as it is only in exceptional cases that a married woman is entitled to an allotment under this act.

5. The register and receiver will receive and suspend applications for allotments filed under this act, number such applications in accordance with the circular of August 9, 1918 (46 L. D., 513), and note the same on the schedules forwarded at the end of the month, as

required by said circular, giving in the "Remarks" column the date of transmittal to the chief of field division. Where the application is found by the local land officers to be complete in all respects, as hereinbefore required, is not rejected by them for any reason, and is received, noted, and suspended by them to await completion of the hereinafter-mentioned proceedings, it operates as a segregation of the land. All claims for land presented to the register and receiver subsequent to the filing of such an application which conflict in whole or in part with such application for the land therein described shall be rejected.

6. The register and receiver will assist applicants in the preparation of their papers, as far as practicable, and, as the act makes no provision for any fees for filing, will make no charge in any of these cases.

7. The application for allotment and all papers filed in connection therewith will, when such application is found satisfactory to the register and receiver and favorably disposed of by them as provided for in paragraph 5 hereof, be referred by the local office to the chief of Alaska field division, who will dispose of them as hereinafter set forth.

Upon receipt of the record from the local office, the chief of field division will call on the district superintendent of the United States Bureau of Education for the district in which the proposed allotment is situated for a report covering such information as he may have in regard to the allotment, and particularly covering the following points:

(a) The location of the land, if necessary, to furnish a more accurate description than given in the application.

(b) The special value of the tract, either for agricultural uses or fishing grounds.

(c) What, if any, residence has been maintained on the tract by the applicant.

(d) The value and character of all improvements thereon.

(e) The fitness of the land as a permanent home for the allottee.

(f) The competency of the applicant to manage his own affairs.

(g) The presence or absence of any adverse claims and, if any such claims exist, a description thereof.

(h) The proximity of the claim applied for to other claims under said act of May 17, 1906.

(i) Such other information as may serve to aid in determining whether the application should be allowed, either in whole or in part, together with his recommendation as to the proper action in the premises.

8. Upon receipt of favorable reports from the chief of field division and district superintendent covering allotment applications here-

after filed, embracing lands covered by the public survey, the register and receiver may, all else being regular, and no valid objections thereto being apparent, allow the same, notice of which, by special letter, reading substantially as follows:

Your application under the act of May 17, 1906 (34 Stat., 197), No. _____, for _____, has been placed of record in this office and forwarded to the General Land Office.

This action segregates the land from the public domain, and no other application can be allowed therefor or settlement rights attach during the life of this application;

should be given to the applicant. Immediately upon the issuance of said notice copy thereof, appropriately marked, should be forwarded to each, the district superintendent, and the Commissioner of the General Land Office.

9. Upon the receipt of the report of the district superintendent, in case of an application for unsurveyed land, the chief of field division will, if in his judgment the report is sufficient, furnish or cause to be furnished by a special agent, as soon as may be convenient and with as little expense to the Government as possible, and, except in the matter of furnishing and installing the listing description monuments, without expense to the applicant, a listing description of the tract applied for. As basis for this listing description the land should be marked with substantial corners, properly installed and witnessed, uniformly marked and, except as provided for in paragraph 12 hereof, corner No. 1 thereof tied to the nearest location or mineral monument or corner of the public-land survey or other official patented survey if within a reasonable distance. The listing description must show that the land is being taken in rectangular form and with true cardinal courses as near as they can be determined.

One of the aforesaid corners, preferably corner post No. 1, may be tied to the official survey of an approved allotment which has been properly tied to some established survey monument or corner of the public-land survey.

10. Except for the protection of preference rights acquired by actual occupancy, the land applied for must be taken by the applicant in rectangular form, if practicable, and when doing the work the basis of the aforesaid listing description, the special agent must do such work in such form, if practicable, and the lines of his said work follow the true cardinal points as nearly as they may be determined, unless one or more of the boundaries be a navigable or meanderable stream, and, except in cases of preference rights acquired by actual occupancy, no application under said act will be favorably considered which embraces tracts of land situate upon both sides of a salmon stream or navigable or meanderable body

of water. The land must be nonmineral in character, and no claim whatever may include in excess of 160 acres of such land.

11. Where the above referred to corner post is not tied to a corner of the public survey, but is tied to a location or mineral monument or one of the official surveys referred to in paragraph 9 hereof, the agent's returns should contain a description of the location or mineral monument to which the corner, preferably corner No. 1, of the involved land is tied, by giving its latitude and longitude, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other permanent 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 upon the map of Alaska, which description shall appear in the aforesaid returns.

Where the corner post, preferably No. 1, is tied to one of the official surveys mentioned in paragraph 9 hereof the location of such post corner with relation to the other monuments of the involved land and the relation of such post to the mineral monument to which the same is tied should be given, together with the other data enumerated in this paragraph concerning the description and position of the mineral monument.

The description of such monuments should be obtained from the surveyor general and appear in a paragraph of the returns separate from the description of the courses and distances herein authorized to be furnished by the agent.

12. In case the land is situated beyond a reasonable distance from a corner of the public survey or location or mineral monument or other survey mentioned in paragraph 9 hereof the location of the land with reference to known rivers, creeks, mountains, towns, trails, mining camps, or other permanent topographic features or natural objects or permanent monuments may and should be shown in the special agent's above-mentioned work and in his returns and be depicted on the map of the section of Alaska in which the allotment is situated, which should accompany his said returns.

13. The special agent will after the service aforesaid shall have been performed by him make report thereof to the chief of field division.

This report in sextuplet should be typewritten, cover all the field work done in the acquisition of and as basis for the foregoing listing description, and contain such a description of the involved land and report of the work done in connection with obtaining the listing description as will enable the Government and all parties interested to readily ascertain the location of said land from said report, even though all visible marks or other physical evidence of

the boundaries may have been entirely obliterated. The report should be accompanied by a sketch, signed and dated by the special agent, depicting the boundaries of the land and the position of same with relation to well-known natural and other objects, the location and description of which should be fully and accurately stated in the agent's returns.

The returns and sketch or diagram above referred to should each bear the same date of approval.

14. Immediately upon receipt of the above report and diagram from the special agent the chief of field division will, if he approves the same, transmit three copies thereof to the register and receiver within whose land district the premises are situated and one copy thereof to the surveyor general.

15. The surveyor general will upon receipt of the report and sketch note same in a book to be kept for such purpose and, where practicable, note the location of the land on the district sheets of his office in pencil until such time as an official survey thereof shall be ordered or final disposition is made of the allotment adverse to the applicant. Information concerning the status of the allotment application may be obtained by the surveyor general from the proper local land officers. The chief of field division is also directed in those cases where he approves the returns aforesaid made by the special agent to amend over his signature the allotment application to conform with the description of the land referred to in said returns as furnished by the special agent's report and forward said application thus amended and conformed to the General Land Office properly indorsed so as to show the changes in description therein and the date when made. The original report or returns made by the special agent should be forwarded by the chief of field division to the General Land Office at the same time the allotment application amended and conformed as hereinbefore directed is forwarded. He will retain in his files the remaining carbon copy of said returns. The report of the district superintendent, approved by the chief of field division in cases where the same meets with his approval, should also be transmitted to the General Land Office at the same time the amended application is forwarded as hereinbefore directed, together with such suggestions as to the application as may seem to him appropriate.

16. The directions herein contained relative to listing descriptions pursuant to field work done by special agents of the lands applied for by an Indian or Eskimo are hereby made applicable, as far as appropriate, to those applications which have already been filed, have not been officially surveyed or approved by the Department, and which are not in condition to be recommended to the Department for approval.

17. The register and receiver, as soon as they shall have received the aforesaid copies of diagrams and notes from the chief of field division, will appropriately note their records so as to show the location, as shown by the listing description aforesaid, of the lands applied for.

18. Upon making the notations required by paragraph 17 hereof so as to further conform the application to the description thus furnished by the chief of field division, the register and receiver will relieve the application from suspension and place the same, as thus amended, of record, all else being regular, immediately reporting to this office by special letter their action in the premises and the date thereof. Notice of the above action of the local land officers should also be given, in writing, to the applicant and to the district superintendent of the United States Bureau of Education for the district in which the land thus applied for is situated, and each, the said applicant and the said superintendent, should be furnished with a copy of the returns or listing description, including diagram, furnished to the register and receiver by the chief of field division as aforesaid. The copy of the special agent's notes furnished the register and receiver by the chief of the field division should be retained by them until the application is finally disposed of, whereupon same should be forwarded by special letter to the General Land Office, with appropriate remarks.

19. The removal of the suspension aforesaid, amendment of the application in the manner and particulars heretofore and hereinafter referred to, and placing of applications of record do not necessarily mean that the applications for allotment will be approved. The indicated action simply further segregates and continues to segregate the land from subsequent conflicting applications therefor until the Secretary of the Interior, in his discretion, decides either to approve or disapprove the application or applications for allotment.

20. Except in cases of surveys already made and approved pursuant to prior regulations and authorizations, and which are free from objections, and also, except in special cases, where special instructions for the survey of the unsurveyed land applied for are issued, it shall be the duty of the register and receiver, upon the filing of the township plat in their office and upon ascertaining, where necessary, from the surveyor general whether his records (see paragraph 15, *supra*) disclose any allotment applications within the township (and provided the allotment application still stands of record in their office), to notify the applicant and the said superintendent thereof, each by registered letter, and to require the adjustment of the claim to the public survey within 90 days.

In default of action by the parties notified, the register and receiver will promptly, and as accurately as the records will permit, adjust the claim to the public-land survey and report their action to the General Land Office.

The said adjustment shall embrace such subdivisions and parts of subdivisions as shall include all of the applicant's improvements and possessions, if possible.

21. If the Commissioner of the General Land Office, upon the entire record submitted, shall find the application meritorious, in whole or in part, he will, not earlier than five years from and after the date when the said application shall have been adjusted to the public-land survey, unless otherwise directed, submit the same to the Secretary of the Interior for his approval. In special cases, however, and without being specially directed so to do, the commissioner may, if upon the entire record submitted he shall find the application meritorious, in whole or in part, submit the same to the Secretary of the Interior for his approval as aforesaid, and if so approved, special instructions for the survey thereof will then issue in accordance with the terms of the approval. Where such special cases are taken up, considered, submitted, and approved, and special instructions for their survey are issued in accordance with the terms of the approval, such cases or allotments shall be subject to the same requirements as to methods of survey, cardinal courses, and permanent markings of boundaries, except for the protection of preference rights acquired by actual occupancy, as land surveyed under United States laws in Alaska in general, in accordance with the instructions governing lands thus surveyed.

22. Allotment applications hereafter filed embracing lands covered by the public survey and allowed by the local land officers will also not be submitted to the Secretary of the Interior for his approval earlier than five years from the date of their allowance by the register and receiver as aforesaid, and not then until the heretofore referred to reports shall have first been made to the Commissioner of the General Land Office.

23. A schedule of all approved allotments shall be kept of record in the General Land Office; and, as the act makes no provisions for a patent, a certificate will issue showing the approval of the allotment (and the survey thereof, if surveyed) for delivery to the allottee.

24. Hereafter the register and receiver will require each person applying to enter or in any manner acquire title to any lands under any laws of the United States, except the homestead law, to file a corroborated affidavit to the effect that none of the lands covered

by his application are embraced in any pending application for an allotment under this act or in any pending allotment, and that no part of such lands is in the bona fide legal possession of or is occupied by any Indian or native except the applicant. Persons applying for the right to cut timber under section 11, act of May 14, 1898 (30 Stat., 414), may, however, substitute for the corroborated affidavit a statement signed by the applicant and duly attested by two witnesses, setting forth the above facts.

25. If the report hereinbefore mentioned of the district superintendent to the chief of field division does not fully cover all the facts, the chief of field division will either return it to the district superintendent for further information or direct an investigation by a special agent of his office, as in his judgment may be deemed best; and, moreover, whether he approves or disapproves the recommendations made in the report of the district superintendent, he will transmit same to the Commissioner of the General Land Office with such suggestions as to the application as may seem to him appropriate.

26. Appropriate forms for the use of applicants under this act have been prepared.

27. Except as herein provided for, all regulations under said act of May 17, 1906, in conflict herewith are hereby revoked.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**PUBLIC RESOLUTION NO. 64, APPROVED MARCH 3, 1921—WAR
TERMINATED TO CERTAIN INTENTS.**

INSTRUCTIONS.

[Circular No. 750.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 16, 1921.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Public resolution No. 64 (41 Stat., 1359), approved March 3, 1921, provides that in the interpretation of any provision relating to the termination of "the present war" or of "the present or existing emer-

gency," the date of the resolution shall be treated as the date of the termination of the war and emergency. Certain exceptions are made but these do not appear to include any public land matters.

2. Attention is invited to the following statutes affected by this legislation:

(a) The act of October 6, 1917 (40 Stat., 391), relating to execution of affidavits before the commanding officer of a public land claimant.

(b) The act of February 25, 1919 (40 Stat., 1161), relating to the credit accorded a soldier, sailor, or marine, in connection with a homestead claim on account of military service.

(c) The act of July 28, 1917 (40 Stat., 248), giving credit for military service after initiation of a homestead entry and requiring certain allegations to be made in contest affidavits. Notwithstanding the present legislation, an affidavit of contest on the ground of abandonment must negative the fact that the homesteader is in the military service pursuant to an enlistment antedating March 3, 1921; also the fact that any part of the entryman's alleged absence from the land before that date was due to employment in the Army, Navy, or Marine Corps or other organization described in the act of July 28, 1917. Proof at the hearing must cover these points.

(d) The Soldiers' and Sailors' Civil Relief Act of March 8, 1918 (40 Stat., 440). To all intents and purposes within the meaning of this act, the war terminated March 3, 1921; but this termination does not affect any extension of time for payment of installments of the price of land to which a person had already become entitled under rules and regulations heretofore issued.

(e) The act of August 7, 1917 (40 Stat., 250), granting further time to soldiers to fulfill requirements on desert land entries.

(f) Section 8 of the act of August 31, 1918 (40 Stat., 955), relating to entries by persons under 21 years of age, who were in the military service during the war.

(g) The Farm Labor Leave Act of December 20, 1917 (40 Stat., 430). The war ended to all intents and purposes within the meaning of this act on March 3, 1921.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

INSTRUCTIONS RELATIVE TO EXTENSIONS OF TIME FOR PAYMENTS FOR LANDS IN PART OF STANDING ROCK INDIAN RESERVATION, NORTH AND SOUTH DAKOTA, ENTERED UNDER THE HOMESTEAD LAW AND THE ACT OF FEBRUARY 14, 1913, AND FOR LANDS IN PART OF CHEYENNE RIVER AND STANDING ROCK INDIAN RESERVATIONS, NORTH AND SOUTH DAKOTA, SOLD AT PUBLIC SALE UNDER ACT OF MAY 29, 1908.

INSTRUCTIONS.

[Circular No. 751.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., April 20, 1921.

REGISTERS AND RECEIVERS, TIMBER LAKE AND LEMMON, SOUTH DAKOTA, AND BISMARCK, NORTH DAKOTA:

The act of March 4, 1921 (41 Stat., 1446), provides:

That the Secretary of the Interior is hereby authorized, in his discretion, to extend for a period of one year the time for the payment of any annual installment due, or hereafter to become due, of the purchase price for lands sold under the act of Congress approved February 14, 1913 (Thirty-seventh Statutes, page 675), entitled "An act to authorize the sale and disposition of surplus or unallotted lands of the Standing Rock Indian Reservation in the States of North and South Dakota, and for other purposes," and any payment so extended may annually thereafter be extended for a period of one year in the same manner: *Provided*, That the last payment and all other payments must be made within a period not exceeding one year after the last payment becomes due by the terms of the act under which the entry was made: *Provided further*, That any and all payments must be made when due unless the entryman applies for an extension and pays interest for one year in advance at 5 per centum per annum upon the amount due, as herein provided, and patent shall be withheld until full and final payment of the purchase price is made in accordance with the provisions hereof: *And provided further*, That any entryman who has resided upon and cultivated the land embraced in his entry for the period of time required by law in order to make commutation proof may make proof, and if the same is approved, further residence and cultivation will not be required: *And provided further*, That failure to make any payment that may be due, unless the same be extended, or to make any extended payment at or before the time to which such payment has been extended, as herein provided, shall forfeit the entry and the same shall be canceled and any and all payments theretofore made shall be forfeited.

Sec. 2. That the Secretary of the Interior is also hereby authorized, in his discretion, to extend for a period of one year, the time for the payment of any annual installment hereafter to become due of the purchase price of lands in the Cheyenne River Indian Reservation in South Dakota and the Standing Rock Indian Reservation in the States of North Dakota and South Dakota, sold at public sale under the act of Congress approved May 29, 1908 (Thirty-fifth Statutes, page 460), under the same terms and on the same conditions as provided in section 1 of this act.

(1) *Lands involved and entries and sales affected.*—Section 1 of the said act of March 4, 1921, applies to homestead entries made either before or after the passage of the act in the part of the Standing Rock Indian Reservation, North and South Dakota, opened under the act of Congress approved February 14, 1913 (37 Stat., 675). Section 2 of the said act of March 4, 1921, applies to sales made either before or after the passage of the act in the part of the Cheyenne River and Standing Rock Indian Reservations, North and South Dakota, opened under the act of May 29, 1908 (35 Stat., 460).

(2) *Granting of extensions of time for payments.*—The right to grant extensions of time for payments is made discretionary with the Secretary of the Interior. Extensions will be granted in all cases where applied for, provided interest is paid in advance at the rate of 5 per cent per annum on the amounts involved, as required by the said act of March 4, 1921.

(3) *Original requirements in the matter of payments in connection with homestead entries.*—The terms of payment prescribed by the act of February 14, 1913, above cited, in connection with homestead entries of Standing Rock lands made thereunder, are as follows:

One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal installments, the first within two years and the remainder annually in three, four, five, and six years, respectively, from and after the date of entry.

(4) *Original requirements in the matter of payments in connection with sales.*—The only sales heretofore authorized under the act of May 29, 1908, above cited, were authorized by departmental regulations of February 27, 1920 (47 L. D., 340). The terms of payment prescribed by said regulations for such sales are as follows:

Purchasers may pay all cash for the lands at the time of purchase or one-third down and the balance in two equal annual installments due one and two years from the date of purchase, interest to be paid on the deferred installments at the rate of 5 per centum per annum.

(5) The said act of March 4, 1921, modifies the above requirements in these respects:

(a) The time for the payment of any annual installment which is due and payable may be extended for a period of one year provided interest at the rate of 5 per cent per annum is paid on the amount in question as a prerequisite to the granting of such extension. Any payment so extended may annually thereafter be extended for a period of one year in the same manner, but the last payment and all other payments must be made within a period not exceeding one year after the last payment becomes due by the terms of the act under which the entry was made. The utmost time allowed for the completion of payments under homestead entries made under the

said act of February 14, 1913, is seven years from the date of entry. The utmost time allowed for the completion of payments under sales made under the said regulations of February 27, 1920, and the said act of May 29, 1908, is three years from the date of sale.

(b) Under the proviso in the said act of March 4, 1921:

That any entryman who has resided upon and cultivated the land embraced in his entry for the period of time required by law in order to make commutation proof, may make proof, and if the same is approved, further residence and cultivation will not be required:

any entryman may submit commutation proof and thereafter complete the payments of purchase money, the same as may be done where three-year proof is submitted. This construction of the said proviso is the construction given to a similar proviso found in the act of April 13, 1912 (37 Stat., 84), under which instructions were approved by the department May 4, 1912 (41 L. D., 12):

(6) *Entrymen in default in the matter of payments.*—You will promptly serve notice on each entryman who is in arrears in the matter of payments that he must by June 30, 1921, make payment of sums of principal due, without interest, or he must, by the date stated, obtain an extension of time for the payment of such sums. You will in the notice to each entryman hold his entry for cancellation because of his default in the matter stated, and provide that if payment, either of principal or of interest, is not made by June 30, 1921, you will report his entry to this office for cancellation. The interest required as a prerequisite to the granting of an extension of time for the payment of any installment which is in arrears should be calculated in the following manner: Where the installment is one year or less in arrears, interest must be paid thereon for one year; where the installment is more than one year and two years or less in arrears, interest must be paid thereon for two years; where the installment is more than two years and three years or less in arrears, interest must be paid thereon for three years, etc.

(7) *Payments which hereafter become due.*—Hereafter entrymen must make the required payments at the time such payments become due. If any entryman fails to make any required payment of principal when such payment becomes due, you will, by notice to him, hold his entry for cancellation because of the default and advise him that in the event of his failure to make the payment, or to apply for and secure an extension of time for that purpose by making proper payment of interest within 30 days from receipt of the notice, you will report his entry to this office for cancellation.

(8) *Entrymen entitled to credit for military or naval service.*—The instructions given herein should be read in connection with departmental instructions of June 9, 1919, circular No. 647 (47 L. D., 191),

as to installment payments required in connection with homestead entries after a period of military or naval service.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

BRUNT v. FIELDS.

Decided April 21, 1921.

CONTEST—AFFIDAVIT—PRACTICE—HOMESTEAD.

Rule 3, Rules of Practice, requiring that the facts must be set forth in the corroborating affidavit, is complied with where the contestant alleges facts which, if proven, warrant cancellation of the entry, and the corroborating witness adopts those statements by alleging that, from his personal knowledge and observation, they are true.

DEPARTMENTAL DECISION DISTINGUISHED.

Nemnich v. Colyar (47 L. D., 5), distinguished.

FINNEY, *First Assistant Secretary:*

Frances W. Brunt has appealed from a decision of the Commissioner of the General Land Office dated March 10, 1920, dismissing her contest against the homestead entry of William H. Fields, made May 14, 1917, for S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 11, T. 3 N., R. 37 W., 6th P. M., Lincoln, Nebraska, land district.

The contest was initiated November 8, 1919, the charge being, in effect, that entryman had never established residence on the land, and that the default charged was not due to military or naval service. The affidavit was corroborated by two witnesses, who alleged that—they are acquainted with the tract described in the above affidavit, and know from personal knowledge and observation that the statements therein made are true. That the above described land is rough pasture land; that said William H. Fields has failed to establish his residence on said tract within six months from the date of his said entry; that said William H. Fields has failed to establish or maintain a residence on said tract from date of entry up to the present time; that said William H. Fields for more than six months prior to the commencement of this proceeding has abandoned said tract; that the absence of said William H. Fields from said land is not due to any military service of any kind; that said William H. Fields is not in the military or naval service of the United States.

Entryman was personally served with notice of the contest within ten days after issuance of the notice, and proof of such service was immediately filed. No answer having been filed within the time allowed by the Rules of Practice, the local officers recommended the cancellation of the entry.

The Commissioner of the General Land Office, in the decision appealed from, held that the affidavit was not properly corroborated, and dismissed the contest, citing *Nemnich v. Colyar* (47 L. D., 5).

In the decision cited, the corroborating witness, one Bentz, before the service of notice was complete, filed an affidavit in which he alleged that he corroborated the contest affidavit without knowing what he was signing, and that the statements made therein were not true. The affidavit concluded with a "demand" that he be allowed to withdraw his name as a witness. The Department held (page 7):

When Bentz formally advised the local officers that he had signed the corroborating affidavit under a misconception of the statements made therein, and that the allegations therein set forth were not true, they could do no less, in the then state of the record, than to dismiss the contest. They were without authority to allow him to proceed. To notify the contestant of their proposed action and to allow him to be heard would have been an idle proceeding, as without amendment of the application to contest by the substitution of a proper corroborating affidavit there was no proper foundation for the proceeding, and such amendment could not have been allowed except in the absence of an intervening application to contest (*Shugren et al. v. Dillman*, 19 L. D., 453), and the amendment would have required proceedings *de novo*.

The amendment of Rule 3 deprived the local officers of the discretion which was formerly vested in them regarding the acceptance of contest affidavits, and the doctrine announced in a long line of cases from *Houston v. Coyle* (2 L. D., 58), to *Bridges v. Bridges* (27 L. D., 654), is no longer controlling.

It needs no extended argument to demonstrate that the rule invoked in the case cited by the Commissioner was not applicable to the contest of Mrs. Brunt. Her affidavit was corroborated in the manner required by Rule of Practice 3, and entryman made no defense. No reason is apparent why the entry involved should not be canceled.

The Department did not intend, in *Nemnich v. Colyar*, *supra*, to hold that a contest affidavit which was in any way corroborated should, after its acceptance by the local officers, be subject to dismissal except on motion of the defendants, timely interposed. As stated in said decision, prior to service of notice the withdrawal of the corroboration impaired the sufficiency of the contest affidavit, and the local officers were without authority to proceed. In Mrs. Brunt's affidavit, the corroborating witnesses stated they had personal knowledge of the statements made by the contestant, and that the statements made by her were true.

In *Gilbert v. Vallier* (47 L. D., 337), the Department held that where the corroborating witness alleges that he has personal knowledge of the facts alleged in the affidavit of the contestant, and that "the statements therein made are true," such facts need not be repeated, if the witness sets forth a statement of how and why he knows the statements to be true. Said decision distinguished the departmental decisions in *Preskey v. Swanson* (46 L. D., 215) and *Bolton v. Inman* (46 L. D., 234), and held that even if the affidavit of Gil-

bert had not been properly corroborated, a motion to dismiss, not filed concurrently with the answer by which issue was joined, comes too late.

Upon mature consideration, the Department is of opinion that if a contestant alleges facts which, if proven, would warrant the cancellation of the entry attacked, and the corroborating witness alleges, from personal knowledge and observation, that the statements made by the contestant are true, thus adopting those statements, the requirement of Rule 3 that "these facts must be set forth in his affidavit" is complied with.

The decision appealed from is reversed, and the entry will be canceled.

BERT SCOTT.

Decided April 21, 1921.

HOMESTEAD ENTRY—RECLAMATION—ESTABLISHMENT OF FARM UNIT—PREFERENCE RIGHT.

Under the act of June 25, 1910, as subsequently amended, lands reserved for irrigation purposes are not subject to settlement or entry until the Secretary of the Interior shall have established the unit of acreage per entry and announced that water is ready to be delivered, and no exception to the rule can be made in favor of an applicant who seeks to make an additional entry of such lands in the exercise of a preference right acquired by contest.

DEPARTMENTAL DECISION DISTINGUISHED—REGULATION DECLARED OBSOLETE.

The case of Henry W. Williamson (38 L. D., 233), distinguished, and section 24 of the regulations of May 18, 1916 (45 L. D., 385, 390), declared obsolete and inoperative.¹

FINNEY, *First Assistant Secretary:*

Bert Scott has appealed from a decision of the Commissioner of the General Land Office dated October 9, 1920, rejecting his application filed February 13, 1920, to make an additional homestead entry under the provisions of the act of April 28, 1904 (33 Stat., 527), for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 18, T. 22 N., R. 56 W., 6th P. M., Alliance land district, Nebraska, contiguous to his original entry 07177 made April 30, 1908, for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, said Sec. 18, subject to the provisions of the reclamation act of June 17, 1902 (32 Stat., 388); upon which final proof was duly submitted showing completed compliance with the ordinary provisions of the homestead law, and accepted by the Commissioner March 24, 1913.

The decision appealed from found and held that no farm unit plat had been approved and no public notice issued fixing the water right charges and the date when water would be available

¹ See Circular No. 756, approved May 16, 1921 (48 L. D., 113).

for the land and that while Scott had earned a contestant's preference right to enter the land under the provisions of the act of May 14, 1880 (21 Stat., 140), he was barred from exercising that right because of the provisions of section 5 of the act of June 25, 1910 (36 Stat., 835), as amended by act of February 18, 1911 (36 Stat., 917), and section 10 of the act of August 13, 1914 (38 Stat., 686). As so amended this section in so far as pertinent now provides:

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 per entry, and water is ready to be delivered for the land in such unit or some part thereof and such fact has been announced by the Secretary of the Interior.

It appears that by order of February 11, 1903, all of section 18 was withdrawn under the second form of withdrawal authorized by the reclamation act. By order of October 10, 1908, the withdrawal was changed to one under the first form. By order of July 2, 1913, the W. $\frac{1}{2}$ NE. $\frac{1}{4}$ said section was restored, but was afterwards again withdrawn under the second form on December 20, 1913, and remains so withdrawn. It further appears that Scott filed his contest June 20, 1907, against homestead entry 05683 of William Ferguson made July 24, 1905, for the said W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 18, and as a result thereof following departmental decision of April 21, 1910, unreported, the said entry was canceled August 31, 1910. Apparently the register and receiver advised Scott at that time that inasmuch as the land was embraced in a first form withdrawal it was not subject to entry.

The existing rule as to the exercise of a preferred right in such cases, assuming proper qualifications, is contained in section 29 of regulations of May 18, 1916 (45 L. D., 385, 391), which reads in part as follows:

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, but should the lands involved be restored to the public domain or a farm-unit plat be approved for the lands and announcement made that water is ready to be delivered, the preference right may be exercised at any time within 30 days from notice of the restoration or the establishment of farm units. Should the land be within a second-form withdrawal, the successful contestant can not be allowed to exercise his preference right of entry prior to the time when the Secretary shall have established the unit of acreage and announced the fact that water is ready to be delivered to the land in said farm unit or some part thereof, but when the farm unit is established and water available as stated, he may make entry under the terms of the reclamation law. If, however, the land at any time be released from all forms of withdrawal, he may enter as in other cases made and provided.

Formerly, land embraced in second-form withdrawal could be entered subject to the reclamation act even though farm units had not been established, but since June 25, 1910, such lands are not sub-

ject to entry except as provided by the act of that date and amendatory acts above cited. Prior to the date of the said act of June 25, 1910, the Department had occasion to consider the question whether a person holding an original homestead entry for less than 160 acres could be permitted to make additional homestead entry for land embraced in second-form withdrawal where farm units had not been established, and it was held that such additional entry was allowable. Henry W. Williamson (38 L. D., 233). Instructions based on that decision were issued and have been continued without due regard to the force and effect of the act of June 25, 1910, and the acts amendatory thereof, *supra*, and are found in section 24 of the regulations of May 18, 1916, *supra*. The Williamson decision, while fully warranted under then existing law, is no longer applicable, in view of later specific provisions of statutes prohibiting entries of lands such as those under consideration, and the said instructions issued thereunder are obsolete and inoperative. They will be formally revoked by separate order.

One point argued in support of the appeal is that the applicant could have made the additional entry if he had been notified of the restoration of July 2, 1913. But such is not the case. A person who has made homestead entry for any area within a reclamation project can not make an additional entry for lands outside a project. See section 23 of regulations of February 6, 1913 (42 L. D., 349, 369), and section 23 of regulations of May 18, 1916, *supra*.

It is further suggested that if the application can not be allowed as an additional entry that it be considered and allowed by way of amendment of the original entry. Such action would be objectionable as in contravention of the law above cited to the same extent as if the claim were allowed as an additional entry.

The decision appealed from is affirmed.

There is with the record an application by William Ferguson for reinstatement of his said canceled entry. However, his claim was fully settled by the contest and the case can not at this late day be reopened, especially in view of the suspended preference right of Scott. The application for reinstatement is accordingly denied.

MAXWELL AND SANGRE DE CRISTO LAND GRANTS (ON PETITION).

Decided April 23, 1921.

SURVEY—MEXICAN LAND GRANT—BOUNDARIES.

In the interpretation of a patent for a Mexican private land grant, in which a mountain range is designated as one of the boundaries, the rule will be applied that where a call is from one point in a continuous object, natural

or artificial, to another point in the same object, the line between and connecting the two points follows the sinuosities of such object, rather than a straight line connecting those points.

SURVEY—MEXICAN LAND GRANT—BOUNDARIES.

The call for courses and distances of a protracted Government survey made subsequent to a Mexican private land grant, which is at variance with the sinuosities of a mountain range described in the patent as one of the boundaries of the grant, must yield, in case of doubt, to the superior call for the natural monuments referred to as constituting the boundary of the claim.

DEPARTMENTAL DECISION MODIFIED.

Decision in case of Maxwell and Sangre De Cristo Land Grants (46 L. D., 301), modified.

FINNEY, *First Assistant Secretary*:

This case came before the Department on appeal from a ruling made by the Commissioner of the General Land Office under date of April 3, 1917, in respect to the eastern boundary of the Sangre de Cristo Grant, and the western boundary of the Beaubien and Miranda, or Maxwell Land Grant.

The origin and nature of the Maxwell Grant are set forth in a decision by the Supreme Court in the Maxwell Land Grant Case (121 U. S., 325). Also a description of the Sangre de Cristo Grant is contained in the case of *Tameling v. United States Freehold and Emigration Company* (93 U. S., 644).

The Maxwell grant lies in the southern part of Colorado and the northern part of New Mexico. It was initiated January 8, 1841, by petition of Charles Beaubien and Gaudalupe Miranda to the Mexican Governor for a tract of land described by metes and bounds, the northwest corner of which was the "top of the mountain which divides the waters of the rivers running towards the east from those running towards the west, and from thence following the line of said mountain in a southerly direction" to the southwest corner. That petition was granted by the Governor. Juridical possession was given, and the lands marked by the Alcalde in accordance with the Mexican laws and customs. Monuments were established at the northwest and southwest corners, and these points are not in dispute. These two claims were confirmed by Congress in the act of June 21, 1860 (12 Stat., 71), the Maxwell Grant being numbered 15, and the other being numbered 14 in the act.

The said confirmatory act of Congress was based upon a report made by the surveyor general, who heard testimony respecting the claims. Patent was issued upon the Maxwell Grant May 19, 1879. The patent referred to the act authorizing the surveyor general to pass upon claims of this character, and recited in full his report to Congress on this grant. Reference was also made to the confirmatory

act above mentioned. Also the full descriptive notes of the surveyor who surveyed the grant are contained in the patent. Said description for the northwest corner of the grant recites that that corner was monumented at a point on top of the mountain which divides the waters flowing east from those flowing west, the same being at the place where the Alcalde in giving juridical possession to said grant erected the fourth mound; "Thence from said northwest corner on a line established along the summit of said mountain range by triangulating from peak to peak of said mountain range on the following courses and distances." Then follow courses and distances to peaks, 17 in number, with straight lines between them to the southwest corner.

The Sangre de Cristo Grant lies to the west of the Maxwell Grant, and its eastern boundary is described as being from a point on the mountain "thence along said mountain, southeast to a point established on the top of the said mountain; thence south to the boundary of the lands of Miranda and Beaubien; thence along said boundary to a point one league south of the Rio Costilla." According to the respective grants they have a common boundary for a distance of about 25 miles. The Maxwell Grant extends on south 25 or 30 miles further, and is bounded on the west, as to that portion, by the Carson National Forest. It appears that the official maps show the two grants to conflict or overlap to some extent, and also that a hiatus at another point exists between them.

The case now before the Department arose on an application in behalf of the claimants under the two grants and request for a definition of the boundaries in question. It is represented that the grant claimants, owing to the uncertainty of their boundaries, are annoyed by prospective claimants, and it is suggested that the difficulty would be avoided if instructions were given to the local land officers to the effect that the true west boundary of the Maxwell Grant is the summit of the mountain range from the northwest to the southwest corners, and that entries upon lands situated to the east of such summit should not be allowed; also that such instructions should be communicated to the Forest Service and to the Commissioner of the public lands of the State of New Mexico; furthermore that where any townships abutting upon the Maxwell Grant to the west are to be sectionized by the Government, the surveyor general should be instructed that the summit of the mountain range must be correctly located and shown upon the plat and must be regarded as the eastern limit of the public lands in that region to the northward of the southwest corner of the grant.

The Commissioner, in his ruling upon that petition, held that while the patent to the grant is outstanding the Land Department is without

authority to change or modify the lines of survey as laid down in the patent, and citation of authorities in support of that doctrine was given. It was, therefore, held that so far as the application contemplated any modification of the boundaries of the Maxwell Grant, as set forth in the patent, such proposition could not be entertained, but it was stated that the Department has authority to ascertain the true limit of its own lands, and in thus defining them it would be necessary to mark upon the ground the boundary line between the private lands and the public lands. It was further stated that steps would be taken looking to the identification of the line upon the eastern boundary of the Carson National Forest in accordance with the boundary of the grant as set forth in the patent, that is, according to the courses and distances given by the surveyor for the western line of the grant, and not according to the actual watershed. Where, according to the language of the grants, the boundaries should be coincident, it was held that the rectification of any alleged errors in such surveys should not be undertaken.

By decision of December 4, 1918 (46 L. D., 301), the Department on appeal affirmed the action of the Commissioner, and motion for rehearing was denied May 3, 1918. A petition was then filed asking for the privilege of presenting oral argument and for reconsideration of the case under the supervisory authority of the Secretary.

Oral argument has been heard and the case has received further consideration in the light thereof and in connection with the written petition and the entire record.

The point now presented for attention is that the claimants are not asking for rectification of the old survey and patent, but for interpretation of same which will give controlling weight to that call in the grant, survey and patent which, it is claimed, is the superior one, viz., the summit of the mountain. In other words, it is urged that the triangulated courses and distances purporting to define the ridge or summit of the mountain should be rejected when in conflict with the more certain call for a well known natural object which is fixed and easily identified.

The former decision conceded that the usual rule accords superior weight to the calls for natural monuments but held that said rule does not apply when the lines were not actually run but were laid down by protraction, citing the case of *Bryant v. Strunk* (151 S. W., 381). It was accordingly held that the courses and distances of the original survey would be followed for reestablishment of the western boundary of the Maxwell Grant except as to that portion of the line where the two grants should be coterminous, and as to the latter part it was said that the Land Department may well recognize that no public land exists between the two grants, leaving the matter of exact loca-

tion of the line to be settled by agreement between the parties. It will thus be observed that the call for the adjacent grant was allowed to control the calls for course and distance as to the northern 25 miles of the western line of the Maxwell Grant boundary. In thus yielding as to that portion, and departing from the rule applied to the remainder of the line, the surveying difficulties are augmented, for it appears that the parties have agreed between themselves to recognize the summit of the mountain as the common boundary, whereas the triangulated line of the Maxwell Grant does not, according to present showing, reach the summit at the point of the south juncture of the two grants. Hence, there is no continuous line of the Maxwell west boundary under the conditions of the prior decision, and the break or hiatus can be mended or closed only by adopting one of two alternatives, *viz.*, either by continuing to follow the summit from the point mentioned, or by arbitrarily running a closing line from that point on the summit to the triangulated line by the shortest distance. It would be difficult to justify the latter in view of the terms of the grant and the call in the patent for the summit as the line between the northwest and southwest corners. To do so would be to adopt an arbitrary and even an uncalled for line in opposition to the most prominent call in the instruments. Furthermore, upon reconsideration of this matter I am strongly impressed with the contention that the call for the summit should be preferred to the calls for courses and distances purporting to delineate the summit. I find much persuasive authority to support that view.

In the case of *Davis v. Commonwealth Land and Lumber Co. et al.* (141 Fed., 711), it was held that both course and distance should yield to the call for two corners on the top of Cumberland Mountain, and that the line between them should follow the meanders of the crest and not run in a straight line following the given course. In that connection it was said that if a call is from one point in a continuous object, natural or artificial, to another point in the same object, the line between and connecting the two points follows the sinuosities of such object, if any. It was also said to be well settled that the mere fact of calls for courses and distances between such points on a continuous object, which do not correspond with the sinuosities or meanders of the continuous object, is not sufficient of itself to show that it was the intention of the parties that the two corners should not be connected by a line following such sinuosities or meanders. Numerous decisions were cited in support thereof.

In *Newsom v. Pryor* (7 Wheat., 7, 10), Chief Justice Marshall said:

The most material and most certain calls shall control those which are less material and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance.

The above rules were referred to in the case of *Watkins v. King* (118 Fed., 524, 536), and the court used the following language:

It is quite well established, and is now, we think, the universal rule, that a call for a natural object, such as a river, a creek, the mouth of a stream, a hill, a dividing ridge between designated localities, a marked tree, shall control both course and distance. The reason for such a rule is quite apparent. The natural monuments referred to are objects indicating the boundary of the land, are generally easily found, and are, with few exceptions, indestructible. Course and distance are usually descriptive of the designated monuments, depending for their accuracy upon the skill and experience of the surveyor.

In the instant case we have the northwest and southwest corners of the grant located by undisputed monuments, and surely the most certain and reliable call for the line between these two points is "the summit of the mountain." The line was not actually run upon the ground. Certain courses and distances, obtained by triangulation, were given, but these are merely descriptive of the more certain call. Their purpose only serves to furnish a general outline of the summit and not to define it with exactness. The language of the court in the case of *Higueras v. United States* (5 Wall., 827, 835), is peculiarly applicable to surveys of this character. The court said:

Measurements of distances and the direction of lines in reference to the points of the compass mentioned in a deed, may be made a part of the description of the premises intended to be granted, and in some cases, where the lines are so short as evidently to be susceptible of entire accuracy in their measurement, and are defined in such a manner as to indicate an exercise of care in describing the premises, such a description is regarded with great confidence as a means of ascertaining what is intended to be conveyed. But ordinarily surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land. Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings.

In a letter to the surveyor general of New Mexico, under date of March 29, 1910, the Acting Commissioner of the General Land Office stated that under the terms of the original grants by the Spanish Governor the Sangre de Cristo and the Maxwell Grants have been decided each to extend to the summit of the Sierra Madre Divide, and that the fact of their having a common boundary must exclude the theory of public land existing between them. He referred to the manner in which the west line of the Maxwell Grant was surveyed, saying that the surveyor, by a mere traverse line, took sights and courses at certain peaks and decided from afar-off that they were points on the actual watershed line of the Sierra Madre Divide; that from this traverse line the several peaks were located by triangulation and thus connected by a line of several

very long courses; that said line had been delineated in the records for the lack of any other, but it can not longer be regarded as the legal boundary because it unquestionably must deviate, perhaps entirely, from the actual watershed of the range, thus clearly recognizing the summit of the mountain as the true boundary of the respective grants.

The Department agrees with the Commissioner that inasmuch as the two grants are coincident as to a portion of the distance, there can be no public lands between them, and therefore there is no authority for resurveying or marking the line as to this portion. But in surveying the public lands which may exist adjacent to the west line of the Maxwell Grant below the point where it is bounded by the Sangre de Christo Grant, it will be necessary to mark the line in order to define the extent of the public lands.

As mentioned in the former decision on appeal, it appears that T. 25 N., R. 15 E., N. M. P. M., at the southern extremity of the west boundary of the grant has been surveyed and the lands which were returned as public have been certified to the State, and are no longer within the jurisdiction of the Land Department. Hence, the Department can have no further occasion for surveying the lands in that township. The remainder of the line is bounded by the Carson National Forest on the west, and no immediate necessity for survey in that region has been brought to my attention. However, should occasion arise for survey of any public land adjacent to the line in question, the summit of the mountain will be recognized as the western boundary of the grant.

In the Bryant-Strunk case, *supra*, the court refused to honor the call in the survey for connection with certain other surveys in the vicinity which would not be reached by the courses and distances given, and which if recognized would add five times to the area called for in the patent there under consideration and entirely change the general shape of the tract as shown by the plat. The court concluded from all of the facts that the surveyor simply made a mistake in calling for the lines of the other surveys, and that the case was one for exception to the general rule that the calls for established objects must be preferred to calls for courses and distances. In that case the designated objects were not reached at all by actual survey and the surrounding facts showed that if actual survey had been made they could not have been reached except by the grossest sort of error. In this case the designated natural, continuous and prominent object was not only reached at the beginning and at the end of the line, but was crossed in a number of instances. The two cases are upon close analysis found to be essentially dissimilar.

The former action is modified as indicated herein.

DONALD C. WHEELER.

Decided April 23, 1921.

SOLDIERS' ADDITIONAL—SUBSEQUENT WITHDRAWAL.

An Executive withdrawal under authority of the act of June 25, 1910, does not affect a prior valid application to make a soldiers' additional entry, provided that the applicant has complied with all applicable laws and departmental regulations.

FINNEY, *First Assistant Secretary:*

On July 17, 1918, at the Carson City, Nevada, land office, Donald C. Wheeler applied to make entry under section 2306, Revised Statutes, for NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 24, T. 41 N., R. 26 E., M. D. M., based upon the assignment of 40 acres of the right of Edward Thompson, who served in Company E, 20th Regiment, United States Colored Infantry, from December 31, 1863, to October 7, 1865, when he was honorably discharged, and who, on May 25, 1874, made homestead entry at the Jackson, Mississippi, land office for 40 acres of public land, which entry was afterwards canceled on relinquishment.

By decision dated April 20, 1920, in which he cited the departmental decision in the case of Josephine C. Woolson (40 L. D., 235), the Commissioner of the General Land Office rejected the application for the reason that the tract applied for had been included in Public Water Reserve No. 70 by Executive order of March 8, 1920, under authority of the act of June 25, 1910 (36 Stat., 847). Applicant has appealed.

In *Leonard v. Lennox* (181 Fed., 760), the Circuit Court of Appeals, Eighth Circuit, in discussing a soldiers' additional application which was not supported by a showing that the land was not saline, held (page 763):

To entitle one to a patent it is essential, among other things, that he comply with all the requirements of the statute under which he seeks the title and the authoritative regulations of the Land Department thereunder.

The Supreme Court of the United States in *Payne v. Central Pacific Railway Company* (255 U. S., —), a suit to enjoin the Land Department from canceling a selection of indemnity lands under a railroad land grant, decided February 28, 1921, held:

As before shown, this indemnity selection was made in full compliance with the directions promulgated by the Secretary, was of lands subject to selection, and was based on actual losses in the place limits adequate to sustain it. The railroad then had been constructed and equipped as required by the granting act and nothing remained to be done by the grantee or its successor to fulfil the conditions of the grant and perfect the right to a patent. The rule applicable in such a situation is that "a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof." *Wirth v. Branson*,

98 U. S., 118, 121; *Benson Mining Co. v. Alta Mining Co.*, 145 U. S., 428, 432. This rule has been applied and enforced where the Secretary through an error of law declined to approve and give effect to lawful selections and certified the lands for the use of another claimant,—the court saying that the Secretary could not thus deprive the selecting company of “rights which became vested by its selection of those lands.” *St. Paul & Sioux City R. R. Co. v. Winona & St. Peter R. R. Co.*, 112 U. S., 720.

The act under which the subsequent power-site withdrawal was made is confined to “public lands,” a term uniformly regarded as not including lands to which rights have attached and become vested through full compliance with an applicable land law. *Newhall v. Sanger*, 92 U. S., 761, 763; *Minnesota v. Hitchcock*, 185 U. S., 373, 391; *United States v. Hemmer*, 241 U. S., 379, 385-386. Besides, to apply the act to the lands in question, lawfully earned and selected as they were, would work such an interference with private rights as plainly to require that it be construed as not including them. *Wilcox v. Jackson*, 13 Pet., 498; 513; *Lytle v. Arkansas*, 9 How., 314, 333, 335; *Sinking Fund Cases*, 99 U. S., 700, 718-719; *United States v. Jin Fuey Moy*, 241 U. S., 394, 400.

The foregoing decision was cited in the decision of the Supreme Court of the United States rendered March 7, 1921, in *Payne v. State of New Mexico* (255 U. S., —), involving an indemnity school-land selection, wherein it was held that the officers of the Land Department were required to give effect to the conditions existing when the selection was made, and that, if it were valid then, they were not at liberty to disapprove or cancel it by reason of the subsequent change in the status of the base tract. Further:

* * * The provision under which the selection was made was one inviting and proposing an exchange of lands. By it Congress said in substance to the State: If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard. In this respect the provision under which the State proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

In the brief for the officers it is frankly and rightly conceded to be well settled that “a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the Government and that his right to a legal title is to be determined as of that time.”; and also that this rule “is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; that in equity it is his and the Government holds it in trust for him.” * * *

The latter decision cited with approval the departmental decision in the case of Gideon F. McDonald (30 L. D., 124), involving a forest lieu selection, wherein it was held that after the selector had fully complied with the terms on which the Government had declared its willingness to be bound, no act of either the executive or legislative branch of the Government could divest him of the right thereby acquired.

The applicant, Wheeler, long prior to the withdrawal of the tract involved, had complied with all the requirements of law and the departmental regulations. The soldier-entryman, Thompson, had earned the right to make entry for approximately 120 acres of vacant public land, and such right, not having been exercised by him, was assignable by his widow. After the assignment of the right, and its location on land subject to entry and the compliance by the applicant with all the requirements of law and the departmental regulations, the tract ceased to be public land within the meaning of the act of June 25, 1910, *supra*, as construed in *Payne v. Central Pacific Railway Company, supra*.

Accordingly, the decision appealed from is reversed and the case remanded. The application will be disposed of on its merits, unaffected by the withdrawal of the land.

PREFERENCE RIGHT TO PROSPECTING PERMITS UNDER SECTION 19 OF THE ACT OF FEBRUARY 25, 1920—REGULATIONS RELATIVE TO LIMITATION AS TO ACREAGE MODIFIED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 23, 1921.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Section 19 of the act of February 25, 1920 (41 Stat., 437), gives to certain persons who had located or acquired placer mining claims and who are able to meet other requirements imposed in the law, a preference right to prospecting permits upon such locations "upon the same terms and conditions, and limitations as to acreage, as other permits provided for in this act."

The limitation as to acreage which may be included in a single permit is found in section 13, 2,560 acres. There is no limitation in section 19 as to the number of permits which may be obtained by a qualified person or persons who held the placer mining claims and are able to meet the conditions of the act.

As an administrative matter and in harmony with the evident intent of the act to avoid monopoly, a regulation was embodied in the oil and gas regulations of October 29, 1920, page 37, to the effect that qualified assignees since October 1, 1919, may secure preference-right permits, "but no such transferee will be permitted to hold permits exceeding 2,560 acres for such lands in the same geological structure, nor more than three times that area in the same State."

While the intent of the act is to prevent monopoly, its primary purpose was to encourage prospecting for and development of the oil

and gas resources of the United States. In localities remote from transportation, refineries, pipe lines, and sources of supply, it may be difficult to secure the exploration of a wild-cat territory if the person or corporation conducting the exploration and development is limited to a maximum of 2,560 acres. Moreover, as stated above, section 19 is a remedial section, designed to take care of equitable claims of those who had initiated claims under the placer mining laws prior to withdrawals or prior to the repeal of the general mining laws as applicable to oil and gas deposits, and consequently no limitation was made in the statute as to the number of such locations which might be surrendered and made the basis of prospecting permits. The limitation above quoted is one of regulation and expediency and not of statute. Therefore, having in mind the purpose of the act and the scope of section 19, it is held that for development purposes, assignments of prospecting permits secured under section 19 of the act, to a qualified individual, corporation, or association outside producing oil and gas fields and in localities without transportation facilities, refineries, pipe lines, or nearby sources of supply, for not exceeding five such permits in a State and near enough to each other for common development, whether contiguous or noncontiguous, may be presented for the consideration of the Secretary of the Interior, and his approval if he shall find same to be in the public interest.

To the extent of its conflict with the foregoing, said regulation under section 19 of the act of February 25, 1920, is modified.

ALBERT B. FALL,
Secretary.

ADMINISTRATIVE ORDER MODIFYING THE ADMINISTRATIVE RULING OF JULY 15, 1914, IN SO FAR AS IN CONFLICT WITH CERTAIN CITED COURT DECISIONS—CONFLICTING DEPARTMENTAL DECISIONS OVERRULED.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., April 23, 1921.

The Supreme Court of the United States in *Payne v. Central Pacific Railway Company*, on February 28, 1921, decided that the railroad indemnity selection there involved should be disposed of "on its merits unaffected by the withdrawal" of the land made after perfection of the selection for a water power site under the act of June 25, 1910 (36 Stat., 847). On March 7, 1921, in the case of *Payne v. New Mexico* the court concluded that the Land Department should dispose of the State's school land indemnity selection "in regular course unaffected by the elimination of the base tract from the reservation" for forestry purposes after the completion of the

selection. In the case of *Payne v. United States ex-rel. Newton*, on March 14, 1921, the court referred to the departmental instructions issued April 25, 1914 (43 L. D., 294), and said:

The Secretary stated that the lapse of two years after the issue of the receiver's receipt "will bar a contest or protest based upon any charge whatsoever," save where the proceeding is sustained by some special statutory provision.

In *Wyoming v. United States*, decided on March 28, 1921, the court held that the conditions obtaining at the date of the completed school land indemnity selection, with respect to the character of the land, whether known or believed to be mineral, were controlling and that the Land Department was without authority to cancel the selection on the ground that the selected land was subsequently included in a petroleum withdrawal and proven to be mineral land.

The Administrative Ruling of July 15, 1914 (43 L. D., 293), is not in harmony with said court decisions, and in so far as said ruling is in conflict therewith the same is hereby modified to conform to the holdings of the court. All departmental decisions based on said ruling which are not in harmony with those decisions among which are *State of California et al.* (44 L. D., 118); *State of California et al.* (44 L. D., 468); *State of Utah* (45 L. D., 551); and *State of New Mexico* (46 L. D., 217), are hereby overruled.

The future adjudication of cases controlled by the decisions mentioned will be in harmony with the principles announced in those decisions.

This order will not affect the disposition of the question of the mineral character of land claimed under the railroad land grants, either within the place or the indemnity limits, or under the swamp land grants. The well established practice and procedure now prevailing as to such lands will continue to be followed.

ALBERT B. FALL,

Secretary.

OIL PROSPECTING PERMIT—REVOCATION OF REGULATION GOVERNING APPLICATIONS FILED UNDER SECTION 13 OF THE ACT OF FEBRUARY 25, 1920.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 23, 1921.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Based upon rulings of the Secretary of the Interior, the regulations concerning oil and gas permits and leases approved October 29, 1920,

state, on page 36, "Where after application under section 13 for a permit and before permit is granted the land is designated as within the structure of a producing oil or gas field, permit can not be allowed."

This regulation and the rulings on which it is based were not issued under a mandatory provision of the statute, section 13 of the act of February 25, 1920, authorizing the Secretary of the Interior to grant to any qualified applicant a prospecting permit upon lands "wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field."

Rulings of this Department in cases involving a like situation, arising under other land laws, are to the contrary. In the case of Charles C. Conrad (39 L. D., 432), where a homestead application was filed, and where the entryman had performed all acts necessary to complete his application, but by reason of delay in action thereupon by the local office a first form withdrawal under the reclamation act intervened, the Department held that his rights could not be prejudiced by the inability of the local office to allow the application until after the withdrawal, but that they related back to the time when he filed in the local land office his application, accompanied by the required showing, including the fees, the land being then subject to his application.

This and similar rulings of the Department are approved in principle by the recent decisions of the Supreme Court of the United States in cases of *Payne v. Central Pacific Railway Company* (255 U. S., —); *Payne v. New Mexico* (255 U. S., —); and *Wyoming v. United States* (255 U. S., —).

Applying the principle so announced, it is clear that not only equitably but legally, qualified persons who filed proper applications for oil or gas prospecting permits under the act of February 25, 1920, can not and should not be deprived of their rights if, because of delay in action upon the applications so filed, there intervenes a designation by this Department of the lands as being within the geological structure of a producing oil or gas field occasioned by a discovery of oil or gas subsequent to the filing of the application in the local land office. Accordingly, said regulation is hereby revoked, and in future applications will be adjudicated in accordance with the views herein expressed.

The statute, however, specifically forbids the allowance and approval of a prospecting permit upon lands within a "known geological structure of a producing oil or gas field" (section 13), and in section 17 provision is made for the disposition of unappropriated lands in such structures by competitive bidding. Therefore, nothing in this opinion shall be construed as modifying or affecting previous

decisions of this Department to the effect that prospecting permits can not be allowed within the geological structure of a producing oil or gas field, so known and existing at and prior to the filing of the application for the prospecting permit.

ALBERT B. FALL,
Secretary.

**INSTRUCTIONS RELATIVE TO DISPOSAL OF CERTAIN LANDS IN
THE GIG HARBOR ABANDONED MILITARY RESERVATION,
WASHINGTON.**

[Circular No. 752.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., April 29, 1921.

REGISTER AND RECEIVER, SEATTLE, WASHINGTON:

The Act of Congress approved March 3, 1919 (40 Stat., 1319), a copy of which is hereto attached, provides for the appraisal and sale of lands in the Gig Harbor Abandoned Military Reservation in the State of Washington in Secs. 5 and 8, T. 21 N., R. 2 E., W. M., embracing 83.49 acres.

These lands have been subdivided into tracts as shown by supplemental plats approved January 11, 1921, which have been duly accepted, and filed in your office. These tracts have been appraised, which appraisement has been duly approved. The total appraised price of said land is \$1,583.98.

1. Any lawful lessee in actual occupancy on December 5, 1917, of any portion of the land described in Section 1 of the said act, who made actual settlement thereon in good faith under the terms of a lease by the War Department, or a sub-lease thereunder on said date, or the heirs or assignees of such lessee or sub-lessee shall be entitled to purchase for the appraised value one of such surveyed tracts so occupied, no right of purchase of such lessee or sub-lessee to exceed the lands actually occupied and improved by him on December 5, 1917, and in no case exceeding 10 acres in a body according to Government surveys and subdivisions thereof, upon the payment to the Government of a sum of money equal to the appraised value thereof.

2. You will mail (registered) a copy of these regulations to each of the claimants, whose names may be found upon the plat of survey, or the records of your office, promptly upon receipt hereof. They are allowed ninety days from the date of the approval of these regulations in which to file in your office an application to purchase under this act. This time limit is statutory and warning is given that the Land Department is without authority to extend such time. Any such lands not so applied for within ninety days from date of

approval hereof will be subject to disposition under the Act of July 5, 1884 (23 Stat., 103). Any offering thereunder will be subject to future regulations. Said lessees, sub-lessees, heirs or assigns in occupancy of lawfully leased tracts on December 5, 1917, who do not purchase such tracts, shall have the privilege of removing from their tracts, prior to any such offering, any buildings placed thereon.

3. Proof required of purchasers hereunder will consist of their affidavits, corroborated by two witnesses, executed before any officer authorized to administer oaths in homestead cases, showing settlement by them on or before December 5, 1917, and maintenance thereon since that date, or showing that they have succeeded to the rights of an actual settler under the terms of a lease by the War Department or a sub-lease thereunder, or that they are the heirs or assignees of such lessee or sub-lessee. Evidence of citizenship, or declaration of intention to become a citizen must also be furnished, and the assignees should furnish a copy of the instrument under which they hold, or preferably, the original thereof. Notice of intention to submit such proof and acquire title must be published not less than thirty days in a newspaper of general circulation in the vicinity of the land, as required under the homestead laws and regulations.

4. Purchasers are required to make payment of the appraised price, which may be made in one sum, or at the option of the purchaser, one-tenth in cash and the balance in nine equal, annual installments, with interest at five per cent per annum, payable annually as the purchaser may elect.

5. Current serial numbers will be assigned to all applications for lands hereunder. If full payment and satisfactory proof are submitted, you will issue a proper cash certificate, but if the applicant elects to make payment on the installment plan, you will issue a memorandum of sale in duplicate, setting forth therein the purchase price of the land and the dates and amounts of the deferred installments. The original will be given the applicant, and the duplicate will be forwarded to the General Land Office with the regular monthly returns. Note on each certificate or memorandum the following: "Gig Harbor Abandoned Military Reservation. See act of March 3, 1919 (40 Stat., 1319)."

6. Publicity will be given this sale by publication of notice for four weeks in two newspapers in general circulation in the vicinity of the lands. A schedule of said lands and their appraised value is hereto attached.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

[PUBLIC—No 336—40 STAT., 1319.]

AN ACT Providing for the appraisal and sale of the Gig Harbor abandoned military reservation in the State of Washington, 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 Gig Harbor abandoned military reservation in sections five and eight, all in township twenty-one north, range two east, Willamette meridian, in the county of Pierce and in the State of Washington, be caused by the Department of the Interior to be surveyed and subdivided into tracts and lots to conform as far as practicable to the tracts and lots lawfully occupied by the tenants thereon on December fifth, nineteen hundred and seventeen.

SEC. 2. That after said survey and the approval thereof by the Commissioner of the General Land Office the plat thereof shall be filed in the office of the register and receiver in the manner provided by law, and thereafter any lawful lessee in actual occupancy on December fifth, nineteen hundred and seventeen, of any portion of the lands described in section one hereof who made actual settlement thereon in good faith under the terms of a lease by the War Department, or a sublease thereunder on said date, or the heirs or assignees of such lessee or sublessee, shall be entitled to purchase for the appraised value one of such surveyed tracts so occupied, no right of purchase of such lessee or sublessee to exceed the lands actually occupied and improved by him on December fifth, nineteen hundred and seventeen, and in no case exceeding ten acres in a body, according to Government surveys and subdivisions thereof, upon the payment to the Government of a sum of money equal to the appraisal value thereof, such appraisalment to be made as provided by law: *Provided,* That in making such appraisalment the appraisers shall not include the improvements thereon made by the occupants of such lands: *Provided further,* That payment to the Government may be made in one sum, or one-tenth cash and the balance in nine equal annual installments, with interest at five per centum per annum, payable annually, as the purchaser may elect.

SEC. 3. That if any tract of the lands described in section one hereof be not purchased by the lessee or sublessee, his heirs or assigns, as provided in section two of this Act, within ninety days after the same becomes subject to purchase under the provisions of this Act, then and in that event the Secretary of the Interior is hereby authorized to dispose of the remaining lands under the provisions of the Act of Congress of July fifth, eighteen hundred and eighty-four, entitled "An Act to provide for the disposal of abandoned and useless military reservations," and the said lessees, sublessees, heirs or assigns, in occupancy of lawfully leased tracts on December fifth, nineteen hundred and seventeen, who do not purchase such tracts shall have the privilege of removing from their tracts any buildings placed thereon, and the Secretary of the Interior is authorized to reappraise any unsold tracts from time to time before offering the same for sale under said Act of July fifth, eighteen hundred and eighty-four.

SEC. 4. That any lands needed for lighthouse or roadway purposes may be segregated or reserved for such use, and the lands so segregated or reserved shall not be subject to disposal hereunder.

Approved, March 3, 1919.

SAMUEL A. ROBINSON.

Decided April 30, 1921.

DESERT LAND—SCHOOL GRANT—PREFERENCE RIGHT.

A claimant who in good faith reclaims, under authority of the act of March 28, 1908, a tract of unsurveyed desert land which, upon survey, falls within a section designated under the school land grant to the State of Montana, acquires, by reason of its indemnity provision, a right to make entry superior to any claim of the State under said grant.

FINNEY, *First Assistant Secretary*:

Samuel A. Robinson took possession of a certain tract of unsurveyed desert land in 1913, which, upon the filing of plat of survey, proved to be the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 16, T. 15 S., R. 7 W., M. M., containing 160 acres which he later reclaimed. On October 30, 1919, he filed his application to enter these tracts under the desert land law, on the theory that the act of March 28, 1908 (35 Stat., 52), gave him a right to enter the tracts in Sec. 16 which was superior to the claim of the State thereto under the school grant.

By its decision of October 27, 1920, the General Land Office held the application for rejection as to the tracts in Sec. 16 on the ground that the right gained by Robinson's possession prior to survey was defeated by the fact that the land when surveyed fell within Sec. 16 and passed to the State.

In his appeal from that decision, Robinson urges that he, as the occupant of unsurveyed desert lands, is entitled to assert the same right as against the State that homestead and preemption claimants may assert under settlements made prior to survey.

The rights of homestead and preemption settlers to which reference is thus made, are mentioned and protected by section 2275 of the Revised Statutes, which declares that—

Where settlements, with a view to preemption or homestead, have been or shall hereafter be made before the survey of the lands in the field, which are found to have been made on Sections 16 or 36, those sections shall be subject to the claims of such settlers.

In the case of Joseph B. Lessman (44 L. D., 347), the Department held that a desert entry of unsurveyed land, made at a time when the desert land law permitted entries of unsurveyed lands, is a disposition of the land within the meaning of section 4 of the act of July 3, 1890 (26 Stat., 215), admitting Idaho to the Union, and the act of February 28, 1891 (26 Stat., 796), providing indemnity for sections 16 and 36, granted for school purposes, when such sections, or parts thereof, have been "otherwise disposed of."

The situation here presented is not dissimilar in principle from that of the Lessman case, *supra*. At a time when the tract was vacant

public land of the United States and prior to any claim thereto on behalf of the State, Robinson, under authority of a federal statute, took possession of and reclaimed it. The State has been notified of Robinson's claim and has offered no objection to its recognition. In view of the liberal indemnity provisions of the applicable statutes, it is held that the circumstances disclosed by the record bring the case within the excepting clause of the school grant to the State of Montana by the acts of February 22, 1889 (25 Stat., 676), and of February 28, 1891, *supra*.

The decision appealed from is reversed and the case remanded for action accordingly.

JAMES B. STOKES AND AMOS H. ECKERT.

Decided April 30, 1921.

STOCK-RAISING HOMESTEAD—ADDITIONAL ENTRY.

An original entry the controlling area of which can be irrigated is not to be designated under the stock-raising homestead laws, nor used as a basis for an additional entry.

STOCK-RAISING HOMESTEAD—APPLICATION—CHARACTER OF LAND.

When an issue is raised between rival applicants, either of them is entitled to a hearing for the purpose of showing that his adversary secured the designation necessary to his entry by making a false or fraudulent representation as to the character of the land.

FINNEY, *First Assistant Secretary*:

In September, 1913, James B. Stokes made a homestead entry 014014, for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 13, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 14, T. 2 S., R. 11 E., B. M., and in 1914, Amos H. Eckert made homestead entry 016179, for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 14, all in the same township.

Each of these parties later presented applications to enter lands adjoining their entries prior to the designation of the land, and each claimed a preferred right of entry by virtue of his holding adjacent lands under his original entry. Stokes's application for an additional entry embraces the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 13, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, in said township, and Eckert's application for an additional entry embraced all of the land included in Stokes's application.

After these parties had been given an opportunity to amicably adjust the matter between themselves, Eckert made no reply but Stokes set up that he had contested a former homestead entry embracing a portion of the land applied for and had later purchased and filed the former entryman's relinquishment of that entry. He further alleged that Eckert's original entry contains about 150 acres of land that can

be irrigated and cultivated, and that more than 30 acres thereof are now under irrigation, and for that reason the land embraced in that entry should not have been designated under the stock-raising homestead law.

By its decision of October 7, 1920, the General Land Office, having found that it would be equitable to do so, directed that the land be equally divided between these applicants, allowing 160 acres to each of them, or in other words, that the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 13, and the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, be awarded to Stokes, and that the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, be awarded to Eckert.

In that decision it was further declared that if after the allowance of the entries as directed, Stokes desired to do so, he could file a contest against Eckert's entry on the ground that it had been improperly designated for entry through his false and fraudulent representations as to the character of the land.

In his appeal from that decision, Stokes, in effect, contends that the hearing mentioned should be ordered at this time.

If it be true that 150 acres, or any other controlling area of the land covered by Eckert's original entry, can be irrigated it should not have been designated and he can not use it as a basis for his additional entry. While the Department has held that an entry made under the enlarged and stock-raising homestead laws for land designated as subject to entry under said laws will not be disturbed because of a charge that the land was improperly designated, unless the designation was induced by false and fraudulent representations of the entryman, that rule will not be applied where, as here, the issue is raised between rival applicants to make entry, either as to the land applied for or as to a tract embraced in a former entry of an applicant. In other words while the Department will protect an entry made in good faith, though the lands may have been improperly classified, it will not permit the allowance of an entry over the protest of an adverse claimant without affording an opportunity to such adverse claimant to be heard on a charge like the one here under consideration.

In view of this fact the case is remanded with directions that Eckert be notified that unless he within thirty days files a sworn and corroborated answer setting up facts which show that that land was correctly designated his application will be rejected and Stokes's entry will be allowed; and that if an answer of that kind is timely filed further action on Stokes's application will be deferred and a hearing will be ordered and held on the issues thus joined.

**INTERMARRIAGE OF HOMESTEADERS—ACT OF APRIL 6, 1914, AS
AMENDED BY THE ACT OF MARCH 1, 1921.**

INSTRUCTIONS.

[Circular No. 753.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 2, 1921.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

Your attention is invited to the act of Congress of March 1, 1921 (41 Stat., 1193), adding a second proviso to the act of April 6, 1914 (38 Stat., 312): Said act now reads as follows:

That the marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry: *Provided*, That the provisions hereof shall apply to existing entries: *Provided further*, That in the administration of this act the terms "entryman" and "entrywoman" shall be construed to include bona fide settlers who have complied with the homestead law for at least one year next preceding such marriage.

2. The amended act applies to entries and settlement claims initiated before or after its date, and before or after the date of the amendatory act. To become entitled to its benefits, it is required that each of the parties shall have complied with the requirements of the homestead laws for not less than one year next preceding their marriage. It is not necessary that either the husband or the wife shall have had an entry placed of record before the marriage.

3. The law confers upon the husband the privilege of electing on which of the two entries the family shall reside. His election must be supported by the affidavits of both parties, describing their entries and showing the facts as to the residence, cultivation, and improvements already had in connection therewith. Only in cases where the tracts involved are situated in different districts will it be necessary that the election and affidavits be executed in duplicate; then copies of all papers must be filed in each office.

4. The local officers will make due notation of the filing of the election on their records as to the entry or entries within their district, and will at once forward the papers with their recommendations, to the General Land Office, which will promptly pass upon the question of accepting the election. In cases where one or both of the claims are based on settlement only, they will assign the cur-

rent serial number to the election, unless a serial number has been theretofore assigned to the claim.

5. Though the election be accepted, proofs on the entries will be submitted separately, as in other cases. It will be necessary to show residence on the selected homestead from approximately the date of the marriage, and on the entries of the respective parties before that time. The act makes no change whatever in the requirements as to cultivation or improvements, as the case may be, or as to the necessity of having a habitable dwelling on the land. Compliance with the homestead law in these regards must be shown as to each entry, precisely as though the marriage had not taken place. In no case can proof be made on a claim before an entry for the land involved shall have been duly placed of record in accordance with an approved survey.

If proof be made on the entry selected as the home before title to the other is earned, residence may nevertheless be continued on the perfected entry and credited to the other. However, the act has no application to cases where the requirements of law have been fulfilled, and proof made, as to one of the entries prior to the marriage.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**CONSTRUCTION OF THE ACT OF JULY 28, 1917, WITH REFERENCE
TO REQUIRED IMPROVEMENTS ON STOCK-RAISING HOME-
STEADS.**

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 3, 1921.

REGISTER, UNITED STATES LAND OFFICE, MONTROSE, COLORADO:

I am in receipt of your letter of April 21, 1921, in which you urge the Department to modify the rule announced in paragraph 3 of Circular No. 641 (47 L. D., 128, 130).

I am of opinion that the Department would not be justified in construing the act of July 28, 1917 (40 Stat., 248), as recommended by you.

It is necessary in homestead cases under section 2289, Revised Statutes, and the enlarged homestead law that the entryman show, upon final proof, residence, cultivation, and a habitable house upon the land. Under the stock-raising law, residence and permanent improvements worth not less than \$1.25 per acre are required. The

act cited by you declares that military or naval service shall be equivalent, within certain limits, to residence and cultivation; but there is no warrant, in the language of the act, for holding that it would excuse either the placing of a habitable house upon a 160 or 320 acre entry, or the required permanent improvements upon a 640 acre entry. Moreover, the act, even as to residence and cultivation, merely reduces the requirements of the statute; it does not waive them.

It is true that in the stock-raising law it is declared that the permanent improvements required are "instead of cultivation." This is a legislative statement explanatory of the requirement of *permanent* improvements of relatively large value, and is, in no sense, a declaration that such improvements are to be in the nature of cultivation or are to be held as the equivalent thereof. On the contrary, the act excuses cultivation in its usual sense, and there is no requirement of the stock-raising act upon which the act of July 28, 1917, *supra*, can operate, except that of residence.

E. C. FINNEY,
First Assistant Secretary.

WILLIAM R. BRENNAN.

Decided May 5, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD.

Land that is not within a designated oil or gas structure is nevertheless to be treated as valuable for oil and gas when embraced within a prospecting permit, and a homestead entry made subordinate thereto must be subject to the provisions and reservations of the act of July 17, 1914.

OIL AND GAS LANDS—PROSPECTING PERMIT.

Upon the granting of an oil prospecting permit, rights thereunder attach as of the date of the filing of the application.

FINNEY, *First Assistant Secretary:*

On March 27, 1920, P. R. Heily applied at the Newcastle, Wyoming, land office for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon, with other lands, the W. $\frac{1}{2}$, Sec. 32, T. 42 N., R. 67 W., 6th P. M. The permit was granted February 2, 1921.

On June 10, 1920, William R. Brennan applied to make entry under the enlarged homestead act for the 320 acres above described. The application was allowed the same day.

By decision dated November 20, 1920, the Commissioner required Brennan to consent to the amendment of his entry to contain the reservations of the act of July 17, 1914 (38 Stat., 509), or suffer the cancellation thereof. Brennan has appealed, contending that the

entry having been allowed without the reservation to the United States of the oil and gas, and the land not being within a designated oil or gas structure, his entry should be allowed to stand as made.

Section 1 of the act of July 17, 1914, *supra*, provides:

That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres: *Provided*, That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this act.

Section 3 of said act provides:

That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.

A prospecting permit under the leasing act of February 25, 1920, is granted in contemplation of a future lease for a part or all of the land in case of discovery. Hence, it is necessary to treat the land embraced in a prospecting permit as if embraced in an oil or gas lease with a reservation to the United States of the right

to lease, sell or otherwise dispose of the surface of the lands embraced within such lease under existing laws or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in extracting or removing the deposits therein,

pursuant to section 29 of the leasing act.

In the administration of the leasing act, lands embraced in a prospecting permit must be treated as valuable for oil and gas, and applications to make homestead entry for such lands should not be allowed unless there is written, stamped, or printed upon their face the following:

Application made in accordance with and subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas.

Heily's application for a prospecting permit was not granted until after the date of the allowance of Brennan's application, but was

filed long prior thereto, and his rights thereunder attached as of the date of his application. It follows that Brennan's entry is subordinate to Heily's prospecting permit.

The decision appealed from is accordingly affirmed, and the entry will be canceled unless entryman consents to the proper amendment of his application.

CHARLES L. STEVENS.

Decided May 10, 1921.

OIL AND GAS LANDS—NOTICE—PRACTICE.

The general Rules of Practice relating to service of notice are applicable to oil prospecting permit cases in which the question of preferred right is involved with respect to unperfected and patented entries containing reservation of the minerals to the United States, and the regulation which requires personal service is to be construed to include actual service by registered mail, when possible, or by publication when proper showing is made that the person to be served can not be found.

DEPARTMENTAL REGULATION AMENDED.

Subdivision (a), section 12 of regulations of March 11, 1920 (Circular No. 672, 47 L. D., 437), amended.

FINNEY, *First Assistant Secretary:*

April 10, 1920, Charles L. Stevens and others, associated for such purpose, applied for oil and gas prospecting permit under the act of February 25, 1920 (41 Stat., 437), for the W. $\frac{1}{2}$, Sec. 10, and S. $\frac{1}{2}$, Sec. 14, T. 3 N., R. 20 E.; NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{2}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14; all Sec. 24; S. $\frac{1}{2}$, Sec. 30, and N. $\frac{1}{2}$, Sec. 34, T. 4 N., R. 20 E., M. M., Bozeman, Montana, land district, containing 2,240 acres.

In his decision of September 25, 1920, the Commissioner of the General Land Office found that the application conflicted with a number of entries patented with reservations, and it was held necessary to serve the owners personally with notice of the application for prospecting permit, so that they might apply for preference right for a permit under section 20 of the leasing act, if they desire to do so.

Service by registered mail had been attempted but evidence of receipt of notice was furnished only as to two of the conflicting owners. The Commissioner declined to recognize said service and rejected the application as to all of the lands applied for except the S. $\frac{1}{2}$, Sec. 30, and N. $\frac{1}{2}$, Sec. 34, T. 4 N., R. 20 E., which were free from entry or patent.

Appeal from that action was filed January 19, 1920. It is urged in the appeal that service by registered mail should be sufficient in

such cases, as that method is used generally in public land cases, but it is more especially complained of that applicants were not allowed additional time within which to serve the owners personally as required by the Commissioner.

With the appeal there is evidence of personal service by the sheriff on two of the owners, W. E. Marsh and Frederick Dunne, and a statement by the sheriff that the others are scattered and reside in different counties and States, so that he was unable to serve them.

It appears that under date of January 20, 1921, the Commissioner advised the local officers to allow the applicants thirty days from notice within which to comply with the requirements of decision of September 25, 1920, but the applicants had then already appealed.

In the appeal it is requested that the personal service made upon Marsh and Dunne, owners of the S. $\frac{1}{2}$, Sec. 24, and W. $\frac{1}{2}$, Sec. 10, T. 4 N., R. 20 E., be accepted and a permit issue covering said lands in addition to the portion allowed by the Commissioner, provided the owners do not assert preference right. It is further stated that the expense of making personal service upon the four other owners involved will be considerable and that the applicants do not feel justified in incurring such expense unless assured that such personal service if now made will be acceptable in the absence of adverse rights.

Upon careful consideration of the questions presented, the Department sees no sufficient reason why the general Rules of Practice approved December 9, 1910, with subsequent amendments, should not be applied in respect to the manner of serving notices in this class of cases, including notice by publication. Service by registered mail will be accepted as therein provided only when the notice is actually received by the proper person. A reasonable time should be allowed such applicant for service of notice upon entrymen or owners having a possible preferred right to a permit. A junior applicant, having no preferred right, should not be allowed to defeat a senior applicant merely by greater dispatch in completing service upon conflicting entrymen and owners. This does not mean that lack of reasonable diligence on the part of the senior applicant is to be excused. He is not to be permitted to unduly delay the execution of service of the necessary notices, but priority of rights will not be determined by a race between two or more applicants in the matter of serving notices. The date of the filing of the applications in the local land office, or the posting of notices on the ground, as the case may be, will govern if diligently followed by performance of other requirements.

Accordingly, subdivision "a" of section 12 of regulations approved March 11, 1920 (Circular 672), which requires personal

service in such cases, will be construed to include actual service by registered mail, and is hereby amended to permit service by publication upon proper showing that the person to be served can not be found.

The decision appealed from is modified as indicated herein, and the applicants will be allowed such further additional time as the Commissioner may deem adequate for service of the necessary notices.

AMENDMENT OF CIRCULAR NO. 672, IN REGARD TO BONDS WITH APPLICATIONS FOR PERMITS.

INSTRUCTIONS.

[Circular No. 754.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 11, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Paragraph 4 (h) of Circular No. 672 (47 L. D., 437), is hereby amended to read as follows:

"The application must be accompanied by a bond with qualified corporate surety, in the sum of \$1,000, conditioned against the failure of the permittee to repair promptly, so far as possible, any damage to the oil strata or deposits resulting from improper methods of operation. The penalty of the bond may be increased by the Secretary of the Interior when conditions warrant, particularly in relief cases."

You will give all publicity possible to this amendment to the regulations and should any applications be filed without a bond, you will advise the applicant that he will be allowed 15 days within which to file such bond under penalty of rejection of his application.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**AMENDING SECTION 23, AND REVOKING SECTION 24, OF THE
GENERAL RECLAMATION CIRCULAR APPROVED MAY 18, 1916.**

[Circular No. 756.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

You are hereby advised that the First Assistant Secretary of the Interior, on April 21, 1921, approved an order as follows:

In view of the act of June 25, 1910 (36 Stat., 835), as amended by Section 10 of the act of August 13, 1914 (38 Stat., 686), Section 24 of regulations approved May 18, 1916 (45 L. D., 385, 390), is inoperative, and is hereby revoked. This action necessitates a slight change in the preceding section. Accordingly, section 23 of said regulations is hereby amended to read as follows:

A person who has made homestead entry for any area within a reclamation project can not make an additional homestead entry. One who has made homestead entry for less than 160 acres outside of a reclamation project is 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 160 acres of land outside of a reclamation project (38 L. D., 58).

WILLIAM SPRY,
Commissioner.

EASEMENTS FOR DITCH RIDER STATIONS—ACT OF MARCH 1, 1921.

INSTRUCTIONS.

[Circular No. 757.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

An Act entitled: "An Act to amend acts to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved March 1, 1921 (41 Stat., 1194), reads:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the rights of way granted by Sections 18, 19, 20, and 21 of the Act of Congress entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891 (Twenty-sixth Statutes, page 1095), as amended by the Act of Congress entitled 'An Act to amend the irrigation Act of March 3, 1891 (Twenty-sixth

Statutes, page 1095, section 18), and to amend section 2 of the Act of May 11, 1898 (Thirtieth Statutes, page 404), approved March 4, 1917 (Thirty-ninth Statutes, page 1197), and, subject to the conditions and restrictions therein contained, the Secretary of the Interior is authorized to grant permits or easements for not to exceed five acres of ground adjoining the right of way at each of the locations, to be determined by the Secretary of the Interior, to be used for the erection thereon of dwellings or other buildings or corrals for the convenience of those engaged in the care and management of the works provided for by said Acts: *Provided*, That this Act shall not apply to lands within national forests."

Applicants for rights of way under this amendment will be governed by the regulations set forth in the circular approved June 6, 1908 (36 L. D., 567), in so far as applicable, appropriate additions being made to the forms on the maps therein prescribed so as to include this amendment.

Approved:

E. C. FINNEY,

First Assistant Secretary.

WILLIAM SPRY,

Commissioner.

HYPOLITE FAVOT.

Decided February 17, 1921.

SCHOOL LAND—MINERAL LANDS—LAND DEPARTMENT—JURISDICTION.

An act of the State of California declaring that granted school lands in place, in which after acquirement of title by the State valuable mineral deposits are found, shall be free and open to prospecting and acquisition under the United States mining laws, does not revest title in the United States or confer jurisdiction upon the Land Department to dispose of them, prior to the approval of a selection of other lands in lieu thereof filed by the State upon a tender of the base.

SCHOOL LAND—MINERAL LANDS—WAIVER.

An act of the State of California permitting mineral prospecting and location under the United States mining laws upon granted school lands in place, after acquirement of title by the State, does not constitute a waiver of the right of the State to claim the benefit of the presumption that the land was nonmineral in character at the time that the grant took effect.

SCHOOL LAND—MINERAL LANDS—SURVEY.

The presumption arises that lands granted to a State for school purposes are of the character contemplated by the grant, in so far as minerals are concerned, if at the time of their identification by the lines of an approved public survey there were no mining claims of record and the returns of the surveyor did not show the lands to be mineral in character.

SCHOOL LAND—MINERAL LANDS—HEARING.

A mineral claimant who does not assert any discovery by him of mineral, at or prior to the approval of a Government survey, on land granted to a State for school purposes, is not entitled to a hearing to prove the character of the land upon a mere showing that casual prospecting had been done by others from time to time prior to and since its survey.

VOGELSANG, *First Assistant Secretary:*

On June 23, 1920, Hyppolite Favot filed in the local land office at Sacramento, California, an application in the nature of a request for a hearing to prove the mineral character of the land involved, styled by him an "application to contest the right of possession and character of the lands embraced in section 16, Township 1 South, Range 15 East, M. D. M., in the County of Tuolumne, State of California."

The applicant alleged that in 1901, he located the Feliciana Quartz Mine in the fractional northeast quarter of said section 16, by amended notice of location of December 17, 1900, which amended notice was recorded December 19, 1900, on the proper Tuolumne Mining District Records; that since said time he has continuously held, worked and operated said mining claim, and each year has performed the assessment work thereon, and has performed work and placed improvements on the claim to the value of approximately \$10,000; that in 1903, he located the Diablo Quartz Mine in said section, which adjoins his Feliciana mine, and has done the assessment work on that claim each year since said time and has performed work and placed improvements thereon in the approximate sum of \$5,000, notice of the location of said claim being duly recorded; that there are veins of quartz bearing gold, passing through said properties, assaying in value from \$1.50 to \$7.00 per ton. He bases his contest upon the ground that the property is mineral in character and that he intends to acquire same under the laws of the United States. He states that said section 16 was sold by the State of California on June 9, 1920, as school land to purchasers unknown to him and he requests that he be allowed to prove his allegations and that any entry, filing or other claim to said property be canceled.

August 6, 1920, the Commissioner dismissed the application for want of jurisdiction, stating that section 16, and other portions of the township, were surveyed in 1880, and that the plat of survey was accepted June 14, 1880; that no mining claims were shown to be in the section at that date and same was not returned by the United States deputy surveyor as being mineral in character and the presumption arises that the title thereto vested in the State in 1880 by virtue of its school grant under the act of March 3, 1853 (10 Stat., 244, 246).

Applicant has appealed from said decision and has filed an amended application and submitted an additional showing to the effect that in 1901, he filed with the register of lands for the State of California an affidavit that the land involved was mineral in character and that he was claiming same under the United States statutes governing the disposition of mineral lands, and that in 1901,

he received a communication from the surveyor general of said State stating in substance that applicant's mining locations were "all right" and that applicant would have no trouble about same; that in 1901 he also filed an affidavit in the United States land office at Sacramento, to the same effect as the affidavit filed with the register of the State land department. He further states that in 1918, he again wrote to the State surveyor general relative to said property, advising that he claimed it as mining property, and asking for certain information, and that he received a reply from said state officer stating that if the land contained valuable mineral deposits, same would be open to exploration, occupation and purchase under the mining laws of the United States by virtue of the provisions of the act of the legislature of California, approved April 1, 1897. See Statutes and Amendments of the Code of California of 1897, page 438. The applicant also submitted the affidavits of two persons, who stated in substance that affiants have known the land in question since the year 1870, and were well acquainted with same; that they personally knew of mining operations for gold being performed upon said land during the years from 1870 until 1919, and that gold was extracted therefrom during that time. Service of the amended application and additional showing appears to have been made upon the surveyor general and the register of the land office of the State of California.

It is argued upon this appeal that said State statute constitutes a waiver of the State's right to claim the benefits of the presumption that the land was nonmineral in character on June 14, 1880, when the plat of survey was accepted by the Commissioner.

Section 3 of said act provides that—

The sixteenth and thirty-sixth sections belonging to the State, in which there may be found valuable mineral deposits, are hereby declared to be free and open to exploration, occupation, and purchase of the United States, under the laws, rules, and regulations passed and prescribed by the United States for the sale of mineral lands.

It is contended that by reason of said act, applicant was induced to enter upon said property and expend money under the belief that the State waived its right to lands upon which valuable mineral deposits were found.

No valid reason is seen why the State, if it desired so to do, might not waive its claim to land within a school section upon which a mineral discovery has been made after survey and select other land in lieu thereof. See *State of California v. Deseret Water, Oil and Irrigation Company* (243 U. S., 415). But the California statute, *supra*, does not constitute a grant to the United States of such land and does not have the effect of revesting the legal title thereto in the United States in the absence of proper legislation by Congress au-

thorizing the revesting of such title. Sewell A. Knapp (47 L. D., 156).

The Department has heretofore had occasion to consider and discuss said section of the act in the case of State of California (33 L. D., 356), wherein it is said:

This would seem to be a waiver on the part of the State to such of the sections 16 and 36 in place as were shown to be mineral in character after their identification, presumably with the intention of encouraging the exploration and development of mineral lands and indemnifying itself for any loss on account thereof through selections under the act of 1891.

After full and careful consideration of the matter the Department is of opinion that under the plan of adjustment provided for in the act of February 28, 1891, it is possible for the State, if she so elects, to waive her right to portions of sections 16 and 36 in place and select other lands in lieu thereof, upon a showing of the mineral character of the lands as a present fact, without regard to their known condition at the time of their identification by the lines of the public survey.

It would therefore be necessary, in order for the Department to gain jurisdiction under his instant application, for Favot to show that the State had tendered the land involved as base for lieu selection on the ground of the present discovery of mineral, and that the lieu selection had been approved by the Department. As held in State of New Mexico (46 L. D., 217), the title to the base land tendered by the State in support of a lieu selection would not vest in the United States until approval of the selection, there being, in fact, no selection until the approval is executed on the part of the Department. It would accordingly appear that the California statute, *supra*, is of no avail to applicant in this proceeding and that the Department is without jurisdiction to hear and determine the issues presented in so far as said State statute confers jurisdiction. It appears moreover that the State has impliedly signified its unwillingness to offer the land involved as base for lieu selection as it is stated that the State has sold same, which would be a much more cogent reason why said statute confers no jurisdiction on the Department.

The supplemental showing submitted on appeal as to the known mineral character of the land at the time the approved plat of survey was filed is not deemed sufficient to warrant a hearing to be ordered. All that can be said of such showing is that casual prospecting was done on the land from time to time. A showing as to the extent to which gold was discovered thereon, when or by whom the discoveries were made, whether any claim to the land was asserted at the date when the State's right attached thereto, or the nature and extent of the mining improvements placed upon the land by the mineral claimant, is not attempted to be made. Nor is applicant claiming by reason of any discovery of mineral made

at that time or prior thereto. The record discloses moreover that no mining claims were shown to be in the section at that date, and it was not returned by the United States deputy surveyor as being mineral in character. Under a uniform line of decisions, the land together with the unknown mineral therein, passed to the State upon the approval of the survey in 1880. See *Davis's Administrator v. Weibbold* (139 U. S. 507); *Colorado Coal and Iron Company v. United States* (123 U. S., 307); *Tillian v. Keepers* (44 L. D., 460).

The decision appealed from is affirmed.

HYPOLITE FAVOT.

Motion for rehearing of departmental decision of February 17, 1921 (48 L. D., 114), denied by First Assistant Secretary Finney, July 21, 1921.

KRAUSS v. PRIBBLE.

Decided March 3, 1921.

STOCK-RAISING HOMESTEAD—ADDITIONAL—PREFERENCE RIGHT.

An entry under section 6 of the act of March 2, 1889, is to all intents and purposes an original entry within the meaning of section 4 of the stock-raising homestead act, and is a proper basis for the assertion of a preferential right under section 8 of the latter act.

VOGELSANG, First Assistant Secretary:

Nathaniel Pribble has appealed from a decision of the Commissioner of the General Land Office, dated July 19, 1920, rejecting his application, filed January 8, 1917, to make entry under the stock-raising homestead act for W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, T. 25 N., R. 61 W., 6th P. M., Cheyenne, Wyoming, land district, as additional to his entry, made May 4, 1916, for W. $\frac{1}{2}$ SE. $\frac{1}{4}$, said Sec. 7.

On January 26, 1917, Carl G. Krauss applied to make entry for said W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, and 240 acres of adjoining land contiguous to his entry under the enlarged homestead act, embracing approximately 320 acres, under which final certificate issued December 16, 1919.

In rejecting Pribble's application the Commissioner held that as the land applied for was not within 20 miles of the land embraced in the perfected Nebraska entry, the applicant was not qualified to make an additional entry under the stock-raising homestead act, and that Krauss was entitled to assert a preferential claim to the 80 acres under section 6 of the act.

Pribble's entry for W. $\frac{1}{2}$ SE. $\frac{1}{4}$, said Sec. 7, was allowed under section 6 of the act of March 2, 1889 (25 Stat., 854), and is an original entry within the meaning of section 4 of the stock-raising homestead act, requiring compliance with all the terms and conditions of the so-called three-year homestead law. He is qualified to make an additional entry under the stock-raising homestead act for 480 acres of designated land within 20 miles of the existing entry, and is entitled to assert a preferential claim to designated land contiguous thereto.

For the reasons aforesaid, the decision appealed from is reversed.

RHODES v. CONNER.

Decided April 6, 1921.

CONTEST—ENLARGED HOMESTEAD—HEIRS—MILITARY SERVICE.

The heirs of a deceased entryman under the enlarged homestead act, whose death occurs more than twelve months from the date of entry, without his having established residence, the default not being due to military or naval service, succeed to no right whatever in the land, and the question of military or naval service of the heirs of such entryman is immaterial in a contest proceeding, charging failure to establish residence and abandonment.

FINNEY, *First Assistant Secretary*:

Blake C. Rhodes has appealed from the decision of the Commissioner of the General Land Office dated August 11, 1920, affirming the action of the local officers and dismissing his contest against the homestead entry of William M. Conner, 018681, made September 3, 1915, under the act of February 19, 1909 (35 Stat., 639), for lots 7, 8, 9, Sec. 4, lots 5, 6, 7, 9, 11, 13, 20, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, containing 320.91 acres, T. 33 S., R. 49 W., 6th P. M., Lamar land district, Colorado.

On September 18, 1917, Blake C. Rhodes filed contest affidavit against said entry, which as amended September 24, 1917, charged as follows:

That said William M. Conner died in the early part of 1916; that the heirs of the said entryman have wholly abandoned said land; that *both entryman and heirs* have failed to establish residence on, improve, cultivate, or in any way assert their right to said lands since the date of entry; and *that the names and addresses of said entryman and heirs and all of them are unknown*; that said defaults have existed from date of entry and continue to this date; that said defaults are not due to any of the parties involved, nor were any of them engaged in military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged.

There appears in the record filed October 15, 1917, the affidavit of one M. D. Conner, wherein it is alleged, in substance, that affiant is well acquainted with the homestead entry of William M. Conner;

that he is a grandson of the entryman; that said entryman was about ninety-six years old at the time of his death in December, 1916; that prior to his death he had not established residence upon or cultivated any of the land; that since his death none of the heirs have resided upon or cultivated any part of the land, but have abandoned the same; that said entryman has five children, all living, or were when last heard from, one of whom is affiant's father; that affiant's father is W. W. Conner, of Leila, Missouri; that affiant does not know the names and addresses of the others but knows that they are all well along in years and that none of them are engaged in the naval or military service of the United States.

Thereafter, on November 14, 1917, Wilber W. Conner, one of the heirs of deceased entryman, duly answered denying the charges, alleging that entryman soon after making said entry was taken sick, and was not able at any time to return to his claim, his death occurring on December 16, 1916, and that his heirs did not have a reasonable time in which to make improvements before the contest was filed.

On February 26, 1918, the local officers dismissed the contest upon the ground that jurisdiction had not been acquired because of failure on the part of contestant to make service on the other heirs. The Commissioner reversed this action by letter "H" of June 10, 1918, wherein it was directed that the case be remanded and reinstated for further proceedings and contestant required to obtain jurisdiction as to the other heirs by personal service or otherwise.

It appears that service of notice by publication on the other heirs of entryman was duly made in accordance with the Rules of Practice, and that on February 14, 1919, a hearing was had before the local officers, at which time contestant appeared in person and by counsel and submitted testimony. The answering contestee, Wilber W. Conner, was represented at the hearing by his attorney, but did not testify and no testimony was submitted in behalf of any of the contestees or heirs of the deceased entryman.

The local officers dismissed the contest upon the ground that contestant failed to prove the allegation that none of the heirs of the deceased entryman were engaged in the military or naval service of the United States, and that this in itself was considered sufficient reason for dismissal. On appeal the Commissioner affirmed the action of the local officers upon the same ground, finding in substance that the burden of proof was upon contestant to show that the heirs of the deceased entryman were not engaged in the military or naval service, which he had failed to do.

Upon due and careful consideration the Department is of opinion that the question of the military or naval service of said heirs is not the material issue involved.

Section 2297 of the Revised Statutes, as amended by the act of June 6, 1912 (37 Stat., 123), provides as follows:

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.

Section 2291, Revised Statutes, as amended by the act of June 6, 1912, *supra*, requires residence and cultivation by a homestead entryman for three years following the date of filing affidavit, and the second proviso of said section is as follows:

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.

When, therefore, the death of the entryman occurs more than twelve months from the date of entry, without his having established residence upon the land, there is such a default that the heirs succeed to no right whatever in the land, and the military or naval service of the heirs of the deceased entryman is not a material question.

In the case at bar, the entryman had six months in which to establish residence, and if by reason of sickness, or other unavoidable cause, he was unable to do so, the Commissioner of the General Land Office in his discretion, could have allowed him a further period of six months in which to commence residence, but, as stated, a year and three months elapsed before the death of William M. Conner without residence having been established.

It follows, therefore, that as the heirs of the deceased entryman succeeded to no right, their military or naval service, as stated, is immaterial. It was not only alleged but clearly proven that the entryman's default was not due to military or naval service.

Accordingly, the decision appealed from is hereby reversed and the entry will be canceled upon this decision becoming final.

RHODES v. CONNER.

Motion for rehearing of departmental decision of April 6, 1921 (48 L. D., 119), denied by First Assistant Secretary Finney, June 6, 1921.

ARTHUR J. MAYS ET AL.

Decided April 9, 1921.

COAL LANDS—PREFERENCE RIGHT—ACT OF FEBRUARY 25, 1920.

The provisions of the act of February 25, 1920, which authorize the Secretary of the Interior, when awarding leases for coal lands thereunder, to recognize equitable rights acquired prior to the act by claimants who had in good faith improved and occupied or claimed the lands under the coal land laws, do not confer any preference right that attaches to or extends over an area outside of the tracts embraced within the original claims.

COAL LANDS—PREFERENCE RIGHT—MILITARY SERVICE.

The act of February 25, 1920, does not award any preference right for military or naval service and preferential consideration can not be given to applicants, as ex-service men with honorable discharges, in the granting of coal land leases thereunder.

FINNEY, *First Assistant Secretary*:

On March 3, 1921, the Commissioner of the General Land Office submitted the record without favorable recommendation pertaining to the petition (serial 025432) of Arthur J. Mays *et al.*, filed on October 12, 1920, for the establishment of a leasing block and the award of a coal lease embracing the E. $\frac{1}{2}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, Sec. 13, E. $\frac{1}{2}$ E. $\frac{1}{2}$, Sec. 24, T. 16 S., R. 7 E., and Sec. 7, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8, and Sec. 18, T. 16 S., R. 8 E., S. L. M., Salt Lake City, Utah, land district.

When the above application was filed conflicting coal filings existed upon the land as follows:

C. D. S.	Claimant.	Land.	Possession.	Expenditure.
025022, Oct. 28, 1919..	Harold R. Mays...	E. $\frac{1}{2}$ E. $\frac{1}{2}$, Sec. 24.....	Oct. 26, 1919	\$25—"old opening cleared of debris and exposed vein of coal to surface."
025023, Oct. 28, 1919..	Leland W. Mays..	SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 13.	Oct. 26, 1919	\$25—"outer debris cleared away and vein exposed to plain sight."
025222, Dec. 22, 1919..	Arthur J. Mays...	SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 13.	Oct. 26, 1919	\$25—"full face of a nine-foot vein exposed showing good grade of coal."
Application to purchase.	Claimant.	Land.	Disposition.	
025241, Jan. 2, 1920.....	Harry L. Gandy..	SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7.	Rejected upon relinquishment filed January 15, 1921.	
025242, Jan. 2, 1920.....	Royal C. Johnson.	SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 7.	Rejected upon relinquishment filed January 15, 1921.	

In their petition the three coal declarants individually offered to waive and release all rights under their filings on the understanding that their equities would be recognized. The applicant, Newman, had no coal filing upon the land. It is averred that a valuable mine of coal had been opened upon each of the tracts upon which the coal declaratory statements had been filed and that considerable time and money had been spent in the development of coal. The applicants averred that they were all ex-service men, having been honorably discharged from the United States military or naval forces upon the conclusion of the war with Germany. The statement is made that the lands applied for should and can be most economically mined from the approaches on the land covered by the coal filings. The contemplated investment is stated to be \$100,000 for the development and equipment of a mine having a daily output of 500 tons or more. The applicants are willing to pay a maximum royalty of ten cents per ton. The applicants state that in the absence of any better bid for lease, they would, within 30 days from the auction, execute a lease for the land.

On December 1, 1920, Arthur J. Mays, on behalf of the association, filed a showing with respect to the claim of the coal declarants in regard to equitable rights and asked that such rights be recognized and that the association be granted a lease upon terms to be mutually agreed upon without competitive bidding or public auction of the land. On February 16, 1921, the Director of the Geological Survey reported that upon the area sought (2494.40 acres), there were at least four workable beds of coal $6\frac{1}{2}$, 7, 12, and $4\frac{1}{2}$ feet thick exposed. It was stated that the block doubtless contained 60,000,000 to 100,000,000 tons of extractable high grade coal sufficient for an output of 1,000,000 tons per year for sixty to one hundred years, and that if two mines of such capacity were installed, the tonnage available would last from thirty to fifty years or more. The Director was of opinion that a much larger initial outlay than \$100,000 was called for in order to develop the property. He also recommended that a royalty rate be fixed at ten cents per ton of 2000 pounds run of mine, which was the rate according with State practice.

With the record is found a report dated January 31, 1921, from the Acting Forester, the lands being within the Manti National Forest. That report indicated that the Forest Service had no objection to the segregating into a leasing unit of the land applied for and called attention to the fact that portions of sections 7 and 12 had been selected by the State and such selections were approved June 24, 1912. The Forest Service recommended that certain specific stipulations formulated in the letter be inserted in the lease.

On February 26, 1921, the applicant, Arthur J. Mays, by wire, advised the Commissioner to the effect that the contemplated expenditure and production mentioned in the original application were given purely as a minimum; that preliminary investigation had disclosed that complete equipment of mine, tram, tipple and yards would cost approximately \$500,000 and railroad development would cost \$1,000,000.

The Commissioner in his letter submitting this matter states that he is unable to see his way clear under the law to recommend a preference right lease. He believed that the land should be put into a leasing block and offered to the highest bidder.

This case presents an important question as to the nature and extent of the recognition to be given to equitable rights in connection with coal leases. Section 2 of the leasing act of February 25, 1920 (41 Stat., 437), provides that the Secretary is authorized in awarding leases for coal lands theretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights in such occupants or claimants. Paragraph 4 of the regulations approved April 1, 1920 (47 L. D., 489, 490), states that equitable rights of such claimants may be recognized in awarding leases and in such cases the rents and royalties not less than the minimum provided for leases under the act will be fixed by the Secretary. Section 37 of the act prescribes that valid claims existent at the date of the passage of the law and thereafter maintained may be perfected.

While the expenditures of the coal declarants shown by the record are not extensive, the Department has reached the conclusion that they possess equitable rights which are entitled to recognition. The Department, however, is clearly of the opinion that this preference right can not attach to or be extended over an area outside of the tracts embraced in the original claims under the coal land laws. In other words, the preference right of the three coal declarants here involved, which covered 480 acres, can not be expanded so as to cover approximately the 2500 acres upon which the lease is sought.

The suggestion that the applicants, as ex-service men with honorable discharges, are entitled to preferential consideration can not be given effect. There is no authority in the leasing act for awarding any preference for military or naval service.

The Department concludes that a preference right for a lease upon 480 acres, being the land covered by the coal declaratory statements, above mentioned, should be recognized and if desired, the applicants may take a lease under their equitable claim for such tract. That area will not be offered at the auction for competitive bidding. The remainder of the land will be put up and auctioned in the usual manner. The two areas will be distinctly described in the notice

issued and the notice will state that the preference right area is not offered for competitive bidding.

If the applicants are successful bidders at the auction, one lease will be awarded to them for the entire block and the minimum investment required in connection with the lease will be \$250,000, and the royalty is hereby fixed at ten cents per ton run of the mine.

If the applicants are not successful bidders, two leases may be awarded, each on such proper terms and conditions and to such parties as the premises may warrant.

Any leases executed will contain proper stipulations for the protection of the timber and the national forest interests, with proper regulation governing timber cutting, along the line suggested by the Acting Forester.

The record is returned to the Commissioner of the General Land Office for further proceedings in harmony with the views herein set forth.

WALTER C. GATTON.

Decided April 23, 1921.

MILITARY SERVICE—STOCK-RAISING HOMESTEAD—RESIDENCE.

In fulfilling the one year minimum residence requirement under the act of July 28, 1917, a soldier is entitled to the same absence privilege as is enjoyed by other entrymen under the general homestead laws, and the period of absence from a stock-raising homestead entry under authority of the so-called drought act of July 24, 1919, may be credited in making up the aggregate of one year required by law.

FINNEY, *First Assistant Secretary:*

On October 10, 1918, at the Buffalo, Wyoming, land office, Walter C. Gatton made entry under the stock-raising homestead act for all of Sec. 30, T. 57 N., R. 77 W., 6th P. M. (622.40 acres). Final proof was submitted July 19, 1920, from which it appears that residence was established June 15, 1919; that entryman was absent under a leave of absence under the so-called drought act of July 24, 1919 (41 Stat., 234, 271), from August 11, 1919, until December 31, 1919; and that he was thereafter absent for five months under the privilege granted by the first proviso to section 2291, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat., 123). The improvements are valued at over \$1,000.

According to a report by the War Department, Gatton served in the military service for more than two years during the world war and the operations along the Mexican boundary.

By decision dated January 31, 1921, the Commissioner of the General Land Office affirmed the action of the local officers in rejecting the final proof for insufficient residence. Said decision also held that the proof was defective in that it failed to show that the land

had been used for raising stock and forage crops. Entryman has appealed.

Under the act of July 28, 1917 (40 Stat., 248), the time required to perfect the entry was reduced to the extent of two years. Said act provides:

That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

The drought act, *supra*, provides as follows:

That any homestead settler or entryman who, during the calendar year 1919, finds it necessary to leave his homestead to seek employment in order to obtain food and other necessaries of life for himself, family, and work stock, because of great and serious drought conditions, causing total or partial failures of crops, may, upon filing with the register and receiver proof of such conditions in the form of a corroborated affidavit, be excused from residence upon his homestead during all or part of the calendar year 1919, or the current year of such homestead which may fall principally in the year 1919, and in the making of final proof upon such an entry absence granted under this Act shall be counted and construed as constructive residence by said homesteader.

Under the act quoted, entryman is entitled to credit for residence during the period from August 11 to December 31, 1919. This period, added to the time he actually resided on the land and the five months he was allowed to be absent, aggregates one year, and the proviso to the act of July 28, 1917, *supra*, is satisfied.

The Department has uniformly held, since the enactment of the so-called three-year homestead law, that in each year of residence required of a soldier he is entitled to the same absence privilege as is enjoyed by other homesteaders. The act of July 28, 1917, *supra*, being a relief act, should be liberally construed; no reason appears why Gatton should not be given the full measure of relief therein provided.

The decision appealed from is modified to agree with the foregoing. The final proof will be accepted if entryman, within a reasonable time, supplements it by a showing that he has actually used the land for raising stock and forage crops.

ANNA M. BAXTER (ON PETITION).

Decided May 19, 1921.

HOMESTEAD ENTRY—OIL AND GAS LANDS—WITHDRAWAL—FINAL PROOF—PATENT.

Section 2 of the act of June 25, 1910, expressly excepting homestead entries from the effects of a subsequent withdrawal, intends that such entries may be perfected only on condition that the lands are nonmineral and subject to disposition under the agricultural land laws, and a petroleum withdrawal made prior to submission of final proof impresses the land with a *prima facie* mineral character which makes it incumbent upon the claimant either to prove that it is of the character subject to his claim, or to accept a restricted patent under the act of July 17, 1914.

FINNEY, *First Assistant Secretary*:

This is the second petition filed by Anna M. Baxter for exercise of the supervisory authority of the Secretary in the matter of her homestead entry, the Department having heretofore, under date of May 5, 1920, denied a petition for the issuance of an unrestricted patent. The history of prior proceedings is fully set out in that decision and will not be repeated. The salient facts, however, are that the petitioner made homestead entry January 31, 1910. The land involved was included in Petroleum Reserve No. 18, by Executive order of January 26, 1911, under the act of June 25, 1910 (36 Stat., 847).

Final proof was submitted December 9, 1913, and final certificate issued March 27, 1915, without reservation of minerals as required and demanded by the act of July 17, 1914 (38 Stat., 509). Thereafter, under date of June 24, 1915, the Commissioner of the General Land Office held that an unrestricted patent could not issue to the claimant unless it should be satisfactorily shown that the land is non-oil and nongas in character, and the claimant was accordingly required to consent to the issuance of such limited patent or, in the alternative, to file application to have the land classified as non-mineral in character, and, in the event the alternative course was adopted and the Commissioner found it inadvisable upon the record showing to comply therewith, the claimant was to be awarded the privilege of a hearing and given an opportunity to overcome the presumption arising by virtue of the withdrawal.

Upon this petition the contention is made that the entry was absolutely excepted from the withdrawal of 1911 by the express terms of the act of June 25, 1910, *supra*, and that that withdrawal therefore gave rise to no presumption as to the mineral character of the land; furthermore, that the claimant obtained a vested right in the said land by virtue of her proof submitted December 9, 1913, of completed compliance with the provisions of the homestead law, and that her right to have unrestricted patent was not in any manner affected or impaired by the act of July 17, 1914 (38 Stat., 509), entitled, "An act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals."

The first contention above enumerated will readily be conceded, but this gives no support for the conclusion or further contention by counsel for the petitioner that the lands were consequently unimpressed with a mineral character; that a vested right was acquired by virtue of the submission and acceptance of proof of completed compliance with the homestead law, and that the provisions of the act of July 17, 1914, *supra*, were, under the circumstances, inoperative.

The act of 1910, *supra*, provides that the President may, at any time, in his discretion, temporarily withdraw from settlement, location, sale or entry, any of the public lands of the United States and reserve the same for water power sites, irrigation, classification, or other public purposes. Section 2 contains a provision to the effect that there shall be excepted from the force and effect of any withdrawal all lands which are, on the date of withdrawal, embraced in any lawful homestead or desert land entry theretofore made.

This is merely a declaration that any person having a nonmineral entry within a withdrawn area may receive patent upon satisfactory proof of full compliance with the provisions of law under which the entry was made, notwithstanding the withdrawal or reservation, providing, of course, the lands are nonmineral in character and such as may be disposed of under the agricultural land laws. The fact that entered lands are excepted from the force and effect of a withdrawal to the extent that the claim may be carried to patent, does not dispel, relieve or lessen any presumption that may have arisen as to their mineral character or their value for deposits of oil. Whatever presumption that may be raised by a withdrawal as to the character of unentered public lands exists and obtains with equal force to entered lands of like situation.

Inasmuch, therefore, as these lands were embraced in a petroleum withdrawal in 1911, prior to the submission of final proof, they were impressed with a *prima facie* mineral character and it is incumbent upon the claimant to show that the land is of the character subject to her claim. See instructions of March 20, 1915 (44 L. D., 32, 37); State of Louisiana *et al.* (47 L. D., 366).

It is manifest, moreover, that the entry was not confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095, 1099), because if for no other reason the Commissioner of the General Land Office, in behalf of the Government, within the two-year period limited by the act, required something to be done by the claimant to duly complete and perfect her entry. See case of Jacob A. Harris (42 L. D., 611), and instructions of April 25, 1914 (43 L. D., 294).

The petition and request for unrestricted patent must, therefore, be denied.

CLAYTON PHEBUS.

Decided May 19, 1921.

SURVEY—NONNAVIGABLE LAKE—RIPARIAN RIGHTS.

When the meander line and the water line of a lake do not coincide, the water line is the boundary of a Government grant of lands abutting thereupon, and in a State in which the statutes contain no specific provision as to

riparian rights with reference to a nonnavigable lake, but in which the common law prevails, the title to the bed of such lake is vested in the owners of the adjoining shore lands.

OIL AND GAS LANDS—PROSPECTING PERMIT—SURVEY—NONNAVIGABLE LAKE.

Ownership by the Government of lands abutting upon a meandered non-navigable lake carries with it the same rights with respect to the adjacent submerged land that private ownership does, and where the title to such land is vested in the United States, an oil prospecting permit granted under the act of February 25, 1920, embracing the Government-owned shore lands includes the right to prospect the submerged lands.

PROSPECTING PERMIT—ACT OF FEBRUARY 25, 1920—NONNAVIGABLE LAKE.

Lands beneath the waters of a nonnavigable lake which is surrounded by tracts that have been patented by the Government or are embraced within existing claims or pending applications are not subject, apart from the abutting uplands, to the oil prospecting permit or lease provisions of the act of February 25, 1920.

FINNEY, *First Assistant Secretary:*

August 16, 1920, Clayton Phebus filed application 029489, under section 13 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon, together with other lands, certain areas described as all of Sec. 2, except lots 1, 2, and 3; all of Sec. 11, except lots 1, 2, 3 and 4; all of the SE. $\frac{1}{4}$, Sec. 3, not included in lots 5 and 6, T. 17 N., R. 76 W., 6th P. M., Cheyenne land district, Wyoming.

The described areas, it appears, are covered by what is shown on the plat of survey of the township as James Lake, a meandered body of water approximately 2 miles in length from north to south, and from $\frac{1}{2}$ to $1\frac{1}{2}$ miles in width. It covers 557.54 acres of Sec. 2, 59.24 acres of Sec. 3, and 535.03 acres of Sec. 11, together with 64.57 acres of Sec. 1, and 7.30 acres of Sec. 12.

The Commissioner of the General Land Office by decision of November 5, 1920, rejected the application as to said lands on the ground that, being within the meandered boundaries of a lake, they are not subject to disposition as public lands of the United States. Appeal from that action brings the case before the Department.

It is contended by appellant that inasmuch as the precise acreage of the fractional subdivisions surrounding and abutting upon the lake are noted on the plat, the meander lines should be regarded as the lakeward boundaries of said subdivisions and for that reason should be held as excluding the proprietors of said subdivisions from any riparian rights which they otherwise might have with respect to such subdivisions. This contention is not sound. As was said by the Supreme Court in *Hardin v. Jordan* (140 U. S., 371, 380);—

It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or

other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary.

See also *Lee Wilson and Company v. United States* (245 U. S., 24), and cases there cited.

The water line of James Lake, therefore, and not the meander line must be held to be the boundary line of the lands surrounding and abutting upon the lake.

It is also urged by appellant that the lake being nonnavigable and the State having enacted no specific legislation relating to riparian rights, the doctrine of riparian rights does not apply to lands abutting upon the lake.

While it is true that no specific provision is found in the laws of Wyoming in regard to rights of riparian owners to the beds of streams, lakes or other bodies of water upon which their lands abut, the common law of England, which embraces the doctrine of riparian rights, has been adopted by the State so far as the same is of a general nature and not inapplicable nor inconsistent with the laws of the State, which law, it is declared, shall be considered as of full force until repealed by legislative authority. Wyoming Compiled Statutes 1910, section 3588; *Hovey v. Sheffner* (Supreme Court of Wyoming, 93 Pac., 305). The only repeal or modification of the common law of riparian rights which has been made by the State has reference solely to the appropriation and use of waters within the State. The common law rule as to the rights of riparian proprietors with respect to the beds of streams, lakes and other bodies of water, is, therefore, in full force in that State.

At common law the question as to what would pass by a grant bounded by a stream of water is held by the Supreme Court of Illinois in *Middleton v. Pritchard* (3 Scam., 510), to depend upon the character of the stream or water. It is there said:

At common law, this depended upon the character of the stream or water. If it were a navigable stream, or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the centre thread of the current.

Citing said decision with approval and defining the common law rule therein stated as applied to lakes and ponds the Supreme Court in *Hardin v. Jordan*, *supra*, at page 391, said:

When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it. Hence the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water.

Besides, a lake or pond, like a river, is a concrete object, a unit, and when named as a boundary, the natural inference is that the middle line of it is intended, that is, the line equidistant from the land on either side.

There is no doubt, therefore, that the title to the bed of James Lake is in the owners of the land abutting upon that body of water.

An examination of the records of the General Land Office shows that all of the lands in Secs. 1, 3, and 11, T. 17 N., R. 76 W., and Sec. 35, T. 18 N., R. 76 W., abutting on the lake were patented in 1895, to the Central Pacific Railroad Company. It is true, as stated in the appeal, that the patents covering said lands recite exclusions and exceptions therefrom of all mineral lands other than those valuable only on account of coal and iron, but as has been held by the Supreme Court of the United States in *Burke v. Southern Pacific Railroad Company* (234 U. S., 669), such mineral land exceptions and exclusions recited in railroad patents are unauthorized, void and of no effect, and that patents so issued carry the entire title to lands described therein subject only to the right of the Government to attack such patents by direct suit for their annulment as to lands known to have been mineral when the patents were issued.

The Union Pacific Railroad Company, therefore, is the absolute owner of all the lands abutting upon the lake so patented to it, with all the rights of a riparian proprietor as to the adjacent submerged lands extending to the center of the lake.

It further appears that lot 1, Sec. 2, and lot 2, Sec. 10, T. 17 N., R. 76 W., abutting upon the lake, have long since been patented to private individuals without reservations of oil and gas deposits, and the ordinary rights arising by virtue of riparian ownership are in the holders of the title to said lands as to the submerged areas opposite the same.

The remaining lands abutting upon the lake consist of lots 2 and 3, Sec. 2, lots 1, 2, and 3, Sec. 12, and approximately the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 14, of the township and range last above mentioned. The said lots in Sec. 12, are covered by a stock-raising homestead entry made with a reservation of all mineral deposits, and by the prospecting permit application 029293 of Gus Becher, the superior rights under which have been adjudicated by the Commissioner to be in Becher as against the appellant Phebus, under his conflicting application covering said lots. Lots 2 and 3, Sec. 2, are covered by the permit application 030205, of Charles Woodhouse, while all of Sec. 14, is embraced in the prospecting permit of Phebus. The legal title to said subdivisions and the oil and gas deposits contained therein is, therefore, still in the United States.

Ownership by the Government of lands abutting upon a meandered nonnavigable body of water carries with it the same rights with respect to the submerged land opposite thereto that private owner-

ship does, and such rights pass by permit or lease of the Government-owned uplands as well as by patent to such lands. A prospecting permit or permit application, therefore, covering land abutting upon a meandered nonnavigable body of water embraces the adjacent submerged area, as well as the upland.

The lake being thus completely surrounded by tracts covered by patents and a prospecting permit or applications therefor which attach to the entire bed of the lake, the Department would clearly in no event be warranted in granting a permit for any portion of the lake bed as such.

The decision appealed from is accordingly affirmed, the case closed and the record returned to the General Land Office.

F. A. HYDE AND COMPANY (ON PETITION).¹

Decided May 20, 1921.

SCHOOL LAND—SURVEY—COMMISSIONER OF THE GENERAL LAND OFFICE.

The grant of sections 16 and 36 to the State of Washington for school purposes does not attach until the survey thereof has been approved by the Commissioner of the General Land Office.

FOREST LIEU SELECTION—SCHOOL LAND—ACT OF JUNE 4, 1897.

A valid selection under the act of June 4, 1897, of unsurveyed lands, is not defeated by reason of their subsequent survey as a part of a section granted to the State of Washington for the support of public schools.

FOREST LIEU SELECTION—WITHDRAWALS—NATIONAL FORESTS.

A selection under the exchange provisions of the act of June 4, 1897, which was valid when made by reason of the selector having complied with all of the departmental regulations in connection therewith, is not affected by the subsequent inclusion of the selected land in a national forest.

FINNEY, *First Assistant Secretary*:

The beneficial owner has filed a second petition for the exercise of supervisory authority in the matter of a selection under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), involving E. $\frac{1}{2}$ and NW. $\frac{1}{4}$, Sec. 16, T. 11 N., R. 5 E., W. M., Washington, the history of which follows.

The selection was made by F. A. Hyde and Company, by Angus McDougall, attorney in fact, on August 8, 1900, the land then being unsurveyed, in lieu of the E. $\frac{1}{2}$ and NW. $\frac{1}{4}$, Sec. 16, T. 5 N., R. 22 E., M. D. M., California, within what was then known as the Stanislaus Forest Reserve, now the Mono National Forest.

By decision of July 2, 1902, the Commissioner of the General Land Office held the selection for cancellation, assigning as the reason "that the title to the land selected is in the State of Washington,

¹ See decision on petition, page 134.

being school lands, and is not, therefore, subject to selection." The selector did not appeal, and the selection was canceled March 30, 1903. The deed and the abstract of title to the base land were returned to the resident attorneys for the selector, at their request, on April 25, 1903.

On August 12, 1918, said attorneys applied to the Commissioner of the General Land Office for authority to file a new selection in lieu of the base lands, under the act of March 3, 1905 (33 Stat., 1264). The Commissioner on November 2, 1918, rejected the application, and on appeal that action was affirmed by the Department in its decision of April 11, 1919. A petition for the exercise of supervisory authority was denied by decision of October 7, 1920.

The selected lands were temporarily withdrawn from settlement or other appropriation by the Secretary's order of December 18, 1902. By proclamation of March 2, 1907, they were placed within the exterior limits of the Mount Rainier National Forest, where they now remain. The plat of survey was approved August 13, 1907, and was filed in the local office September 22, 1908.

It is contended in the petition under consideration that the selection was erroneously canceled, and that the selector is entitled to a further selection under the repealing act of March 3, 1905, *supra*.

The Supreme Court of the State of Washington in its decision of March 24, 1920, in *Thompson v. Savidge* (188 Pac., 397), held that in the light of the decision of the Supreme Court of the United States in *Heydenfeldt v. Daney Gold and Silver Mining Company* (93 U. S., 634), as interpreted in *United States v. Morrison* (240 U. S., 192)—

* * * we cannot escape the conclusion that the decision of this court in *State v. Whitney*, holding that our school land grant was one *in praesenti* of unsurveyed as well as surveyed sections, completely vesting title in all of said sections at the time of the grant, must now be regarded as erroneous, and no longer controlling upon that Federal question.

In *United States v. Morrison*, *supra*, the court held that nothing in the act of February 14, 1859 (11 Stat., 383), for the admission of Oregon into the Union, or in section 2275, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), operated to pass title to the State of Oregon of sections 16 and 36 at any intermediate stage of the survey; further, that a survey is incomplete until formally approved by the Commissioner, and even though approved without modification it does not so relate back to the date of the grant or of the field survey as to destroy the power of Congress to dispose of the land while unsurveyed.

After mature consideration, the Department is of opinion that inasmuch as the survey of the selected lands was not approved until

August 13, 1907, the cancellation of the selection on March 30, 1903, for the reason stated by the Commissioner, was erroneous, and in legal contemplation the selection was never canceled. The subsequent inclusion of the selected land in a national forest did not affect the selection, which was valid when made, the selector having complied with all the departmental regulations in connection therewith. Administrative Order of April 23, 1921 (48 L. D., 97).

The petitioner does not ask that the selection be reinstated, but that he be granted the right of reselection under the repealing act of 1905. In view of the forest withdrawal, the Department will not insist that he take the selected lands, but will treat the selection as canceled without fault of the selector, leaving him qualified to make a new selection.

The departmental decisions of April 11, 1919, and October 7, 1920, are recalled and vacated, and the Commissioner's decision of November 2, 1918, is reversed.

F. A. HYDE AND COMPANY (ON PETITION).

Decided August 17, 1921.

FINNEY, *First Assistant Secretary*:

By decision of May 20, 1921 (48 L. D., 132), the Department held that a selection under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), made by F. A. Hyde and Company, August 6, 1900, for E. $\frac{1}{2}$ and NW. $\frac{1}{4}$ Sec. 16, T. 11 N., R. 5 E., W. M., Washington, had been erroneously canceled March 30, 1903, and that the selector was entitled to make a new selection under the act of March 3, 1905 (33 Stat., 1264).

Said decision stated that:

The petitioner does not ask that the selection be reinstated, but that he be granted the right of reselection under the repealing act of 1905.

The beneficial owner of the right has filed a petition for reconsideration, praying that the selection be fully restored to its status as though no order of cancellation had been made, and that the same be passed to patent. To this end, the deed, abstract of title, and powers under which the selection was filed, and which were returned after the order of cancellation, have been refiled.

Inasmuch, as held by the Department in the decision of May 20, 1921, *supra*, the selection, in legal contemplation, was never canceled, the selector is within his rights in demanding the issuance of a patent.

Accordingly, in the absence of objection not now appearing, patent will issue in due course.

STRATTON v. LUSE.

Decided May 20, 1921.

DESERT LAND ENTRY—ENLARGED HOMESTEAD—ACT OF FEBRUARY 27, 1917.

The act of February 27, 1917, validates a desert land entry for 160 acres made prior thereto by one, who at the time was holding an entry for 320 acres under the enlarged homestead act, where no attempt was made to conceal the existence of the previous entry.

DESERT LAND ENTRY—ACT OF MARCH 4, 1915.

In the construction of section 5 of the act of March 4, 1915, the good faith of a desert land entryman will not be held to have been negated by the fact that but a small portion of the land is practically susceptible of irrigation and that he has used, and apparently intended to use the land for grazing purposes in connection with his homestead entry for an adjoining tract.

FINNEY, *First Assistant Secretary:*

On April 5, 1913, at the Havre, Montana, land office, Benjamin W. Luse made desert-land entry for E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 10, T. 35 N., R. 21 E., M. M. (160 acres). In his application he disclosed the fact that he was holding an entry under the enlarged homestead act for 320 acres, the land being described. Three annual proofs were thereafter filed, and on March 17, 1917, entryman applied for relief under paragraph 3, section 5, of the act of March 4, 1915 (38 Stat., 1138, 1161). By order entered June 13, 1917, the Commissioner of the General Land Office granted the application for relief, and on November 24, 1917, entryman elected to perfect the entry by purchase, and made the required payment.

A contest was initiated against the entry on March 31, 1919, by Earl W. Stratton, who charged (1) that entryman was not a qualified entryman at date of entry, for the reason that he had an existing homestead entry for 320 acres; (2) that the land is not desert in character, there being a spring on the land; and (3) that the entryman had not expended as much as \$3 per acre in improvements and reclamation of the land. A hearing was had on June 26, 1919, before the local officers, who by decision of January 26, 1920, recommended the cancellation of the entry. On appeal, the Commissioner of the General Land Office, by decision dated November 20, 1920, affirmed the decision of the local officers. An appeal to the Department has been filed.

As entryman did not attempt to conceal the fact that he was holding an entry for 320 acres under the enlarged homestead act at the date he applied to make the entry in question, it is apparent that he acted under the belief that he was qualified to make the entry here involved. Accordingly, it must be held that his entry

was validated by the act of February 27, 1917 (39 Stat., 946), which provides:

That the right to make a desert-land entry shall not be denied to any applicant therefor who has already made an enlarged homestead entry of three hundred and twenty acres: *Provided*, That said applicant is a duly qualified entryman and the whole area to be acquired as an enlarged homestead entry and under the provisions of this act does not exceed four hundred and eighty acres.

The testimony shows the land to be very rough and that there is but a small portion which could be irrigated if there was a sufficient water supply. However, the Department held by decision of August 3, 1915 (unreported), in *Curran v. Baque*, involving the construction of the act of March 4, 1915, *supra*, that an entryman's good faith is not negatived by the facts that but a small portion of the land is practically susceptible of irrigation and that the entryman has used, and apparently intended to use, the land for grazing purposes in connection with his homestead entry for an adjoining tract. The rule laid down in the decision cited has been followed consistently by the Department.

The relief act of 1915 was enacted for the benefit of a large number of persons who had been allowed to make desert-land entries for land which was not susceptible of irrigation, and for the allowance of which the Department was primarily responsible; and with knowledge of the conditions which Congress intended to relieve, the Department has uniformly granted relief in the face of a showing that the land could not be irrigated even if water were available.

Thus the only question to be determined is whether, prior to the granting of relief, \$3 per acre had been expended on the land in an attempt to effect reclamation. The local officers in their decision noted that there was a sharp conflict and wide divergence in the testimony offered by the two groups of witnesses. According to the testimony of contestant and his two witnesses, the total expenditure was not in excess of \$220, but the entryman and his son and the other witness called by entryman fixed the cost of the improvements at a much higher figure. The local officers gave the "lack of uniformity and the extravagance in the statements" made by the entryman and his witnesses as their reason for discrediting the statements of the cost of the improvements. But when there is taken into consideration the facts that the dam in a coulee had been washed away by a flood, and that the contestant and his witnesses were not shown to be qualified to testify as to the probable cost thereof, no reason is apparent why the testimony of the persons who constructed the dam should not be accepted.

The Department is unable to hold that the contestant proved, by a preponderance of the testimony, that \$3 per acre had not been

expended by entryman in an effort to reclaim the land. It follows that the contest must be dismissed.

For the reasons aforesaid, the decision appealed from is reversed.

BLAKEMAN v. ELKINS.

Decided May 27, 1921.

STOCK-RAISING HOMESTEAD—RELINQUISHMENT—PREFERENCE RIGHT.

A preference right based upon an application to enter, and petition for designation filed under the stock-raising homestead act is forfeited upon the execution of a relinquishment prior to designation of the land, and said right will not inure to the benefit of one procuring such relinquishment as against a claimant, asserting a preference right as the holder of adjacent land, who had his application of record prior to designation.

FINNEY, *First Assistant Secretary*:

On January 4, 1917, Jose Bedolla filed stock-raising homestead application 029960, Pueblo, Colorado, land district, for, as amended January 12, 1918, lots 3 and 4, Sec. 1, lots 1, 2, 3, and 4, S. $\frac{1}{2}$ N. $\frac{1}{2}$, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 2, T. 26 S., R. 61 W., 6th P. M., containing 613.50 acres, accompanied by a petition for designation.

On March 25, 1918, Robert Lee Elkins made homestead entry 036045, for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, T. 25 S., R. 61 W., and on August 17, 1918, he filed stock-raising homestead application 037266, for lots 2, 3, and 4, S. $\frac{1}{2}$ N. $\frac{1}{2}$, Sec. 2, T. 26 S., R. 61 W., claiming a preference right, the land being contiguous to that of his original entry. The tracts embraced part of the land applied for by Bedolla.

The land was designated as stock-raising land and on November 2, 1918, Bedolla's entry was allowed. On August 29, 1919, his relinquishment was filed and on the same day Iva E. F. Blakeman filed stock-raising application 039772, which was allowed January 13, 1920.

On March 25, 1920, the register and receiver rejected Elkins's application finding that on the date of filing, his application was subject to rejection for conflict with Bedolla's application 029960, under paragraph 13 (h), Circular No. 523 (47 L. D., 227, 237). On April 16, 1920, Elkins filed an appeal showing service on Blakeman who replied. The Commissioner of the General Land Office by decision of November 16, 1920, affirmed the rejection of Elkins's application. He has appealed.

Elkins's application was not rejected until March 25, 1920, after Bedolla had relinquished his entry and the land had been entered by Blakeman. The rejection was considerably delayed. It should have been rejected, if at all, immediately after Bedolla's entry was allowed.

Elkins's rights are to be adjudicated as of the date he filed. His rights were in conflict with Bedolla's, and if Bedolla's entry was properly allowed Elkins's right in the land ceased and his application was properly rejected. It does not appear that Elkins was ever advised that this application was suspended and held subject to Bedolla's, or that Bedolla's entry was allowed and his rejected, until March 25, 1920, at which time Bedolla had relinquished and the land had been entered by Blakeman. Elkins contends that if he had had notice of the allowance of Bedolla's entry and the rejection of his own application at the time, he could have shown that Bedolla's application should not have been allowed.

An examination of Bedolla's relinquishment discloses that it is dated August 9, 1918, and that it was filed August 29, 1919. Several erasures and changes appear on the relinquishment and it appears to have been written on three different typewriters. The relinquishment is dated prior to Elkins's application. Elkins was asserting a preference right as the holder of adjacent land, which was superior to the claim of all other persons except that of Bedolla; but the latter appears to have disposed of his preference right prior to the designation of the land. If this be true, Elkins's application should have been allowed and that of Bedolla rejected, as would have been done had the facts been known. Blakeman can not stand in a better position than Bedolla, charged as she is with knowledge of the matters appearing of record in the case.

The decisions relating to relinquishments of entries have no application to unallowed and unallowable homestead applications or preference rights, which may be waived, lost or forfeited by formal relinquishment, by failure to assert the right or by conduct inconsistent with good faith; and when such an application or preference right is, in fact, waived, lost or forfeited, it inures to the benefit of the next legal applicant, since a homestead application or a preference right does not segregate the land from the public domain.

Blakeman will be allowed thirty days from notice within which to show cause why her entry should not be canceled and the application of Elkins allowed; and the record is remanded for appropriate action by the General Land Office.

STATE OF COLORADO.

Decided May 27, 1921.

SCHOOL LAND—INDEMNITY—SECTIONS 2275 AND 2276, REVISED STATUTES.

A State is not entitled under sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891, which authorize selections to compensate deficiencies in school sections, to select indemnity for an alleged loss or deficiency of school lands in a fractional unsurveyed township.

SCHOOL LANDS—INDEMNITY—RESERVATION—SURVEY.

In the adjustment of the school land grants of the several States, the provision of section 2275, Revised Statutes, as amended, which imposes the duty upon the Secretary of the Interior to ascertain by protraction or otherwise, without awaiting the extension of the public surveys, the number of townships that will be included within an Indian, military, or other reservation in order that indemnity may be allowed for the specified school sections embraced therein, does not confer any authority to make protractions for the purpose of determining an alleged loss of school lands in an unsurveyed township situated within the unreserved and unappropriated public domain.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

Case of *California v. Wright* (24 L. D., 54), cited and followed.

FINNEY, *First Assistant Secretary*:

This is an appeal by the State of Colorado from a decision of the Commissioner of the General Land Office dated November 24, 1920, holding for cancellation certain of its school land indemnity selections because of defective or invalid base. The sole question raised on this appeal is whether the State is entitled to select indemnity for an alleged loss or deficiency of school lands in a fractional unsurveyed township.

The decision of the Commissioner proceeds upon the theory and properly, that the right to make indemnity selections for a fractional deficiency rests upon the ascertainment of a definite loss in the school sections in place and that until the Government surveys are extended over the public lands it can not be properly determined that the sections specified in the granting act are wanting or are deficient in quantity.

This is manifestly correct. In the case of the State of California *v. Wright* (24 L. D., 54), the identical question was considered and answered by the Department in the negative and further consideration discloses no sufficient reason for a modification of the conclusion there reached. The State does not take title to its granted school sections in place until the lands have been identified by an approved Government survey and in determining the amount of indemnity land granted for fractional townships under the adjustment provided for in section 2276, Revised Statutes, as amended, the acreage of land returned by the Government survey has been taken as the basis for calculation. The measure of indemnity is as follows:

For each township or fractional township containing more than 640 acres and less than 5760 acres, 320 acres.

For each township containing more than 5760 acres and less than 11,520 acres, 640 acres.

For each township containing 11,520 acres and less than 17,280 acres, 960 acres.

For each township containing 17,280 acres, 1280 acres.

It is suggested in the present appeal, however, that the amount of indemnity to which the State is entitled for deficiency in unsurveyed townships can be readily and satisfactorily determined by means of protractions of the lines of survey or by estimates or calculations of the acreage by the office of the United States Surveyor General.

This plan is pursued under express statutory direction in cases where because of their special or peculiar status there is no immediate or future probability of a survey by the Government of the townships for which indemnity is sought; or in other words where in all likelihood the lands have been removed from the operation of the grant by the intervention of the paramount right of others or by a dedication of the lands to some governmental or public use, and where from the very nature of the case the grant would otherwise be totally defeated. The authority for protractions contained in section 2275, Revised Statutes, is limited to lands of the classes therein specified and in these instances protractions are made not upon the theory that the school sections are wanting or are fractional or deficient in area and the right of selection is not to compensate a natural deficiency or loss, but to select in lieu of lands lost in place by reason of being taken or appropriated by the Government, or for a loss occasioned by reason of a confirmed Mexican or other private land grant.

The provision of law above referred to appropriates and grants, in lieu of sections 16 and 36, other lands of equal acreage and authorizes the selection of such indemnity or lieu lands within the State or Territory, where said sections "are included within any Indian, military, or other reservations, or are otherwise disposed of by the United States" and makes it the duty of the Secretary of the Interior, "without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservation."

Lands within Indian, military, forest or other reservations or within a confirmed private land grant (in the latter case being "otherwise disposed of") therefore, occupy a peculiar or special status because of which they may never be surveyed or in any event may be long withheld from survey by the Government. Under these conditions the State or Territory is not compelled to await the extinguishment of the reservation and the extension of the public surveys manifestly because such postponement of its rights would in many instances be tantamount to an extinguishment of the grant. But this is not the case where the lands lie within the unreserved and unappropriated public domain. Here the grantee will take the specified sections in place when the survey is made and if a shortage is

then disclosed the right of indemnity attaches and is immediately available.

Congress has vested in the Land Department the power to make the surveys. The exercise of this discretion and power rests with the Commissioner of the General Land Office who it must be assumed will use a sound discretion and make such extension of the surveys as the nature of the territory and the advance of settlements justify and demand. The grant is made to the State upon this condition and with this understanding and the possibility of some delay in the making of the surveys is manifest to all. In this connection see case of State of Montana (16 L. D., 437).

Protractions do not in any event afford a safe guide for determining the extent of the grant because if the township lies in an extensive unsurveyed territory, there could be no basis for an accurate calculation of areas. The lines would necessarily have to be projected from the nearest established survey, possibly some remote point and this results in a purely theoretical adjustment, in many cases amounting to little more than intelligent conjecture. An actual survey in the field might disclose and frequently has shown that many of the townships called for by a protraction are mere theoretic creations and have no existence in fact.

The decision appealed from is affirmed.

CHARLES JENSEN.

Decided June 4, 1921.

INTERMARRIAGE OF HOMESTEADERS—ELECTION AS TO RESIDENCE—STOCK-RAISING HOMESTEAD.

The election requirement contained in the act of April 6, 1914, as modified by the act of March 1, 1921, to the effect that both parties must have complied with the homestead law for one year next preceding marriage, is satisfied with respect to the husband, if he had, for a period of one year prior to marriage, resided upon land covered by his application to make a stock-raising homestead entry which was, subsequently allowed, notwithstanding the fact that credit can not be given for such residence in the submission of final proof.

FINNEY, First Assistant Secretary:

This is an appeal by Charles Jensen from a decision of the Commissioner of the General Land Office dated November 23, 1920, rejecting his election filed October 15, 1920, in accordance with the provisions of the act of April 6, 1914 (38 Stat., 312), to reside with his wife, formerly Maude B. Lamb, upon his stock-raising homestead entry made March 24, 1919.

It appears that on June 11, 1917, Maude B. Lamb made enlarged homestead entry 017256 for the W. $\frac{1}{2}$, Sec. 9, T. 43 N., R. 72 W., 6th

P. M., Newcastle, Wyoming, land district, and on June 18, 1918, made additional entry under section 4 of the stock-raising homestead act for the E. $\frac{1}{2}$, Sec. 8, same township and range, which lands are contiguous to her original entry.

December 7, 1917, the appellant, Charles Jensen, filed stock-raising homestead application, accompanied by petition for designation, for, as amended, the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 31, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 32, T. 48 N., R. 74 W.; lots, 1, 2, 3, and 4, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 6, and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, and lots 1, 2, 3, and 4, Sec. 5, T. 47 N., R. 74 W., 6th P. M., containing 635.25 acres. The application was suspended pending designation, which was approved, effective May 10, 1918, and as above stated, the entry was allowed March 24, 1919.

Election was filed on the date hereinabove given, the parties submitting an affidavit stating that they were married June 29, 1918; that Charles Jensen established residence upon his homestead May 1, 1917, and that he had since continuously resided thereon; that he had fenced the land, ploughed and cultivated 45 acres, erected a sheep shed and corrals at a cost of \$1500, built a house 14 by 16 feet, and constructed a reservoir costing \$200; that Mrs. Jensen, prior to her marriage, established residence on her homestead June 15, 1917, and had resided thereon continuously until the time of her marriage, June 29, 1918; that she had improvements on her homestead entry consisting of a house valued at \$250, fencing worth \$200, and ploughing which cost \$240; that in 1918, 20 acres were cultivated to corn and in 1919 and 1920, 40 acres were cultivated in the same crop.

In the decision appealed from the Commissioner held as follows:

Said act of April 6, 1914, provides that each of the parties claiming its benefits shall have complied with the requirements of the homestead laws with regard to their respective entries, during the year next preceding the date of their marriage, as to residence, improvements and cultivation.

The stock raising act provides that the filing of an application for entry of land thereunder, though accompanied by petition for its designation, confers upon the applicant no right to occupy the land sought, and therefore no credit can be allowed for residence and improvements prior to the designation of the lands.

The showing made by the wife is found to be satisfactory. However, it appears that the husband's entry was allowed after the date of marriage and that the designation of the lands embraced in his entry did not take effect until one month prior to that date.

The election, therefore, cannot be accepted.

As shown by the record before the Department Maude B. Lamb-Jensen submitted final proof on her original and additional entries September 8, 1920, wherein she states that soon after her marriage she removed to the homestead entry of her husband where she was then residing. This proof was suspended by the register and re-

ceiver, who notified claimant of the requirements of the act of April 6, 1914, *supra*, and election was thereupon filed by the husband, who thereafter under date of December 20, 1920, submitted final proof upon his entry, final certificate issuing December 22, 1920.

Jensen states in his final proof that he first established residence upon his homestead May 1, 1917. He further states "I have never been absent from this land since squatting on this land in the spring of 1917. That I bought out J. D. Powers and immediately moved my sheep wagon on to this land and continued residence until this day."

The act of April 6, 1914, *supra*, provides:

That the marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry: *Provided*, That the provisions hereof shall apply to existing entries.

The foregoing act was amended by the act of March 1, 1921 (41 Stat., 1193), by adding thereto the following: "*Provided further*, That in the administration of this act the terms 'entryman' and 'entrywoman' shall be construed to include bona fide settlers who have complied with the homestead law for at least one year next preceding such marriage."

The stock-raising homestead law expressly provides that the filing of an application for entry of land thereunder, though accompanied by a petition for its designation, confers upon the applicant no right to occupy the land sought, and as stated by the Commissioner, in the administration of the law, credit can not be allowed in final proof for residence and improvements prior to the designation of the lands.

This is clearly a correct application of the law but manifestly it does not prevent or preclude settlement and occupation of the public domain with a view to homestead entry. It merely conveys a warning that those who go upon the public lands prior to designation, and erect improvements and undertake to establish a claim to 640 acres of supposed stock-raising lands, do so at their own risk and in event the lands are found not to be of the character subject to designation thereunder, their claims must be confined to a lesser area; and notwithstanding the lands are subsequently designated prior compliance with law will go for naught at final proof.

In this case it appears that Jensen was a qualified entryman under the homestead laws. As shown by the record he established residence May 1, 1917, and has since continuously maintained his home thereon.

More than one year elapsed from the date of the establishment of residence to the time of marriage and so far as shown, claimant was at no time in default but had fully complied with the requirements of law up to that time.

Considering these facts in connection with the amendatory act of March 1, 1921, *supra*, the Department believes that the right of election was improperly denied. The fact that the entryman can not claim and secure credit in final proof for his compliance with law prior to designation of the lands, does not in the opinion of the Department afford sufficient reason for denying the benefits of the act of April 6, 1914, *supra*, where the case is otherwise within the purview of the statute.

The decision appealed from is accordingly reversed.

WILLIAM B. KETCHUM.

Decided June 6, 1921.

HOMESTEAD ENTRY—ADDITIONAL—ACT OF MARCH 2, 1889.

Only one exercise of the right to make an additional entry is authorized by section 6 of the act of March 2, 1889, notwithstanding that the entryman does not secure by such entry sufficient land to complete the maximum quantity of 160 acres.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

Case of August Meisner (34 L. D., 294), cited and followed.

FINNEY, *First Assistant Secretary*:

William B. Ketchum has appealed from a decision of the Commissioner of the General Land Office, dated December 3, 1920, rejecting his application to make additional homestead entry for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 19, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 30, T. 66 N., R. 26 W., 4th P. M., Cass Lake, Minnesota, land district, under section 6 of the act of March 2, 1889 (25 Stat., 854).

It appears that the applicant made original homestead entry March 18, 1904, Wausau 0738, for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 8, T. 18 N., R. 2 W., 4th P. M., which was perfected. He also made additional homestead entry, Wausau 03132, September 21, 1910, for the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22, T. 42 N., R. 10 W., 4th P. M. That entry was made and completed under section 6 of the act of March 2, 1889, *supra*.

In the decision appealed from the Commissioner held that the applicant had exhausted his additional right under section 6 of the act of 1889 by the prior entry under that provision of law.

This case is in all essential respects similar to that of August Meisner (34 L. D., 294), cited by the Commissioner as authority for his action.

It is urged in support of the appeal that the language employed in section 6 of the act of 1889 does not restrict the right of additional entry to one exercise of the right, but permits any number of entries until an aggregate area of 160 acres has been acquired. This is not a new question nor new argument. It has been heretofore thoroughly considered and settled. Every argument which could be offered in favor of more than one exercise of the additional right could with equal force be applied to the original law itself. If the Department had permitted more than one exercise of the right of entry under the original law, there would have been no occasion for legislation granting additional and second entry rights. But from an early date it was held that one exercise of the right under the original law exhausted the right thereunder and this has long been a well settled rule recognized not only by the executive but by the legislative branch of the Government as well. The same rule has been applied to additional entries under the act of 1889, *supra*, as shown in the Meisner case.

No reason is now seen for disturbing this ancient construction and continued application of the law. Accordingly, the decision appealed from is affirmed.

GUY J. GAY.

Decided June 8, 1921.

DESERT LAND ENTRY—CULTIVATION—ACT OF MARCH 4, 1915.

A desert land entryman who applies to purchase the land under the relief provisions of the act of March 4, 1915, need not show that he continued cultivation after the privilege of making the purchase was granted, if he has in good faith used the land for agricultural purposes for at least three years at any time since making his original entry, and has upon the tract permanent improvements conducive to the agricultural development thereof, of the value of at least \$1.25 per acre.

FINNEY, *First Assistant Secretary*:

On March 21, 1912, Guy J. Gay made desert land entry 05501 for E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 11, T. 43 N., R. 96 W., 6th P. M., Lander, Wyoming, land district, under which he on May 13, 1916, filed final proof showing that he had cleared, broken, and prepared 20 acres for planting to grain and had set out 1,000 apple trees and cultivated about 10 acres to potatoes in 1912 and 1913, and that at that time about 20 acres were planted to oats and alfalfa. He later supplemented this proof by a corroborated affidavit in which he stated "that he has expended and caused to be expended on said land in an endeavor to reclaim the same the following sums: Breaking 23 acres, \$69; purchasing 23 shares of the capital stock of the John A. Thompson ditch

for the purpose of irrigating said lands at \$40, \$920; fencing, \$72," making a total of \$1,061.

After this proof had been reported by a field agent as defective in that there was not an adequate and continuing supply of water for the irrigation of the land, Gay, on December 8, 1917, withdrew the proof and applied "for leave to purchase the land embraced in said entry under the provisions of the act of Congress of March 4, 1915." On April 10, 1920, the relief prayed for under that act was granted and on May 10, following, Gay filed his election to purchase the land under the act referred to, and on August 18, 1920, he filed final proof under that election in which he showed that he had on the land an inclosing fence, a house 10 by 12 feet, and an irrigating ditch, all valued at \$300. Later the entryman was required to file a corroborated affidavit showing whether any of the land had been cultivated since 1914; and if so "the area planted each year and the results obtained therefrom, what crops were planted, and any other matters connected therewith which might tend to show good faith in the matter of compliance with the law."

In response to that requirement Gay filed a corroborated affidavit in which he stated that he did not cultivate the land after he made his desert land proof for the reason that he had during that time and up to October, 1920, been postmaster at Thermopolis, Wyoming, and consequently could not cultivate it himself and he could not lease or hire the same cultivated without material financial loss; that he had permitted the land to be used by the neighbors in that vicinity for grazing purposes and received no rental therefrom except the good will of the settlers and such accommodations as he received from them in looking after the land; that he is certain a good reservoir will soon be built near the land which will furnish plenty of water for its irrigation after which it would be very valuable.

By its decision of February 15, 1921, the General Land Office held that the showing thus made was not satisfactory for the reason that—

There has been no agricultural use of the land for or on behalf of this claimant for several years past, and as such use to be *bona fide* should be brought down to about the time of the submission of final proof, the proof in this case is hereby rejected subject to the usual right of appeal.

It was further held in that decision that inasmuch as Gay's election to purchase the land was not filed until May 10, 1920, he would have five years from that date within which to make satisfactory final proof under his election and that for that reason the entry would be held intact.

In support of his appeal from that action which is sworn to and corroborated, Gay alleges that he has expended \$2,920 in connection with this entry, in plowing, clearing and preparing the land for irrigation, for water rights, for building one-half mile of fence,

and for constructing a ditch; and he contends that inasmuch as he has cultivated the land for four years prior to the offering of final proof under his desert land entry, his present proof should be accepted.

Under the showings thus made this Department is of the opinion that this proof should be accepted. The law on which the proposed purchase is based gives the right of purchase to an entryman who shows, among other things, that he "has upon the tract permanent improvements conducive to the agricultural development thereof of the value of not less than \$1.25 per acre, and that he has, in good faith, used the land for agricultural purposes for three years."

It will be observed that this statute does not in terms say that the entryman must continue his cultivation after the privilege of making the purchase has been granted to him, and there is nothing in the regulations issued under the relief act (45 L. D., 374), which requires such continued cultivation. Paragraph 48 of those regulations declares among other things that—

The final proof, in order to be acceptable, must show that, at the date of the proof, the claimant has upon the tract permanent improvements conducive to the agricultural development thereof, of the value of at least \$1.25 per acre, and that he has in good faith used the land for agricultural purposes for at least three years. * * * Actual residence on the land need not be shown.

Under the circumstances of this case and in view of the provisions of the statute and regulation just mentioned, it is believed that this application to purchase should be allowed and the decision appealed from is consequently hereby reversed.

McGEE v. WOOTTON.

Decided June 18, 1921.

OIL AND GAS LANDS—MINING CLAIM—PROSPECTING PERMIT—EVIDENCE.

A protest by an oil placer mining claimant against the allowance of a prospecting permit, containing no allegation which, if substantiated by evidence adduced at a hearing, shows that the protestant is entitled to complete his claim under the placer mining laws or to use the same as a basis for a permit or lease under any of the relief provisions of the act of February 25, 1920, is not sufficient to defeat a permit application filed under section 13 of that act.

FINNEY, First Assistant Secretary:

W. T. McGee has appealed from a decision of the Commissioner of the General Land Office of March 17, 1921, dismissing for insufficiency of allegation his protest against the application 07582 of J. Tracy Wootton, under section 13 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon certain lands including the NW. $\frac{1}{4}$, Sec. 26, T. 29 N., R. 12 W., 6th P. M., Evanston

land district, Wyoming, to which quarter section the protest is directed.

The application was filed April 30, 1920, and the protest, which was filed September 1, 1920, alleges in substance that the tract hereinbefore described was, on August 12, 1918, located under the placer mining laws by the protestant and seven other persons; that at the time of the filing of the protest the legal title to said claim was in the protestant; that the protestant and his predecessors in interest have endeavored in good faith, and with due diligence to protect said claim, and develop the same; that during the year 1918, the protestant performed upon the claim "validation work" of the reasonable value of \$50, and that in the performance thereof, oil or indications of oil, were discovered on the claim in sufficient quantities to warrant a reasonable man, familiar with the production of oil and gas, to expend money thereon in the belief that by further exploration and development oil in paying quantities would be found; that it is now the intention of the protestant to proceed further with the development work on such claim in that belief; that except for the cloud cast upon his possessory title to the premises by the application of Wootton, he would be engaged in active work of drilling and boring upon the land in the hope of producing oil or gas therefrom in commercial quantities; that the protestant and his predecessors in interest were *bona fide* occupants and claimants of the land and were in diligent prosecution of the work leading to discovery thereon, and while a discovery of oil in commercial quantities had not actually been made on the land at the date of the passage of the leasing act, the claim was exempted from the operation of the act by virtue of section 37 thereof; that it is the intention of the protestant in good faith and with due diligence to proceed with the development of the property for the purpose of completing the location of the claim and to make an actual discovery of oil or gas thereon as soon as his right to maintain possession of the claim as against the applicant shall have been determined by the Department. He accordingly asks that the application be rejected and that he be held to have a valid and existent right of possession to the land under the said placer location and section 37 of the leasing act as long as he shall maintain such right by diligently prosecuting the work of development for the discovery of oil and gas thereon. The Commissioner, in the decision complained of, finds the land embraced in the application to have been unwithdrawn.

By said section 37 of the leasing act it is provided that deposits of oil, gas and other minerals therein referred to in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in the act "except as to valid claims existent at

the date of passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws including discovery."

In view of said provisions no oil placer mining claim can be passed to patent under the provisions of the placer mining laws unless (a) it shall be shown to have been supported at the date of the leasing act by a sufficient discovery; or (b) discovery being at that time absent, it shall be established that work leading to discovery was then being diligently prosecuted by or for the claimants thereof and thereafter diligently continued to discovery. See section 32 of the regulations of March 11, 1920; as amended to October 29, 1920 (47 L. D., 437, 462), issued under the leasing act. Nor, in the absence of a similar showing, can an unperfected oil placer mining claim not entitled to be made the basis for relief under the provisions of sections 18, 18(a) or 19 of the leasing act because of the expiration of the periods prescribed by said sections for the filing of application for relief, be successfully set up to defeat an application for permit or lease under the act.

The Department finds nothing in the protest even suggesting a discovery on the land prior to the date of the leasing act save the allegation that work of the value of \$50 was, in 1918, performed upon the claim, and that as a result of such work "oil or indications of oil" were discovered. If this allegation in any event could be accepted as one of discovery it is negatived by another allegation in the protest to the effect that it is the intention of the protestant to proceed with the development of the claim for the purpose of completing the location and making an actual discovery of gas thereon. The protest on the whole therefore can not be regarded as alleging a discovery of oil or gas on the land at any time. Nor is it sufficiently alleged in the protest that from and after the passage of the act there has been a diligent prosecution of work on the claim leading to the discovery of oil or gas. The protest merely alleged in this connection that the protestant and his predecessors in interest were in diligent prosecution of work leading to the discovery of oil on the claim, without specifying any particular time, and that it is protestant's intention to proceed with diligence to develop the property as soon as his right to maintain possession as against the applicant shall be determined by the Department.

In other words, the protest contains no allegations which, if substantiated by evidence adduced at a hearing, would show the protestant to be entitled to complete the claim under the provisions of the placer mining laws, or to use the same as a basis for a lease or permit under any of the relief provisions of the leasing act.

The decision of the Commissioner is accordingly affirmed, the case closed, and the record returned to the General Land Office.

MARATHON OIL COMPANY v. WEST, UNITED STATES,
INTERVENER.

Decided June 18, 1921.

OIL AND GAS LANDS—SURFACE RIGHTS—ACTS OF JULY 17, 1914, AND FEBRUARY 25, 1920.

The provisions of the surface act of July 17, 1914, and those contained in the leasing act of February 25, 1920, are not in conflict, but are the complement of each other, to the extent that by the former, mineral rights and all incidents essential thereto are excluded from homestead entries, while by the latter, the rights pertaining to the estate of the surface claimant are duly respected and protected:

OIL AND GAS LANDS—SURFACE RIGHTS—JURISDICTION—LAND DEPARTMENT—COURTS.

The courts, not the Land Department, have direct jurisdiction to determine questions pertaining to actual physical possession of lands in cases arising from conflicts between claimants under the acts of July 17, 1914, and February 25, 1920, respectively.

FINNEY, First Assistant Secretary:

The Marathon Oil Company has appealed from the decisions of the Commissioner of the General Land Office, dated December 11, 1920, wherein protests alleging mineral character of the land and discovery of oil prior to withdrawal against the homestead entries of Benjamin F. West for the SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$, respectively, of Sec. 13, T. 25 S., R. 18 E., M. D. M., Visalia, California, land district, were dismissed subject to the right of appeal.

From the record presented the following filings affecting the lands have been made:

On December 2, 1915, Benjamin F. West made homestead entry 05845, for the SE. $\frac{1}{4}$ of said section, pursuant to the oil surface act of July 17, 1914 (38 Stat., 509), the tract having been withdrawn September 27, 1909, and included in Petroleum Reserve No. 2, by Executive order of July 2, 1910. On November 10, 1916, West made additional enlarged homestead entry 05883, for the NE. $\frac{1}{4}$ of said Sec. 13, with reservation of the oil and gas deposits.

The Marathon Oil Company as early as May, 1909, was claiming the two tracts under oil placer locations, and at that time upon the NE. $\frac{1}{4}$ of said section began the drilling of a well. On January 20, 1916, the company applied to contest West's entry for the SE. $\frac{1}{4}$, and July 2, 1919, his entry for the NE. $\frac{1}{4}$. The company alleged that the lands were oil bearing lands, and that oil had been discovered prior to entry, which facts were well known to the entryman, and that the company intended to acquire title under the mining laws. Answer was filed, and in 1919, a request to intervene on behalf of the Government was filed by the Chief of Field Division. Hearings were had. In May, 1920, the local officers decided that the

protest filed by the company had been sustained, they finding as to the SE. $\frac{1}{4}$, Sec. 13, that oil was discovered on the land prior to the filing of the homestead application and prior to the Presidential order of withdrawal, and that such discovery proved the land to be mineral in character. As to the NE. $\frac{1}{4}$, Sec. 13, they held that the company, in the spring of 1909, began the diligent prosecution of work which led to the discovery of oil prior to the filing of the homestead application, which discovery proved the land to be mineral. The entryman appealed from said decisions. Thereupon the Commissioner rendered the decisions now under attack.

On June 1, 1920, the Marathon Oil Company filed its application for a permit, 09145, under section 19 of the act of February 25, 1920 (41 Stat., 437), covering the SE. $\frac{1}{4}$, Sec. 13. Under date of April 2, 1921, the Commissioner favorably reported upon the application. The Department at this time can see no reason why said permit application should not be allowed and the requisite oil and gas prospecting permit issued. It is so ordered.

On August 17, 1920, it appears that Guy L. Warson filed application for prospecting permit, 09266, for the NE. $\frac{1}{4}$, Sec. 13, and other tracts not here involved. Against such application the Marathon Oil Company, on January 19, 1921, filed its protest asserting its prior right to the land. The Department finds the protest to be well founded and that the application of Warson, as to said NE. $\frac{1}{4}$, Sec. 13, must be rejected. It is so ordered.

The company on January 29, 1921, filed its application 09582 for relief and compromise under section 18 (a) of the leasing act as to the NE. $\frac{1}{4}$, Sec. 13. This application was favorably reported to the President, who on February 19, 1921, approved and authorized such compromise and the issuance of a lease pursuant thereto.

In view of the company's applications for permit and lease covering the two tracts involved in West's entries, it is not deemed necessary at this time to give an extended review of the evidence submitted. The Commissioner concluded that no discovery sufficient to validate either location had been made, and also that there was lack of diligence in prosecution of the work, and consequently that the claim did not fall within the protective provisions of the Pickett Act. The Department finds no reason to disturb the Commissioner's conclusion in this regard. The same is accordingly affirmed. In this matter it is not deemed advisable to discuss the relative rights of the surface homestead claimant on the one hand as against the rights of the company as a mineral claimant pursuant to its applications for permit and lease. The Department is inclined to the view that all rights pertaining to the homestead surface entries can be respected without infringing upon or unnecessarily interfering with the operations of the company in its pursuit of oil upon these tracts.

The provisions of the surface act of July 17, 1914 (38 Stat., 509), and those contained in the leasing act of February 25, 1920, *supra*, are not in conflict, but are the complement of each other. From the homestead entries mineral rights and all incidents essential thereto are reserved, while in the lease and permit that may be issued to the mining claimant the rights pertaining to the estate of the surface claimant must be duly respected and protected.

Any question that may arise as to actual possession of any portion of the area, or any possible difficulties between these two claimants, are matters over which this Department has no direct jurisdiction. Those matters must be investigated and adjudicated in the local tribunals having jurisdiction over the parties.

It is concluded accordingly, as hereinbefore stated, that the company is entitled to a permit for the oil and gas deposits in the SE. $\frac{1}{4}$, Sec. 13, and all else being regular and complete, a lease pursuant to the compromise authorized should be issued to the company for the oil deposits within the NE. $\frac{1}{4}$ of said Sec. 13. The application of Warson for a permit as to said NE. $\frac{1}{4}$ must be and is hereby rejected. The homestead entries of West, covering as they do the surface estate only, are permitted to remain intact, and if his final proof and record is found to be in all respects regular, a patent thereon will be issued. This matter having been fully considered, the Department sees no reason for giving time for filing a motion for rehearing herein. This decision is accordingly declared final and the Commissioner will proceed at once to its execution.

REWARD FOR DISCOVERY—CIRCULAR NO. 672, AMENDED.

[Circular No. 761.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., June 15, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

The regulations pertaining to and governing oil and gas permits and leases, pursuant to the act of Congress of February 25, 1920 (41 Stat., 437), published as Circular No. 672, are hereby amended so as to incorporate therein a new paragraph, to be numbered Paragraph 8(a), reading as follows:

8(a). When an application for a lease of the one-fourth part of the area affected by a prospecting permit is submitted, supported by the requisite evidence of discovery and production of oil or gas, such application must be accompanied by further application by the permittee, or by an assignee of such permittee, for a lease of the remaining portion of the area described in the

permit; or, in the alternative, a relinquishment of the permit and waiver of preference right in respect of such remaining area must be submitted.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
Acting Secretary.

**AMENDING GENERAL RECLAMATION CIRCULAR OF MAY 18, 1916,
AND MODIFYING DEPARTMENTAL DECISION IN THE CASE OF
JOHN J. MANEY (35 L. D., 250).**

[Circular No. 759.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 18, 1921.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

You are hereby advised that, in view of the decisions of the United States Supreme Court in the cases of *Payne v. Central Pacific Railway Company*, decided February 28, 1921, and *Payne v. New Mexico*, decided March 7, 1921, the First Assistant Secretary of the Interior, by order approved May 27, 1921, revoked paragraph 15 of the General Reclamation Circular dated May 18, 1916 (45 L. D., 385), and amended paragraphs 13, 14 and 16 of said circular, as hereinafter set forth. Said order also modified the decision in the case of John J. Maney (35 L. D., 250), in so far as said decision is in conflict with the action taken in this order.

13. 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 presented after the date of such withdrawal should be rejected and denied. Any withdrawal otherwise valid shall not be affected by failure to note same on tract book or otherwise follow usual procedure. (42 L. D., 318.) Lands can not be examined at the instance of individuals prior to the completion of construction to determine whether particular lands will be irrigable. (42 L. D., 8.)

14. If any lands embraced 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 August 30, 1890 (26 Stat., 391), under the reclamation law, payment therefor will be made upon agreement of the owner with the representative of the Government as to the value of the land and the improvements thereon. Where the owner of the land and the representative of the Government fail to agree 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 of June 17, 1902 (32 Stat., 388).

15. Revoked.

16. Lands withdrawn under the second form and becoming subject to entry in the manner provided by section 10 of the act of August 13, 1914, 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, 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 subject to all the charges, terms, conditions, limitations, and provisions of the reclamation law. See Sarah E. Allen (44 L. D., 331). 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 (36 Stat., 835), February 18, 1911 (36 Stat., 917), and section 10 of the act of August 13, 1914 (38 Stat., 686, 689), or is restored to the public domain.

WILLIAM SPRY,
Commissioner.

ANNA M. YOUNT.

Decided June 23, 1921.

HOMESTEAD ENTRY—RESIDENCE—ACT OF DECEMBER 20, 1917.

An entrywoman who marries subsequently to the making of her entry is entitled to credit under the act of December 20, 1917, for constructive residence for the time she spends in performing farm labor upon land owned or controlled by her husband.

GOODWIN, Assistant Secretary:

Anna M. Yount, formerly Anna M. Finkbeiner, has appealed from a decision of the Commissioner of the General Land Office dated September 30, 1920, holding for rejection the final proof submitted by her on her homestead entry embracing Sec. 14, T. 30 N., R. 36 W., 6th P. M., within the Alliance, Nebraska, land district.

The entry was made on September 16, 1916, and on December 12, 1916, the entrywoman married Amado M. Yount, who moved to her homestead and they remained there until July 25, 1918, when they moved to the husband's homestead. On July 3, 1918, claimant filed application for leave of absence under the act of December 20, 1917 (40 Stat., 430), to begin June 24, 1918, and to continue during the period of the war.

It appears from the record that the husband made stock-raising homestead entry 09880 as additional to homestead entry 06885 on July 15, 1918, all the land being designated under the stock-raising act. On December 27, 1918, claimant and her husband filed notice of election under the act of April 6, 1914 (38 Stat., 312), to select the husband's homestead as the family residence. On

March 22, 1920, claimant submitted final proof which the local officers rejected and claimant appealed. By the Commissioner's letter of July 8, 1920, the election under the act of April 6, 1914, was rejected and the proof suspended, the Commissioner requiring claimant to make a more specific showing. On August 17, 1920, claimant filed a corroborated affidavit in which she attempted to comply with the Commissioner's requirements, and in the decision appealed from the Commissioner rejected the final proof submitted, holding that the act of December 20, 1917, did not contemplate family cooking and milking.

Upon this appeal claimant has submitted further showing as to work done upon her husband's land, in addition to that already submitted, which satisfactorily convinces the Department that she is entitled to the benefits of the act of December 20, 1917. Said act contains no provisions which would forbid an entrywoman who marries subsequent to the making of her entry from performing the farm labor contemplated thereby upon land owned or controlled by her husband, and in the opinion of the Department the labor performed by Mrs. Yount upon her husband's land was such as is clearly contemplated by said act.

The decision appealed from is reversed.

TILMON D. MABRY (ON REHEARING).

Decided June 29, 1921.

HOMESTEAD—FINAL PROOF—PATENT—OIL AND GAS LANDS—WITHDRAWAL.

The rule of law that a withdrawal is ineffective as against one who prior thereto had done everything necessary to vest in him a complete equitable title, can not be invoked by a homesteader who made entry of lands before but did not submit final proof until after their inclusion within a petroleum reserve, and a patent issued upon such entry must contain a reservation to the United States of the oil and gas unless the entryman assumes the burden of proof and shows that the lands are in fact nonmineral in character.

COURT DECISION CITED AND CONSTRUED—DEPARTMENTAL DECISIONS CITED AND ADHERED TO.

Case of Wyoming *v.* United States (255 U. S., —), cited and construed; cases of James Rankine (46 L. D., 46), State of Louisiana *et al.* (47 L. D., 366), Cleveland Johnson (48 L. D., 18), Anna M. Baxter (48 L. D., 126), cited and adhered to.

FINNEY, *First Assistant Secretary:*

Tilmon D. Mabry has filed motion for rehearing in the matter of his application for the issuance of an unrestricted patent in lieu of the patent issued in his name November 15, 1916, with reservation of the minerals, as required and demanded by the act of July 17, 1914

(38 Stat., 509), on his homestead entry made November 30, 1909, for the W. $\frac{1}{2}$ of lot 1 of the NW. $\frac{1}{4}$ and lot 2 of the NW. $\frac{1}{4}$, Sec. 4, T. 28 S., R. 27 E., M. D. M., Visalia, California, land district, wherein the Department, by decision dated January 27, 1921, affirmed a decision of the Commissioner of the General Land Office, dated June 21, 1920, declining to issue such unrestricted patent.

For the purpose of this decision a brief history of the case will be given. The entry, as above stated, was made November 30, 1909. The land was included in Petroleum Reserve No. 18 by Executive order January 26, 1911. Mabry submitted final five-year proof December 30, 1914, but certificate was withheld on request of the chief of field division. The Commissioner of the General Land Office considered the case October 13, 1915, and held that it came under section 3 of the act of July 17, 1914, *supra*, which provides:

That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.

He thereupon, through the register and receiver, served notice upon the entryman in accordance with paragraph 10(b) of the circular of March 20, 1915 (44 L. D., 32, 37), that patent, if issued, would contain a reservation to the United States of the oil and gas deposits unless

within thirty days, there is filed in your office an application for classification of the land as non-mineral, together with a showing, preferably the sworn statements of experts or practical miners, of the facts upon which is founded the knowledge or belief that the land applied for is not valuable for minerals.

In the event that such application is filed and same is denied, a hearing will be allowed, if applied for, at which the burden of proof will be upon the claimant to show that the land is not valuable for oil and gas deposits.

Should, however, claimant fail to take any action within the time allowed, you will, upon proper payments being made, issue final certificate with a reservation of the oil and gas deposits to the United States under the act of July 17, 1914.

The claimant appealed from this holding which, however, was affirmed by the Department under date of February 12, 1916, wherein it was stated:

Public lands are subject to disposal only by authority of Congress. Mineral lands are not subject to homestead entry. Except for this provision (act of July 17, 1914), claimant's homestead entry would be subject to cancellation for its mineral character.

Following this decision claimant was advised under date of May 8, 1916, that he would be allowed thirty days within which to apply for a nonmineral classification of the land and in the event same was denied he would be accorded a hearing, if desired, to show its nonmineral character. He was further advised that in case he took no action final certificate would issue containing reservation of minerals, as provided by the act of July 17, 1914, *supra*. No further action having been taken, final certificate issued August 17, 1916 and restricted patent November 15, 1916.

The entryman accepted the patent and, as is shown by the record before the Department, it was recorded, at his request, in the Kern County records July 7, 1917. His application for the issuance of an unrestricted patent in lieu thereof was filed in the local land office at Visalia, California, March 29, 1920, and action thereon was taken as hereinbefore stated.

It is now shown, and was so stated in the decision complained of, that Secs. 1 to 5, 8 to 17, 20 to 29, and 35 to 36, of said township 28 S., R. 27 E., M. D. M., are within the geologic structure of the producing Kern River Oil Fields as defined and fixed by the Geological Survey pursuant to the act of February 25, 1920 (41 Stat., 437), and regulations thereunder of March 11, 1920 (47 L. D., 437).

Prolonged discussion of the case and examination in detail of the numerous alleged errors in the Department's action in the matter are believed unnecessary. It is contended, however, in substance and effect, that equitable title vested upon submission by Mabry of proof of completed compliance with the provisions of the homestead law; that regardless of the location of the lands within a producing oil field and regardless of the fact that it may now be held or classified as mineral lands, it was not of *known mineral character* at the date of final proof; that the burden rests upon the Government to prove this and that by no refinement of reasoning can it relieve itself of this burden.

The proposition is not a new one. It has frequently been urged before the Department and consistently denied in numerous adjudicated cases. See James Rankine (on reconsideration) (46 L. D., 46); State of Louisiana, *et al.* (47 L. D., 366); Cleveland Johnson, decided February 21, 1921, on motion for rehearing (48 L. D., 18); and Anna M. Baxter, decided May 19, 1921, on petition for exercise of supervisory authority (48 L. D., 126). See also digest of decisions and opinions in connection with the administration of the act of February 25, 1920, *supra*, as applied to oil and gas, contained in Circular 672, approved March 11, 1920 (47 L. D., 437). The following excerpt is taken therefrom (page 471):

RESERVATION OF MINERAL—WHEN REQUIRED.

Where a homestead entry (not under the grazing act) is made without a reservation of the oil to the Government and the land is withdrawn or classified as oil land before completed final proof is submitted, the entryman must take patent with a reservation of the oil, unless he can procure a reclassification of the land by the Department or a removal of the withdrawal, or unless he can show at a hearing (the burden of proof being on him) that the land was not of a known mineral character at date of final proof.

But where, in the case last stated, the withdrawal or classification as mineral was not made until after final proof was submitted, the entryman will be entitled to a patent without a reservation, unless the Government can show (the burden of proof being on the Government), at a hearing if necessary, that the land was of known mineral character at the date of final proof. If the Government can show this, the result will be the same regardless of whether there has been a withdrawal or classification.

The Department therefore adheres to its established and uniform ruling in this connection and will continue to do so unless its application of the law is clearly shown to be erroneous. No good reason is apparent for a departure from the rule fixed by the decisions above referred to, and in the judgment of the Department said decisions are based on a reasonable construction of the statute and a correct view of the law. The suggestion that the case is controlled in principle by the decision of the Supreme Court in *State of Wyoming v. United States*, decided March 28, 1921 (255 U. S. —), is without force.

The motion is denied.

TIECK v. McNEIL.

June 30, 1921.

CONTEST—OIL AND GAS LANDS—PROSPECTING PERMIT—LAND DEPARTMENT.

An oil and gas prospecting permit is not subject to a contest by a third party and an application therefor can not be entertained.

Decision of Acting Commissioner Wickham of the General Land Office, Approved by Assistant Secretary Goodwin, to the register and receiver, Visalia, California.

October 14, 1920, the Secretary of the Interior granted permit 09212, your series, to J. V. McNeil, for Sec. 34, T. 26 S., R. 28 E., and W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 2, T. 27 S., R. 28 E., M. D. M., Visalia, California, land district.

June 9, 1921, August B. Tieck filed an application to contest and protest against said permit, alleging as grounds for protest and contest that the said McNeil did not, within 90 days after said permit mark or cause to be marked each of the corners of said above tracts upon the ground with substantial monuments and did not within said

period post in a conspicuous place on said land notice that said permit had been granted; that said permittee did not within six months from date of said permit begin drilling operations on said land and that said permittee had not at the date of said protest posted said above required notices nor has he begun drilling operations on said land.

Applicant further alleges an interest in the N. $\frac{1}{2}$, said Sec. 34, by reason of a patent issued to him May 20, 1920, said entry and patent being subject to the act of July 17, 1914 (38 Stat., 509), reserving oil and gas to the United States and intends, if so permitted, to file an application for oil and gas prospecting permit for said land.

The homestead entry of said protestant having been made with a reservation of the oil and gas to the United States and the patent issued containing such reservation the protestant has no interest in the oil and gas content, if any there be in said land and has no preference right to a permit under Section 20 of the act of February 25, 1920 (41 Stat., 437).

The Department has held that in case a permittee is unable to begin drilling operations with the exercise of diligence within six months from date of the permit, action will not be taken looking to the cancellation of the permit but that 12 months and 10 days from date thereof authorized, every permittee is required to file a corroborated affidavit specifying the work done upon the land embraced in the permit, together with such other information as may be pertinent to his operations thereon.

The purpose of this was undoubtedly to disclose to the Department the status at that time in order to show what has been done by the permittee and to show if the terms of the permit have been substantially complied with and the term, "together with such other information as may be pertinent to his operations," would include a statement as to marking the corners and posting the required notice on the land.

The purpose of the posting and marking of the corners on the land embraced in a permit is to give notice of the fact that a permit has been granted for that particular tract of land. In this case it appears that the protestant is fully aware that a permit was granted for said land and his only purpose in seeking the cancellation of the permit is to enable him to make application for a permit. To allow contests against permits for such purpose would be to invite endless litigation, which would tend to defeat the very purpose of the oil and gas leasing act, to wit: developing of the oil and gas resources of the country.

The only question raised by the protest is whether an oil and gas permit is subject to contest by a third party. The only parties in the case of an oil and gas permit is the permittee and the United

States and a contestant could acquire no preference right to a permit though the contest was sustained and the permit canceled. The enforcement of the stipulation in a permit rests with the Department and evidence that the permittee is not complying with the terms of his permit is welcome but a contest by a third party is not the proper procedure and the application is, therefore, denied and the protest dismissed without right of appeal.

CAREY ACT SELECTIONS.

July 13, 1921.

CAREY ACT—MINERAL LANDS—WITHDRAWAL.

The listing of lands under a Carey Act selection, although amounting to a segregation, does not confer the status of vested equitable title, and until the right to title is fully earned, the lands may be withdrawn or the mineral deposits therein may be disposed of by the United States.

DECISIONS DISTINGUISHED.

Cases of *Payne v. Central Pacific Railway Company* (155 U. S., —), *Payne v. New Mexico* (155 U. S., —), and *Wyoming v. United States* (155 U. S., —), cited and distinguished.

GOODWIN, *Assistant Secretary*:

I am in receipt of your [Commissioner of Public Lands of the State of Wyoming] letter of June 10, 1921, wherein with reference to the Administrative Order which was issued April 23, 1921 (48 L. D., 97), under the act of February 25, 1920 (41 Stat., 437) you request to be advised whether under the Supreme Court decisions in cases of *Payne v. Central Pacific Railway Company*, February 28, 1921; *Payne v. New Mexico*, March 7, 1921; *Wyoming v. United States*, March 28, 1921, cited therein, the holdings of the court are applicable in the case of segregations of public lands under the Carey Act.

Replying thereto, you are advised that under section 4 of the act of August 18, 1894 (28 Stat., 372, 422), a contract is authorized to patent desert lands not to exceed 1,000,000 acres to each State under the conditions specified in the act. The lands selected by the several States within their respective boundaries are segregated from the public domain for a period of 10 years, the State undertaking within that time to cause an adequate irrigation system to be constructed, and a sufficient water supply to be made available in a substantial ditch, for the reclamation of the lands by irrigation and upon satisfactory proof furnished by the State that the terms have been complied with, patents shall be issued to the State or its assigns. The lands when patented are disposed of by the States to actual settlers.

The act of June 11, 1896 (29 Stat., 413, 434) authorized a lien on the land for the cost of construction of the irrigation works and permits the issuance of patent without actual cultivation of the land.

Section 3 of the act of March 3, 1901 (31 Stat., 1133, 1188) authorized an extension of the period of segregation for 5 years.

In the cases referred to by you which involve certain railroad and State indemnity selections, the court held in effect that when the selection of lands subject thereto has been fully perfected under the law—that is when the selector has done all that the law requires in order to establish its rights—the selector acquires an equitable vested title in the selection not affected by withdrawals or changes in the status of the land.

In considering the cases it was found that the terms of the statutes authorizing the grants had been complied with at the time of filing of the selections in question.

In the matter of Carey Act selections, however, the filing of the selection does not complete the obligation to the Government. It merely serves to segregate the land from disposal except under the Carey Act and no title can be obtained by reason of this selection only.

In order to obtain title the State must file its list for patent showing that it has complied in all respects with the conditions imposed by the act and in the event the stated conditions have not been met, at the expiration of the 10 years or of the extended period, the lands may be restored to the public domain.

It therefore follows that the State has not the position of a selector in the sense such term is applied in the cases wherein opinion was rendered by the Court but acts under the Carey Act in the capacity of an agency of the Federal Government through which the lands are disposed of and their reclamation accomplished.

It is accordingly the opinion of the Department that the rulings of the Supreme Court in the cases cited are not applicable in the matter of segregations under the Carey Act and that until such time as the right to title has been fully earned, the lands listed under a Carey Act selection may be subject to withdrawal and to disposition by the United States of the mineral deposits contained therein.

SURPLUS LANDS IN THE SOUTH HALF OF THE COLVILLE INDIAN RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 23, 1921.

UNITED STATES LAND OFFICES,
SPOKANE AND WATERTVILLE, WASHINGTON:

The act of Congress approved March 22, 1906 (34 Stat., 80), under which surplus lands within the south half of the former Colville

Indian Reservation, Washington, were opened to homestead entry, among other things, provides:

"That the lands remaining undisposed of at the expiration of five years from the opening of the said lands to entry shall be sold to the highest bidder for cash, at not less than one dollar per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold ten years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price."

Certain lands on the reservation were opened to homestead entry September 5, 1916, and as to such lands the five year period will expire September 4, 1921. Lands on the reservation which have been opened to homestead entry since September 5, 1916, will remain subject to such disposition for a period of five years from the time that they were opened to entry.

Lands which on September 4, 1921, are embraced in existing entries may be re-entered if such entries are subsequently canceled on contest, relinquishment, or otherwise; but if the lands are unappropriated at such time as an offering of the lands is directed they may be listed for disposition and sold in like manner as other undisposed of lands.

Any application to enter these lands or any application for amendment presented on or before September 4, 1921, may if sufficient be allowed subsequent to that date. In the event that any such application is denied, the lands will not become subject to other appropriation but will automatically fall in the class of lands which must be sold at public auction to the highest bidder.

A settler on the lands on September 4, 1921, may make entry after that date, provided he does so within the three months allowed for that purpose.

Lands which on September 4, 1921, are embraced in a prior withdrawal may be entered after that date if the withdrawal is revoked.

You will advise with reference to the preparation of a list of the undisposed of lands in your district for the purpose of sale when such list is desired. The lands will not become subject to sale until such time as may be fixed by the Secretary of the Interior. No information can be furnished at this time as to when the sale will take place.

All stock raising applications now pending for said lands and all such applications received by you up to and including September 4, 1921, will be examined and passed upon before the close of the present field season.

You are directed to give all publicity possible without incurring expense to the Government of the information herein contained.

Approved:

E. C. FINNEY,

First Assistant Secretary.

GEO. R. WICKHAM,

Assistant Commissioner.

INSTRUCTIONS.

July 30, 1921.

ENLARGED HOMESTEAD—STOCK-RAISING HOMESTEAD—ADDITIONAL ENTRY—RULE OF APPROXIMATION.

The term "one quarter section," as used in sections 2289 and 2298, Revised Statutes, means a subdivision of 160 acres, and where an original entry contains more than that amount, for the excess of which payment is made, such excess is to be disregarded in applying the rule of approximation and in computing the area that the entryman may embrace in an additional entry under either the enlarged or the stock-raising homestead act.

DEPARTMENTAL DECISION OVERRULED.

The case of Ernest Muller (46 L. D., 243), overruled.

FINNEY, *First Assistant Secretary*:

By letter of July 14, 1921, you [Commissioner of the General Land Office] submitted for instructions the question as to the payment for the excess area under the following state of facts:

On September 4, 1909, William S. Ellenwood made homestead entry at the Lewistown, Montana, land office for the NW. $\frac{1}{4}$ (or lots 1 and 2 and E. $\frac{1}{2}$ NW. $\frac{1}{4}$), Sec. 19, T. 18 N., R. 15 E., M. M. (164.41 acres), paying \$5.51 for the excess area. On February 14, 1920, said Ellenwood made entry (Lewistown 043823) under section 7 of the enlarged homestead act for S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 21, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 22, T. 22 N., R. 16 E., M. M. (160 acres).

You request that the Department reconsider the rule stated in the case of Ernest Muller (46 L. D., 243), that the fact that an entryman paid for an excess when he made his original entry does not excuse him from paying for the excess area later entered.

The act of July 3, 1916 (39 Stat., 344), under which Ellenwood's additional entry was allowed, provides that the additional entry "shall not with the original entry exceed 320 acres."

The law governing the original entry (section 2289, Revised Statutes) limited its area to "one quarter section," and section 2298, Revised Statutes, provides:

No person shall be permitted to acquire title to more than one quarter section under the provisions of this chapter.

The meaning of "one quarter section" has been defined by Congress in providing for public-land surveys as meaning a subdivision of 160 acres; hence, in construing the provisions of said sections 2289 and 2298, the Department has from an early date held that if a "quarter section" contained an excess of 160 acres, the entryman must pay for the excess. It was under said departmental construction that Ellenwood was required to pay for the 4.41 acres excess in his original entry.

Upon mature consideration, the Department has reached the conclusion that to give full effect to the provisions of sections 2289 and 2298, Revised Statutes, it must be held that any excess over 160 acres embraced in an original entry—the entryman having paid for such excess—must be disregarded in computing the area which the entryman may embrace in an additional entry under either the enlarged or the stock-raising homestead act.

Accordingly, the decision in the case of Ernest Muller, *supra*, in so far as it conflicts with the views herein expressed, is overruled, and you will advise said Muller, provided he paid for the 18.26 acres referred to in said decision, that an application for repayment will receive prompt consideration.

CONDITIONS UNDER WHICH CAREY ACT ENTRYMEN ARE ENTITLED TO PREFERENCE RIGHTS UNDER SECTION 20, ACT OF FEBRUARY 25, 1920—WHEN ELECTION UNDER ACT OF JULY 17, 1914, IS REQUIRED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., July 30, 1921.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

The Department is in receipt of your letter of July 14, 1921, requesting to be instructed whether Carey Act entrymen are entitled to preference rights under section 20 of the act of February 25, 1920 (41 Stat., 437), under the following conditions, no patents having been issued to the State:

1. Where the entry was made and patent applied for by the State prior to February 25, 1920.
2. Where the entry was made prior to February 25, 1920, and patent has been applied for by the State after the approval of the act of that date.
3. Where the entry was made prior to February 25, 1920, for lands embraced in a segregated list only and no application for patent has been filed.
4. Where the entry was made after the passage of the act under any of the conditions stated above.

Considering the object of the provisions of said section 20, the Department is of opinion that State entrymen under the Carey Act should be accorded the same privileges under said section as entrymen under the public land laws. Accordingly, under the conditions numbered 1, 2, and 3, you will treat that class of entrymen as entitled to a preference right to a permit. Under the condition numbered 4, no preference right can be granted, paragraph 12 of the regulations (47 L. D., 437) specifically holding that the provisions of section 20 apply only to entries made prior to February 25, 1920.

If an application comes within the conditions numbered 1 and 2, it will be necessary for the proper State officer to elect to take patent subject to the provisions and limitations of the act of July 17, 1914 (38 Stat., 509). Under the condition numbered 3, a consent to accept a restricted patent need not be required prior to the application by the State for a patent.

E. C. FINNEY,
First Assistant Secretary.

JOHN C. BARBER.

Decided August 2, 1921.

HOMESTEAD—SOLDIERS' ADDITIONAL—SUBSEQUENT POWER-SITE WITHDRAWAL—
ALASKA.

The rights of an applicant who has complied fully with the regulations pertaining to the making of soldiers' additional homestead entries in Alaska and made timely proof of such requirements, relate back to the date of the application and are not affected by a subsequent withdrawal.

FINNEY, *First Assistant Secretary:*

John C. Barber has appealed from a decision of the Commissioner of the General Land Office dated January 21, 1921, rejecting his application to make entry under sections 2306 and 2307, Revised Statutes, for certain lands located near Ketchikan, Alaska, and designated as Surveys Nos. 1281 and 1282, containing 4.90 and 1.10 acres.

The applicant is the president of the Citizens' Light, Power and Water Company, engaged in the business of furnishing electric light, power, and water service to the inhabitants of the town of Ketchikan, Alaska, and he made the application in his own name to facilitate and expedite the allowance of the same, declaring that he made the application in the interests of his company. It is the intention of the company to erect a dam in the southeast corner of the tract known as Survey No. 1281, to impound the waters of Lake Carlanna, which lake has a surface of about 10 acres and empties into, or is drained by, Charcoal Creek. The tract now known as Survey No. 1282 is situated about one-half mile south of Survey No. 1281, in a deep box canyon, about 500 feet south of falls about 125 feet high. These falls are a part of Charcoal Creek, running from Lake Carlanna to tidewater. The company expects to erect a power house on this tract.

The application in question was filed September 25, 1919. On October 16, 1919, the register of the Juneau office certified the application to the surveyor general, who on October 20, 1919, authorized the making of the surveys, which were commenced on October 22, 1919, and completed three days later. The field notes were approved

by the surveyor general on June 30, 1920, and were filed in the local office on October 30, 1920. On November 26, 1920, the register issued a notice for publication. A copy thereof was posted in the local office on November 26, 1920, and remained posted until February 8, 1921. Copies were posted on the land December 1, 1920, and remained posted during the period of publication, and the notice was printed in a daily paper published at Ketchikan from December 1, 1920, to February 4, 1921. Proof of the publication and posting of the notice was filed February 8, 1921. A special agent of the General Land Office who made a field investigation reported that neither tract is mineral nor occupied in any manner adversely to the applicant.

The application was rejected because the tracts had been withdrawn and included in Power Site Reserve No. 753 by Executive order of December 9, 1920.

The record discloses that applicant complied fully with the regulations pertaining to the making of soldiers' additional homestead entries in Alaska (45 L. D., 236), and having made timely proof of such requirements his rights relate back to the date of his application. Hence, his rights are not affected by the subsequent withdrawal.

The fact that the land involved is most valuable for power-site purposes can not be made the basis of the rejection of the application.

The decision appealed from is reversed.

DEFECTIVE CONTEST AFFIDAVITS—AMENDMENT—MILITARY SERVICE.

INSTRUCTIONS.

[Circular No. 767.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 2, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

The act of July 28, 1917 (40 Stat., 248), provides in part as follows:

Hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, entryman, or person unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases hereinafter initiated that the alleged absence from the land was not due to his employment in such military or naval service.

The requirement, that in all contests hereafter initiated it shall be alleged in a preliminary affidavit that the absence from the land *was*

not due to military or naval service, is mandatory according to the holding of the Department on February 17, 1921, in Carrel vs. Thrall (Lewistown 040803). In view thereof you will examine carefully all affidavits of contest filed in your office and should the allegation as to military service of the contestee be not in conformity with the statute, you will call attention to that fact and permit the contest affidavit to be amended so as to cure the defect, but should such amendment not be filed within the time allowed for that purpose, you will reject same subject to the right of appeal.

If, however, another contest has been filed in the meantime, fully complying with the law, the amended affidavit must be considered as junior to the other contest.

These instructions do not modify the instructions contained in Circular No. 750, approved April 16, 1921 (48 L. D., 78).

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

ALICE E. JACKSON (FORMERLY McCLURE).

Decided August 4, 1921.

HOMESTEAD—CONTEST—FRAUD—COURTS—INSANE AND DECEASED ENTRYMEN.

A charge of fraud, connivance or conspiracy is not sustained where it is shown that the conservator or the administrator of the estate of an insane or of a deceased homestead entryman, acting in good faith and with the approval of a court of competent jurisdiction, for a valuable consideration to the enrichment of the estate, fails to submit final proof or make defense to a contest under the belief that it would be futile to do so on account of doubtful right by reason of noncompliance with the statutory requirements as to residence and cultivation on the part of the entryman.

DEPARTMENTAL DECISIONS CITED AND ADHERED TO.

The cases of *Ostreim v. Byhré* (37 L. D., 212), *William Duffield* (43 L. D., 56), *Fisher v. Kelly* (45 L. D., 467), cited and adhered to.

FINNEY, *First Assistant Secretary:*

Alice E. Jackson, formerly McClure, has appealed from a decision of the Commissioner of the General Land Office dated April 23, 1921, holding for cancellation her entry under the stock-raising homestead act embracing all of Sec. 2, T. 19 S., R. 57 W., 6th P. M. (640.22 acres), Pueblo, Colorado, land district.

It appears that on December 7, 1915, Mary Elizabeth Bingham made entry under the enlarged homestead act for the S. $\frac{1}{2}$, said Sec. 2, and fifteen days later Myra F. Bingham, mother of Mary Elizabeth

Bingham, made a like entry for the N. $\frac{1}{2}$, of said section. On December 21, 1917, Alice E. McClure filed separate applications to contest said entries, one affidavit alleging:

That said Mary Elizabeth Bingham, entrywoman, made homestead above on the 17th day of December 1915, and was adjudged insane about the month of September 1917; that during all this time she never established residence with the view of making this her exclusive home; that during this time she might have spent a night or so on this entry, but that also during all this time she maintained a home in Sugar City, exclusive of any home elsewhere; that no part of said entry has been cultivated; that said entry has at this time been abandoned and deserted for more than six months; that said default exists at the date hereof; that said absence was not due to her employment in the military service or the National Guard of any of the several States.

The other affidavit alleged:

That said Myra F. Bingham made homestead entry above on December 22nd, 1915, and died about the 7th day of November, 1916, and from the date of her entry until the date of her death never established residence on said entry, did not improve it in any manner or cultivate any part thereof; that she wholly deserted and abandoned said entry for more than six months after the date of filing and for nearly 11 months after date of filing; that after her death in November 1916, no effort was made by any heir to cultivate or improve said entry; that said absence was not due to her employment in military service of the United States or the National Guard of any of the several States; that said entry has been abandoned and deserted by entrywoman and heirs now for nearly two years; that said default exists at the date hereof.

Notice of the contest against the mother's entry was served on a daughter (Mrs. Joseph B. Grimes) and on the administrator of the estate, and in the case of the daughter's entry notice was served on the conservator of the estate and on Mrs. Grimes. No answer having been filed in either case, the entries were canceled by the Commissioner of the General Land Office on February 12, 1918, whereupon Miss McClure applied to make the entry in question, and, after designation of the land, her application was allowed on February 1, 1919.

On May 24, 1919, Mary E. Bingham, then on parole from an institution for the insane, filed petitions for the reinstatement of her entry and that of her mother, alleging that the conservator of her estate and the administrator of her mother's estate had entered into a contract to aid and assist in a contest against said homestead entries.

Under date of June 11, 1919, proceedings against the entry of McClure (now Jackson) were instituted by the Commissioner of the General Land Office on charges preferred by a special agent, who alleged that the cancellation of the Bingham entries—

was consummated by fraud, connivance and conspiracy, in that one A. S. McClure agreed and arranged with Joe Wallace, conservator of the estate of Mary E. Bingham, insane, and Fred Tarbox, administrator of the estate of

Myra F. Bingham, deceased, that said Wallace and Tarbox would in consideration of a certain stipulated sum to be paid them by the said A. S. McClure, to wit: the sum of \$150.00 each, default in the matter of said contest, and that pursuant with said agreement said Wallace and Tarbox altho notified of said contest, made no response, but allowed the entries to be canceled on said contest by default, and without the knowledge of said Mary E. Bingham and Myra F. Bingham.

Testimony was submitted at Ordway, Colorado, on February 4, 1920, the register of the Pueblo office presiding at the hearing. By decision dated March 10, 1920, the local officers recommended that the proceedings be dismissed.

In reversing the decision of the local officers, the Commissioner of the General Land Office held:

Having carefully considered all of the facts and circumstances shown by the record in this case, this office is of the opinion that the administrator and conservator of the Bingham estates erred in judgment to the effect that the homestead entries 021796 and 024322 might not have been successfully defended against contest for abandonment.

The acts performed by Miss Bingham in connection with her entry were sufficient for the establishment of residence on the land, and causing the fencing of the claim and its use for grazing purposes, considering the quality of the soil, was to all intents and purposes an agricultural use and compliance with legal requirements in that respect up to the time when she was adjudged to be insane and put under restraint and guardianship. Her entry should not have been canceled.

Mrs. Bingham's physical condition was such as to have entitled her to an extension of time within which to have established residence upon her claim, and she died within the period for which extension would have been granted if application therefor had been presented. Therefore, her entry should not have been canceled.

It appears from the testimony submitted at the hearing that Mrs. Bingham had not seen the land prior to the initiation of the entries made by herself and her daughter. There is no evidence in the record to indicate that she was ever upon, or actually saw, the land embraced in her entry, or was at any time nearer to it than the residence of A. S. McClure on the section adjoining. She was about 78 years of age at the time she made the entry, and while not in robust health was, in the language of her daughter (page 255 of the testimony) "remarkably well preserved for a woman of her years, excepting that her step was going halting." The daughter, although palpably led in that direction by counsel, would not say that her mother was "in a very bad shape" in 1916, the year in which she died. It does not appear, therefore, that she was prevented by ill health or physical disability from timely establishing residence on her homestead. Nothing is found in the record that would warrant the Department in holding that Mrs. Bingham was entitled to an extension of time within which to establish residence upon her homestead, and that her laches in that respect should be excused.

She never made improvement of any kind upon the land. The law under which the entry was made provides 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. Act of June 6, 1912 (37 Stat., 123).

It thus appears that the heirs of Mrs. Bingham were not in position to submit acceptable final proof on her entry, and that the heirs had no defense to the contest.

As to the entry of Miss Bingham, the Commissioner stated the facts as follows:

In June, 1916, at the time when by statute the Bingham were required to establish residence upon their homesteads, no definite preparation for so doing had been made, and on the last day of the six-months period, Miss Bingham requested McClure to erect a tent upon her claim so that she might comply with the law by making actual settlement thereon that day. It was not possible—at least not convenient—for him to do so, and, so informing her, he promised to place a tent upon the claim the following day, and he did so. However, Miss Bingham did not occupy the tent, and after some days it was blown down by the wind and removed from the land.

In the latter part of July or early August 1916, Miss Bingham caused to be built upon her homestead a small house, or "shack," which she furnished comfortably in January, 1917. She was on the claim several times in 1916, at intervals of from two or three weeks to a month, and there is positive testimony in the record showing that she slept twice on the land between the date of the erection of the shack upon the tract and the development of her mental incapacity.

Her visits to the land were usually in the daytime, driving the fourteen to sixteen miles from her home in Ordway in the morning, lunching at the cabin, and returning in the afternoon. The total number of her visits to the land, testified to by McClure, through whose place she passed on each occasion, were eight, and on page 244 of the transcript, the entrywoman practically admitted that estimate to be correct; but, she declared that she slept there on each of those occasions.

Miss Bingham was committed to an institution for the insane on October 3, 1917. She was on parole at the date of the proceedings against the entry of Miss McClure, but on October 1, 1920, was again committed to a hospital for the insane.

The act of June 8, 1880 (21 Stat., 166), relating to settlers who become insane, provides that their claims shall be confirmed and patented provided it shall be shown "that the parties complied in good faith with the legal requirements up to the time of their becoming insane."

Almost 22 months had elapsed between the date of Miss Bingham's entry and her commitment to an asylum for the insane, and during that time she had not "complied in good faith with the legal re-

quirements." It follows that the act of June 8, 1880, *supra*, is not applicable. *Ostreim v. Byhre* (37 L. D., 212); *Fisher v. Kelly* (45 L. D., 467).

In neither the petitions for reinstatement nor in the charges which were made the basis of the proceedings against the present entry was it alleged that either of the Bingham had complied with the statutory requirements as to residence or cultivation, nor that a good defense against the contests of Miss McClure might have been made in behalf of either entrywoman.

It appears from the record that the guardian of Miss Bingham's estate and the administrator of the estate of Mrs. Bingham made inquiry among people residing in the neighborhood of the land, and consulted the register of the Pueblo office and the judge of the probate court, resulting in their becoming convinced that acceptable final proof could not be made on either entry, and that in the event of a contest against either or both of said entries on the ground of abandonment no successful defense could be made. Acting on the advice of the register and the judge of the probate court, it was concluded to sell the claims, and the guardian and administrator entered into contracts with A. S. McClure whereby, in consideration of the sum of \$150 to be paid by McClure to each of said estates, no defense would be attempted by said representatives against contests to be brought by McClure's daughter. The \$300 was turned into the estates and accounted for by the officers, their actions being approved by the court. As to this phase of the case the decision appealed from held:

There is no evidence in this record to indicate, or suggest, to this office that there was any venality on the part of any of the persons connected with the transactions here involved. It is believed that the register acted in good faith when advising the representatives of the estates as he did in regard to the futility of attempting either the submission of final proof upon or defense of contests against the homestead entries; that the judge of the county court, in good faith, advised the sale of the claims; that the representatives of the two estates acted honestly and as they believed to the best interests of their charges in entering into the agreements with McClure.

In the case of William Duffield (43 L. D., 56) the Department held:

In the absence of charges against the homestead entry of one who becomes insane, the entry should as a rule be perfected and title taken under the act of June 8, 1880; but if it appear to a court of competent jurisdiction that the entryman has a doubtful right which should be sold rather than attempt proof to obtain patent, the judgment of the court in that respect should ordinarily be followed and relinquishment of the claim be permitted.

The estates of the Bingham (totaling about \$9,000) were being administered by the county (probate) court, and the guardian and administrator were officers of that court. They concluded, with the approval of the court, that the method adopted was the only one

by which anything of value could be secured for the estates, and no reason appears why the judgment of the court should not be followed.

For the reasons aforesaid, the decision appealed from is reversed, the proceedings being dismissed.

INSTRUCTIONS UNDER ADMINISTRATIVE ORDER OF APRIL 23, 1921, WITH REFERENCE TO STATE, RAILROAD AND LIEU SELECTIONS.

[Circular No. 768.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 4, 1921.

UNITED STATES LAND OFFICES,
AND CHIEFS OF FIELD DIVISIONS:

Attention is directed to the Administrative Order of April 23, 1921 (48 L. D., 97), as follows:

The Supreme Court of the United States in *Payne v. Central Pacific Railway Company*, on February 28, 1921, decided that the railroad indemnity selection there involved should be disposed of "on its merits unaffected by the withdrawal" of the land made after perfection of the selection for a water power site under the act of June 25, 1910 (36 Stat., 847). On March 7, 1921, in the case of *Payne v. New Mexico* the court concluded that the Land Department should dispose of the State's school land indemnity selection "in regular course unaffected by the elimination of the base tract from the reservation" for forestry purposes after the completion of the selection. In the case of *Payne v. United States ex rel. Newton*, on March 14, 1921, the court referred to the departmental instructions issued April 25, 1914 (43 L. D., 294), and said:

"The Secretary stated that the lapse of two years after the issue of the receiver's receipt will bar a contest or protest based upon any charge whatsoever, save where the proceeding is sustained by some special statutory provision."

In *Wyoming v. United States*, decided on March 28, 1921, the court held that the conditions obtaining at the date of the completed school land indemnity selection, with respect to the character of the land, whether known or believed to be mineral, were controlling and that the Land Department was without authority to cancel the selection on the ground that the selected land was subsequently included in a petroleum withdrawal and proven to be mineral land.

The administrative ruling of July 15, 1914 (43 L. D., 293), is not in harmony with said court decisions, and in so far as said ruling is in conflict therewith the same is hereby modified to conform to the holdings of the court. All departmental decisions based on said ruling which are not in harmony with those decisions among which are *State of California et al.* (44 L. D., 118); *State of California et al.* (44 L. D., 468); *State of Utah* (45 L. D., 551); and *State of New Mexico* (46 L. D., 217), are hereby overruled.

The future adjudication of cases controlled by the decisions mentioned will be in harmony with the principles announced in those decisions.

This order will not affect the disposition of the question of the mineral character of land claimed under the railroad land grants, either within the place or the indemnity limits, or under the swamp land grants. The well established practice and procedure now prevailing as to such lands will continue to be followed.

In accordance with said order, chiefs of field divisions will report to this office, without investigation or further examination, and close on their books all matters involving State, railroad indemnity, lieu selections, and other like claims to land which have been completed and perfected and are now merely awaiting field examination solely for the purpose of determining whether or not the lands claimed are of value for watering places or for power or reservoir purposes.

Field investigation with respect to minerals of lands involved in State selections, lieu selections, and other like claims is to be made for the purpose of determining their character—whether nonmineral or known or believed to be mineral—at the time of the perfected selection or claim, and hearings proceedings are to be conducted for the same purpose.

Field investigations and hearings with respect to minerals will proceed as heretofore in connection with railroad and wagon-road place and indemnity lands and with lands claimed by States as swamp and overflowed in character.

If doubt is entertained as to whether any particular selection or claim to land is to be returned without field examination or hearing heretofore ordered, advice from this office should be sought in the particular case, and action taken in accordance therewith. The purpose of these instructions is to indicate procedure broadly and in general terms, rather than to formulate specific rules to be held applicable in any possible case which may arise.

The regulations governing selections by States of indemnity school lands and of lands under quantity grants for specific purposes (39 L. D., 39) require publication of notice of the selections to be made by the State and proof thereof filed in the local land office within 90 days after receipt by the State officials of the notice for publication as prepared by the register at the time of the acceptance of the selection. Such selections, regular in all respects when filed, and perfected by the timely filing of the requisite proofs, are effective from the date filed. If defective when presented, or not perfected by timely filing of proofs, they are effective only from the time the defect is cured or the required proofs are filed.

Final action on pending selections coming within the rule announced in the administrative order, *supra*, made for lands which,

after selection were embraced within the boundaries of mineral withdrawals, and in connection with which mineral waivers or elections have been filed, in the absence of request for present action on the record, will be suspended for a period of six months from the date hereof, in order that opportunity may be afforded for the filing of formal motions for readjudication in the light of said order. Notice is given, however, that should such motion be filed, it may be necessary to have a field investigation made for the purpose of ascertaining the known character of the land as of the time of the perfection of the selection.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**ENLARGED HOMESTEAD—ADDITIONAL ENTRIES—SECTION 6 OF
CIRCULAR NO. 486 AMENDED.**

[Circular No. 770.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 6, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

On July 22, 1921, the Department amended the second paragraph of section six of the regulations (Circular No. 486), of July 8, 1916 (45 L. D., 208), under the act of July 3, 1916 (39 Stat., 344), adding a seventh section to the enlarged homestead act, to read as follows:

In the proof, to be submitted within five years after the date of the additional entry, there must be shown residence on the additional tract—or on the original, if permitted under the twenty mile exception above explained—for not less than three years, subject to the privilege of being absent five months in each year, as provided by the three year homestead law; also cultivation of not less than one-sixteenth of the additional tract during the second year after the date of the entry, and of not less than one-eighth of its area during the third year and until submission of proof; but residence and cultivation for the requisite period after the date of the application and until the submission of proof will be accepted. If the land is most valuable for grazing, and an order entered relieving entryman from cultivating the required area, proof that the tract has been grazed for three years will be accepted. Credit for military service will be allowed as in other cases.

WILLIAM SPRY,
Commissioner.

W. E. STAUNTON AND LEE SIMONSEN.

Decided August 13, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—RAILROAD GRANT—ACT OF JULY 17, 1914.

An applicant for a prospecting permit under section 13 of the act of February 25, 1920, is not required to serve notice on the owner of lands patented to a railroad company with reservation of the oil and gas under the act of July 17, 1914, inasmuch as claimants of railroad grant lands are excepted by section 20 of the former act from the preference right to permits thereunder.

FINNEY, *First Assistant Secretary:*

The NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 31, T. 58 N., R. 99 W., 6th P. M., Wyoming, were selected by the Northern Pacific Railway Company on October 22, 1915, under the act of July 2, 1864 (13 Stat., 365), in lieu of mineral lands within the primary limits of the grant to said company, and were patented on November 28, 1916, with oil and gas reservation under the act of July 17, 1914 (38 Stat., 509).

On February 1, 1921, at the Lander, Wyoming, land office, W. E. Staunton and Lee Simonsen applied for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon said subdivisions (and other lands).

By decision dated July 14, 1921, the Commissioner of the General Land Office required said applicants to serve notice of their application on the owner or owners of said subdivisions. The applicants have appealed.

Section 20 of the act of February 25, 1920, *supra*, excepts from the preference right to permits therein granted "lands claimed under any railroad grant."

The decision appealed from is accordingly reversed.

**AMENDMENT OF CIRCULAR NO. 679, IN REGARD TO BONDS WITH
COAL-LAND LEASES.**

INSTRUCTIONS.

[Circular No. 773.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 16, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

The regulations governing coal mining leases, permits and licenses, under the act of February 25, 1920, Circular 679, approved April 1,

1920 (47 L. D., 489), is hereby amended by adding to section 8 thereof the following provision:

Provided that in case of lease for a small area where the investment to be made is less than \$10,000, the lessee shall furnish one bond to cover both the investment and compliance with the terms of the lease, such bond to be in half the amount of the investment to be made, but in no case shall be less than \$1,000.

This amendment was approved by the Secretary of the Interior, August 10, 1921, and is effective from that date.

WILLIAM SPRY,
Commissioner.

J. T. WILLIAMS AND JOHN BLATHRAN.

Decided August 19, 1921.

COAL LANDS—PREFERENCE RIGHT—ACT OF FEBRUARY 25, 1920.

Under sections 2348-2352, Revised Statutes, the opening and improving of a mine of coal upon unreserved public lands by a qualified person in actual possession thereof, confers a preference right to purchase for a total period of substantially fourteen months, that is, for sixty days absolutely, and for a further period of one year from the filing of a declaratory statement, if filed within the sixty days, and such preference right to purchase is not defeated or abridged by the intervening passage of the leasing act of February 25, 1920.

DEPARTMENTAL DECISIONS CITED AND ADHERED TO.

The cases of *Skoyen v. Harris* (24 L. D., 46), *McKibben v. Gable* (34 L. D., 178; 447), *Lehmer v. Carroll et al.* (34 L. D., 267; 447), *Charles S. Morrison* (36 L. D., 126; 319), cited and adhered to.

FINNEY, Acting Secretary:

Your office [General Land Office] has submitted for consideration, with the view to the waiving of certain requirements of the regulations, coal declaratory statement 024445 and coal application 026517 presented by John Blathran and J. T. Williams, for S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 5, NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 8, T. 10 S., R. 5 E., Salt Lake City, Utah, land district.

The record shows that on June 9, 1919, the applicants filed their joint coal declaratory statement, above mentioned, in which they alleged that they entered into possession of the land on April 1, 1919, and on June 2, 1919, opened a valuable mine of coal and had improved the same at an expenditure of \$800 as follows: "The labor consists in building a cabin, improving a spring, and making three openings, one tunnel 120 feet long, another tunnel 20 feet long, and an open cut 10 feet long."

On June 14, 1920, the claimants filed their coal-land application to purchase, under section 2347, Revised Statutes, the tracts described. They made no reference therein to their preference right but did

state that they had never held "except the above" lands or purchased any lands under the coal act. On the same day the application was rejected by the register because not filed under the proper act. About June 24, 1920, the applicants received notice by registered mail of the rejection of their application "for the reason that you must make application for a lease under the act of February 25, 1920." The notice granted claimants thirty days within which to appeal to your office. On July 14, 1920, an appeal was filed accompanied by an affidavit from claimant, Williams, and a formal application to purchase pursuant to section 2348 of the Revised Statutes. Affiant Williams avers that he presents the application for himself and his coclaimant under said section based upon the coal declaratory statement and respectfully asks that it be substituted for the prior application which was filed by mistake and based upon erroneous information given him at the land office. It is alleged that the claimants have expended since April 1, 1919, a sum in excess of \$2850 and that the mistake in filing of the application was due to reliance placed upon officials of the Land Department and their advice. It is asked that the sum of \$10 paid in connection with the first application be applied to the substitute application and that the later application be given the same standing as if it had been filed on June 12, 1920, and in the form now presented, and, further, that proper notices for publication and posting be issued thereon. In the substituted or amendatory application an expenditure in labor and improvements of \$2850 is set up, being as follows:

90 ft. tunnel—4 ft. wide—6 ft. high—exposing 2 ft. of coal.

95 ft. tunnel—4 ft. wide—6 ft. high—exposing 2 ft. of coal.

115 ft. tunnel—4 ft. wide—6 ft. high—for 75 ft. and 6x6 ft. the last 40 ft.—exposing 6 ft. of coal.

20 ft. tunnel—4 ft. wide—6 ft. high—exposing 3 ft. of coal. Total value, \$2500.

Cabin for miners—value, \$50 to \$100. Road to make it passable to property—value, \$300.

From the foregoing it is obvious that the preference right of the claimants was initiated on June 2, 1919, and that the sixty-day period for the filing of a coal declaratory statement expired upon and with August 1, 1919.

Consequently, the statutory year for the perfection of the claim expired on and with August 1, 1920. The first application was filed 48 days before the expiration of the statutory year and the amendatory application 18 days.

From the tenor of the letter submitted by your office it would appear that the view is entertained that these claimants were delinquent under the statute and the regulations because the application to purchase was not filed within one year after the filing of the coal declaratory statement.

If such view is entertained it is not in accordance with the law, the regulations or the decisions. Section 2349, Revised Statutes, in connection with the preceding section, contemplates that the coal declaratory statement or notice setting up a preference-right claim must be presented within sixty days after the date of the inception of the preference right, that is to say, within sixty days after the date a mine of coal has been opened and improvements on such mine commenced, accompanied by actual possession of the land. Section 2350, Revised Statutes, provides that preference-right claimants must submit their proofs and pay for the lands filed upon "within one year from the time prescribed for filing their respective claims."

Paragraph 7 of the regulations states that a preference right accrues only where a qualified person has opened and improved a mine of coal upon the public lands and is in actual possession thereof, and not by the filing of a declaratory statement. It is further stated that to preserve the preference right, claimant, within sixty days from actual possession and commencement of improvements, must file his declaratory statement. Paragraph 12 prescribes that "one year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment." Paragraph 17 states that publication must be sufficiently early to permit entry within the statutory year. Paragraph 18 prescribes that in the exercise of a preference right the publication and posting should be completed and the proof thereof filed within the year fixed by the statute.

The decisions bearing upon the two statutory periods involved are as follows: *Skoyen v. Harris* (24 L. D., 46); *McKibben v. Gable* (34 L. D., 178; 447); *Lehmer v. Carroll et al.* (34 L. D., 267; 447), and *Charles S. Morrison* (36 L. D., 126; 319). See paragraph 13, Coal Land Regulations (46 L. D., 131, 139).

If the local officers on June 14, 1920, had merely suspended the application and called for an application under section 2348, Revised Statutes, there would have remained ample time for the posting and publication of notice and making proof and payment within the statutory year. Quite promptly after the receipt of notice of the rejection of their application the claimants not only preserved their rights by taking an appeal but tendered a good and sufficient application.

From the showing made it is clear that at the date of the approval of the leasing act, February 25, 1920 (41 Stat., 437), the applicants had a valid claim for the tracts and their legal rights in the premises have been duly preserved by the action they have taken.

The Department is of the opinion that your office should direct the local officers to promptly cause the proper notices for posting and publication to be issued and thereafter, in due time, upon submission of proof and making of payment for the land, to allow coal-land entry upon the application presented by the claimants.

The Department does not deem it necessary that any of the provisions of the coal-land regulations should be expressly waived in this case. Papers are returned to your office and further proceedings will be taken in harmony with the views above expressed.

MARTI v. RIDDLE.

Decided July 8, 1921.

STOCK-RAISING HOMESTEAD—MILITARY SERVICE—RESIDENCE.

A stock-raising homestead entryman is entitled, by virtue of the provisions of the act of July 28, 1917, to have his military service construed as equivalent to the establishment of residence *eo instanti* as of the date of the designation of the land where, after the filing of his application, he entered the service and remained therein until after the land was designated.

CONTEST—STOCK-RAISING HOMESTEAD—RESIDENCE—MILITARY SERVICE.

In a contest proceeding against a stock-raising homestead entry in which failure to establish residence and abandonment are alleged, it is not necessary for an entryman, who was in the military service at the time that the land was designated, to prove the establishment of actual residence, in order to be entitled to credit for constructive residence for time engaged in the performance of farm labor under the act of December 20, 1917.

CONTEST—ABANDONMENT—NOTICE.

Notice given by a homestead entryman of his intention to absent himself for the purpose of performing farm labor under the act of December 20, 1917, protects the entry against contest on the ground of abandonment.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

Case of *Morris v. Moyer* (46 L. D., 297), cited and followed.

GOODWIN, Assistant Secretary:

On January 13, 1917, Robert L. Riddle filed stock-raising homestead application 029863 Santa Fe land district, New Mexico, for the S. $\frac{1}{2}$, Sec. 13, N. $\frac{1}{2}$, Sec. 24, T. 7 N., R. 12 E., N. M. M., containing 640 acres, as a second entry under the act of September 5, 1914 (38 Stat., 712). The lands were designated as stock-raising lands November 15, 1918, and on October 17, 1919, after a proper showing, his entry was allowed under section 6 of the stock-raising homestead law. On May 5, 1920, he filed notice in the local office as follows:

This is to notify you that I am leaving my claim to farm at Fort Sumner, N. Mex., this summer. Serial No. 029863.

On June 2, 1920, Peter Marti filed affidavit of contest against said entry, charging:

That said entry (man) has wholly abandoned for more than six months last past and has never established residence or lived thereon and his absence is not due by him being in the Army or Navy or any branch of the military service of the United States. This information is from inquiries and belief.

Notice of contest was issued and served on the entryman, who on June 14, 1920, answered as follows:

That he denies each and every allegation in said contest. That he is farming under the act of Dec. 20, 1917, and gave notice of said farming to the United States Land Office at Santa Fe, N. M., on about the 4th day of May, 1920, which was prior to the filing of this contest. That he served two years (lacking twenty days) in the Army of the United States, in Company A, 144th Machine Gun Bn., No. 1631230. That he established residence on the land 16th day of April, 1920, and immediately on leaving the land gave written notice of farming. I move that this contest be dismissed.

The register and receiver recommended that the case proceed to a hearing. The entryman, by his attorney, urged that the motion to dismiss be acted on by the Commissioner of the General Land Office before the entryman be put to the expense of a hearing. The Commissioner found that the contestant and entryman had joined issue on the question of whether or not the entryman had established residence on the land of his entry and by decision of January 22, 1921, dismissed the motion and ordered that the matter proceed to a hearing. The entryman has appealed.

It appears that the land here involved was designated as stock-raising land November 15, 1918, and by a report of record in the case, the Adjutant General advised that the entryman was in military service from May 24, 1917, to May 2, 1919. Under the stock-raising homestead law, credit for residence can not inure to the entryman's benefit until the land has been designated. On that date, the record discloses that the entryman was in the military service, and residence on the land was *eo instanti* established in accordance with the act of July 28, 1917 (40 Stat., 248), which provides that said service is "equivalent to all intents and purposes to residence and cultivation." See case of *Morris v. Moyer* (46 L. D., 297).

The entryman on May 5, 1920, filed notice of absence from his homestead to engage in farm labor under the act of December 20, 1917 (40 Stat., 430). His military service being equivalent to residence on the land it is not necessary for him to prove the establishment of actual residence on April 16, 1920, as alleged, and he is entitled to credit for constructive residence for such period of time as he was engaged in farm labor and the purpose of the notice is to protect his homestead from contest on the ground of abandonment or his failure to maintain residence. Said notice was filed prior to con-

test. In the presence of these facts which appear of record in the case, the charge does not state a cause of action.

The Commissioner's decision is reversed.

THOMAS v. RICHEY.

Decided July 19, 1921.

MILITARY SERVICE—ACT OF AUGUST 29, 1916—HOMESTEAD ENTRY—SETTLEMENT.

There is no law under which service in the Regular Army in time of peace excuses or constitutes compliance with the homestead law, nor does one who, after making homestead entry, enlists in the Regular Army for such service, come within the class contemplated by Public Resolution No. 32, act of August 29, 1916, and an entry which has been canceled because of failure to make settlement will not be reinstated to the prejudice of a third party who has entered the land and complied with the law.

MILITARY SERVICE—HOMESTEAD ENTRY—CONTEST—ABANDONMENT—PRACTICE.

While the Land Department, in order to further safeguard the interests of those protected by the military service statutes, has refused to entertain all contests based upon the charge of abandonment during the periods covered thereby, in the absence of an allegation that the default was not due to such service, yet that practice need not have controlling weight where, a contest having been entertained, it is clearly shown that the entryman was not of the class protected by the law.

FINNEY, *First Assistant Secretary:*

On February 29, 1916, William I. Thomas made enlarged homestead entry 025244, Pueblo land district, Colorado, for the W. $\frac{1}{2}$, Sec. 33, T. 25 S., R. 54 W., 6th P. M. On March 16, 1917, Bertha M. White filed contest against said entry, in which she charged—

That the said William I. Thomas never established residence on this claim, never built a house, never cultivated, never fenced, nor made any improvements thereon whatsoever; that said defaults exist to date of filing this contest; that I have heard that after his abandonment of this claim, he voluntarily enlisted in the Navy of the United States, altho I do not know this to be a fact; that if it is so, he, nor his family, have ever established residence on this claim, nor improved same in any way.

Notice of contest was served by publication and no answer having been filed, the entry was canceled July 27, 1917. On September 17, 1917, David H. Richey made enlarged homestead entry 034461 for the land.

The Adjutant General by endorsement dated January 18, 1918, reported that William I. Thomas enlisted at Fort Logan, Colorado, on March 24, 1916, and was serving with the 9th Company, Manila Bay, Fort Mills, Manila, Philippine Islands. The Commissioner of the General Land Office by decision of April 19, 1918, revoked the action of July 27, 1917, dismissed the contest, and reinstated Thomas's

entry. On July 15, 1918, the Commissioner issued a rule against Richey requiring him to show cause why his entry should not be canceled because of conflict with the prior right of Thomas. On May 14, 1919, the Commissioner held Richey's entry for cancellation. He appealed. The Department by decision of January 15, 1920, held that Thomas's entry had been erroneously canceled, but in view of the fact that Thomas was not applying for reinstatement of his entry and that Richey had made entry without knowledge of the error, Richey's entry should remain intact in the absence of other objection or further showing.

On June 11, 1920, Thomas filed application for reinstatement of his entry and requested that Richey's entry be canceled. He set forth that he enlisted in the United States Army on March 24, 1916, and had been in active service up to May 11, 1920, at which time he was furloughed to the Regular Army Reserve. He stated that the land has not been fenced, and that the improvements thereon consist of a three-room shack worth \$100, a barn partly constructed worth \$50 and eight or ten acres of sod broken. He estimated the improvements to be worth about \$175 and held himself ready to make just compensation to Richey for any improvements placed upon and remaining upon the land.

On June 28, 1920, Richey filed motion to dismiss said application for reinstatement urging that Thomas's entry was closed out by departmental decision of January 15, 1920. Richey set forth that he established residence on the land in February, 1918, and has continued to reside there ever since except during the period of his military service in 1918 and 1919, during which time his wife and family lived on the land. He stated that he was injured while in military service and can not do much work. He alleged that he sowed 20 acres to sweet clover for pasture the first year and every year farmed 10 to 20 acres. The improvements consist of a 14 by 32 foot house, a barn 14 by 32 feet, cow shed 14 by 20 feet, and 400 rods of fence. He estimated the value of his improvements at \$450 to \$500.

He contended that as Thomas was not employed in the military service in connection with the operations in Mexico or along the border thereof, his entry was not protected by Public Resolution No. 32, approved August 29, 1916 (39 Stat., 671).

Thomas's application for reinstatement of his entry and showing as to his military service claiming protection of his homestead rights, bore evidence of service thereof on Richey who filed brief in reply. The Commissioner by decision of February 5, 1921, held Richey's entry for cancellation and Thomas's entry for reinstatement subject to the right of appeal. Richey has appealed.

The question presented is not on the merits of White's contest but of the conflicting rights of Thomas and Richey, and whether or not Thomas's entry was in fact subject to cancellation. The reinstatement of Thomas's entry depends upon whether or not his rights were protected during his military service.

White contested Thomas's entry March 16, 1917. At that time Thomas had not established residence upon, cultivated, nor in any manner improved the land, though his entry was then more than a year old. His defaults were not due to "military service rendered in connection with operations in Mexico or along the borders thereof, or in mobilization camps elsewhere," but to service in the Regular Army in time of peace, which under no law or regulation of the department has ever excused or constituted compliance with the homestead law. Public Resolution No. 32, approved August 29, 1916, *supra*, making the provisions of the act of June 16, 1898 (30 Stat., 473), applicable to operations along the Mexican border was for the protection of settlers engaged in such operations or mobilized therefor, and for no others; for it is in favor of "such settlers" that the inhibition against contests without the charge and proof of non-military service is directed.

While the Department in order to further safeguard the interests of those protected by the resolution and act aforesaid has refused to entertain all contests based upon the charge of abandonment during the periods covered by the resolution and act, in the absence of an allegation that the default was not due to military service, that practice need not have controlling weight where as here, the entryman was not of the class protected by the law. The contest was entertained, the entry canceled, and a third party has in good faith entered the land, and, so he alleges, has complied with the law and is prepared to submit proof thereof.

Both Thomas and Richey served their country in the late war and both are entitled to and have received the indulgent consideration of the Department. Thomas was in default as to his entry. No default is alleged as to Richey's entry. Thomas has expended no time and little money with respect to his claim, while the land has been the home of Richey and his family for more than three years and he has made valuable improvements thereon.

In this state of the record the Department is constrained to hold that there is no justification either in law or equity for the cancellation of Richey's entry and it will remain intact of record. The decision appealed from is accordingly reversed and Thomas's application for reinstatement is denied without prejudice to his right of second entry or to his applying for the return of moneys paid in connection with his canceled entry.

VINCENT C. WILCOX.

Decided July 30, 1921.

WATER POWER—WITHDRAWAL—STOCK-RAISING HOMESTEAD—ACT OF JUNE 10, 1920.

The proviso to section 24 of the Federal Water Power Act of June 10, 1920, which authorizes the approving or patenting, subject to the limitations and conditions of the act, of locations, entries, selections, or filings theretofore made for lands reserved as water-power sites, has reference only to such locations, entries, selections, or filings as were made prior to the passage of the act, and does not protect a stock-raising homestead application filed thereafter for lands previously withdrawn and included within a Federal power-site reserve.

WATER POWER—WITHDRAWAL—STOCK-RAISING HOMESTEAD—PREFERENCE RIGHT.

Favorable action upon a petition filed by an applicant who has been denied the right to make a stock-raising homestead entry, resulting in the restoration of lands withdrawn under the provisions of the Federal Water Power Act of June 10, 1920, does not confer any preferential right upon the petitioner to make entry.

FINNEY, *First Assistant Secretary:*

Vincent C. Wilcox filed stock-raising homestead application, Sacramento 013721, for additional entry for lot 1, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 18, T. 29 N., R. 2 E., M. D. M., and for other tracts, on March 18, 1921, with a petition for designation.

By decision of May 12, 1921, the Commissioner of the General Land Office found that said tracts, first described, were withdrawn and included in Power Site Reserve No. 364, Executive order of May 27, 1913, and held that the right of election under the proviso to section 24 of the Federal Water Power Act of June 10, 1920 (41 Stat., 1063), applies only to applications filed prior to June 10, 1920.

Accordingly the Commissioner rejected the application as to the lands first above described but directed that the application be allowed to remain intact as to the other tracts described in the application, subject to the requirements of the stock-raising law; that claimant be allowed to file an application for the restoration of said reserved lands, under section 24 of the Federal Water Power Act but that, should the lands be restored, they would be opened subject to the sixty-day preference right for ex-soldiers of the war with Germany.

The claimant appealed on the ground that, at the time of filing his application, he had filed his notice of election under section 24 of the Federal Water Power Act; that there is nothing in said section 24 of said act to show that it applies only to applications filed prior to June 10, 1920, but that it applies to all entries and that claimant requests the restoration to entry of the lands first above described.

Under the terms of Circular No. 729, approved November 20, 1920 (47 L. D., 595), setting forth instructions in reference to section 24 of the said Federal Water Power Act, it is provided that applications of any sort filed subsequent to June 10, 1920, must be rejected. Certain exceptions to this rule are specified in said circular but these exceptions do not affect the question presented in this record.

It is further provided in section 4 of Circular No. 729, that when an application has been rejected, the claimant may file a petition for the restoration of such withdrawn lands, under the provisions of section 24 of the Federal Water Power Act but that favorable action upon such application will not confer any preference right when the lands are finally restored and that the lands will be restored in strict accordance with Circular No. 324, approved May 22, 1914 (43 L. D., 254), as modified by Circular No. 678, approved March 31, 1920 (47 L. D., 346).

Circular No. 678 was issued under Public Resolution No. 29, approved February 14, 1920 (41 Stat., 434), which provides that for two years following the passage of said resolution, on the restoration of lands previously withdrawn, claimants who have been engaged in the military or naval service of the United States and who have been honorably discharged or placed in the Regular Army or Naval Reserve, shall have a preference right of entry under the homestead or desert land laws, except as against prior existing valid settlement rights and as against preference rights conferred by existing laws or equitable claims subject to allowance and confirmation.

It does not appear from the record that claimant had acquired any right or interest in the land which would bring his claim within the exceptions provided by the terms of said Public Resolution No. 29, and no reason appearing why the decision of the Commissioner should be modified, the same is affirmed accordingly.

JOHN VAN HOUTEN AND RICHARD E. DOWD.

Decided August 3, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—STATUTES.

The act of February 25, 1920, contemplates that the right to an oil and gas prospecting permit may be initiated by filing an application therefor, and it is clear that it was not the intention of Congress by the insertion of the condition in section 13 thereof that "the applicant shall, prior to filing his application for permit, locate such lands," when construed *in pari materia* with other provisions of said section, to require a demarcation of the boundaries on the ground as a condition precedent to the validity of such application.

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT.

As between two conflicting applications for an oil and gas prospecting permit, no such preference right is acquired by the second applicant by reason of his previous location of the land and posting of notice thereupon as will defeat a proper application filed prior thereto.

FINNEY, *First Assistant Secretary*:

John Van Houten has appealed from the decision of the Commissioner of the General Land Office, dated April 9, 1921, holding for rejection in so far as in conflict with the prior application of Richard E. Dowd, his application filed November 15, 1920, for a permit to prospect for oil and gas under the provisions of section 13 of the act of February 25, 1920 (41 Stat., 437).

On October 16, 1920, Dowd filed in the local land office at Vernal, Utah, his application 08742, for prospecting permit covering certain lands described as embraced in Secs. 17, 18, 19 and 20, T. 4 S., R. 4 W., U. S. M., aggregating 2,558.61 acres. Van Houten, as stated above, filed his application November 15, 1920, for other lands in the same vicinity conflicting, however, as to the tracts in sections 17, 18 and 19 embraced in the prior application of Dowd. Van Houten claims a preference right under his application and in support thereof alleges that he had theretofore—

caused to be erected at a spot 100 feet southeast of the northwest corner of section 19 in the above lands described, a monument not less than 4 feet in height and not less than 4 inches square or in diameter, and firmly imbedded in the ground, and of such a size as to be visible to anyone who might be interested, upon which monument a notice was placed by his duly authorized attorney in fact at 3.11 p. m. on the 16th day of October, 1920.

Considering the case under the oil and gas regulations of March 11, 1920 (47 L. D., 437, 441), the Commissioner laid a rule upon Van Houten to show cause why his application should not be rejected to the extent of the conflict disclosed, and appeal from that decision brings the case before the Department where counsel for the appellant has been heard orally on the question.

The Commissioner's decision is in harmony with section 5 of the oil and gas regulations *supra*, which section relates to the initiation of preference rights for prospecting permits, subparagraph (c) of which provides that—

In cases of conflict between a preference right application and one filed without any claim of preference, the priority of the initiation of the claim will govern; for example, the filing of a proper application in the land office prior to the posting of notice by another, as aforesaid, will give a prior right.

The appeal is based solely upon that portion of section 13 of the act of February 25, 1920, *supra*, which provides that—

Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate

such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified.

It is in effect conceded that under the regulations as promulgated, Dowd has the prior right, but it is urged that the departmental construction of the law as therein announced does not express the intent of the statute, which declares that "the applicant shall, prior to filing his application for permit, locate such lands"; that the word "locate" as used in the statute was intended and should be taken to have the meaning of that term as employed in the mining laws; that the requirement of *location* is mandatory; that it must precede and is an essential prerequisite to the validity of any such application.

In the judgment of the Department this contention is without merit. While it is essential to the validity of a mining location that there be a prior marking of the boundaries of the property upon the ground so that the same may be readily traced, it is not believed that Congress intended by the use of the word "locate" in the act of February 25, 1920, *supra*, to impose any such requirement upon an applicant for a permit to prospect for oil or gas. Clearly, in the opinion of the Department, the statute contemplates that the right to a permit may be initiated by filing an application therefor in the land office for the district where the lands are situated or located, specifically describing them by legal subdivisions, if surveyed, and if unsurveyed, by metes and bounds. True the law specifies that—

whether the lands sought * * * are surveyed or unsurveyed * * * the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width.

But this does not contemplate or require a *prior* demarcation of the boundaries on the ground such as is required of the locator of a mining claim. Strong confirmation of this view is found in that further provision of the act, *supra*, which stipulates that: "The applicant shall, within ninety days after receiving a permit, mark each

of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby."

This makes clear that one to whom a permit has been granted must thereafter go upon the lands and establish such monuments and post such notice as will make it easily understood by others inspecting the land to what extent it is claimed by the prior applicant.

Manifestly the purpose of the statute in primarily requiring of an applicant for a permit that he "locate such lands in a reasonably compact form * * *" was to provide a plan for orderly arrangement and selection and to demand of the applicant that he determine, choose or locate the lands to be prospected, with due regard to form, shape and external lines. The condition imposed relates solely to these matters and was not intended to mean that the area applied for should in the first instance be *located* in the same manner as mining claims are located under the mining laws of the United States.

The Department has carefully considered the question presented, in the light of the argument submitted, and is firmly convinced that the appellant's contention is without merit. The law will not admit of the construction sought to be placed upon it.

The decision of the Commissioner is accordingly affirmed.

JOHN B. FORRESTER AND ROBERT M. MAGRAW.

Decided August 4, 1921.

COAL LANDS—ACT OF FEBRUARY 25, 1920—STATUTES.

In determining the time that the leasing act of February 25, 1920, became effective, the general statutory rule of construction that an act is in force and operation during the entire day on which it was approved by the President, is to be applied, subject to the privilege of any one having a substantial right that would be affected by the application of said rule to prove, if he can, the exact time of the approval.

COAL LANDS—SECTION 2347, REVISED STATUTES—ACT OF FEBRUARY 25, 1920—APPLICATION.

An application to purchase coal land under section 2347, Revised Statutes, in order to be entitled to consideration as a valid claim existent at the date of the passage of the act of February 25, 1920, within the purview of the saving clause of section 37 thereof, must thereafter be maintained in compliance with the preexisting law under which it was initiated; and where the application was filed on the day that the leasing act was approved, the applicant will not be permitted to prove that it was filed prior to the time of actual approval, if he has failed to comply with the conditions of the act under which the claim was initiated and of the departmental regulations thereunder relating to its maintenance.

FINNEY, *First Assistant Secretary*:

This is an appeal from the decision of the Commissioner of the General Land Office, of October 14, 1920, holding for cancellation the coal entry, serial 025416, of John B. Forrester and Robert M. Magraw, application for which was filed February 25, 1920, under section 2347, Revised Statutes, for S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 33, T. 15 S., R. 8 E., S. L. M., 160 acres, in the Salt Lake City, Utah, land district.

Said lands had been classified as coal lands and appraised at prices running from \$25 to \$125 per acre, the price of the whole 160 acres aggregating, under said appraisal, \$10,600. The application to purchase was filed February 25, 1920, at 9.05 a. m., notice posted the same day, and publication of notice begun March 5, 1920. No adverse claim or protest was filed during the period of publication. On May 19, 1920, the associated applicants paid to the register and receiver the full appraised price of the lands, and final certificate was issued to them by the register. On August 20, 1920, the receiver reported to the Commissioner that he had on that day applied the purchase money paid in connection with said coal-land entry on May 19, 1920.

The act of Congress entitled "An Act To promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain," popularly known as the "Mineral-Leasing Law," was approved by the President on February 25, 1920 (41 Stat., 437). Section 37 of said act is as follows:

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, * * * shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at date of passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

On August 12, 1920, the Secretary of the Interior addressed a letter to the Commissioner of the General Land Office, in paragraph 1 of which he stated:

Under the general rule of law applicable to such cases, the act of February 25, 1920, was in force and operation during that entire day, subject, however, to the privilege of any person having a substantial right which would be affected by the application of the general rule to prove, if he can, the exact time of approval.

On October 14, 1920, the Commissioner, in his decision here under review, after briefly stating the history of this case, held:

Because of the enactment of the mineral-leasing act, approved February 25, 1920, a coal application to purchase, filed under section 2347, Revised Statutes, could not, however, be filed subsequent to February 24, 1920.

The coal entry herein is, accordingly, hereby held for cancellation, subject to the usual right of appeal.

The entrymen in their appeal from said decision to the Department, claim that the Commissioner erred in thus holding, and in not holding that a substantial right of said applicants was affected, and in not granting to the applicants the right to prove, if they can, that said act of February 25, 1920, was not signed by the President and did not become a law until after the filing by applicants of their application to purchase and its due acceptance by the local officers.

Assuming for the moment that it can be proved that, in point of fact, said act of February 25, 1920, was not approved by the President until after the filing by the applicants of their application to purchase, two questions arise for preliminary consideration: (1) Did such filings and acceptance, if at the moment thereof the old law relative to coal deposits was still in force, create a "valid claim existent at date of passage" of the new law or, to use the words of the Secretary's quoted instruction of August 12, 1920, a "substantial right"? (2) Was such claim "thereafter maintained in compliance with the laws under which initiated"?

1. A "valid claim existent" in the statutory phrase, and a "substantial right" in that of the Secretary's instruction, are, for the purposes of this discussion, equivalent terms. The Secretary's quoted instruction on the point in hand must be taken to have been given with the saving clause of said section 37 in mind, and to have been intended to define the field of the proper application of that saving clause. This is evident because section 37 of said act contained the only exception to its operation as wholly superseding the operation of the prior law; and said instruction was given to define the field of that exception as limited only by the actual time of approval of said act.

Either phrase denotes such a claim or right, existent prior to the going into operation of the leasing act, as, if regularly followed up, would ripen into acquisition of ownership of the land involved under the provisions of the former law.

Such a claim under the homestead law, protected against later changes therein, would be derived from a settlement right or a regularly allowed application for entry. No reason is perceived for denying equal potency to the filing of an application for cash purchase of coal land, by a qualified applicant, while the former law providing for its purchase was still in force.

2. But the restrictive words of this saving clause invite attention—"except as to valid claims existent at date of the passage of this act *and thereafter maintained in compliance with the laws under which initiated,*" before they are entitled to raise the question whether or not it was a "valid claim existent at date of the passage of this (the leasing) act"—in other words, before they are entitled to prove, if

they can, that the time of approval of the leasing act was subsequent to the time when their claim was "initiated" and became "existent" under the former law.

The coal-land regulations under the former law, promulgated July 7, 1917 (46 L. D., 131, 133), prescribed, in paragraph 18 thereof (ib., 141-2), that—

The claimant will be required within 30 days after the expiration of the period of newspaper publication to furnish the proofs specified in this paragraph. * * *

The proofs referred to in the quoted matter, and specified in the preceding clause of the regulation, are proofs of publication of notice of the application to purchase, of its posting upon the land, and of its posting in the register's office.

The record in this case shows that such a notice, bearing even date with the filing of the application, was published weekly from March 5 to April 2, 1920, inclusive, the publication period expiring on April 5, 1920; and that, while proofs of publication and of posting in the register's office were apparently filed within thirty days thereafter, proof of posting on the land was made only by affidavit of the applicant, Forrester, sworn to and filed in the local office on May 19, 1920, forty-five days after the expiration of the period of publication.

The regulations quoted from were issued by the Commissioner under authorization by section 2351 of the former coal law, were not in contravention but in aid of that law, and are a part of that law. The regulation quoted is mandatory in terms; and though such a regulation might in certain cases, where no adverse private interest was involved, be waived or disregarded, it will not be disregarded where that might narrow or postpone the application of a later law, intended by Congress to supersede immediately the former mode of disposal of valuable interests in the public lands.

Therefore, the "claim existent" under the former law was not thereafter maintained in compliance with the law under which it was initiated, and hence it could not fall within the exception in section 37 of the leasing act, and might not be perfected under the former law, even if it were so existent prior to the effective date of passage, that is, the actual time of approval, of the leasing act.

This conclusion renders it unnecessary to inquire whether or not the actual time of the approval of the leasing act was subsequent to the hour of the filing, on February 25, 1920, of the application to purchase.

As modified by the views above expressed, the decision of the Commissioner is affirmed.

HONEY LAKE VALLEY COMPANY ET AL.

Decided August 10, 1921.

SCHOOL LAND—INDEMNITY—RES JUDICATA—STATUTES—LAND DEPARTMENT.

The final adjudication of a case by the Land Department adversely to a claimant in accordance with the governing rule then in force renders the question involved therein *res adjudicata* between the parties thereto, and a subsequent change in the interpretation of the law either by the Department or by the courts as the result of diligent prosecution of a similar claim by another in a separate and distinct proceeding will not entitle the former to have the matter relitigated to the detriment of the property rights of a third party.

SCHOOL LAND—INDEMNITY—ABANDONMENT—AMENDMENT—LACHES.

The right initiated by the filing of a State indemnity school selection must be treated as an abandoned right, and one not subject to reinstatement or amendment, if, after cancellation of the selection for reason of some defect, the State, through its laches by failure to avail itself of the privilege accorded by the governing regulations, permitted an adverse claim to intervene, notwithstanding the fact that by a subsequent opinion of the United States Supreme Court in a similar but separate and distinct case, it might have acquired an equitable right or title under its original selection.

COURT DECISIONS CITED AND CONSTRUED—DEPARTMENTAL DECISIONS CITED AND FOLLOWED.

Cases of *Gallihier v. Cadwell* (145 U. S., 368), *Moran v. Horsky* (178 U. S., 205), *Payne v. New Mexico* (255 U. S., 367), cited and construed; cases of *Thomas Hall* (44 L. D., 113), *Hendricks v. Damon* (44 L. D., 205), *Albert M. Salmon* (44 L. D., 491), cited and followed.

FINNEY, *First Assistant Secretary*:

Fred W. Lake, attorney for the Honey Lake Valley Company, Incorporated, alleged transferee of the State of California under indemnity school land selection, Susanville 0405, for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 24, T. 26 N., R. 16 E., M. D. M., California, has appealed from the decision of the Commissioner of the General Land Office rendered September 9, 1920, rejecting indemnity school land selection list, Susanville 06690, filed January 20, 1919, for the same land, which latter selection purports to be amendatory to said original selection (0405) by substituting, in part, new base therefor.

The original selection, 0405, was filed March 20, 1908, and accepted by the local officers August 18, 1909. All of the several portions of the base tendered in support thereof were valid with the exception of 1.86 acres, a part of the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 36, T. 46 N., R. 3 E., California, which section was temporarily withdrawn for forestry purposes January 9, 1907, and restored from the withdrawal December 26, 1911. By Executive order of May 4, 1919 (after final cancellation of the selection), said section was included in an addition to the Modoc National Forest.

The Commissioner by decision of November 14, 1912, held the selection (0405) for cancellation on the ground that said Sec. 36, T. 46 N., R. 3 E., although previously included within the boundaries of a temporary national forest, was restored to settlement December 26, 1911, and to entry January 25, 1912.

This order looking to the cancellation of the selection was strictly in conformity with the rulings then in force to the effect that exclusion of the 1.86 acres of the base land from the withdrawal, or reservation, precluded the Department's approval of the selection.

March 12, 1913, Fred W. Lake intervened, the case was reconsidered by the Commissioner and by a decision of December 5, 1914, the previous order holding the selection for cancellation was adhered to. By subsequent decisions rendered by the Department upon appeal, motion for rehearing and petition for the exercise of supervisory authority, the action taken by the Commissioner was concurred in. Final order of cancellation of the selection as originally filed was entered July 31, 1915.

March 21, 1916, Raleigh O. Hender made desert land entry 05417 for the 40 acres involved. October 14, 1918, one Leonora J. Rogers filed contest against Hender's desert land entry. The desert land entry was canceled March 17, 1919, and contestant, exercising her preference right, made homestead entry 06675 which was allowed March 22, 1919. It will be here noted that the second selection (06690) which the State's alleged transferee insists was amendatory to the original selection and related back to and perfected original selection 0405 was not filed until January 20, 1919, while Hender's desert land entry was intact, subsequent to the contest by Rogers regularly initiated and three and one-half years subsequent to the cancellation of the original selection.

The Commissioner by the decision complained of ruled that the State selection (0405) having been canceled of record July 31, 1915, was, therefore, not subject to amendment. This ruling is concurred in regardless of whether or not rights of other parties had intervened subsequent to cancellation of the selection July 31, 1915, and prior to January 20, 1919. The selection filed January 20, 1919, must be considered as a new selection and the State's rights thereunder adjudicated accordingly.

The State acquiesced in the cancellation of the original selection (0405) not only from July 31, 1915, to date of allowance of Hender's desert land entry, March 21, 1916, during which period of time the tract involved appeared of record and in fact was vacant unappropriated public land, but also for nearly three years after allowance of said desert land entry. The State did not attempt prior to the

intervention of the rights of the third parties to reselect or take other appropriate steps to acquire title to the 40 acres applied for. Having permitted the rights of Hender and Rogers to have been established the Commissioner exercised proper discretion in the matter by protecting such rights pursuant to the governing rule as laid down in the case of Albert M. Salmon (44 L. D., 491). Furthermore, at the date the State filed its second selection January 20, 1919, said selection was properly rejected for conflict with a lawful entry then of record and upon this proceeding the State is only entitled to judgment as to the correctness of the action taken at the time of the rejection of its selection. *Hendricks v. Damon* (44 L. D., 205).

In determining what rights, if any, the State may have under the original, or first selection (0405), filed March 20, 1908, the Department has considered the issues in the light of the opinion rendered by the Supreme Court of the United States, March 7, 1921, in the case of Payne, Secretary of the Interior *et al. v. The State of New Mexico* (255 U. S., 367).

In so determining two questions necessarily arise, first, whether, recognizing the right of the present homesteader, Rogers, a subsequent change in the interpretation of a statute justifies the reopening of a claim formerly disposed of adversely in accordance with the then prevailing rule or construction placed upon a similar statute; and, secondly, whether or not even though it may have acquired an equitable right, or title, under its former filing (0405), within the meaning of the recent opinion of the Supreme Court hereinbefore referred to and rendered in a proceeding separate and distinct from the case under consideration, such right, or title, had been lost by the State through its laches.

The first proposition needs little or no discussion. It could not be seriously contended that upon a change by either this Department, or the courts, in the interpretation of any law, which different construction was brought about through the diligent prosecution of the claim of another in a separate and distinct proceeding having no bearing upon this case, the reopening of a former case properly disposed of in accordance with the governing rule then in force, would be justifiable to the detriment of the property rights acquired by another in the meantime. Such a course of procedure would bring about chaotic conditions and promote endless litigation.

In this connection it was held in the case of *Thomas Hall* (44 L. D., 113, 114)—

It is a well-settled doctrine that a final adjudication will not be later disturbed because of a subsequent change in the construction of the law which governed the case at the time it was originally adjudicated. This rule has been generally enforced by this Department, even in cases where the Depart-

ment's construction of statutes has been declared erroneous by the Supreme Court. (Frank Larson, 23 L.D., 452; *Mee v. Hughart et al.*, 23 L. D., 455.)

It would be immaterial as the record stands before this Department whether or not the State of California acquired an equitable right, or title, under its former selection (0405), within the meaning of the Supreme Court's opinion in the case of *Payne*, Secretary of the Interior *et al. v. The State of New Mexico*, *supra*. In the case at bar the cancellation order of the original selection was entered July 31, 1915. No action was taken by the State until January 20, 1919, with the view to reselecting the land as it had a right to do in its own interest or that of its transferee. During the time that elapsed from date of cancellation of the selection, and entry of the land by Hender, March 21, 1916, the State failed to avail itself of the privileges accorded by the governing regulations and principles enunciated in the case of *Albert M. Salmon*, *supra*.

The State will not at this late date be heard to say that the former selection should be reinstated, or amended, and the entry of contestant, *Rogers*, canceled. The State's laches and the intervening adverse claim bar the assertion of any such contention. As was said (syllabus) in *Moran v. Horsky* (178 U. S., 205)—

A neglected right, if neglected too long, must be treated as an abandoned right, which no court will enforce.

The rule applicable here is well stated in *Gallihier v. Cadwell* (145 U. S., 368, 373), wherein the court stated that—

* * * laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.

The Department concurs in the conclusion reached by the Commissioner in the decision appealed from which is hereby affirmed.

REGULATIONS RELATING TO THE ADJUSTMENT OF CLAIMS IN CERTAIN TOWNSHIPS IN FLORIDA UNDER THE ACT OF OCTOBER 31, 1919.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 12, 1921.

THE HONORABLE

THE SECRETARY OF THE INTERIOR:

The following regulations are recommended to govern the procedure to be adopted in making the adjustment of claims or disputes under the provisions of the act of October 31, 1919 (41 Stat., 325).

1. Parties seeking relief under the act will be required to file a petition setting forth the relief sought, the description of the land lost or erroneously shown by the old plat and the land desired in place thereof. It must also be set out that by the filing of the petition the terms and conditions of the act are accepted and that the adjudication of and award made in the claim will be accepted as final.

2. Only petitions based on rights acquired or initiated prior to the withdrawal of the land will be considered as coming under the provisions of the act.

3. A duly authenticated abstract of title showing the ownership of the land lost or erroneously located must be filed with each case.

4. Only public lands can be selected unless petitioner submits an affidavit of the owner of the lands sought authorizing an exchange or other method of adjustment.

5. A representative or committee of this office will, if found advisable, be detailed to review the papers and visit the field for the purpose of compromising or otherwise adjudicating any conflicting selections. Field investigation will be made as deemed appropriate.

6. Report and recommendations will be made to this office. Said report and committee recommendations will be reviewed and office recommendations announced in letter to the Department.

7. Action by the Secretary will be taken as deemed appropriate, after which thirty days will be allowed in which any petitioner may file a motion for a rehearing of the awards made if objection to such action should arise.

8. Directions setting forth the final awards will issue after the consideration of whatever motions for rehearing may be received.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

[Public, No. 71—41 STAT., 325.]

AN ACT To authorize the Secretary of the Interior to adjust disputes or claims by entrymen, selectors, grantees, and patentees of the United States against the United States and between each other, arising from faulty surveys in townships twenty-nine south, range twenty-eight east; also in townships thirty-six, thirty-seven, and thirty-eight south, ranges twenty-nine and thirty east, Tallahassee meridian, in the State of Florida, 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 be, and he is hereby, authorized to equitably adjust disputes and claims by entrymen, selectors, grantees, and patentees of the United States, their heirs or assigns, against the United States and between each other, arising from faulty surveys in township twenty-nine south, range twenty-eight east; also in town-

ships thirty-six, thirty-seven, and thirty-eight south, ranges twenty-nine and thirty east, Tallahassee meridian, in the State of Florida, the said surveys having been shown to have been faulty by the resurvey of certain lands in said townships, and for this purpose the said Secretary is authorized to accept conveyances from and grant patents to any such entrymen, selectors, grantees, patentees, their heirs or assigns, of any of the lands of the United States in the said townships open to entry or settlement which, in the judgment or discretion of said Secretary, it shall be just and equitable to grant or convey to such parties or any of them, to make up any deficiency or loss sustained by any such parties by reason of such faulty surveys, or by the meander lines, location, or existence of lakes or other bodies of water, not shown or incorrectly shown by such original faulty surveys of the United States in said townships, to the end that such entrymen, selectors, grantees, patentees, their heirs or assigns, may be duly vested with the title to such part of the lands of the United States as shall be necessary or proper to make up any deficiency in acreage or loss, as far as possible, due to such faulty survey, as shown by the resurvey of the said townships, preserving to the owners who have lands shown by the former faulty surveys to be actually bounded by lakes or other bodies of water, as far as practicable, the right to have patented to them the lands shown by such new resurveys to lie between their holdings and such lakes or bodies of water: *Provided*, That in the said adjustment no greater area shall be patented to any claimant than that which is surrendered by him or of which he is deprived by the fact that, under the corrected survey, the area to which title, derived from the United States, is now asserted by the entryman, selector, grantee, patentee, his heirs or assigns, is found to have no existence in fact, or to be covered by water and to have been so covered at the time of the faulty survey: *Provided further*, That nothing herein shall be construed as authorizing the Secretary of the Interior in the said settlement to patent to any entryman, selector, grantee, or patentee, or his heirs or assigns an area which, when added to the area retained by the said entryman, selector, grantee, patentee, or his heirs or assigns, shall give a larger acreage than that originally entered or thought to be acquired from the United States, or any grantee of the United States.

Sec. 2. That the said Secretary of the Interior be, and is hereby authorized, to cause to be made such surveys or resurveys in said townships as may in his judgment be necessary in order to carry out the provisions of this act.

Received by the President, October 20, 1919.

[Note by the Department of State.—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

WALKER RIVER IRRIGATION DISTRICT.

Decided August 26, 1921.

WATER POWER—ACT OF JUNE 10, 1920—SUSPENDED APPLICATION.

The act of June 10, 1920, section 24 of which expressly provides that lands of the United States included in any project under the provisions of the act shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the public-land laws until otherwise directed by the Federal Power Commission or by Congress, does not contemplate that lands thus reserved shall be subject to suspended filings or applications while they remain reserved.

FINNEY, *First Assistant Secretary*:

This is an appeal by the Walker River Irrigation District from the decision of June 16, 1921, by the Commissioner of the General Land Office rejecting its application for reservoir easement for irrigation purposes under the act of March 3, 1891 (26 Stat., 1095, 1101), which includes a dam site on the east fork of Walker River and certain tracts of public lands in conflict with the prior application of C. E. Loose filed under the act of February 15, 1901 (31 Stat., 790), but now pending before the Federal Power Commission for consideration under the Federal Water Power Act of June 10, 1920 (41 Stat., 1063).

It is urged that the application was at least rejected prematurely; that it should have been held in suspension awaiting decision by the Power Commission on the Loose application; that if the Loose application be rejected, then this application should be allowed, and that if the Loose application be allowed, then this application should still be allowed subject to the prior and superior right of Loose to use the land for power purposes under the power license.

The Department can not assent to this view. Section 24 of the act of June 10, 1920, expressly provides that any lands of the United States included in any project under the provisions of the act shall from the date of filing of application therefor be reserved from entry, location or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress. And it is further provided in that section that whenever the Power Commission shall determine that the value of any lands of the United States so applied for, or theretofore or thereafter classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry or selection under the public land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry or selection, subject to certain restrictions therein stated.

The act does not contemplate that reserved lands shall be subject to suspended filings or applications while so reserved. Therefore, as to any public lands covered by the application which are so reserved the application is ineffective and can not be entertained.

A further reason warranting rejection is that Loose owns the lands comprising the site for the dam for the proposed reservoir, and without the control or use of that site the irrigation project as now planned would not be feasible.

The decision appealed from has been carefully reviewed and the Department fully concurs in the conclusion reached therein. It is accordingly affirmed.

KEATING ET AL. v. DOLL.

Decided May 20, 1921.

CITIZENSHIP—HOMESTEAD ENTRY.

Conviction of the crime of manslaughter which, by a State statute, suspends the enjoyment of the rights and privileges of citizenship until formally restored, is not a bar to the making of a homestead entry, inasmuch as Congress has never declared it to be a disqualification under the homestead laws.

APPLICATION—OFFICERS—NATIONAL FOREST LANDS.

An entry for national forest lands under the act of June 11, 1906, allowed upon an application prematurely filed, and defective because not executed before a qualified officer, is not void, but merely voidable, and all defects are cured by the subsequent filing of a properly executed supplemental application.

CONTEST—PRACTICE—APPLICATION.

An entry, voidable because prematurely allowed on an imperfectly executed application, is not subject to contest on such grounds, under Rule 1, Rules of Practice.

REJECTION OF APPLICATION—EFFECT OF APPEAL.

An appellant, whose homestead application has been rejected because the land is segregated by the entry of another, is entitled only to a judgment as to the correctness of the rejection, and any question as to the validity of the existing entry is not to be considered.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

The case of *Hendricks v. Damon* (44 L. D., 205), cited and followed.

FINNEY, *First Assistant Secretary:*

A tract of 125.53 acres of unsurveyed land within the Harney National Forest was listed (List 2-2437) on the application of Charles Doll, and became subject to entry at the Rapid City, South Dakota, land office on May 4, 1920, under the act of June 11, 1906 (34 Stat., 233). The tract was identified as Homestead Entry Survey No. 565.

On April 2, 1920, said Doll filed an application to make entry for said tract, and the same was allowed by the local officers on April 17, 1920.

Ambrose E. Keating, on May 3, 1920, filed an application for the tract, and on May 4, 1920, Margaret E. Fox also applied. The local officers rejected said applications for conflict with the entry of Doll, and both parties appealed.

By decision of September 10, 1920, the Commissioner of the General Land Office noted that Doll's application was executed at Sioux Falls, South Dakota, outside of the land district and outside of the county wherein the land is located, and was allowed before the restoration of the land took effect; and Doll was required to show cause why his entry should not be canceled. The decision held that Fox's application was junior to that of Keating, but both applications were suspended to await disposition of Doll's entry. Doll has appealed.

It appears that Doll had been a settler on the land, under a special use permit, since 1911, and had made valuable improvements. He was residing on the land when arrested for killing one, Fox, and was tried in October, 1919, when he was found guilty of manslaughter in the second degree and sentenced to serve four years in the penitentiary. He was confined in the South Dakota Penitentiary at the date of his application, and he assigns that fact as the reason why his application was not executed in accordance with section 2294, Revised Statutes, as amended by the act of March 4, 1904 (33 Stat., 59).

On October 7, 1920, Doll appeared at the local office and filed a supplemental application, executed before the register. It appears therefrom that he is a native-born citizen of the United States.

In their appeals to the Commissioner of the General Land Office, both Keating and Fox contended that Doll was disqualified, by reason of his conviction of the crime of manslaughter, from making a homestead entry, as under the laws of South Dakota his enjoyment of the rights and privileges of citizenship were suspended subject to restoration by the Board of Charities and Corrections upon the expiration of his term of imprisonment.

As to whether Doll's right, as a citizen of the United States, to make the entry in question was affected by the laws of South Dakota, we need only refer to one provision of the Constitution of the United States—

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Congress has enacted no law under which Doll's rights as a homesteader were affected by reason of his conviction of the crime of manslaughter. The laws of South Dakota may affect his rights as a citizen of that State, but can not affect his rights under the homestead laws. His application was prematurely filed, was allowed prior to the date fixed in the notice of listing, and was not executed before a qualified officer. However, the entry was not void, but only voidable, and all defects were cured by the filing of a supplemental application on October 7, 1920.

Neither Keating nor Fox alleged settlement on the land, nor any right superior to Doll; therefore, on appeal from the rejection of their applications the Commissioner should not have considered the question of the validity of Doll's entry. The appellants were entitled only to a judgment as to the correctness of the action of the local officers in rejecting their applications and, as the land was segregated by the entry of Doll, it was error to suspend the applications. They gained no rights under their applications, which would not have segregated the land if it in the meantime became subject to entry. *Hendricks v. Damon* (44 L. D., 205).

Although Doll's entry when made was voidable, it was not even subject to contest because prematurely allowed on an imperfectly executed application, as all such defects were apparent from an inspection of the papers. See Rule 1, Rules of Practice.

Accordingly, the decision appealed from is reversed. The entry of Doll will remain intact, and the applications of Keating and Fox will stand rejected.

KEATING v. DOLL.

Motion for rehearing of departmental decision of May 20, 1921 (48 L. D., 199), denied by First Assistant Secretary Finney, August 29, 1921.

STATE OF LOUISIANA (ON PETITION).

Decided September 16, 1921.

SWAMP LAND—PATENT—JURISDICTION—LAND DEPARTMENT—LOUISIANA.

Neither the act of March 2, 1849, granting swamp and overflowed lands to Louisiana, nor the general swamp act of September 28, 1850, creates of its own force a present grant of complete title in the State, and prior to approval by the Secretary of the Interior under the former or the issuance of a patent under the latter, the authority of the Land Department to inquire into and determine all rights and equities claimed as against the Government does not cease.

SWAMP LAND—ACTS OF MARCH 2, 1849, AND SEPTEMBER 28, 1850—LOUISIANA.

The State of Louisiana does not acquire a complete and perfected interest equivalent to full equitable title under either of the swamp acts of March 2, 1849, and September 28, 1850, to any tract until it has been finally identified as of the class and condition contemplated by the granting act.

SWAMP LAND—MINERAL LANDS—LOUISIANA.

Mineral lands, not being expressly included within the terms of either of the swamp acts of March 2, 1849, and September 28, 1850, do not inure to the State of Louisiana, and prior to the Secretary's approval under the former or the issuance of a patent under the latter act, the character of claimed swamp land is open for investigation and adjudication.

SWAMP LAND—OIL AND GAS LANDS—WITHDRAWAL—BURDEN OF PROOF.

A subsisting petroleum withdrawal impresses the lands therein with a *prima facie* mineral character, and where the State of Louisiana seeks to acquire title to claimed swamp lands within such withdrawn area, it is incumbent upon the State to prove that the lands are in fact nonmineral.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

The case of State of Louisiana (47 L. D., 369), cited and followed.

FINNEY, *First Assistant Secretary*:

Counsel on behalf of the State of Louisiana have filed a paper styled "Motion for Rehearing" in this matter, which involves the

State's swamp-land claim with respect to certain tracts in T. 18 N., R. 14 W., L. M., Baton Rouge land district, Louisiana. This case was considered and adjudicated in the departmental decision of July 18, 1921 (unreported), the Department there stating:

It is not perceived that any useful purpose would be subserved by allowing time for a formal motion for rehearing. This decision is declared to be final and conclusive and further proceedings will be in harmony with the views above expressed. The record is transmitted to the Commissioner of the General Land Office.

The motion now presented will be treated and disposed of as a motion for the exercise of supervisory power.

The contentions of counsel are substantially the same as those urged upon appeal. Much stress, however, is placed upon the differences between the act of March 2, 1849 (9 Stat., 352), applicable to Louisiana only, and the general swamp-land act of September 28, 1850 (9 Stat., 519), which are pointed out as follows:

(1) The act of 1849 requires no patent, but merely the approval of a list to be made out, by direction of the Secretary, by the surveyor general or his deputy, whereas the act of 1850 requires a patent to vest the fee-simple title.

(2) The act of 1849 requires no selection by the State, no patent nor any request for the approval of the lands, whereas, the act of 1850 provides that patent shall issue at the request of the governor of the State.

It is urged that the act of 1849 is applicable and controlling, which act contains no mineral reservation or exclusion and requires no patent; that the grant is one *in praesenti* and attaches as of the date of the granting act upon the identification of the tracts as swamp and overflowed; that the duty is imposed upon the Secretary to approve the lists of such lands certified by the surveyor general; and that, even conceding that mineral lands are excluded from the grant, the tracts here involved inure to the State because returned and identified as swamp by the survey of 1871, and not reported or withdrawn as oil or gas lands until long after the date of the grant and the identification of the tracts as swamp by survey.

To this the Department can not assent. True, the acts of 1849 and 1850 differ somewhat in their terms. This difference, however, in the opinion of the Department is not controlling, or of great moment. And conceding that the distinction is vital, it would be of no importance in the instant case because examination discloses that the State's pending selections in T. 18 N., R. 14 W., are practically all embraced in List 93, the claim being asserted under the provisions of the act of 1850. But the soundness of the State's argument is not conceded. The Department takes the position that the act of 1849 does not of its own force, any more than the act of 1850, create a present grant of a complete title in the State. As said in the case of State of Louisiana, decided April 12, 1920 (47 L. D., 366, syllabus):

Only upon approval by the Secretary of the Interior under the act of March 2, 1849, granting swamp and overflowed lands to Louisiana, or the issuance of patent under the general swamp act of September 28, 1850, does the fee simple title vest in the State; prior thereto its title is inchoate and imperfect both in law and in equity.

In connection with the swamp-land grants, the following propositions have been considered by this Department and are deemed to have been properly determined:

(1) Mineral lands not being expressly included within the terms of the swamp grant either of 1849, or 1850, do not inure to the State. (2) The interest of the State is inchoate and incomplete until title is vested and the fee simple title only passes upon approval under the act of 1849 and by patent pursuant to the act of 1850. (3) The authority of the Land Department to inquire into and determine all rights and equities claimed as against the Government does not cease until the legal title has passed. (4) A complete and perfected interest corresponding to full equitable title does not accrue to or vest in the State as to any tract until the same has been finally identified as of the class and condition contemplated by the granting act. (5) The question as to the mineral or nonmineral character of claimed swamp land is open for investigation and adjudication up to and until the time of patent under the act of 1850 and up to the date of the Secretary's approval under the act of 1849.

Nothing presented by counsel persuades the Department that the holding on appeal in this case is in error. Upon the records of the Land Department, the tracts are impressed with a *prima facie* mineral character by reason of the subsisting petroleum withdrawal. The State has been accorded due opportunity to show that such is not the character of the lands and that they are, in fact, not mineral bearing, failing in which, it was held the swamp-land claim must stand rejected.

The conclusions reached in the decision rendered upon appeal herein are adhered to and the present motion is denied.

ISIDOR VITO GALLEGOS, JR.¹

Decided May 20, 1921.

HOMESTEAD ENTRY—RESIDENCE—MILITARY SERVICE—VOCATIONAL TRAINING.

A homestead entryman, who after making entry, enlisted or was actually engaged in the military or naval service of the United States during the war against Germany, and who after discharge is furnished a course of vocational rehabilitation, is entitled to credit under the acts of July 28, 1917, and September 29, 1919, for residence to the extent of the combined periods of his service and of his vocational training; but he must fulfil the requirements of the homestead law as to residence and cultivation for a period of at least one year.

¹ See decision on motion for rehearing, page 207.

HOMESTEAD ENTRY—RESIDENCE—MILITARY SERVICE—OFFICERS' TRAINING CAMPS.

Attendants at officers' training camps during the recent war with Germany were not a part of the military establishment of the United States, and time spent therein was not such "military service" within the purview of the act of July 28, 1917, as entitles one to credit for residence under the homestead laws.

FINNEY, First Assistant Secretary:

Isidor Vito Gallegos, jr., has appealed from a decision of the Commissioner of the General Land Office, dated July 26, 1920, holding his final proof made August 11, 1919, for rejection and the entry for cancellation, upon the ground of failure to comply with the law in the matter of residence, but because of certain military service rendered by entryman, it was directed that the order of cancellation be suspended and that he be credited with thirteen months' residence, the time covered by his said service in the United States Army.

It appears that Gallegos made homestead entry 015274 May 13, 1912, as amended June 8, 1912, for the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 2, T. 11 N., R. 25 E., N. M. P. M., containing 160 acres, and that he also made additional homestead entry 015300 May 25, 1912, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 35, T. 12 N., R. 25 E., N. M. P. M., containing 160 acres, Tucumcari land district, New Mexico.

The record discloses that this case has been once before considered by the Department, it appearing that final proof was submitted on both entries June 10, 1915, under the three-year act, but upon protest filed by the Chief of Field Division, final certificate was withheld; that a hearing was ordered and had upon the charge that entryman had failed to establish and maintain a residence on the land, which charge was sustained by decision of the Commissioner of February 21, 1918, and affirmed by departmental decision of August 17, 1918.

It further appeared that on June 9, 1917, prior to the date of the hearing, claimant filed a motion to dismiss the hearing or that he be granted a continuance, upon the ground that he was then in the military service of the country, and by reason of that fact, it was impossible for him to attend the hearing on the day fixed, which motion was overruled by the local officers and the case proceeded to hearing before a designated officer June 29, 1917, on which date testimony was submitted in behalf of both parties, the United States being represented by a special agent of the General Land Office, and claimant by counsel. The local officers did not concur, rendering separate decisions, and upon appeal the Commissioner by said decision of February 21, 1918, held the proof for rejection, but permitted the

entry to remain intact subject to future compliance with the law. Upon appeal, the Department, by said decision of August 17, 1918, concurred in the finding of the Commissioner that the proof submitted did not show compliance with the provisions of the three-year homestead law in the matter of residence, and that it was properly held for rejection, the entries to remain intact subject to the submission of new proof. But it was also held that entryman was entitled to a favorable ruling on the motion for continuance, it appearing that he was duly enrolled in the military service and could not be present when the case was heard. It was accordingly directed that the entry be suspended and no further action be taken thereon during the period of the entryman's military service.

It further appears that on November 21, 1916, Roy F. Reeve filed affidavit of contest against the entry, charging abandonment and failure to cultivate, and that entryman's absence was not due to military or naval service in the Army or Naval establishment. The local officers suspended the contest and held that it must await disposition of the matter under and by said adverse proceeding. With respect to said contest the Commissioner held that action on the same appeared to be unnecessary, as the case could properly be disposed of on the record as now made up. In this the Department fully concurs, and inasmuch as the question of residence was disposed of by said departmental decision up to the time of the hearing, it is only necessary to consider the new three-year final proof filed, as stated, August 11, 1919.

The records of the War Department show that entryman was in the military service, having enlisted January 5, 1918, and that he was discharged February 6, 1919. Entryman also claims credit for military service in an officers' training camp from May 7, 1917, to August 5, 1917, which was disallowed by the Commissioner upon the ground that this was not such military service as would entitle him to credit for residence under the homestead law, quoting an excerpt from a letter of the Adjutant General dated June 2, 1920, to the following effect:

The men attending these camps were organized into provisional training regiments and these regiments did not form a part of the military establishment of the United States, and as regiments, were not used for offense and defense during the recent war with Germany.

In view of this holding of the Adjutant General with respect to officers' training camps, the Commissioner held, as stated, that entryman would only be entitled to credit for actual military service of a year and one month, it being admitted that he did not reside on the land for any period after the hearing. The new proof was accordingly rejected and the entry held for cancellation upon the

ground, as stated, of noncompliance with the law in the matter of residence, entryman not having shown seven months' residence in any one year during the remaining time.

It was further held that if he so desired, he could file a motion to suspend action, when he would be permitted to go upon the land and complete the requirements; that as he had thirteen months' credit for military service he could complete residence by staying on the land one year and eleven months subsequent to proof, and upon making supplemental showing to that effect, the proof would be accepted. Upon appeal entryman states that he was severely wounded at the battle of Argonne Forest in October, 1918, which fact does not appear in his discharge certificate; that he is still partially disabled by reason of the wounds received, and has been in vocational training continuously from September 5, 1920, to date of appeal. In corroboration of this he has filed a letter from the Adjutant General, dated December 4, 1920, stating that the records of the War Department show that Isidor V. Gallegos, serial No. 165142, Private, Headquarters Company, 102nd Infantry, was wounded October 27, 1918, and that if his discharge certificate does not show he was wounded, it should be returned for amendment in that respect.

Section 1 of the act of July 28, 1917 (40 Stat., 248), provides, in part, as follows:

That any settler upon the public lands of the United States; or any entryman whose application has been allowed; or any person who has made application for public lands which thereafter may be allowed under the homestead laws, who, after such settlement, entry, or application, enlists or is actually engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, shall, in the administration of the homestead laws, have his services therein construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; * * * *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

The act of September 29, 1919 (41 Stat., 288), allowing homesteaders discharged from the military or naval service leave of absence to undergo vocational training, provides as follows:

That every person who, after discharge from the military or naval service of the United States during the war against Germany and its allies, is furnished any course of vocational rehabilitation under the terms of the Vocational Rehabilitation Act approved June 27, 1918, upon the ground that he comes within article III of the act of October 6, 1917, fortieth volume, Statutes at Large, page 398, and who before entering upon such course shall have made entry upon or application for public lands of the United States under the homestead laws, or who has settled or shall hereafter settle upon public lands, shall be entitled to a leave of absence from his land for the purpose of undergoing

training by the Federal Board of Vocational Education, and such absence, while actually engaged in such training shall be counted as constructive residence: *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

As stated, it appears from the statement of the claimant that he has been in vocational training since September 5, 1920, and that he was still undergoing such training at the date of appeal. He is, therefore, entitled, under the provisions of said act of September 29, 1919, to credit for the time spent in vocational training, which, with the thirteen months' credit on account of actual service in the Army, will amount to approximately two years of the time required under the three-year act.

It will be noted, however, that the proviso to each of the above cited acts provides that a homesteader must show at least one year's residence and cultivation in connection with his entry, regardless of the length of his military service, or the time spent in vocational training.

Accordingly, upon his discharge from the vocational training institution to which he is accredited, he will be allowed one year in which to make a supplemental showing of seven months' residence, or if he has already been discharged therefrom, he will be allowed one year, from the date of receipt of this decision, in which to complete the seven months' residence required.

The decision appealed from is hereby modified in accordance with the foregoing.

ISIDOR VITO GALLEGOS, JR. (ON REHEARING).

Decided September 22, 1921.

HOMESTEAD ENTRY—RESIDENCE—CULTIVATION—FINAL PROOF—PATENT—MILITARY SERVICE.

A homestead settler or entryman who, after settlement or entry and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the war with Germany, and has been honorably discharged, is by the act of March 1, 1921, entitled to make proof without further residence, improvement, or cultivation and to receive patent, if, because of physical incapacities due to service, he is unable to return to the land.

FINNEY, *First Assistant Secretary*:

Motion for rehearing has been filed on behalf of Isidor Vito Gallegos, jr., in the above entitled case, wherein the Department, by decision rendered on appeal, May 20, 1921, modified the action taken by the Commissioner of the General Land Office July 26, 1920, to the extent of giving claimant credit for constructive residence and cultivation covering the period of time spent in vocational training,

pursuant to the provisions of the act of September 29, 1919 (41 Stat., 288), in addition to the period of his service in the United States Army, as provided by the act of July 28, 1917 (40 Stat., 248). In view of the fact that both of the acts cited require that a homesteader entitled to the benefits thereof must show at least one year's actual residence and cultivation in connection with his entry, regardless of the length of his military service or duration of time spent in vocational training, the Department on appeal further held that Gallegos must show, within a specified time after his discharge from the vocational training institution, one year's actual residence and compliance with law as to cultivation pursuant to the provisions of the act of June 6, 1912 (37 Stat., 123).

It appears that both the original and additional entries were allowed under the act of February 19, 1909 (35 Stat., 639), prior to the passage of the act of June 6, 1912, *supra*, the original entry, 015274, having been made May 13, 1912, for lots 2 and 3, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 2, T. 11 N., R. 25 E., and the additional entry, 015300, allowed May 25, 1912, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 35, T. 12 N., R. 25 E., N. M. P. M., Tucumcari land district, New Mexico.

Gallegos originally submitted final proof June 10, 1915, having elected to submit the same under the provisions of the three-year law, which proof was rejected by the Commissioner of the General Land Office February 21, 1918, and by the Department on appeal, August 17, 1918. Adverse action was taken on the ground that the proof, as submitted, did not show seven months' actual residence each year for three years as required by the act of June 6, 1912, *supra*. The Commissioner of the General Land Office specifically held in his decision of February 21, 1918, referred to, that entryman acted in good faith and up to the time of submission of that particular proof sufficiently complied with the requirements of the five-year homestead law, in force and effect at the dates of allowance of both the original and additional entries. Five years had not elapsed, however, from date of allowance of the original entry to date of submission of final proof and the proof was, therefore, premature under the old law. The Commissioner had no alternative other than to reject the proof submitted June 10, 1915, same being premature under the five-year law and not showing seven months' residence each year for three years as required by the act of June 6, 1912, *supra*.

The Department, by its decision on appeal, August 17, 1918, did not differ with the conclusion reached by the Commissioner to the extent that he found that Gallegos had complied with the requirements of the five-year law up to date of submission of the proof, but

merely held that the proof was insufficient under the three-year law, the Department further holding that Gallegos's rights in the premises were protected by section 501 of the act of March 8, 1918 (40 Stat., 440, 448), and, therefore, the local officers erred in ordering a hearing and requiring submission of testimony during the absence of claimant occasioned by military service. The entries were accordingly left intact subject to submission of new proof.

Briefly recapitulating the subsequent steps taken by claimant, it appears that Gallegos served abroad in the Army of the United States, was seriously wounded, invalided home, entered a vocational training institution, and submitted a second three-year proof upon his entries, August 19, 1919, which latter proof was held for rejection by the Commissioner and by the decision of the Department on appeal rendered May 20, 1921, which latter decision required one year's actual residence upon and cultivation of the land, as hereinbefore stated.

Upon this motion entryman maintained that if the Department's ruling on appeal to the effect that he must return to the land and actually reside upon and cultivate the same for one year is adhered to (which requirement is unnecessary for the reasons hereinbefore stated), it would be a physical impossibility for him to comply with such requirement due to serious and permanent injuries received while actually engaged in the military service abroad. The Department, therefore, in advance of taking final action upon the motion, called upon Gallegos for satisfactory showing as to the extent of the injuries received with the view to ascertaining whether or not his case came within the purview of the provisions of the act of March 1, 1921 (41 Stat., 1202), which provides as follows:

That any settler or entryman under the homestead laws of the United States, who, after settlement, application, or entry and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the war with Germany, who has been honorably discharged and because of physical incapacities due to service is unable to return to the land, may make proof, without further residence, improvement, or cultivation, at such time and place as may be authorized by the Secretary of the Interior, and receive patent to the land by him so entered or settled upon: *Provided*, That no such patent shall issue prior to the survey of the land.

Gallegos submitted affidavits which the Department finds bring the case within the provisions of the act of March 1, 1921, *supra*, and the governing regulations thereunder (48 L. D., 54) and that for this reason, if no other, Gallegos is entitled, upon the proof as submitted, to issuance of final certificate and patent in the absence of other valid objection appearing of record.

The motion is accordingly granted, the prior decisions rendered herein are vacated, and the case remanded for appropriate action.

SON v. MIDWAY SOUTHERN OIL COMPANY ET AL.

Decided September 22, 1921.

OIL AND GAS LANDS—ACT OF FEBRUARY 25, 1920, SECTION 19—LEASE.

The purpose and intent of the provision of section 19 of the act of February 25, 1920, which specifies that "all permits or leases thereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear," is obviously to permit the Land Department to deal with the holder or holders of the record mining title, and *a priori* the mere lessee of such claimant, not being himself in a position to surrender to the United States the mining title, is not entitled to a lease in his own name under said section.

DEPARTMENTAL DECISION CITED AND CONSTRUED.

The case of *Burke et al. v. Taylor et al.* (47 L. D., 585), cited and construed.

FINNEY, *First Assistant Secretary*:

The land here involved is the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 8, T. 11 N., R. 23 W., S. B. M., Los Angeles land district, California, and on May 2, 1908, was, together with the E. $\frac{1}{2}$ of said quarter-section, located by eight persons under the provisions of the oil placer mining law as the Side Hill No. 4 Claim.

November 24, 1909, the claim was conveyed to Charles A. Son, who, after performing some development work thereon at a cost of more than \$1,000, on August 23, 1910, leased the said W. $\frac{1}{2}$ NE. $\frac{1}{4}$, and "an undivided 40 acres in the E. $\frac{1}{2}$ NE. $\frac{1}{4}$," to one Rollin J. Van Houten for a period of twenty years. On the date last mentioned Van Houten leased the W. $\frac{1}{2}$ NE. $\frac{1}{4}$ to the Midway Southern Oil Company. On November 27, 1910, Van Houten released to the said Charles A. Son all his right, title, and interest in the said lease and on December 6, 1910, Son executed a lease for twenty years covering the said W. $\frac{1}{2}$ NE. $\frac{1}{4}$, to the said Midway Southern Oil Company.

In the meantime the land was withdrawn by Executive order of September 27, 1909, from location and entry under the placer mining laws and was later included in Petroleum Reserve No. 2, created by Executive order of July 2, 1910.

On December 6, 1910, the Midway Southern Oil Company entered into possession of the said W. $\frac{1}{2}$ NE. $\frac{1}{4}$, including a partially drilled well thereon, together with all the tools and equipment, and continued drilling operations on said well until about July 1, 1912, at which time the well had attained a depth of about 1,075 feet. In July, 1911, the lessee commenced the drilling of a second well on the land which was continued to a depth of 2,530 feet, when about July 1, 1912, drilling operations on the land were discontinued, such discontinuance being alleged by the company to have been due to trouble that

was encountered and also to the fact that the land had been withdrawn.

August 14, 1912, the said Charles A. Son commenced suit against the lessee for the forfeiture of the lease and restitution of the land, for failure on the part of the lessee to comply with the terms of the lease, and on January 31, 1914, it was adjudged, ordered, and decreed that—

the lease set out and described in the said complaint be and the same is forfeited and that all of the lands and property described in the complaint be and the same are restored to plaintiff.

Appeal by the lessee from said judgment was on May 3, 1916, dismissed. On November 4, 1916, Nellie Adamson made additional homestead entry 029773, of the said NE. $\frac{1}{4}$, Sec. 8, under the provisions of section 3 of the act of February 19, 1909 (35 Stat., 639), subject, however, to the provisions, conditions, and reservations of the act of July 17, 1914 (38 Stat., 509). On January 6, 1920, final proof was submitted on said entry and on June 14, 1920, final certificate issued, followed by patent dated September 10, 1920.

On March 16, 1920, Joseph R. McCarthy filed application 032836 under section 13 of the leasing act for a permit to prospect for oil and gas on the said tract and on September 24, 1920, a permit was granted to him subject, however, to valid rights existing at the date of the permit.

On August 20, 1920, the said Charles A. Son filed application 033365, under section 19 of the leasing act for a permit to prospect for oil and gas upon the NE. $\frac{1}{4}$, Sec. 8.

On August 25, 1920, the said Midway Southern Oil Company filed application 033406, for a lease to the said W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 8, based upon its lease from Son and the alleged expenditure of more than \$75,000 in drilling operations on the land and an alleged discovery of oil thereon. Upon considering the applications the Commissioner of the General Land Office by decision of April 5, 1921, found in substance and effect that the interest of the company in and to the land was based solely upon its lease from Son, the sole claimant of the fee simple title to the ground; that inasmuch as the surrender of the legal or fee simple title to the ground for which lease is sought, under section 19 of the act is required by the provisions thereof, and as the Midway Southern Oil Company is unable to show such a title thereto, its application must be rejected and it was so ordered. It was further stated that if the application of Son should be ultimately forwarded to the Department for approval recommendation would be made that the permit heretofore issued to McCarthy for the said NE. $\frac{1}{4}$, Sec. 8, be revoked. From this action both the Midway Southern Oil Company and McCarthy have appealed.

By the said section 19 of the act it is provided that—

All permits or leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear.

A similar provision is contained in section 18 of the leasing act and construing same, the Department in *Burke et al. v. Taylor et al.* (47 L. D., 585), held that said section contemplates and requires that a lease thereunder shall issue to the person, persons, or corporation possessing and surrendering to the United States the mining title and that those claiming under or through such claimant or claimants are protected by the provisions similar to those hereinbefore quoted. The same rule applies with equal force to applications for lease under section 19 of the act and accordingly the Commissioner properly held that a mere lessee of the claimant of the mining title is not entitled to a lease in his own name under the provisions of section 19 of the act. The Commissioner's action in rejecting the application of the Midway Southern Oil Company for a lease is affirmed.

Inasmuch as the Commissioner has not passed upon the application of the said Charles A. Son for a permit covering the NE. $\frac{1}{4}$ of Sec. 8, and has not taken any step looking to the actual revocation of the permit heretofore issued to McCarthy for said area, the Department deems it unnecessary to act upon the appeal of McCarthy.

The case as to the Midway Southern Oil Company is closed and the record returned to the General Land Office.

APPLICATIONS FOR COPIES OF RECORDS—SUBDIVISION 3 OF SECTION 1 OF DEPARTMENTAL INSTRUCTIONS OF AUGUST 4, 1915, MODIFIED.

[Circular No. 777.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 22, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES SURVEYORS GENERAL,

CHIEFS OF FIELD DIVISIONS, AND OTHER FIELD OFFICERS:

Departmental circular of August 4, 1915 (44 L. D., 235), providing, among other things, that applicants for copies of records must state "the purpose for which such copy is desired to be used," has been modified by the Secretary of the Interior under date of September 20, 1921, to the extent of revoking the requirement noted above, so far as the same applies to the field services of the General Land Office.

WILLIAM SPRY,
Commissioner.

A. W. MASON (ON PETITION).

Decided September 30, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—PREFERENCE RIGHT.

Prospecting permits can not be granted within the geological structure of a producing oil or gas field, and the Land Department did not intend by its instructions of April 23, 1921, to recognize any right in an applicant who applied under section 13 of the act of February 25, 1920, to prospect lands which, because of delay in action upon the application, are subsequently designated as within such a field, although not designated, yet so known and existing at and prior to the filing of the application.

FINNEY, First Assistant Secretary:

By decision of January 10, 1921, the Department affirmed the decision of the Commissioner of the General Land Office of September 15, 1920, rejecting the application 09014 of A. W. Mason, filed March 26, 1920, under Section 13 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas on the N. $\frac{1}{2}$ and SW. $\frac{1}{4}$, Sec. 8, T. 30 S., R. 23 E., M. D. M., Visalia land district, California, for the stated reason that the Director of the Geological Survey reported that the land described is within a known geological structure of the producing Elk Hills oil and gas field.

Petition for reconsideration of the case has been filed by Mason on the ground that the petitioner is advised that the Department has since said decision promulgated rules and regulations to the effect that the designation of the land as "within the known geological structure of a producing oil and gas field," after the filing of an application for prospecting permit covering said land, will not affect the rights of the applicant, and that the petitioner is advised that the land described was not so designated until July, 1920. He accordingly asks that the rejection of his application be set aside and that a prospecting permit be granted to him as prayed.

By instructions issued April 23, 1921 (48 L. D., 98, 99), the Secretary modified the regulations theretofore existing by declaring that legally qualified persons who filed proper applications for oil or gas prospecting permits under the said act of 1920, can not and should not be deprived of their rights, if, because of delay in action upon the application so filed, there intervenes a designation by the Department of the lands as within the geological structure of a producing oil and gas field, occasioned by a discovery of oil or gas subsequent to the filing of the application in the local office. He added, however, that the statute specifically forbids the allowance and approval of a prospecting permit upon lands within a "known geological structure of a producing oil or gas field"; and that nothing in the said circular should be construed as modifying or affecting previous decisions of the Department to the effect that prospecting permits can

not be allowed within the geological structure of a producing oil or gas field, so known and existing at and prior to the filing of the application for the prospecting permit.

With respect to the particular lands here in question, the Director of the Geological Survey reports, under date of August 27, 1921, that the said lands formed a part of the known geological structure of the Elk Hills field for some years prior to the passage of the leasing act, and, therefore, before any rights could be initiated under that act.

It is clear, therefore, that notwithstanding the fact that the land may not have been designated by the Director of the Geological Survey as within the known geological structure of a producing oil and gas field until after the application of Mason was filed, the land was not subject to permit under Section 13 of the act for the reason that as a matter of fact it was at the time of the filing of Mason's application known to be within such a geological structure.

For the reasons stated, the decision of the Department complained of is adhered to, and the petition for reconsideration denied.

GEORGE WATSON ET AL.

Decided September 30, 1921.

OIL AND GAS LANDS—HOMESTEAD ENTRY—PATENT—ASSIGNMENT—TRANSFeree—PROSPECTING PERMIT—PREFERENCE RIGHT.

Where a homestead entry, patented with reservation of the oil and gas by the United States, has been sold or transferred subsequently to January 1, 1918, the transferee does not acquire a preference right under section 20 of the act of February 25, 1920, to prospect for oil or gas upon the patented land, but having become the sole owner of the land, subject to the reservation contained in the patent, he may, in the absence of other sufficient objection, be granted a prospecting permit under section 13 of the leasing act.

FINNEY, First Assistant Secretary:

April 7, 1920, George Watson and Robert Watson filed application 044391 under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon the S. $\frac{1}{2}$, Sec. 24, T. 8 N., R. 21 E., M. P. M., Lewistown land district, Montana.

Upon considering the application, the Commissioner of the General Land Office, by decision of September 3, 1920, rejected the same for the reason that the tract covered thereby is embraced in the homestead entry, 019800, and the additional homestead entry, 024957, made respectively January 25, 1913, and March 25, 1914, under the enlarged homestead act by Philip Doherty, both entries originally without mineral reservation but owing to the later inclusion of the

land in Petroleum Reserve No. 49, created by Executive order of September 14, 1916, patented to the entryman with reservation of oil and gas deposits. The Commissioner held that the entryman was entitled to a preference right to a permit and lease covering said land under section 20 of the leasing act and directed that the applicants be allowed thirty days from notice within which to serve notice of such application upon the owner of the land with a view to affording him opportunity to file an application for permit for the same.

From this action the applicants appeal, alleging that by deed acknowledged March 22, 1919, Philip Doherty, the entryman, conveyed the land to the applicants. They urge that they, themselves, are entitled to a preference right to a lease for said land under said section 20 of the leasing act, and on that basis, ask that their application be allowed.

The applicants are not entitled to a preference right as transferees of the entryman for the reason that said section 20 of the act accords preference rights to assignees of entrymen and patentees only in cases "where assignment was made prior to January 1, 1918," and according to the applicants' own showing they do not fall within the terms of this statute. Inasmuch, however, as they seem to be the sole owners of the land, subject to the reservations contained in the patent, their application for permit should be allowed in the absence of objection other than that raised in the decision appealed from.

The said decision is accordingly reversed.

JOHN B. O'ROURKE.

Decided October 6, 1921.

OFFICERS—COMMISSIONERS OF THE GENERAL LAND OFFICE—RECORDS.

Under the rules applicable to matters pending before the Commissioner of the General Land Office, registers and receivers have no authority to take action or to make any notation upon their records until specifically directed to do so by him, other than to file, note, and transmit such papers as may be filed in connection therewith, or to report at the proper time that no action has been taken, if that be the fact.

OIL AND GAS LANDS—PROSPECTING PERMIT—LAND DEPARTMENT—APPEAL—PRACTICE.

The filing of an appeal and showing of naturalization in the Department, instead of the local office, in a case involving an application for an oil and gas prospecting permit, is irregular, but it is merely such an irregularity as may be waived by the Department in the absence of an adverse claim to the land.

OIL AND GAS LANDS—PROSPECTING PERMIT—CITIZENSHIP—LAND DEPARTMENT.

While an oil and gas prospecting permit can not be issued under the act of February 25, 1920, to an alien, yet there is nothing in the law or the practice of the Land Department that forbids the issuance thereof to a citizen who is naturalized after the filing of the application but before the granting of the permit.

FINNEY, *First Assistant Secretary:*

On August 19, 1920, one Septimus A. Lane filed in the Durango, Colorado, land office his duly verified application, 09044, for an oil and gas prospecting permit, under section 13 of the act of February 25, 1920 (41 Stat., 437), for certain lands in that district, wherein it was shown, among other matters, that he was born a British subject in 1880; that he emigrated to the United States, arriving at New York on June 7, 1908; that on July 5, 1917, he duly declared his intention to become a citizen of the United States; and that "second (final) naturalization papers are being applied for."

On January 24, 1921, said Lane was admitted to citizenship by the United States District Court for Colorado.

On June 21, 1921, the Commissioner of the General Land Office rejected Lane's application for permit for the reason that it appeared that he was not a citizen of the United States when it was filed. He was allowed fifteen days from receipt of notice within which to appeal, in default whereof he was advised that the case would be closed without further notice. Lane received notice of this decision on July 6, 1921.

On July 8, 1921, Lane telegraphed the Commissioner of the General Land Office that he had received "second" citizenship papers, was forwarding an appeal, and requesting that he be permitted either to amend his original application or file a new one without prejudice. The appeal, with a certified copy of the naturalization papers was transmitted by the attorney for Lane on July 12, 1921, was received in the Department four and the General Land Office six days later.

On July 22, 1921, the local officers at Durango closed the case of Lane's application, whereupon John B. O'Rourke filed his application for an oil and gas prospecting permit under the act of February 25, 1920, *supra*, for NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and S. $\frac{1}{2}$, Sec. 34, SE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 33, SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 32, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 29, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 31, T. 36 N., R. 17 W., and all of Secs. 4 and 9, T. 35 N., R. 17 W., N. M. P. M., covering 2,558.86 acres.

Said application conflicted with that of Lane as to all the tracts described except SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 33, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 34, said township and range.

On August 23, 1921, an oil and gas prospecting permit was granted to Lane under his application and the record as then made up in the General Land Office.

On September 2, 1921, the local officers at Durango forwarded to the General Land Office O'Rourke's application, which was rejected by the Commissioner so far as in conflict with Lane's permit, by decision of September 20, 1921, from which O'Rourke has appealed.

From the foregoing chronological statement of the material facts of record, the Department concludes:

1. The local officers were without authority to note upon their records on July 21, 1921, that Lane's application was finally closed. Under the rules applicable to matters pending before the Commissioner of the General Land Office, registers and receivers are not warranted in taking any action or in making any notation upon their records until specifically directed to do so by the Commissioner, other than to file, note and transmit such papers as may be filed in the case, or to report at the proper time, that no action has been taken, if that be the fact.

2. Not only was the notation by the local officers of the closing out of Lane's application an act without the scope of their authority, but it was an error of fact and law. As early as July 18, 1921, prior to the time the case could have been closed under the decision of June 21, 1921, even by the Commissioner himself, that officer had before him a complete application for the land in question by a duly qualified citizen of the United States, there was no adverse claim to the land, and the Commissioner, as set forth in the decision appealed from, accepted the showing of citizenship, when it reached him, as completing the application.

3. While the filing of an appeal and showing of naturalization in the Department, instead of the local office was irregular, it was such an irregularity as could be, as it was, waived by the Department, there being then no adverse claim to the land. In *ex parte* cases great latitude is allowed claimants in matters of procedure, and even in contests the rules are regarded as a means of securing, not defeating, justice. Lane was the first qualified applicant for the land in question and his application as supplemented on July 18, 1921, was received by the Commissioner and accepted by the Department. When the application, as completed, was received, there was no adverse claim.

4. It is earnestly argued, orally and by brief, on behalf of O'Rourke that Lane's application as filed on August 19, 1920, was void and, therefore, incapable of being amended or supplemented, as it showed upon its face that he was an alien. While a permit under the act of February 25, 1920, *supra*, can not be issued to an alien, there is nothing in the law or the practice of the Land Department that

would forbid the issuance of such a permit to a citizen who is naturalized after application for but before the granting of the permit. Under the mining law, if a party to a contest concerning a claim, under section 2326, Revised Statutes, who is an alien at the outset, becomes a citizen during the proceedings and before judgment, his disability under section 2319, Revised Statutes, to take title is thereby removed. *Manuel v. Wulff* (152 U. S., 505). The same rule has been uniformly followed by the Department in homestead cases. See *Lerow v. Grant* (32 L. D., 403), and cases there cited.

The decision appealed from is affirmed.

PETER S. KEENAN.

Decided October 8, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT.

Expenditures incident to the examining, surveying and staking of an oil or gas location, and the recording of notices thereof can not be accredited in making up the aggregate of \$250 required to be expended by section 19 of the act of February 25, 1920, in order to entitle the claimant to a preference right to a prospecting permit.

OIL AND GAS LANDS—PROSPECTING PERMIT—ADVERSE CLAIM.

An applicant for an oil and gas prospecting permit under section 19 of the act of February 25, 1920, who is unable to show sufficient fulfillment of the expenditure requirement of that section necessary to entitle him to a permit thereunder, can not be allowed to amend his application and take a permit under section 13 of the act in the presence of an adverse claim existing by reason of the pendency of an application previously filed by another under the latter section.

FINNEY, *First Assistant Secretary:*

August 25, 1920, Peter S. Keenan filed application, 08031, under section 19 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon the SE. $\frac{1}{4}$, Sec. 29, T. 29 N., R. 113 W., 6th P. M., Evanston land district, Wyoming.

The application was based upon an asserted placer mining location known as the Keenan No. 2, alleged to have been located October 26, 1918, by the applicant and seven other persons. It was further alleged that on said date and at the expense of the locators, and for their use and benefit, a discovery of oil in sufficient quantities to justify men of ordinary prudence in making further expenditures on said land, was made by one, Bruce Parker; that on October 31, 1918, the applicant became the sole owner of the claim by conveyance from the other locators; that during 1918, the applicant expended upon the land more than \$100 in time, labor and money in making improvements on the land and drilling a well

thereon; that in 1919, he expended more than \$100 in time, money and labor in drilling a second well on the land; that in examining, surveying, staking, locating and recording, the sum of more than \$60 was expended; that prior to February 25, 1920, the claimant expended on the land more than \$250 in time, money and labor in making improvements and developments looking to the production of oil from said land. In connection with the application, there is filed what purports to be a copy of an affidavit executed by Bruce Parker wherein he avers that a discovery of petroleum was made on the land in question October 26, 1918, "by drilling a well on said land and said discovery was made in said well at a depth of 23 feet for Peter S. Keenan." There are also filed copies of affidavits of assessment work with respect to said claim for the years 1918 and 1919, it being alleged in said affidavits that at least \$100 was expended during each of said years for said purpose.

Upon considering the application, the Commissioner of the General Land Office by decision of May 9, 1921, found the application to be in conflict with the prospecting permit application 07506, of R. R. Rose, filed March 18, 1920, under the provisions of section 13, of said leasing act of 1920, and that it is evident from copies of affidavits submitted with the application of Keenan and the showing made by him in connection with a protest filed by him against the application of Rose that Keenan did not expend \$250 upon said claim, "but that the expenditure made was merely assessment work." He held that the expenditure incident to the examining, surveying, staking and recording can not be accepted in satisfaction of the \$250 expenditure required by said section 19 of the leasing act and rejected the application because of insufficient expenditure and conflict with the prior application of Rose.

From this action Keenan appeals on the ground (1) that the Commissioner erred in holding that Keenan had not expended \$250 upon or for the benefit of the claim and in rejecting the application for that reason; (2) that even if it be true that Keenan had not made such expenditures, his preference right only would be defeated thereby and that "it would still be in the discretion of the Secretary to recognize his equities in the land and grant him equal rights with the section 13 application."

The Department concurs in the Commissioner's holding that expenditures incident to the examining, surveying and staking of mining locations and the recording of notices thereof can not properly be accredited towards \$250 expenditures required by said section 19. The showing fails to prove that Keenan has expended upon or for the benefit of the claim in actual development work, the sum required by the statute. Hence, he has not shown himself entitled to a permit under said section 19.

It is true that the Department has permitted applicants for permits under section 19 of the act, who were unable to show a sufficient expenditure to entitle them to a permit under said provision of the law, to amend their applications and take a prospecting permit under section 13 of the act, but this can only lawfully be done in the absence of prior adverse claims. In this case, R. R. Rose filed his application for prospecting permit under section 13 of the leasing act on March 18, 1920, accompanying it with the necessary proofs. Keenan's application under section 19 was not filed until August 25, 1920. The claim of Rose is therefore prior in time, and Keenan not being entitled to a preference right under section 19 of the leasing act, or under any other provision of said law, can not be granted a permit in the face of the claim of Rose, prior in time and regular in form.

When Congress has definitely granted preference rights to those claimants of possible oil-bearing lands who are able to show expenditures to the amount and of the character specifically defined in the statute, this Department is without authority to grant a like preference to those who are unable to meet the requirements of the statute. No preference exists under the law in such cases and all applicants, without preference, must be accorded equal rights and privileges. In such case the rule of priority, long established and consistently maintained by this Department, should and does control.

The decision appealed from is accordingly affirmed, the case closed and the record returned to the General Land Office.

STOCK DRIVEWAY WITHDRAWAL—INVESTIGATION OF NON-MINERAL CLAIMS BASED UPON PRIOR SETTLEMENT.

INSTRUCTIONS.

[Circular No. 783.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 8, 1921.

REGISTERS AND RECEIVERS AND CHIEFS OF FIELD DIVISIONS:

Hereafter when nonmineral applications are presented for lands embraced in a stock driveway withdrawal by persons claiming settlement prior to such withdrawal, you will refer such applications to the proper chief of field division for investigation and report before final action is taken thereon, in accordance with the practice established under the circular of March 6, 1911 (39 L. D., 544), governing applications of alleged settlers for lands withdrawn under the act of June 25, 1910 (36 Stat., 847).

In certain instances heretofore entries of alleged settlers have been allowed for lands withdrawn for driveway purposes, owing to the exception in the orders of withdrawal, with a view to investigation if deemed advisable at the time final proof is submitted. The procedure hereby adopted will supersede that practice and protect applicants from the loss that might be sustained should their residence then be found insufficient to defeat the withdrawal.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**BOND REQUIREMENT IN FORM OF LEASE ADOPTED UNDER
POTASH REGULATIONS OF MARCH 21, 1918, AMENDED.**

[Circular No. 781.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 10, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

The form of lease adopted as a portion of the potash regulations of March 21, 1918 (46 L. D., 323, 330), under the act of October 2, 1917 (40 Stat., 297), provides in section 2(a) that the lessee must furnish a bond in the sum of one-tenth of the proposed investment, but in no case less than \$5,000.

You are advised that under date of October 5, 1921, the Secretary of the Interior amended said regulations so as to provide that this bond shall in no case be less than \$2,500.

WILLIAM SPRY,
Commissioner.

LYDIA M. JOHNSON AND MINNIE MARTIN PARKER.

Decided October 11, 1921.

INDIAN LANDS—ALLOTMENT—PATENT—STATUTES—ACT OF AUGUST 7, 1882—
NEBRASKA.

It was clearly intended by the terms of section 6 of the act of August 7, 1882, which provided for the allotment of lands in the Omaha Reservation, Nebraska, that the determination of questions of descent in the event of the death of an allottee should be controlled entirely by the statutes of that State from the time of the issuance of the trust patent, and consequently the common law rule of descent has no application to cases arising under that act.

INDIAN LANDS—ALLOTMENT—PATENT—STATUTES—NEBRASKA.

The interests of a deceased allottee under a trust patent issued for lands in the Omaha Reservation, Nebraska, allotted by the act of August 7, 1882, descend in accordance with the laws of that State to the surviving husband or wife and sons and daughters of the decedent, and upon the death of all of the children, without issue, the entire estate inures to the surviving parent.

DEPARTMENTAL DECISIONS CITED AND FOLLOWED—COURT DECISIONS CITED AND CONSTRUED.

The cases of *St. Dennis v. Breedan* (27 L. D., 312), and *Harrison McCauley et al.* (27 L. D., 399), cited and followed; cases of *United States v. Rickert* (188 U. S., 432), and *Highrock v. Gavin* (179 N. W., 12), cited and construed.

GOODWIN, *Assistant Secretary*:

You [Commissioner of Indian Affairs] have transmitted briefs filed by Attorney Hiram Chase in behalf of Lydia M. Johnson and Minnie Martin Parker, mother and sister respectively of We-ha-ton-gah or Maggie Martin Parker, deceased, together with other papers involving heirship to decedent's allotment on the Omaha Reservation, Nebraska.

The Omaha Act of August 7, 1882 (22 Stat., 341), under which decedent's allotment was made and to whom trust patent issued, provides in the sixth section thereof that upon approval of the allotments patents shall issue therefor declaring that the United States will hold the lands for the period of twenty-five years in trust for the sole use and benefit of the Indian allottees, or in case of their decease, of their heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patents to the Indians or their heirs in fee discharged of the trust. Alienation of the lands is forbidden during the trust period. And the act further provides "that, the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered."

The allottee died February 28, 1920, survived by her husband, Charles A. Parker, and son, Wallace Parker, who died April 13, 1920, and a daughter, Margaret Parker, who died April 16, 1920, both without issue. In the determination of heirs, which was done in accordance with the laws of descent of the State of Nebraska, it was found that upon allottee's death her estate was inherited by her husband, son, and daughter in equal shares; that upon the death of the son, his interest passed to his sister; and that upon the daughter's death her interest passed to her father, Charles A. Parker, the allottee's husband, who thus acquired the entire estate.

It is contended in the briefs that there was error in the determination of decedent's heirs in that the entire estate is awarded to the

husband, Charles A. Parker; that under the provisions of the sixth section of the Omaha Act the State laws of descent do not apply until after the issuance of final or fee patent; and that in the case of the death of an allottee during the trust period the estate passes to the next of kin and blood relatives which would exclude the husband, reference being made in this connection to the common law.

A similar contention was made in the case of Harrison McCauley *et al.* in which the Assistant Attorney General for this Department rendered opinion September 14, 1898 (27 L. D., 399). In that opinion after referring to the sixth section of the Omaha Act it was said:

The main question presented is, therefore, who are the "heirs" of a deceased Indian allottee "according to the laws of the State of Nebraska."

The character of the estate granted has no bearing on this question, except in determining "the law of descent and partition in force in the said State * * * after patents therefor have been executed and delivered."

The language just quoted evidently refers to the preliminary or trust patents, for the reason that it was already provided that the patent to be issued at the expiration of the twenty-five year period should convey a fee "free of all charge or incumbrance whatsoever," and to say that the law of descent and distribution in said State should apply after a conveyance in fee would be mere surplusage and add nothing to the statute, or be held as intended to operate as a restraint on alienation after a conveyance in fee, a thing which was clearly not contemplated by the statute. The term "fee" alone carries with it an estate of perpetuity, and confers an unlimited power of alienation. In modern estates fee, fee-simple, and fee-absolute are synonymous—"simple" or "absolute" adds nothing to the comprehensiveness of the original term. Moreover, to hold that the phrase "after patents have been issued" operates to defer the operation of the laws of Nebraska as to descent upon these lands until after the final patents have been issued would be against the general policy of the Government to bring these Indians under the operation of all the laws of the State as fast as practicable. (See opinion of the Assistant Attorney General of August 12, 1898, Vol. 14, page 38.) It results that the law of descent and partition in the State of Nebraska applies and governs the disposition of these allotted lands upon the death of the allottee.

That opinion is decisive of the question raised in the briefs but it is claimed that the opinion was overruled in the case of United States *v.* Rickert (188 U. S., 432). This claim or assumption is apparently based on the closing part of the opinion wherein allotments upon which trust patents have issued are referred to as being "freehold" estates. The use of the word in that connection appears to have conveyed the erroneous impression that "freehold" and "fee" are necessarily synonymous terms. The argument seems to be that as this opinion was overruled as claimed it results that a trust patent allottee has an estate limited at common law to a particular class of heirs such as next of kin and blood relatives. That the use of the term "freehold" was not intended in that sense is clearly shown in the above quotation from the McCauley case wherein it is pointed

out that a fee is the highest type or character of title. The term was evidently used in that case in respect to a trust patent allottee solely in the sense of being an estate of inheritance as contemplated by the Omaha Act, and which allotment in case of the death of the allottee would under the provisions of the act pass to his heirs according to the Nebraska laws of descent. The use of the term in that connection was apparently justified as applied to trust allotments under the definition and classification of estates of freehold and freeholds of inheritance, viz:—"such estate as requires actual possession"; "estate of inheritance or for life in real property"; "an estate of inheritance is an estate which may descend to heirs";—all of which are distinguishable from the definition of a fee simple estate: "largest estate and most extensive interests that can be enjoyed in land, being an absolute estate in perpetuity, and conferring an unlimited power of alienation." Under the authorities a freehold estate may be less than a fee.

It is well settled that upon the issuance of a trust patent to an Indian allottee he secures an equitable title to the land, the legal title remaining in the Government until issuance of final or fee patent. A freehold estate may be legal or equitable and it was evidently in the latter sense that the term was used in the McCauley case. Furthermore, the opinion in that case was dealing with an allotment upon which trust patent only had issued and the Omaha Act specifically provides that fee title is not to pass until issuance of the second or final patent. The true situation in respect to the contention now made in this matter is further shown in the case of *St. Dennis v. Breedan* (27 L. D., 312), reference to which is made in the McCauley case and wherein the Assistant Attorney General for this Department held among other things—

It might be claimed that the phrase "after patents have been issued" operates to defer the operation of the laws of Oregon as to alienation and descent upon these lands until after the final patents have been issued at the expiration of the period of twenty five years. But this would be against the general intention to bring these people under the operation of all the laws of the State as fast as practicable. The object of the proviso quoted above was to furnish a rule to determine the heirship in cases where the allottee should die before the issuance of the second or final patent. Upon the issuance of that patent the right of the allottee to the land became full and perfect, relieved of all control or supervision of the United States, and the Indian having become a citizen there could be no necessity for a declaration as to what laws of alienation and descent should thereafter control. It was the evident intention to make these lands subject to the laws of the State of Oregon from the time of the issuance of the trust patents except as to the right of alienation.

As to invoking the common law in the matter of determining the heirs to the estate of Maggie Martin Parker, deceased, to whom trust patent was issued, it is sufficient to say that such determination is

controlled entirely by statute which provides that in case of the death of an allottee during the trust period the allotment will be held for the benefit of the heirs "according to the laws of Nebraska" and "that the laws of descent and partition in the said State shall apply thereto" after the trust patents have been issued.

The case of *United States v. Rickert*, *supra*, clearly does not have the effect of overruling the *McCauley* case as claimed. In fact, upon full analysis they will be found to be in accord. That case was not dealing with the subject involved here and it merely defines the province of a trust patent saying that the choice of the word "patents" to express the real meaning was not happily chosen; "in other words the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee." This is in line with the manner in which the law has always been construed and administered. Nor is there anything in the case of *Highrock v. Gavin* (179 N. W., 12), to which reference is also made in the briefs, opposed to what has been said in regard to the *Rickert* case.

The provisions of the sixth section of the Omaha Act, the construction placed thereon by the Department and the courts, and the manner in which they and similar provisions of law have been administered, all support the action taken in determining the heirs of Maggie Martin Parker. Such action will, therefore, be adhered to, the contention made on behalf of Lydia M. Johnson and Maggie Martin Parker being hereby denied.

**PREFERENTIAL CLAIMS UNDER SECTION 8 OF THE ACT OF
DECEMBER 29, 1916—CIRCULAR NO. 523, AMENDED.**

[Circular No. 782.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 13, 1921.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

On August 29, 1921, the Department amended paragraph 13 (d) of the regulations under the stock-raising homestead act of December 29, 1916 (39 Stat., 862), as embodied in the reprint (Circular No. 523), of July 30, 1919 (47 L. D., 227, 237), and of August 27, 1920, to read as follows:

"13 (d). A preferential claim cannot be recognized unless, on the date the designation of the land in question becomes effective, the land originally entered

by the claimant has been designated under the act or there is pending a petition by such claimant for the designation of the land originally entered by him."

WILLIAM SPRY,
Commissioner.

LACKEY v. DURNFORD.

Decided August 24, 1921.

COAL LANDS—OIL AND GAS LANDS—APPLICATION—SECTION 2347, REVISED STATUTES.

Where a conflict arises between a coal land application filed pursuant to section 2347, Revised Statutes, and an oil placer mining location previously initiated, involving a tract of classified coal land, it must be held that said land is not subject to disposition under that statute as "vacant coal land of the United States not otherwise appropriated," if it is shown that the land was at the date of the filing of said application and continuously thereafter in the possession and occupancy of the mining locator, and that work thereon was prosecuted to a sufficient discovery of oil.

DECISION CITED AS IN POINT.

The case of *Cosmos Exploration Company v. Gray Eagle Oil Company et al.* (112 Fed., 4), cited as in point.

FINNEY, First Assistant Secretary:

The land here involved is the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 28 N., R. 114 W., 6th P. M., Evanston land district, Wyoming. It was by the Commissioner's letter of June 29, 1907, classified as coal land and appraised at the minimum price of \$10 per acre, the land being situated more than 15 miles from a completed railroad.

On May 12, 1916, Nelida A. Durnford filed coal-land application 05477 for said tract, together with the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ of Sec. 1 of the same township and range. Notice of application was published and posted for a period of 30 days commencing May 25, 1916, and proof thereof was filed in the local office July 5, 1916, on which date the applicant relinquished the said S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 1, and made payment for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, in the sum of \$800 at the appraised price of the land.

On June 24, 1916, Charles Lackey filed a protest against said application alleging that on or about May 1, 1916, he moved onto the land in question a well drilling apparatus; that he immediately began drilling for petroleum on said land; that on May 4, 1916, he and others, including George and Neil Durnford, made a placer mining location, the Cretaceous Oil Claim No. 1, of the NE. $\frac{1}{4}$, Sec. 12; that on May 6, 1916, a discovery of petroleum was made on said land; that on November 9, 1916, seven of the locators conveyed to him, the eighth locator, all of their right, title, and interest in and to said mining claim; that the land contains valuable deposits of petroleum and gas and is more valuable on account of said deposits than for any other

purpose, and that he and his assigns have a legal claim to said land and the petroleum and gas deposits therein.

By decision of July 24, 1918, the Commissioner of the General Land Office dismissed the said protest on the report of a mineral examiner of his office and directed that upon the filing of an affidavit by the applicant showing that the money with which she paid for the land was her own separate funds, she being a married woman and the wife of the said George Durnford, final certificate would issue. On July 29, 1918, but pending the period allowed for appeal by the protestant from the said decision of the Commissioner, final certificate issued on the application.

Appeal from said decision was filed August 29, 1918, the protestant having in the meantime, however, and on August 6, 1918, filed a second protest against the application and entry setting up, in addition to the allegations contained in the former protest, that on May 6, 1916, the affiant made a discovery of petroleum in a 175-foot well drilled on the said land; that in the course of drilling said hole extending over a period of six days, the affiant took out and removed therefrom six barrels of high grade petroleum; that from the time of posting of notice of location on the land, to and including the said discovery of oil, drilling operations were prosecuted continuously and with all possible diligence by the protestant; that the Cretaceous Oil Company is the owner, by quitclaim deeds from the locators, of said claim; that said company has expended approximately \$30,000 upon the land described and lands adjacent thereto, in the development of oil and gas resources thereof; that the said company has caused a well to be sunk to a depth of about 800 feet upon the land described and that drilling operations are now in progress; that the affiant has been familiar for a number of years with the coal deposits on said land; that the said deposits are at no place more than 30 inches in thickness and that the coal is very soft and of exceedingly inferior grade; that the affiant has endeavored to use said coal in his drilling operations and that a fire can not be maintained in the boiler with said coal; that affiant has customarily used wood hauled a distance of more than two miles in preference to using said coal which can be obtained within 80 feet of the boiler; that the land is entirely worthless so far as its coal deposits are concerned.

By decision of September 9, 1918, the Commissioner ordered a hearing on said charges, holding therein that if the charges could be established by sufficient evidence the coal classification of the land should be set aside and the land declared to be subject to acquisition under the placer mining laws. Hearing was accordingly had commencing April 28, 1919, and upon consideration of the evidence the local officers rendered nonconcurring opinions, the register finding in favor of the coal claimant and the receiver in favor of the

protestant. From said decisions the protestant and the protestee, respectively, appealed.

Upon considering the case the Commissioner by decision of December 6, 1920, found and held that the protestant went upon the land May 1, 1916, and moved a drilling rig thereon; that on May 4, 1916, the NE. $\frac{1}{4}$, Sec. 12, was located for oil by Lackey and seven others; that the location notice was recorded May 11, 1916; that on May 9, 1916, the locators joined in a quitclaim deed to Charles Lackey and that on the same date George Durnford entered into an agreement with Lackey by the terms of which Durnford surrendered to Lackey certain cabins, mining tools and coal workings on the ground and agreed that Lackey should have the use of said cabins, sheds, etc., and tools and the privilege of mining and using all coal necessary for drilling operations and domestic use on the claim; that on May 6, 1916, an apparently valid discovery of oil was made on the claim in a 175-foot well; that further drilling upon the land in the summer of 1918 resulted in the production of oil from a well sunk to a depth of 1,023 feet, which had an estimated daily pumping capacity of 25 barrels; that two other wells had been sunk by the protestant on Sec. 1, same township and range, in which oil was found; that both coal and oil have been developed on the land but that the coal was of poor grade and apparently of no commercial value; that George Durnford, the husband of the protestee, opened a coal mine upon the land and after working it for upwards of a year, under a declaratory statement filed in October, 1914, had forfeited his rights to the property; that the protestee was undoubtedly fully aware of the oil operations of Lackey conducted in May, 1916, upon the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, when she filed her application to purchase the land; that at that time, however, Lackey was in possession of the land, had a perfected placer mining location thereon and was, thereafter, subject to all the obligations and possessed all the privileges of one in possession of a valid and subsisting mining claim; that in view of said facts and of the provisions of section 2347, Revised Statutes, which restrict applications thereunder to vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, the land in question was not subject to purchase by the protestee; that Lackey had established the allegations of his protest, and that the coal-land application should be rejected and the coal land classification in so far as it applied to the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, set aside. The decision of the register was accordingly reversed and that of the receiver affirmed. From this action the protestee appeals.

It appears that on October 3, 1914, George Durnford, the husband of the protestee, filed a coal declaratory statement for the land here in question and the adjoining S. $\frac{1}{2}$, Sec. 1, alleging that he entered

into possession of the land August 15, 1914, and on September 20, 1914, opened a valuable mine of coal thereon. On September 8, 1915, he relinquished the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 1, and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, and on the same date filed application to purchase the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12. Proof of publication of notice of the application for 30 days commencing September 16, 1915, and of contemporaneous posting of the same in the local office was filed October 28, 1915, but the application was rejected by the local officers April 15, 1916, for failure on the part of the applicant to file proof of posting of notice on the land and to tender payment of the purchase price. From this action no appeal was filed. On the other hand the applicant, on May 12, 1916, filed a relinquishment of all his right, title, and interest in and to the tract covered by his application.

In the meantime, however, he had prosecuted development work on the mine that he had opened on the land and at the time of the filing of his last relinquishment the mine consisted of a slope about 165 feet in length running in an easterly direction from a point about 400 feet south of the north line and approximately the same distance of the west line of NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 12. From this mine it appears Durnford had removed and sold, and received pay for, over 300 tons of coal.

As above stated, and on May 4, 1916, Durnford joined with the protestant, Lackey, and six others, including his son Neil Durnford, in a notice of the location of the Cretaceous No. 1 placer mining claim embracing the land in question and on May 9, 1916, joined in the execution of a deed purporting to quitclaim and convey the interests of seven of the said locators in and to the claim to Lackey, and on the date last named entered into the agreement with Lackey recited in the Commissioner's decision.

On June 20, 1916, Lackey executed a deed purporting to quitclaim and convey the location to the Cretaceous Oil Company, a corporation. Since May 1, 1916, the locators of said claim and their successors in interest have been in continuous, exclusive and uninterrupted possession of the ground.

From the first until about the sixth of May, 1916, Lackey was engaged in drilling a well on said land at a point a few feet from the portal of the coal mine. Lackey testifies that said well was sunk to a total depth of 175 feet; that he was assisted in the drilling of said well by Gray Huston and Bruce Parker; that the first showing of oil therein was found at a depth of 80 feet; that the well was then drilled to a depth of 175 feet where they obtained more oil; that this was shale oil; that at the time the discovery was made Bruce Parker was operating the drill and that at the time the oil was encountered at the depth of 175 feet the witness and Parker

were doing the drilling. Asked to state approximately the quantity of oil that was discovered in that well, the witness said, "Oh, in the neighborhood of one-half barrel in a day. In a day and a night we took out more than a barrel." Gray Huston testified that he worked for Lackey and assisted in the drilling of a well on the land in the early part of 1916; that he worked as a helper; that a discovery of oil was made in that well, but that he does not know for sure at what depth the discovery was made as they never measured it; that it might have been 70, 75 or 80 feet; that Lackey was not present at the time the discovery of oil was made; that when Lackey left he gave witness instructions to stop the machinery if he got oil and that he shut the machinery down when oil was encountered; that after Lackey returned he, Lackey, went on with the drilling. George Durnford testified that he and a mineral examiner went to that well in 1917 and found a hole 44 feet deep. Asked what indications of oil they found in that hole, the witness said, "we found in the bottom of the hole a heavy black substance of an oily nature about eight inches in depth."

This is substantially all of the testimony with respect to the result of the drilling in said 175-foot well and the Department is of opinion that it falls far short of establishing a legal discovery of mineral on the claim. However, in the summer of 1918, the mineral claimants in the meantime having maintained their possession of the land, a well was sunk at a point about six feet from said 175-foot well to a depth of 1,023 feet. This well penetrated a deposit of oil-bearing sand 43 feet in thickness carrying a high grade of paraffin oil. While the producing capacity of this well has not been tested, from six to ten barrels of oil appear to have been taken therefrom and the Department has no doubt that the oil developed therein is sufficient in quantity to constitute a mineral discovery.

The evidence adduced at the hearing on behalf of the protestant does not, in the judgment of the Department, warrant the overturning of the classification of the land as valuable for coal and its appraisal at the minimum price as such, as it clearly appears that no systematic attempt was made by the protestant or any of his witnesses to demonstrate the quality of the coal exposed on the land or to determine the extent to which the land is underlain by that or any other body of coal. But assuming, in accordance with the protestee's contentions, that the land does possess a positive value for coal the evidence shows that at the date of the filing of her application the land was and since has been in the continuous occupancy and possession under claim and color of title, asserted by virtue of the oil placer mining laws, of the locators of the Cretaceous No. 1 placer mining claim, of whom the protestee's husband was one, and their successors in interest; that they at large expense have performed

drilling operations upon the land which ultimately led to the actual disclosure within the limits of the claim of oil sufficient in quantity to constitute a mineral discovery, although no such discovery had been made at the time the said application was filed. Section 2347, Revised Statutes, pursuant to which the protestee is seeking title to the land, authorizes the entry thereunder only of "vacant coal land of the United States not otherwise appropriated."

The case as thus presented is very closely analogous to that of *Cosmos Exploration Company v. Gray Eagle Oil Company et al.* (112 Fed., 4), which involved a conflict between a selection application under the act of June 4, 1897 (30 Stat., 11, 36), and an antecedent oil placer mining location upon which no discovery of mineral had been made at the time the selection application was filed. The act prescribed that lands to be subject to disposition thereunder should be "vacant and open to settlement" and it was contended by the appellant that the land there in controversy was of that status at the time the application was filed for the reason that the defendant's mining locations were then void for want of discovery. In passing upon that contention the court said:

It will be noticed that these locations were made over six months prior to the date of selection under the forest reserve act by the grantor of appellant. What is the meaning of the words "vacant lands open to settlement," used in the act with reference to the facts as alleged in the bill? The ordinary meaning of the word "vacant" in its general use, is to be empty or unoccupied. * * * Vacant lands are such as are absolutely free, unclaimed, and unoccupied. "The word 'vacant,' when applied to lands, means those which have not been appropriated by individuals." *Marshall v. Bompert*, 18 Mo. 84, 87.

* * * * *

From the allegations of the bill it appears that at the time of appellants' selection of the lands in question no discovery of any mineral had been made. Appellees could not at that time have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose; but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral and were diligently at work to prove it to be such. Under these circumstances it cannot, in our opinion, be said to be vacant land at the time of appellants' selection thereof under the provisions of the act of 1897. The land was not vacant and open to settlement at that time, because it was then occupied by the defendant's grantors under a claim and color of right. It matters not that they had not all that time acquired any rights against the United States. It is true that no valid location of a mining claim can be made, under the mining laws, until the discovery of mineral. * * * It does not, however, follow that, because no mineral was found, the land in question was unoccupied.

* * * * *

But, whatever his rights may be, the fact that the miner is in the actual possession without having made any location at all shows that the land is not "vacant."

The Department is of opinion that the same rule applies with equal force to the case of a conflict between a coal land application under section 2347 of the Revised Statutes and an oil placer mining location initiated prior to the filing of the application, at all times within the possession and occupancy of the mineral claimants, and upon which a sufficient discovery of oil has been made; that, in other words, such land is not vacant and unappropriated coal lands of the United States and subject to entry under said section.

It is accordingly held that the land here in question, having been shown to have been at the date of the filing of the protestee's application and continuously thereafter in the possession and occupancy of persons claiming the same under an oil placer mining location initiated prior to the said filing, work upon which was prosecuted to a discovery of substantial quantities of high grade oil, was not subject to entry under said application. The judgment of the Commissioner is therefore affirmed and the coal entry will be canceled.

LACKEY v. DURNFORD.

Motion for rehearing of departmental decision of August 24, 1921 (48 L. D., 226), denied by First Assistant Secretary Finney, October 14, 1921.

EVANS v. WOODARD (ON REHEARING).

Decided October 14, 1921.

CONTEST—HOMESTEAD ENTRY—MILITARY SERVICE—AFFIDAVIT—ACT OF JULY 28, 1917.

A departmental regulation directing that no contest against a homestead entry charging abandonment be entertained during the periods covered by the act of July 28, 1917, unless accompanied by a nonmilitary service affidavit, is broader than the act itself, which requires such affidavits to be furnished only in contests against those specified in the act; and the practice based upon such regulation need not have controlling weight where, a contest having been entertained, it is clearly shown that the entryman was not of the class which Congress intended to protect.

CONTEST—HOMESTEAD ENTRY—FINAL PROOF—LAND DEPARTMENT.

Where the statutory period within which final proof upon a homestead entry may be submitted has not terminated, the Land Department may, upon the withdrawal of a contest predicated on the charge of abandonment, treat the matter as *ex parte* and permit the entryman to perfect the claim if the requirements of law have been satisfactorily fulfilled, even though such compliance was subsequent to the initiation of the contest.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

The case of *Thomas v. Richey* (48 L. D., 181), cited and followed.

FINNEY, *First Assistant Secretary*:

Motion for rehearing has been filed on behalf of Nellie Woodard, in the above entitled case, wherein the Department, by decision rendered on appeal, July 13, 1921, affirmed the action taken by the Commissioner of the General Land Office, January 10, 1921, sustaining the contest of Arley A. Evans and holding said Woodard's additional entry for cancellation on the ground of nonfulfillment of the residence and cultivation requirements of the enlarged homestead act.

The motion was accompanied with a brief and by affidavits of C. Raymond Woodard and Wiley P. Renshaw, copies of all of which papers were duly served on the contestant as evidenced by registered return receipt.

Two reasons are set forth on behalf of the contestee why the motion should be entertained, which are (1) that the Commissioner of the General Land Office and the Department were without jurisdiction to act upon the case inasmuch as the contest affidavit failed to allege that the entrywoman's default was not due to her employment in the army, navy or marine corps of the United States, as mandatorily required by the act of July 28, 1917 (40 Stat., 248), and the departmental instructions issued pursuant thereto, and (2) that the parties in interest have effected a settlement of the controversy and the contestant has executed a withdrawal of the contest.

A formal withdrawal of the contest, executed by the contestant, was filed September 19, 1921.

It appears from the statements contained in the affidavits submitted with the motion that since the time of the hearing, the contestee has been living upon the entry, complying with the law, and is now in a position to submit final proof.

The first contention of counsel for contestee is without merit. That point was carefully considered by this Department in the case of *Thomas v. Richey*, decided July 19, 1921 (48 L. D., 181), in which it was held that while the Land Department, in order to further safeguard the interests of those protected by the military service statutes, has refused to entertain all contests based upon the charge of abandonment during the periods covered thereby, in the absence of an allegation that the default was not due to such service, yet that practice need not have controlling weight where, a contest having been entertained, it is clearly shown that the entryman was not of the class protected by the law. This principle is applicable to the case at bar. The provisions of the act of July 28, 1917, *supra*, were aimed to protect a special class of entrymen. To safeguard their interests the Department required by its regulations that the nonmilitary service averment should be incorporated in all contest

affidavits. The act itself did not, however, go so far. It required the averment only in the contest affidavits involving entries of those specified in the act. Congress did not intend to protect those who clearly were not of the class for whose benefit it legislated.

The second contention warrants consideration. In view of the fact that the contestant has voluntarily executed and filed a withdrawal of the contest, that withdrawal is hereby accepted and the contest is accordingly dismissed and the case will be treated as an *ex parte* matter. According to the record the statutory period within which final proof must be submitted has not yet expired, and, inasmuch as affidavit testimony has been submitted to the effect that the contestee has since the hearing complied with the law and is in a position to submit proof, the motion is granted, the prior decision rendered herein is vacated, and the case remanded to the end that the entrywoman be permitted to perfect her entry if she is now in a position to submit satisfactory proof.

PROCEDURE WITH REFERENCE TO NONCOMPLIANCE WITH THE TERMS OF AN OIL AND GAS PERMIT.

INSTRUCTIONS.

[Circular No. 785.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 14, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

In the case of oil and gas prospecting permits issued under section 13 of the act of February 25, 1920 (41 Stat., 437), where more than twelve months and ten days have elapsed you will not call for corroborated affidavits describing the work done upon the land pursuant to the letter of the Secretary of the Interior, dated January 12, 1921, unless directed to do so by this office in any specific case.

The Department, however, will consider any information as to non-compliance with the terms of a permit and should such showing be filed you will transmit same to this office for consideration.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

INSTRUCTIONS.

October 18, 1921.

RECLAMATION—YUMA AUXILIARY PROJECT—CITIZENSHIP—PATENT.

Section 2 of the act of January 25, 1917, which imposes the qualification of citizenship upon "any purchaser or patentee" of lands within the Yuma Auxiliary Project, Arizona, did not contemplate the restriction of the right of original entry or purchase to native born or to those who had theretofore become citizens, but the conditions of the statute as to citizenship are sufficiently met if, at the time of the issuance of patent, the patentee is a citizen of the United States.

FINNEY, *Acting Secretary*:

The Department is in receipt of your [Commissioner of the General Land Office] letter of August 31, 1921, requesting instructions in regard to the showing in the matter of citizenship which should be required of applicants to purchase lands within the Yuma Auxiliary Project, Arizona, under the provisions of the act of January 25, 1917 (39 Stat., 868), as amended.

Section 2, of this act provides in part as follows:

Upon full payment of the purchase price, patent shall issue for the lands, and no qualification or limitation shall be required of any purchaser or patentee except that he be a citizen of the United States.

The law contemplates that full payment of all installments of the purchase price shall be made within three years of the date of sale or receipt of notice by the purchaser of the acceptance of his bid by the Secretary of the Interior. The specific question presented is:

whether this office should wait until the purchase price has been fully paid and *application made for issuance of patent on the land before requiring any evidence of claimant's citizenship*; or, whether such evidence should be furnished by the applicant *at the time of filing application to purchase*, or within the time allowed by notice from this office specifically requiring such evidence. If any evidence of citizenship is required *at the time of filing application to purchase*, the further question arises as to whether a person who has merely filed declaration of intention to become a citizen is eligible to make application for the purchase of the land, or whether he should show that he is a native born or naturalized citizen of the United States.

In the approved form of application to purchase (47 L. D., 273, 275-277), the affidavit of citizenship requires the applicant to state whether he is native born or naturalized, and if not native born, he is informed by means of instructions printed on the affidavit that "record evidence of citizenship will be required before patent will issue." Apparently, the form makes no provision for discovering whether or not an unnaturalized alien has declared his intention to become a citizen.

The uniform policy of Congress has been to restrict the right of entry and purchase of public lands of the United States to citizens

or those who have declared their intention to become citizens. For instance, section 2289, Revised Statutes, provides:

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled * * *

to make homestead entry.

Section 2291, Revised Statutes, provides for the submission of final proof on homestead entries and for issuance of patents to the beneficiaries specified therein "if at that time citizens of the United States."

The act of March 3, 1877 (19 Stat., 377), amended by the act of March 3, 1891 (26 Stat., 1095, 1096), allows desert-land entry to be made by "any citizen of the United States, or any person of requisite age, who may be entitled to become a citizen, and who has filed his declaration to become such." Such entryman can not, however, obtain patent until he has become a citizen of the United States.

While section 2 of the act of January 25, 1917, *supra*, imposes the qualifications of citizenship upon any "purchaser or patentee," the obvious purpose of the law is to limit the issuance of patents to such entrymen not native born as have completed their purchases and become citizens of the United States, and not to restrict the right of original entry or purchase to such as had theretofore become citizens.

An applicant should be required to state at the time he files application whether he is native born, naturalized or has filed his declaration to become a citizen. If not native born, he should be required within such time as may be accorded for that purpose to file evidence of citizenship or a certified copy of his declaration of intention to become a citizen.

MARY ELIZABETH TOLAND.

Decided October 20, 1921.

MILITARY SERVICE—HOMESTEAD—RESIDENCE—CULTIVATION.

In applying credit for military service in connection with final proofs on homestead entries, such credit is to be accepted as constructive residence and cultivation for the third year of the entry where the entryman is entitled to one year for service and for the second and third years where he is entitled to two years for service.

DEPARTMENTAL INSTRUCTIONS INTERPRETED.

The Departmental instructions contained in Circular No. 646, approved June 4, 1919 (47 L. D., 151), interpreted.

FINNEY, *First Assistant Secretary:*

On November 29, 1916, Mary Elizabeth Toland made an enlarged homestead entry 035895, Lewistown land district, Montana, for the

E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 12, T. 18 N., R. 26 E., M. M., containing 280 acres.

On December 24, 1920, she submitted final proof showing that she established residence on the land in May, 1917, and lived there until November 15, 1917, at which time she filed notice of leave of absence. On May 15, 1918, she entered the United States Navy Nurse Corps and served until December 31, 1918. During the year 1919 she was absent on a leave of absence on account of her health, having contracted the "flu" while in the service. She returned to the land on March 3, 1920, and lived there until December 1, 1920, and cultivated 18 acres to millet and harvested a good crop. The improvements consist of a 10 by 12 foot frame house, two wells, and one-half mile of two-wire fence. Final certificate was issued January 3, 1921.

On June 20, 1921, the Commissioner of the General Land Office called on the entrywoman to show why she had not cultivated at least 35 acres during 1920, and held the proof for rejection and final certificate for cancellation, leaving the entry intact, subject to future compliance with the law within the statutory life of the entry. She has appealed from said holding. She contends that she has complied with the law by cultivating 18 acres which is more than one-sixteenth of the area, and calls attention to Circular No. 646, approved June 4, 1919 (47 L. D., 151), which provides that if the entryman had one year's military service he must comply with the law as to residence for two years and cultivate at least one-sixteenth of the area the second year. She states further that she has cultivated the land since proof and has a reasonable expectation of a good crop.

The entrywoman has complied with the homestead law by living on the land more than seven months each year for two years and cultivating more than one-sixteenth of the area during the second year. The circular of June 4, 1919, *supra*, may be better understood if it is borne in mind that one year's military service is acceptable as constructive residence and cultivation for the third year of the entry, and two years' service for the second and third years. The proof may be accepted in the absence of other objections.

The decision appealed from is reversed.

ALEXANDER FRASER AND CARL HARVEY.

Decided September 12, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—DESERT LAND ENTRY—ASSIGNMENT.

Section 20 of the act of February 25, 1920, did not modify or limit the right of assignment of a desert-land entry authorized by preexisting law or deprive an assignee of any rights or privileges conferred upon the original entryman, and the recognized assignee of one who made a desert-land entry

of lands not withdrawn or classified as mineral at the time of entry is entitled to a preference right to prospect for oil and gas, notwithstanding that the assignment was made subsequent to January 1, 1918.

FINNEY, *First Assistant Secretary*:

At the Visalia, California, land office on December 24, 1920, Carl Harvey applied for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon the NW. $\frac{1}{4}$, Sec. 6, T. 29 S., R. 24 E., M. D. M. The local officers rejected the application because the land was not withdrawn and was embraced in an unrestricted desert-land entry. The applicant appealed. The desert-land entry referred to was made by Zida Whitaker on January 31, 1911, and was assigned to Alexander Fraser by instrument executed November 24, 1920. The assignment was recognized by the Commissioner of the General Land Office on February 15, 1921.

Under date of May 13, 1921, the Director of the Geological Survey reported that in his opinion the geologic conditions existing under the land are such that opportunity for prospecting should not be denied. Whereupon the Commissioner of the General Land Office directed the local officers to advise the desert-land entrywoman that she would be allowed to file her consent to the reservation to the United States of the oil and gas content of the land and to exercise her preference right to a permit. On June 29, 1921, the assignee of the desert-land entry, Fraser, filed his consent to accept a patent containing the provisions, reservations, and limitations of the act of July 17, 1914 (36 Stat., 509), and on the same day applied for a permit under section 20 of the act of February 25, 1920, *supra*, to prospect for oil and gas upon the land.

The Commissioner of the General Land Office has submitted the record, with a recommendation that the application of Fraser be rejected as the desert-land entry was assigned to him subsequent to January 1, 1918.

Section 20 of the act of February 25, 1920, *supra*, provides:

In the case of lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery. * * *

The evident purpose of limiting the preference right to assignees who acquired title prior to January 1, 1918, was to prevent speculation in such lands by those who might desire to acquire preference rights through such transactions, and it is evident from the language that Congress had in mind assignments or sales made after patent or after the right to a patent had been fully earned by compliance with law by the original entryman or patentee. As a general rule,

the public-land laws—and that is particularly true of the homestead laws—do not recognize or permit assignment until after the beneficiary has fully complied with the law and earned a right to a patent. In the case of desert-land entries, however, the law specifically authorizes and permits the assignment thereof to qualified persons. When such assignment is recognized, the assignee takes the place of the original entryman, is required to perform the labor and make the expenditures requisite to final proof and patent, and is entitled to all the benefits that would have accrued to his assignor.

I am clearly of the opinion that Congress did not intend to modify or limit the right of assignment of desert-land entries conferred by existing law or to deprive an assignee under that law of any rights or privileges which said laws conferred upon the original entryman.

The foregoing is in accordance with the thought that the preference, except as to assignments made prior to January 1, 1918, is to be conferred only upon those who are required to earn title by residence, cultivation, improvement, or some other act required by the applicable law. The widow, heir, or devisee of a homestead entryman, and the heirs or assignee of a desert-land entryman, are the successors of the original entryman, and are within the class entitled to the preference right provided for by said section 20, since they are allowed by law to complete the entry by compliance with the applicable statute.

The case is remanded with directions that the officers be instructed to forward the application of Fraser, suspended in their office, and if upon examination thereof it appears that the applicant is in all respects qualified, the application of Harvey will be rejected and that of Fraser granted.

ALEXANDER FRASER AND CARL HARVEY.

Motion for rehearing of departmental decision of September 12, 1921 (48 L. D., 237), denied by First Assistant Secretary Finney, October 21, 1921.

FRED MATHEWS.

Decided October 25, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—ACT OF FEBRUARY 25, 1920—STATUTES.

The provision in section 13 of the act of February 25, 1920, relating to the limitation of length of a tract of land that may be included in an oil and gas prospecting permit, is directory, not mandatory, and a permit may be granted under that section for the prospecting of a tract, the length of which exceeds two and one half times its width, where the conditions are such that, because of prior disposals, a reasonable area of land in compact form as prescribed by the act is not available.

FINNEY, *First Assistant Secretary*:

At the Salt Lake City, Utah, land office on February 5, 1921, Fred Mathews applied for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon a tract of unsurveyed land, described by metes and bounds, and believed to be, when surveyed, approximately SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 17, S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 16, S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 15, S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 14, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 13, T. 36 S., R. 8 E., S. L. M.

By decision dated June 9, 1921, the Commissioner of the General Land Office rejected the application because the length of the land described is more than two and one-half times its width. Applicant has appealed.

Section 13 of the act of February 25, 1920, *supra*, provides, among other things, that the lands sought in an application for a permit shall be located in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed—

and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width.

The tract applied for is 19,800 feet long and 1,741 feet wide, and is located between and is bounded by land embraced in prior applications for prospecting permits. Its area is slightly in excess of 791 acres.

In prescribing the length and width of unsurveyed tracts which may be embraced in prospecting permits, Congress apparently intended to prevent an applicant from securing an undue advantage by locating a long and narrow tract of land across a geologic structure, and assumed that unsurveyed land was unappropriated and could be taken in the prescribed form.

In construing the provisions of said section 13 as to compactness of areas that may be included in a prospecting permit the Department has held that those provisions of the section were directory, not mandatory. For example, it has been held that incontiguous tracts within a square of six miles may be included in a permit where conditions are such that, because of prior disposals, a reasonable area of contiguous land can not be procured.

At the date of Mathews's location he found that prior locators had left only a narrow strip on the geologic structure, and that if he desired to prospect upon that particular structure he must be content with a fraction of the maximum area allowed under section 13. In locating an area less than one-third of the prescribed maximum he sought no undue advantage, and the tract does not, under the condi-

tions existing, violate the spirit of the provisions under which the application was rejected. Accordingly, the decision appealed from is reversed, and a prospecting permit will be issued to applicant in the absence of other objection not now appearing.

INSTRUCTIONS.

October 26, 1921.

DESERT LAND—ASSIGNMENT—FINAL PROOF—ACTS OF MARCH 4, 1915, AND MARCH 21, 1918.

Under the first of the last three paragraphs of section 5 of the act of March 4, 1915, the assignee of a desert land entry of the class specified therein was entitled to the same benefits as the original entryman, regardless of the date of assignment, and Congress did not intend that the proviso to the amendatory act of March 21, 1918, should place any restriction with respect to limitation of assignment upon entries of that class.

PRIOR DEPARTMENTAL INSTRUCTIONS MODIFIED.

Departmental instructions of May 22, 1918 (46 L. D., 388), modified.

FINNEY, *First Assistant Secretary*:

Reference is made to your [Commissioner of the General Land Office] letter of October 19, 1921, asking for instructions in respect to a suggested interpretation of the act of March 21, 1918 (40 Stat., 458). The act referred to reads as follows:

That the provisions of the last three paragraphs of section five of the Act of March fourth, nineteen hundred and fifteen, "An Act making appropriations to supply deficiencies in appropriations for the fiscal year nineteen hundred and fifteen, and for prior years, and for other purposes," be, and the same are hereby, extended and made applicable to any lawful pending desert-land entry made prior to March fourth, nineteen hundred and fifteen: *Provided*, That in cases where such entries have been assigned prior to the date of the Act the assignee shall, if otherwise qualified, be entitled to the benefit hereof.

Your question relates to the status of an assignee applying for an extension of time under the first of the last three paragraphs of section 5 of the act of March 4, 1915 (38 Stat., 1161), as amended by the act of March 21, 1918, *supra*, where the assignment was made after the date of the latter act. The instructions under the former act (45 L. D., 345, 371) recognized that the first of the last three paragraphs of section 5 of that act placed no limitation in respect to the date of assignment, and, therefore, the assignee was entitled to the same benefits as the original entryman could have obtained under that paragraph, regardless of the date of the assignment. As to benefits under the last two paragraphs of said section 5 prior to amendment, the assignment must have been made prior to March 4, 1915, the date of the act.

The instructions under the amendatory act of March 21, 1918 (46 L. D., 388), stated that as to assigned entries made prior to March 4, 1915, relief is authorized where assignment was made prior to March 21, 1918.

You call attention to the fact that as to applications for relief under the first of the last three paragraphs the said instructions, instead of conferring a benefit as intended by the amendatory act, result in disadvantage to an assignee, in that he is denied the benefit of an extension of time if the assignment was not made prior to March 21, 1918.

Upon consideration of the matter presented, I concur in your view that extension of time for the submission of final proof should not be denied an assignee for the reason that the assignment was made after the date of the amendatory act. In my opinion it was not the purpose or intent of that act to limit the benefits of the first of the last three paragraphs of section 5 of the prior act by reference to the date of assignment, but that the limit in that regard had reference to the benefits provided in the last two paragraphs. This distinction was conveyed in the prior act, probably for the reason that the latter paragraphs provided a more liberal form of relief, by which title could be obtained without compliance with the ordinary requirements of the desert-land laws. It is clear that the purpose of the act of March 21, 1918, was to extend the provisions of the former act to embrace entries made on or after July 1, 1914, and prior to March 4, 1915. That being true, the proviso may well be construed as applicable only to those paragraphs of the prior act wherein the date of the assignment was indicated as a matter of importance in the termination of the rights of an assignee. It could not be applied to the provisions of the first of the last three paragraphs of section 5 without restricting the rights of assignees theretofore recognized as to entries made prior to July 1, 1914. It is believed that such result was not intended, and to make a distinction in this regard between entries made prior to July 1, 1914, and those made after that date but prior to March 4, 1915, would present such an anomalous condition that a construction of that tenor is not to be implied.

I have, therefore, to advise you that assignees may be allowed extension of time for submission of final proof on desert-land entries, upon proper showing, under the first of the last three paragraphs of the amended act referred to, irrespective of the date of the assignment; but relief to assignees under the last two paragraphs will be confined to entries assigned prior to March 21, 1918.

**AMENDMENT OF CIRCULAR NO. 679, IN REGARD TO BONDS WITH
COAL LAND LEASES—CIRCULAR NO. 773, REVOKED.**

INSTRUCTIONS.

[Circular No. 789.]

**DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 31, 1921.**

**REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:**

You are advised that under date of October 20, 1921, the Secretary of the Interior amended Circular No. 679, approved April 1, 1920 (47 L. D., 489), governing coal mining leases under the act of February 25, 1920, by adding to section 8 thereof the following provision:

"Provided, That in case of lease for a small area, where the investment to be made is \$10,000 or less, the lessee shall furnish one bond to cover both the investment and compliance with the terms of the lease, such bond to be in half the amount of the investment to be made, but in no case shall be less than \$1,000."

Accordingly, Circular No. 773 of August 16, 1921 (48 L. D., 175), amending said section 8, is revoked and superseded hereby.

**WILLIAM SPRY,
Commissioner.**

EMERALD OIL COMPANY.

Decided July 8, 1921.

OIL AND GAS LANDS—MINERAL LANDS—MILL SITE—PATENT.

The operation of the mill site law, section 2337, Revised Statutes, is in terms limited to nonmineral land and the Land Department has no authority to issue a limited patent thereunder for surface lands within a petroleum reserve.

GOODWIN, Assistant Secretary:

The Emerald Oil Company has appealed to the Department from the decision of the Commissioner of the General Land Office rendered December 6, 1920, rejecting its application for patent for four mill site claims designated as the Emerald Nos. 1, 2, 3, and 4, together embracing lots 5 and 6 of Sec. 8, T. 1 N., R. 102 W., 6th P. M., in the Glenwood Springs, Colorado, land district, and comprising an area of 20.26 acres.

Said decision appealed from sets forth:

The applicant alleges that the mill sites are used in connection with oil placer mining claims owned by it, the names and locations of which claims are not given. The locations are alleged as of September 26, 1918, and the improvements to exceed \$2000, consisting of two frame buildings, a building to be used for a refinery, a reservoir for water, a building used as a boiler room, and pipe lines that have been put in to be used with the refinery.

The land, which is part of the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of said Sec. 8, was included in the Petroleum Reserve No. 3 under Executive order of July 2, 1910. The proof of the nonmineral character of the land consists of affidavits that there are no veins or lodes upon the same; that the claims are not contiguous to oil-producing lands, and so far as known there is no oil upon said lands. The withdrawal having impressed the lands with a presumptive oil character, they cannot be disposed of as nonmineral unless restored from the petroleum reserve. Further, the mining laws contemplate the patenting of a mill site used in connection with a specific and designated lode mining claim or claims. See section 2337, Revised Statutes. The lode with which the mill site is used must be embraced in the application for patent or if the mill site application is made alone it must show that it is used in connection with a patented claim or claims. See paragraph 62 of the Mining Regulations.

The application is accordingly rejected, subject to the right of appeal.

In its application for patent said company had already, prior to said Commissioner's decision, stated that "Applicant asks for surface rights only." And in its appeal said company sets forth:

The company expressly waives all rights to any mineral or oil upon said mill site and asks only for the surface rights; and, further, expressly waives all claim to the land embraced in applications for mill sites Nos. 1, 3, and 4, under the above serial number, realizing that it is entitled to but five acres of land for mill site purposes.

The land covered by the several mill site locations is all embraced within Temporary Petroleum Withdrawal No. 10, of December 20, 1909, and the withdrawal of July 2, 1910, for Petroleum Reserve No. 3, in continuation of said temporary withdrawal, subject to the provisions of the act of June 25, 1910 (36 Stat., 847). The notices of the several mill site locations all bear date September 26, 1918.

The proceedings under said application for patent appearing to be regular and complete, the case presents for decision, first, the question, whether or not a surface right can be obtained under the mill site law to land included in a petroleum reserve.

The severance of surface for sub-surface rights in land, which an individual proprietor, in its disposal may make as he will, has been authorized by sundry acts of Congress relative to the disposal by the United States of its public domain, among which may be mentioned the act of June 22, 1910 (36 Stat., 583), which permitted agricultural entry of the surface rights in withdrawn or classified coal lands, the act of July 17, 1914 (38 Stat., 509), which permitted like entry of the surface rights in withdrawn phosphate, oil, gas, and other specified

mineral lands, and the leasing act of February 25, 1920 (41 Stat., 437), which provided for disposal by lease of the sub-surface rights separately from the surface ownership, in lands containing certain specified minerals. But every one of such statutes contemplates a sub-surface mineral character of land to which it shall be applicable, while the operation of the mill site law is in terms limited to non-mineral land, and no law has as yet authorized a mill site entry limited to the surface rights.

The mill site law is *sui generis* applicable only to nonmineral land, yet resorted to only for purposes ancillary to the exploitation of mineral land. While in some cases, such as that now under consideration, it might promote its objects to permit its use in securing surface rights in land of mineralized sub-surface, Congress has not as yet so provided.

The Department is constrained to hold, therefore, that there is no authority of law for a mill site patent limited to the surface rights, and that consequently the withdrawal of said land here involved as a petroleum reserve, in force since July 2, 1910, barred the application for a mill site patent thereof, even though the application extended only to the surface rights.

This conclusion obviates consideration of the question whether the appellant has by the further showing in its appeal brought its case in other respects within the terms of either the first or the second clause of said mill site law.

The decision of the Commissioner is affirmed.

RULES OF PRACTICE.

[Approved December 9, 1910; effective February 1, 1911; reprint July 13, 1921, with amendments.]

I.

PROCEEDINGS BEFORE REGISTERS AND RECEIVERS.

INITIATION OF CONTESTS.

RULE 1. Contests may be initiated by any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Land Department.

Any protest or application to contest filed by any other person shall be forthwith referred to the Chief of Field Division, who will promptly investigate the same and recommend appropriate action.

APPLICATION TO CONTEST.

RULE 2. Any person desiring to institute contest must file, in duplicate, with the register and receiver, application in that behalf, together with statement under oath containing:

(a) Name and residence of each party adversely interested, including the age of each heir of any deceased entryman.

(b) Description and character of the land involved.

(c) Reference, so far as known to the applicant, to any proceedings pending for the acquisition of title to or the use of such lands.

(d) Statement, in ordinary and concise language, of the facts constituting the grounds of contest.

(e) Statement of the law under which applicant intends to acquire title and facts showing that he is qualified to do so.

(f) That the proceeding is not collusive or speculative, but is instituted and will be diligently pursued in good faith.

(g) Application that affiant be allowed to prove said allegations and that the entry, filing, or other claim be canceled.

(h) Address to which papers shall be sent for service on such applicant.

RULE 3.¹ The statements in the application must be corroborated by the affidavit of at least one witness having such personal knowledge of the facts in relation to the contested entry as, if proven, would render it subject to cancellation, and these facts must be set forth in his affidavit.

RULE 4. The register and receiver may allow any application to contest without reference thereof to the commissioner; but they must immediately forward copy thereof to the Commissioner of the General Land Office, who will promptly cause proper notations to be made upon the records, and no patent or other evidence of title shall issue until and unless the case is closed in favor of the contestee.

CONTEST NOTICE.

RULE 5. The register and receiver shall act promptly upon all applications to contest, and upon the allowance of any such application shall issue notice, directed to the persons adversely interested, containing:

(a) The names of the parties, description of the land involved, and identification, by appropriate reference, of the proceeding against which the contest is directed.

(b) Notice that unless the adverse party appears and answers the allegation of said contest within 30 days after service of notice the allegations of the contest will be taken as confessed.

(For contents of notice when publication is ordered, see Rule 9.)

SERVICE OF NOTICE.

RULE 6. Notice of contest may be served on the adverse party personally or by publication.

RULE 7. Personal service of notice of contest may be made by any person over the age of 18 years, or by registered mail; when served by registered mail, proof thereof must be accompanied by post-office registry return receipt, showing personal delivery to the party to whom the same is directed; when service is made personally, proof thereof shall be by written acknowledgment of the person served, or by affidavit of the person serving the same, showing personal delivery to the party served; except when service is made by publication, copy of the affidavit of contest must be served with such notice.

² When the contest is against the heirs of a deceased entryman, the notice shall be served on each heir. If the heirs of the entryman are nonresident or unknown, notice may be served upon them by publication as hereinafter provided. If the person to be personally served is an infant under fourteen years of age or a person who has been legally adjudged of unsound mind, service of notice shall be made by delivering a copy of the notice to the statutory guardian or committee of such infant or person of unsound mind, if there be one; if there be none, then by delivering a copy of the notice to the person having the infant or person of unsound mind in charge.

¹ Amended Sept. 23, 1915.

² Amended July 13, 1921.

RULE 8.¹ Unless notice of contest is personally served within 30 days after issuance of such notice and proof thereof made not later than 30 days after such service, or if service by publication is ordered, unless publication is commenced within 20 days after such order and proof of publication is made not later than 20 days after the fourth publication, as specified in Rule 10, the contest shall abate: *Provided*, That if the defendant makes answer without questioning the service or the proof of service of said notice, the contest will proceed without further requirement in those particulars.

SERVING NOTICE BY PUBLICATION.

RULE 9. Notice of contest may be given by publication only when it appears, by affidavit by or on behalf of the contestant, filed within 30 days after the allowance of application to contest and within 10 days after its execution, that the adverse party can not be found, after due diligence and inquiry, made for the purpose of obtaining service of notice of contest within 15 days prior to the presentation of such affidavit, of the postmaster at the place of address of such adverse party appearing on the records of the land office and of the postmaster nearest the land in controversy and also of named persons residing in the vicinity of the land.

Such affidavit must state the last address of the adverse party as ascertained by the person executing the same.

The published notice of contest must give the names of the parties thereto, description of the land involved, identification by appropriate reference of the proceeding against which the contest is directed, the substance of the charges contained in the affidavit of contest, and a statement that upon failure to answer within 20 days after the completion of publication of such notice the allegations of said affidavit of contest will be taken as confessed.

The affidavit of contest need not be published.

There shall be published with the notice a statement of the dates of publication.

RULE 10.² Service of notice by publication shall be made by publishing notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and if no newspaper be printed in such county, then in a newspaper printed in the county nearest to such land.

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.

¹ Amended Nov. 15, 1912.

² Amended Mar. 7, 1911.

Copy of the notice as published 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 10 days after the first publication of notice as hereinabove provided.

RULE 11. Proof of publication of notice shall be by copy of the notice as published attached to and made a part of the affidavit of the publisher or foreman of the newspaper publishing the same, showing the publication thereof in accordance with these rules.

Proof of posting shall be by affidavit of the person who posted notice on the land, and the certificate of the register as to posting in the local land office.

DEFECTIVE SERVICE OF NOTICE.

RULE 12. No contest proceeding shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served; but in such case the time to answer may be extended in the discretion of the register and receiver.

ANSWER BY CONTESTEE.

RULE 13. Within thirty days after personal service of notice and affidavit of contest as above provided, or, if service is made by publication, within twenty days after the fourth publication, as prescribed by these rules, the party served must file with the register and receiver answer, under oath, specifically meeting and responding to the allegations of the contest, together with proof of service of a copy thereof upon the contestant by delivery of such copy at the address designated in the application to contest, or personally in the manner provided for the personal service of notice of contest.

Such answer shall contain or be accompanied by the address at which all notices or other papers shall be sent for service upon the party answering.

FAILURE TO ANSWER.

RULE 14.¹ Upon the failure to serve and file answer as herein provided, the allegations of the contest will be taken as confessed, and the register and receiver will forthwith forward the case, with recommendation thereon, to the General Land Office, and notify the parties by registered mail of the action taken.

DATE AND NOTICE OF TRIAL.

RULE 15. Upon the filing of answer and proof of service thereof the register and receiver will forthwith fix time and place for taking testimony, and notify all parties thereof by registered-letter mail not less than 20 days in advance of the date fixed.

¹ Amended July 2, 1915.

PLACE OF SERVICE OF PAPERS.

RULE 16. Proof of delivery of papers required to be served upon the contestant at the place designated under clause "h" of Rule 2 in the application to contest, and upon any adverse party at the place designated in the answer, or at such other place as may be designated in writing by the person to be served, shall be sufficient for all purposes; and where notice of contest has been given by registered mail, and the registry-return receipt shows the same to have been received by the adverse party, proof of delivery at the address at which such notice was so received shall, in the absence of other direction by such adverse party, be sufficient.

Where a party has appeared and is represented by counsel, service of papers upon such counsel shall be sufficient.

CONTINUANCE.

RULE 17. Hearing may be postponed because of absence of a material witness when the party applying for continuance makes affidavit, and it appears to the satisfaction of the officer presiding at such hearing, that—

(a) The matter to which such witness would testify, if present, is material.

(b) That proper diligence has been exercised to procure his attendance, and that his absence is without procurement or consent of the party on whose behalf continuance is sought.

(c) That affiant believes the attendance of said witness can be had at the time to which continuance is sought.

(d) That the continuance is not sought for mere purposes of delay.

RULE 18. One continuance only shall be allowed to either party on account of absence of witnesses, unless the party applying for further continuance shall, at the same time, apply for order to take the testimony of the alleged absent witnesses by deposition.

RULE 19. No continuance shall be granted if the opposite party shall admit that the witness on account of whose absence continuance is desired would, if present, testify as stated in the application for continuance.

Continuances will be granted on behalf of the United States when the public interest requires the same, without affidavit on the part of the Government.

DEPOSITIONS AND INTERROGATORIES.

RULE 20. Testimony may be taken by deposition when it appears by affidavit that—

(a) The witness resides more than 50 miles, by the usual traveled route, from the place of trial.

(b) The witness resides without, or is about to leave, the State or Territory, or is absent therefrom.

(c) From any cause it is apprehended that the witness may be unable to, or will refuse to, attend the hearing, in which case the deposition will be used only in the event personal attendance of the witness can not be obtained.

RULE 21. The party desiring to take deposition must serve upon the adverse party and file with the register and receiver affidavit setting forth the name and address of the witness and one or more of the above-named grounds for taking such deposition, and that the testimony sought is material; which affidavit must be accompanied by proposed interrogatories to be propounded to the witness.

RULE 22. The adverse party will, within 10 days after service of affidavit and interrogatories, as provided in the preceding rule, serve and file cross-interrogatories.

RULE 23. After the expiration of 10 days from the service of affidavit for the taking of deposition and direct interrogatories, commission to take the deposition shall be issued by the register and receiver directed to any officer authorized to administer oaths within the county where such deposition is to be taken, which commission shall be accompanied by a copy of all interrogatories filed.

Ten days' notice of the time and place of taking such deposition shall be given, by the party in whose behalf such deposition is to be taken, to the adverse party.

RULE 24. The officer before whom such deposition is taken shall cause each interrogatory to be written out, and the answer thereto inserted immediately thereafter, and said deposition, when completed, shall be read over to the witness and by him subscribed and sworn to in the usual manner before the witness is discharged, and said officer will thereupon attach his certificate to said deposition, stating that the same was subscribed and sworn to at the time and place therein mentioned.

RULE 25. The deposition, when completed and certified as aforesaid, together with the commission and interrogatories, must be inclosed in a sealed package, indorsed with the title of the proceeding in which the same is taken, and returned by mail or express to the register and receiver, who will indorse thereon the date of reception thereof, and the time of opening said deposition.

RULE 26. If the officer designated to take the deposition has no official seal, certificate of his official character under seal must accompany the return of the deposition.

RULE 27. Deposition may, by stipulation filed with the register and receiver, be taken before any officer authorized to administer oaths, and either by oral examination or upon written interrogatories.

RULE 28. Testimony may, by order of the register and receiver and after such notice as they may direct, be taken by deposition before a United States commissioner, or other officer authorized to administer oaths near the land in controversy, at a time and place to be designated in a notice of such taking of testimony. The officer before whom such testimony is taken will, at the completion of the taking thereof, cause the same to be certified to, sealed, and transmitted to the register and receiver in the like manner as is provided with reference to depositions.

RULE 29. No charge will be made by the register and receiver for examining testimony taken by deposition.

RULE 30. Officers designated to take testimony will be allowed to charge such fees as are chargeable for similar services in the local courts, the same to be taxed in the same manner as costs are taxed by registers and receivers.

RULE 31. When the officer designated to take deposition can not act at the time fixed for taking the same, such deposition may be taken at the same time and place before any other qualified officer designated for that purpose by the officer named in the commission or by agreement of the parties.

RULE 32. No order for the taking of testimony shall be issued until after the expiration of time allowed for the filing of answer.

TRIALS.

RULE 33. The register and receiver and other officers taking testimony may exclude from the trial all witnesses except the one testifying and the parties to the proceeding.

RULE 34. The register and receiver will be careful to reach, if possible, the exact condition and status of the land involved in any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest; to this end said officers should, whenever necessary, personally interrogate and direct the examination of a witness.

RULE 35. In preemption cases the register and receiver will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming; the steps taken to mark and secure the claim; and the exact status of the land at that date as shown upon the records of their office.

RULE 36. In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.

RULE 37. Due opportunity will be allowed opposing claimants to cross-examine witnesses.

RULE 38. Objections to evidence will be duly noted, but not ruled upon, by the register and receiver, and such objections will be considered by the commissioner. Officers before whom testimony is taken will summarily stop examination which is obviously irrelevant.

RULE 39. At the time set for hearing, or at any time to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing.

When testimony is taken in shorthand the stenographic notes must be transcribed, and the transcription subscribed by the witness and attested by the officer before whom the testimony was taken: *Provided, however,* That when the parties shall, by stipulation, filed with the record, so agree, or when the defendant has failed to appear, or fails to participate in the trial, and the contestant shall in writing so request, such subscription may be dispensed with.

The transcript of testimony shall, in all cases, be accompanied by certificate of the officer or officers before whom the same was taken, showing that each witness was duly sworn before testifying, and, by affidavit of the stenographer who took the testimony, that the transcription thereof is correct.

RULE 40. If a defendant demurs to the sufficiency of the evidence, the register and receiver will forthwith rule thereon. If such demurrer is overruled, and the defendant elects to introduce no evidence, no further opportunity will be afforded him to submit proofs.

When testimony is taken before an officer other than the register and receiver, demurrer to the evidence will be received and noted, but no ruling made thereon, and the taking of evidence on behalf of the defendant will be proceeded with; the register and receiver will rule upon such demurrer when the record is submitted for their consideration.

If said demurrer is sustained, the register and receiver will not be required to examine the defendant's testimony. If, however, the demurrer be overruled, all the evidence will be considered and decision rendered thereon.

Upon the completion of the evidence in a contest proceeding, the register and receiver will render joint report and opinion thereon, making full and specific reference to the posting and annotations upon their records.

RULE 41. The register and receiver will, in writing, notify the parties to any proceeding of the conclusion therein, and that 15 days will be allowed from the receipt of such notice to move for new trial upon the ground of newly discovered evidence, and that if no motion for new trial is made, 30 days will be allowed from the receipt of such notice within which to appeal to the commissioner.

NEW TRIAL.

RULE 42. The decision of the register and receiver will be vacated and new trial granted only upon the ground of newly discovered evidence, in accordance with the practice applicable to new trials in

courts of justice: *Provided, however,* That no such application shall be granted except upon showing that the substantial rights of the applicant have been injuriously affected.

No appeal will be allowed from an order granting new trial, but the register and receiver will proceed at the earliest practicable time to retry the case, and will, so far as possible, use the testimony theretofore taken without reexamination of same witnesses, confining the taking of testimony to the newly discovered evidence.

RULE 43. Notice of motion for new trial, setting forth the grounds thereof, and accompanied by copies of all papers not already on file to be used in support of such motion, shall be served upon the adverse party, and, together with proof of service, filed with the register and receiver not more than 15 days after notice of decision; the adverse party shall, within 10 days after such notice, serve and file affidavits or other papers to be used by him in opposition to such motion.

RULE 44. Motions for new trial will not be considered or decided in the first instance by the commissioner or the Secretary of the Interior, or otherwise than on review of the decision thereof by the register and receiver.

RULE 45. If motion for new trial is not made, or if made and not allowed, the register and receiver will, at the expiration of the time for appeal, promptly forward the same, with the testimony and all papers in the case, to the commissioner, with letter of transmittal, describing the case by its title, nature of the contest, and the land involved.

The local officers will not, after forwarding of decision, as above provided, take further action in the case unless so instructed by the commissioner.

FINAL PROOF PENDING CONTEST.

RULE 46.¹ The pendency of a contest will excuse the submission of final proof on the entry involved until a reasonable time after the disposition of the proceedings, but final or commutation proof may be submitted at any stage thereof. The payment of the final commissions or purchase money, as the case may be, should be deferred until the case is closed, when, if the contest is dismissed and the proof is found satisfactory, claimant will be allowed 30 days from notice within which to pay all sums due and furnish a nonalienation affidavit, upon receipt of which the proper form of final certificate will issue.

In such cases the fee for reducing the proof testimony to writing must be paid at the time the proof is submitted.

The final proof should be retained in the local office until the record in the contest case is forwarded to the General Land Office, but will not be considered in determining the merits of the contest, though it may be used for the purpose of cross-examination during the trial.

¹ Amended May 16, 1916.

In such cases the party making the proof will at the time of submitting same be required to pay the fees for reducing the testimony to writing.

APPEALS TO COMMISSIONER.

RULE 47. No appeal from the action or decision of the register and receiver will be considered unless notice thereof is served and filed with the local officers in the manner and within the time specified in these rules.

RULE 48. Notice of appeal from the decision of the register and receiver shall be served and filed with such register and receiver within 30 days after receipt of notice of decision: *Provided, however,* That when motion for new trial is presented and denied, notice of such appeal shall be served within 15 days after receipt of notice of the denial of said motion.

RULE 49. No person who has failed to answer the contest affidavit, or, having answered, has failed to appear at the hearing, shall be allowed an appeal from the final action or decision of the register and receiver.

RULE 50. Such notice of appeal must be in writing, and set forth in clear, concise language the grounds of the appeal; if such appeal be taken upon the ground of insufficiency of the evidence to justify the decision, the particulars of such insufficiency must be specifically set forth in the notice, and, if error of law is urged as a ground for such appeal, the alleged error must be likewise specified.

Upon failure to serve and file notice of appeal as herein provided the case will be closed.

RULE 51. When any party fails to move for a new trial or to appeal from the decision of the register and receiver within the time specified, such decision shall, as to such party, be final and will not be disturbed except in case of—

(a) Fraud or gross irregularity.

(b) Disagreement in the decision between the register and receiver.

No case will be remanded for any defect which does not materially affect the aggrieved party.

RULE 52. All documents received by the local officers must be kept on file and the date of filing noted thereon; no papers will, under any circumstances, be removed from the files or from the custody of the register and receiver, but access to the same, under proper regulations, and so as not to interfere with transaction of public business, will be permitted to the parties or their attorneys.

COSTS AND APPORTIONMENT THEREOF.

RULE 53. A contestant claiming preference right of entry under the second section of the act of May 14, 1880 (21 Stat., 140), must

pay the costs of contest. In other cases 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; the cost of noting motions, objections, and exceptions must be paid by the party on whose behalf the same are made.

RULE 54. Accumulation of excessive costs will not be permitted. When the officer before whom testimony is being taken shall rule that a course of examination is irrelevant, the same will not proceed except at the sole cost of the party insisting thereon and upon his depositing the amount reasonably sufficient to pay therefor.

RULE 55. Where a party contesting a claim shall by virtue of actual settlement and improvement establish his right of entry of the land in contest under the preemption, homestead, or desert-land laws by virtue of settlement and improvement without reference to the act of May 14, 1880, the costs of contest will be imposed as prescribed in the second clause of Rule 53.

RULE 56. The only cost of contest chargeable by registers and receivers are the legal fees for reducing testimony to writing. No other contest fees or costs will be allowed to or charged by those officers, directly or indirectly.

RULE 57. Registers and receivers may at any time require either party to give security for costs, including expense of taking and transcribing testimony.

RULE 58. Upon the filing of the transcript of the testimony in the local office, any excess in the sum deposited as security for costs of transcribing testimony will be returned to the parties depositing the same.

RULE 59. When hearings are ordered on behalf of the Government, all costs incurred on its behalf will be paid from the proper appropriation, and when, upon the discovery of reason for suspension in the usual course of examination of entries and contest, hearings are ordered between contending parties, the costs will be paid as required by Rule 53.

RULE 60. The costs provided for by the preceding rules will be collected by the receiver when the parties are brought before him in obedience to the order for hearing.

RULE 61. The receiver will append to the report in each case a statement of costs, the amount actually paid by each of the parties, and the disposition thereof.

PREPARATION OF NOTICES.

RULE 62. All notices and other papers not required to be served by the register and receiver must be prepared and served by the respective parties.

RULE 63. The register and receiver will require proper provision to be made for such notices not specifically provided for in these rules as may become necessary in the usual progress of the case to final decision.

APPEAL FROM DECISION REJECTING APPLICATION TO ENTER PUBLIC LANDS.

RULE 64. To facilitate appeals from the action of local officers relative to applications to file, enter, or locate upon the public lands, the register and receiver will—

(a) Indorse upon every rejected application the date of presentation and reasons for rejection.

(b) Promptly advise the party in interest of their action and of his right of appeal.

(c) Note upon their records a memorandum of the transaction.

RULE 65. The party aggrieved will be allowed 30 days from receipt of notice in which to file notice of appeal in the local land office. The notice of appeal, when filed, will be forwarded to the General Land Office with full report upon the case, which should recite all the facts and proceedings had, and must embrace the following particulars:

(a) The original application, with reasons for the rejection thereof.

(b) Description of the tract involved and statement of its status, as shown by the records of the local office.

(c) Reference to all entries, filings, annotations, memorandum, and correspondence shown by the record relating to said tract and to the proceedings had.

II.

PROCEEDINGS BEFORE SURVEYORS GENERAL.

RULE 66. The proceedings in hearings and contests before surveyors general shall, as to notices, depositions, and other matters, be governed as nearly as may be by the rules prescribed for proceedings before registers and receivers, unless otherwise provided by law.

III.

PROCEEDINGS BEFORE THE COMMISSIONER OF THE GENERAL LAND OFFICE AND SECRETARY OF THE INTERIOR.

EXAMINATION AND ARGUMENT.

RULE 67. The commissioner will cause notice to be given to each party in interest whose address is known of any order or decision affecting the merits of the case or the regular order of proceedings therein.

RULE 68. No additional evidence will be admitted or considered by the commissioner unless offered under stipulation of the parties or in support of a mineral application or protest: *Provided, however,* that the commissioner may order further investigation made or evidence submitted upon particular matters to be by him specifically designated.

Affidavits or other ex parte statements filed in the office of the commissioner will not be considered in finally determining any controversy upon the merits.

RULE 69. After receipt of the record by the commissioner 30 days will be allowed to expire before any action is taken thereon, unless, in the judgment of the commissioner, public policy or private necessity shall require summary action, in which event he will proceed at his discretion, first notifying the attorneys of record of his intention so to do: *Provided,* That where no appeal has been filed the case may be immediately considered and disposed of.

RULE 70. If brief is not filed before a case is reached in its order for examination, the argument will be considered closed, and no further argument or motion of any kind will be entertained, except upon application and upon good cause appearing to the commissioner therefor.

RULE 71. In the discretion of the commissioner, oral argument may be presented, at a time to be fixed by him and upon notice to opposing counsel, which notice shall specify the time for such argument and the specific matter to be discussed. Except as herein provided, oral hearings or suggestions will not be allowed.

REHEARINGS.

RULE 72. No motion for rehearing of any decision rendered by the Commissioner of the General Land Office will be allowed.

MOTIONS.

RULE 73. No motion shall be entertained or considered in any case after the record has been transmitted to a reviewing officer.

In ex parte cases, where the entryman has been allowed by the commissioner to furnish additional evidence or to show cause, or, in the alternative, to appeal, both the evidence or showing and the appeal are filed, the commissioner shall pass upon the evidence or showing submitted, and, if found sufficient, note the appeal as closed. If such evidence or showing be found insufficient, the appeal will be forwarded to the Secretary as in other cases.

APPEAL FROM THE COMMISSIONER TO THE SECRETARY.

RULE 74. Except as herein otherwise provided, an appeal may be taken to the Secretary of the Interior from the final decision of the commissioner in any proceeding relating to the disposal of the public lands and private claims.

RULE 75. No appeal shall be had from the action of the commissioner affirming the decision of the local officers in any case where the party adversely affected shall have failed to appeal from the decision of said local officers.

RULE 76. Notice of appeal from the commissioner's decision must be served upon the adverse party and filed in the office of the register and receiver or in the General Land Office within 30 days from the date of service of notice of such decision.

RULE 77. When the commissioner considers an appeal defective he will notify the party thereof; and if the defect be not cured within 15 days from the date of receipt of such notice, the appeal may be dismissed and the case closed.

RULE 78. In proceedings before the commissioner in which he shall decide that a party has no right to appeal to the Secretary, such party may apply to the Secretary for an order directing the commissioner to certify said proceedings to the Secretary and suspend action until the Secretary shall pass upon the same; such application shall be in writing, under oath, and fully and specifically set forth the grounds upon which the same is made.

RULE 79. When the commissioner shall decide against the right of appeal he will suspend action on the case for 20 days from service of notice of such decision to enable the party against whom the decision is rendered to apply to the Secretary for an order certifying the record as hereinabove provided.

RULE 80. The appellant will be allowed 20 days after service of notice of appeal within which to serve and file brief and specification of error, as provided by Rule 50, the adverse party 20 days after service of such within which to serve and file reply thereto; appellant will be allowed 10 days after service of such reply within which to serve and file response: *Provided, however,* That if either party is not represented by counsel having offices in the city of Washington, 10 days in addition to each period above specified will be allowed within which to serve and file the respective briefs.

No arguments otherwise than above provided shall be made or filed without permission of the Secretary or commissioner granted upon notice to the adverse party.

RULE 81. Examination of cases will be facilitated by filing arguments in printed form.

ORAL ARGUMENT BEFORE THE SECRETARY.

RULE 82.¹ Oral argument in any case pending before the Secretary of the Interior will be allowed, on motion, in the discretion of the Secretary, at a time to be fixed by him, after notice to the parties. The counsel for each party will be allowed only one-half an hour, unless an extension of time is ordered before the argument begins.

REHEARING OF SECRETARY'S DECISION.

RULE 83.² Motions for rehearing before the Secretary must be filed within 30 days after receipt of notice of the decision complained of and will act as a supersedeas of the decision until otherwise directed by the Secretary. Such motions, briefs, and arguments must not be served on the opposite party and must be filed directly with the Secretary of Interior, Washington, D. C.

Any such motion must state concisely and specifically the grounds upon which the motion for rehearing is based and be accompanied by brief and argument in support thereof.

If proper grounds are not shown the rehearing will be denied and sent to the files of the General Land Office, whereupon the commissioner will proceed to execute the decision before rendered. If upon examination grounds sufficient for rehearing are shown, a rehearing will be granted and the moving party will be notified that he will be allowed 15 days from receipt of notice within which to serve a copy of his motion, together with all argument in support thereof, on the opposite party, who will be allowed 30 days thereafter in which to file and serve answer, brief, and argument. Thereafter the cause or matter will be again considered and appropriate action taken, which may consist either in adhering to the former decision or modifying or vacating the same, or the making of any further or other order deemed warranted.

As applied to the Territory of Alaska, the periods of time granted by this rule shall be doubled.

MOTIONS FOR REVIEW AND REREVIEW.

RULE 84. Motions for review and rereview are hereby abolished.

SUPERVISORY POWER OF SECRETARY.

RULE 85. Motion for the exercise of supervisory power will be considered only when accompanied by positive showing of extraordinary emergency or exigency demanding the exercise of such authority.

In proceedings before the Secretary of the Interior the same rules shall govern, in so far as applicable, as are provided for proceedings before the Commissioner of the General Land Office.

¹ Amended Nov. 6, 1911.

² Amended Oct. 25, 1915.

RULE 86. No rule here prescribed shall be construed to deprive the Secretary of the Interior of any direct or supervisory power conferred upon him by law.

ATTORNEYS.

RULE 87.¹ Every attorney, before practicing before the Department of the Interior and its bureaus, must comply with the requirements of the regulations prescribed by the Secretary of the Interior pursuant to section 5 of the act of July 4, 1884 (23 Stat., 101).

RULE 88. In all cases where any party is represented by attorney, such attorney will be recognized as fully controlling the same on behalf of his client, and service of any notice or other paper relating to such proceedings upon such attorney will be deemed notice to the party in interest.

Where a party is represented by more than one attorney service of notice or other papers upon one of said attorneys shall be sufficient.

RULE 89. No person hereafter appearing as a party or attorney in any case shall be entitled to notice of any proceeding therein who does not, at the time of appearance, file in the office in which the case is pending a statement showing his name and post-office address and the name and post-office address of the party whom he represents.

RULE 90. Any attorney in good standing employed, and whose appearance is regularly entered in any case pending before the department, will be allowed full opportunity to consult the records therein, together with abstracts, field notes, tract books, and correspondence which is not deemed privileged and confidential.

RULE 91. Verbal or other inquiries by parties or counsel directed to any employee of the department, except the commissioner, assistant commissioner, or chief of division of the General Land Office, or the Secretary and Assistant Secretary, the Solicitor, or the first assistant attorney in the offices of the Secretary of the Interior, or with the consent of one or more of said officers, is expressly forbidden.

RULE 92. Abuse of the privilege of examining records of the department or violation of the foregoing rule by any attorney will be treated as sufficient cause for institution of disbarment proceedings.

SERVICE OF NOTICES.

RULE 94.² Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notice or other papers by mail from the General Land Office, except in case of notice to resident attorneys, in which case one day will be allowed.

In computing time for service of papers under these rules of practice the first day shall be excluded and the last day included: *Pro-*

¹ Amended Apr. 9, 1915.

² Amended Apr. 30, 1917.

vided, That where the last day is a Sunday, a legal holiday, or half holiday such time shall include the next full business day.

RULE 95.¹ Notice of all motions and proceedings before the commissioner or Secretary, except as specified below, shall be served upon parties or counsel personally or by registered mail, and no motion will be entertained except on proof of service of notice thereof. As to motions for rehearing, petitions for certiorari and petitions for the exercise of supervisory authority before the Secretary, service of notice shall be made only after such proceeding has been entertained and service directed, as provided by Rule 83.

RULE 96. Ex parte proceedings and proceedings in which the adverse party does not appear will, as to notice of decision, time for appeal, and filing of exceptions and arguments, be governed by the rules prescribed in other cases, so far as the same are applicable. In such cases the commissioner or Secretary may, pursuant to application and upon good cause being shown therefor, permit additional evidence to be presented for the purpose of curing defects in the proofs of record.

INTERVENTION.

RULE 97. No person shall be allowed to intervene in any case except upon application therefor, under oath, showing his interest therein.

HOW TRANSFEREES AND INCUMBRANCERS MAY ENTITLE THEMSELVES TO NOTICE OF CONTEST OR OTHER PROCEEDINGS.

RULE 98.² Transferees and incumbrancers of land the title to which is claimed or is in process of acquisition under any public-land law shall, upon filing notice of the transfer or incumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original entryman or claimant. Every such notice of a transfer or incumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the General Land Office, where like notation thereof will be made. Thereafter such transferee or incumbrancer, as well as the entryman, must be made a party defendant to any proceeding against the entry.

ACKNOWLEDGMENT OF THE FILING OF APPLICATIONS AND OTHER PAPERS.

RULE 99.³ The Secretary and the Commissioner of the General Land Office will not acknowledge the receipt of papers forwarded by mail, but if a prepared receipt is forwarded to a district land office with any paper the register or receiver will sign and return the receipt to the party who forwarded the same, after inserting the date and the serial number.

¹ Amended Sept. 28, 1917.

² Adopted Sept. 23, 1915.

³ Adopted Nov. 10, 1915.

**PROSPECTING FOR AND MINING OF METALLIFEROUS MINERALS
ON UNALLOTTED LANDS OF INDIAN RESERVATIONS—REGULA-
TIONS OF SEPTEMBER 16, 1919, AMENDED.**

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., March 3, 1921.

On March 3, 1921, sections 4, 6, 13, 15, 16 and 17 of the regulations approved September 16, 1919 (47 L. D., 261), governing prospecting for and mining of metalliferous minerals on unallotted lands of Indian reservations, were amended, and sections 2, 4 and 8 of the form of lease required thereunder were modified. The above enumerated sections as amended and modified read as follows:¹

Section 4. Lessees will have the right to mine only within the exterior boundaries of the leased lands and to lines drawn vertically downward therefrom. The provision of the general mining laws that the locator of a mining claim shall have the exclusive right to all veins, lodes, or ledges throughout their entire depth, the tip or apex of which lies inside the surface lines, extending downward vertically, does not apply to these leases, since the act limits the application of the general mining laws to the manner of the location of mining claims. Discovery of ore by prospect drilling or boring methods will be equivalent to discovery by shaft sinking.

Section 6. Before a lease will be granted covering a lode mining claim, or a placer claim, on unsurveyed land, it will be necessary for the locator, at his expense, to have the claim surveyed by a United States deputy mineral surveyor. The survey must be made in the form and manner required by and under the laws and regulations governing the survey of claims under the United States mining laws, application for such survey to be made to the United States surveyor general for the State wherein the claim is located; Provided, That where a number of contiguous claims are held in common, the survey may be made of the exterior boundaries of the group and the entire group may be included in one lease. Two copies of the plat and two copies of the field notes must be filed by the locator with his lease.

Section 13.² Each lessee will be required to pay a royalty on production computed on the net value of the output of the minerals at the mine, payable at the end of each month. The law provides that this royalty shall not be less than 5 per cent, but in view of the impossibility of fixing in advance by regulation the exact royalty to be imposed upon the different minerals found, varying in value and in conditions under which they are mined, the royalty governing each lease will be fixed and determined prior to the issuance of each lease and incorporated therein. The term used in the law, "net value of the output of the minerals at the mine," is construed to mean the amount received for the ores, concentrates, or bullion derived therefrom, less the cost of transportation and smelting necessary for the sale of said ores, concentrates, or bullion.

Section 15. Each lessee shall keep proper and true books of account of all his production, expenditures, and receipts in full detail, with proper distribution. The books shall show the amount of ore mined, the amount of ore shipped,

¹ Section 14 of regulations of September 16, 1919, amended April 23, 1921 (48 L. D., 266).

² Further amended September 1, 1921 (48 L. D., 266).

or other substances sold or treated, each month, and the amount of money received or receivable from the sale of ores, etc. The books of the lessee shall be open to inspection, examination, and verification by any officer of the Interior Department assigned to such duty by the Secretary of the Interior, and the duly authorized agents of the United States shall be permitted freely to make copies of all the accounts and other books of the lessee. All royalties due under the lease shall be paid to the officer in charge of the reservation in cash, or by certified check or other suitable form of exchange, and at time of payment each lessee must file with said officer a sworn statement showing the amount of ore mined during the preceding month, the amount of ore shipped or sold, and the amount received therefor. Lessee must also file with the officer in charge within 20 days after the reduction of the ores a duplicate of all mill and smelter returns and of the receipted bills for freight or transportation charges when the sale of mineral is not made at the mine.

Section 16. Lessees shall submit to the superintendent or other officer of the United States having jurisdiction over the leased premises annual reports giving detailed costs of mining and milling or other treatment of the ore or mineral at the mine necessary for sale but not including smelter costs, accompanied by maps and diagrams drawn to scale, within 20 days after the close of each calendar year, with the officer in charge, showing the extent, character, and location of all development work and mining operations, such annual reports to be in the form of sworn statements by the lessee or superintendent in charge of the work, and such other reports from time to time as the Secretary of the Interior may, in his discretion, require.

Section 17. (a) In mining operations the lessee shall keep the mine timbered at all points where necessary, in accordance with good mining practice and in such manner as may be necessary to the proper preservation of the property leased and the safety of the workmen. The lessee in prospecting and mining shall observe appropriate and good mining practice in sinking shafts and winzes, in driving drifts and tunnels, stoping, blasting, hoisting, ventilating, timbering, pumping, and other operations for the proper development and preservation of any mine, equipment, or property on the lease, and shall exercise diligent care in the prevention of unnecessary mineral waste and in promoting the safety and welfare of employees. For the safety of mine employees ample provision shall be made appropriate to the number of employees exposed to the mining hazard, for adequate safety equipment in the hoisting and transportation of employees, and in the use of explosives, protection from fire, the providing of ladders for emergency escape, and, whenever practicable, make provision for two exits or means of escape from the lowest and farthest workings to the surface, and for the positive circuiting throughout the mine of ventilating currents.

(b) If it be necessary to use for mining developments any wood, stone, coal, or other material from unallotted and unleased lands on the Indian reservation, the lessee shall first obtain written permission from the officer in charge and shall pay him, for the Indians, the current prices for all materials taken.

SECTIONS 2, 4, AND 8 OF FORM OF LEASE, AS MODIFIED.

Sec. 2.¹ The lessee hereby agrees to pay or cause to be paid to the superintendent, or other officer of the United States having jurisdiction over the leased premises, hereinafter called the officer in charge, for the use and benefit of the Indians of said reservation, annually in advance, a rental of 25 cents per acre for the first year beginning with the date of execution of lease, 50

¹ Paragraph 3, section 2, further amended April 23, 1921 (48 L. D., 266).

cents per acre per annum for the second, third, fourth, and fifth years, and \$1 per acre for each succeeding year, all rent paid in any year to be credited on the royalty for that year, if production begins therein.

The lessee further agrees to pay as royalty on the production of ores and minerals under this lease a royalty of _____ per cent upon the net value of the output of the minerals at the mine which is to be ascertained by deducting from the gross value of the ores, concentrates, or bullion, the cost of transportation and smelting necessary for the sale of said ores, concentrates or bullion. The lessee agrees to file with the officer in charge of the reservation within 20 days after the end of the month within which the minerals were extracted a sworn statement showing the amount of ore mined during the preceding month, the amount of ore shipped or sold, and the amount received therefor. He also agrees to file with the officer in charge within 20 days after the reduction of the ores a duplicate of mill and smelter returns, and of receipted bill for freight or transportation charges when the sale of mineral is not made at the mine, and to pay all royalties under this lease monthly to the officer in charge of the reservation, or such officer or agent as may be designated by the Secretary of the Interior, payments to be made in cash or by certified check or other suitable form of exchange.

There shall be expended annually in development work on each location a sum of not less than \$5 per acre, the total amount to be not less than \$100.

The royalties on all products mined under this lease shall be based on sworn reports and shall be paid within ten days after the close of each month.

Sec. 4. The lessee shall at all times conduct operations in a workmanlike manner, protect all mines and deposits, and not commit nor suffer any waste upon the reservation; and if it be necessary to use any wood, stone, coal, or other material thereon, he shall first obtain written permission from the officer in charge and shall pay to him for the Indians the current prices for all such material taken. He shall take good care of the land herein described, and not permit any nuisance to be maintained nor any intoxicating liquors to be sold or given away thereon for use as a beverage; he shall not use or permit the use of said lands and premises for any other purpose than as herein authorized, and at the expiration of this lease he shall return the same to the owners in good condition.

Sec. 8. The lessee shall not, without the consent of the lessor, assign or sublet any part of the lands leased. He may, however, surrender the lease for cancellation with the consent of the lessor, but the lessee or assignee should surrender his copy of the lease to the officer in charge, and all royalties and other obligations due and accrued to date of completion of application for cancellation, in addition to a cancellation fee of one dollar, must be paid and discharged before such application will be considered, provided that if the lease has been recorded the lessee or assignee shall execute a release, record the same in the proper recording office, and file the release with the officer in charge. An application for cancellation will be considered as completed on the date such application is filed in the office of the officer in charge, provided the foregoing requirements have been fully observed.

On abandonment of the lease, the lessee or lessees shall forfeit all claims or right to ore stoped, broken and stored in the mine or placed upon the dump or in bins on the surface.

CATO SELLS,
Commissioner.

Approved:

JOHN BARTON PAYNE,
Secretary.

METALLIFEROUS MINERAL LEASES ON UNALLOTTED LANDS OF INDIAN RESERVATIONS—REGULATIONS OF SEPTEMBER 16, 1919, FURTHER AMENDED.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., April 23, 1921.

Section 14 of the regulations approved September 16, 1919 (47 L. D., 261, 265), as amended March 3, 1921 (48 L. D., 263), governing prospecting for and mining of metalliferous minerals on unallotted lands of Indian reservations under section 26 of the act of June 30, 1919 (41 Stat., 3, 31), as amended by the act of March 3, 1921 (41 Stat., 1225, 1231), and the third paragraph of section 2 of the lease contract are hereby amended as follows:

Section 14 of the regulations: In addition to the royalty on production the lessee will be required to pay advance rental of 25 cents per acre for the first year, 50 cents per acre for the second, third, fourth, and fifth years, respectively, and \$1 per acre for each year thereafter, the rental for any one year to be credited against the royalties as they accrue for that year. *It will also be necessary for the lessee to expend annually in development work on or for each location the sum of not less than \$5 per acre, the total amount to be not less than \$100 for each location, which expenditures, if benefitting or developing a group of contiguous claims included in a lease, may be made upon any one or more of such claims.*

Third paragraph, section 2 of lease contract: There shall be expended annually in development work on or for each location the sum of not less than \$5 per acre, the total amount to be not less than \$100 for each location, which expenditures, if benefitting or developing a group of contiguous claims included in a lease, may be made upon any one or more of such claims.

E. C. FINNEY,

First Assistant Secretary.

METALLIFEROUS MINERAL LEASES ON UNALLOTTED LANDS OF INDIAN RESERVATIONS—REGULATIONS AND LEASE CONTRACT FURTHER AMENDED.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., September 1, 1921.

Section 13 of the regulations approved September 16, 1919 (47 L. D., 261, 264), as amended March 3, 1921 (48 L. D., 263), governing prospecting for and mining of metalliferous minerals on unallotted Indian lands under section 26 of the act of June 30, 1919 (41 Stat., 3, 31), as amended by the Indian Appropriation Act of March 3, 1921 (41 Stat., 1225, 1231), and the second paragraph of section two of the lease contract are hereby amended to read as follows:

Section 13 of the regulations. * * * The term used in the law, "net value of the output of the minerals at the mine," is construed to mean the amount received for the ores, concentrates, or bullion derived therefrom, less the cost

of transportation and treatment necessary for the sale of said ores, concentrates, or bullion.

Second paragraph, section two, of lease contract. The lessee further agrees to pay as royalty on the production of ores and minerals under this lease a royalty of ——— per cent upon the net value of the output of the minerals at the mine, which is to be ascertained by deducting from the gross value of the ores, concentrates, or bullion, the cost of transportation and treatment necessary for the sale of said ores, concentrates, or bullion. * * *

E. C. FINNEY,

First Assistant Secretary.

ROBERT K. COX AND EARNEST I. ALFREY.

Decided September 2, 1921.

CONTESTANT—CONSTRUCTIVE NOTICE—PREFERENCE RIGHT—HOMESTEAD ENTRY.

The mailing of a letter to a successful contestant, who has not changed his record address and who holds himself in readiness to receive all notices sent to him, notifying him of his preference right, does not charge him with constructive notice thereof, if, through no fault of his, the letter is not delivered to him and he has no knowledge of its having been sent; and where there has been no negligence or lack of diligence on his part he is entitled to exercise the right within the statutory period from the time that he comes into possession of knowledge that the contested entry has been canceled.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

The case of McGraw v. Lott (44 L. D., 367), cited and followed.

FINNEY, *First Assistant Secretary:*

On March 26, 1920, Robert K. Cox filed enlarged homestead application 027320, Lamar land district, Colorado, for the NW. $\frac{1}{4}$, Sec. 20, T. 30 S., R. 44 W., 6th P. M., as additional to his patented entry 02284, Dodge City land district, Kansas, for SE. $\frac{1}{4}$, Sec. 1, T. 30 S., R. 33 W., 6th P. M., accompanied by petition for designation. He filed an affidavit with his application claiming a preference right secured by the successful prosecution of his contest against Wesley C. Burbridge, who had made homestead entry 018642 for the same land, claiming a settlement right by virtue of residence established on the land in March, 1919, after the filing of said contest.

It appears that the Commissioner of the General Land Office by decision of January 26, 1920, ordered Burbridge's entry canceled and awarded Cox a preference right of entry. Notice of said action was sent by registered letter on January 31, 1920, from the local office, addressed to Cox at his record address and the letter was returned unclaimed on March 16, 1920. In the meantime, on March 8, 1920, Glenn Pickell filed enlarged homestead application 027267 for the land, which was allowed because Cox had not asserted his preference right within 30 days from mailing of notice.

Cox shows by corroborated affidavit that he had been in the habit of receiving his mail almost every day at his record address for over

two years and that he did not receive such letter, nor notice of such letter, nor was notice of such letter delivered to his place of receiving mail until March 15, 1920. The post office clerk in charge makes an affidavit that the letter was received February 2, 1920, and that three notices were sent to Cox in regular order of business and that the letter was returned unclaimed March 15, 1920.

Cox on learning of the letter immediately went to Lamar, about 60 miles distant, and was there when the land office opened on the morning of March 16, 1920, and was informed by the local officers that the returned letter had been received in that morning's mail and that entry for the land had been made by Glenn Pickell. He immediately sought his attorney and filed application.

The register and receiver rejected Cox's application because of conflict with Pickell's entry. Cox appealed to the Commissioner, who by decision of December 1, 1920, found that Cox had not asserted his preference right within 30 days from mailing of notice and affirmed the rejection. Subsequently, on March 1, 1921, Pickell executed a relinquishment which was filed at 12 m. on March 29, 1921, at the same time Earnest I. Alfrey's enlarged homestead entry 027967 for the land was allowed. At 2:30 p. m. Cox filed his appeal from the Commissioner's decision.

The Department in the case of *McGraw v. Lott* (44 L.D., 367), held (syllabus)—

Where a contestant by his negligence in failing to call for the letter, or by changing his post office address without notification to the local office, and without authorizing some one else in writing to receive the letter for him, puts it out of the power of the land department to deliver the notice to him or some one authorized by him, he will, after expiration of the period accorded him within which to exercise his preference right, and return of the letter uncalled-for, be considered to have had constructive notice, and will not thereafter be heard to complain that he never received the notice.

To charge a contestant with constructive notice where he fails to call for the registered letter containing notice of his preference right, the letter must have remained in the post office, subject to call, during the entire period it was required to be so held, and must be returned to the local office as uncalled-for at the end of that period as evidence of that fact.

Assuming that the matters alleged by Cox are true, it does not appear that he was negligent or that he lacked diligence as to the notice of preference right. He held himself in readiness to receive all notices at his record address and he can not be charged with the failure of the notices to be delivered to him. A letter can not be said to be held subject to call if not delivered when the addressee is ready to receive it. Under such circumstances Cox can not be charged with notice until he received it, to wit, March 16, 1920. On March 26, 1920, he filed application claiming his preference right and asserting a settlement claim and stated that Pickell knew of his settlement. His application was filed during the preference right

period and his rights were superior to Pickell's. Pickell's relinquishment and Alfrey's application were filed March 29, 1921. On the same day Cox filed his appeal. Alfrey's application should have been held suspended to await action on the appeal. Alfrey can not stand in a better position than Pickell. His rights are also junior to Cox's.

The Commissioner's decision is reversed, and unless Alfrey shall, within thirty days from notice hereof, file his corroborated affidavit specifically denying the matters alleged by Cox and asking a hearing upon the issues raised, his entry will be canceled and Cox's application allowed.

BUMPERS v. HOLLOWAY.

Decided September 9, 1921.

ENTRY—APPLICATION—RECORDS—PREFERENCE RIGHT.

Where two or more conflicting applications to make entry are received in the same mail, the application first taken up, numbered, and entered on the records, in the regular course of business, is entitled to precedence, notwithstanding the fact that it may not have been the first to have been executed.

DEPARTMENTAL DECISIONS CITED WITH APPROVAL.

The cases of *Barnes v. Smith* (33 L. D., 582), *Jones et al. v. Bettis* (34 L. D., 712), *Heter v. Lindley* (35 L. D., 409), cited with approval.

FINNEY, *First Assistant Secretary*:

Columbus W. Bumpers has appealed from a decision of the Commissioner of the General Land Office dated June 20, 1921, requiring him to show cause why his timber and stone entry embracing NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4, T. 9 N., R. 5 E., St. S. M., Alabama, should not be canceled for conflict with the prior right of John Henry Washington Holloway.

It appears that on April 28, 1920, said Bumpers executed before the circuit clerk at Grove Hill, Alabama, an application to purchase said tract under the timber and stone law, and that on May 3, 1920, before the same official, said Holloway executed a like application. Both applications were forwarded by mail to the land office at Montgomery, Alabama, where they were received at 10 o'clock on the morning of May 13, 1920. Apparently, Holloway's application was the first one acted upon, and to it was assigned serial 011023, receipt No. 2457230 being issued for the fee. To Bumpers's application was assigned serial 011026, and receipt No. 2457233 was issued thereon.

The local officers inadvertently allowed Bumpers to make final proof and payment, final certificate issuing on March 30, 1921. A notice of the appraisal of the land had been issued to Holloway, but it was returned unclaimed because addressed to "John Henry Washington." When notice was given to Holloway, he promptly forwarded the appraised price, \$117.90.

It was formerly the practice to treat applications received in the same mail as filed simultaneously, and to award the right of entry to the highest bidder. Subsequently, pursuant to the ruling announced in *Barnes v. Smith* (33 L. D., 582), and *Jones et al. v. Bettis* (34 L. D., 712), relative to applications to contest, the practice was changed, and the rule adopted that when received by mail the first application to make entry taken up, numbered, and entered on the records, in the regular course of business, is entitled to precedence, in the absence of any claim of prior settlement. This rule was stated in a departmental telegram to the local officers at Little Rock, Arkansas, on November 14, 1912, wherein it was held:

In case applications for same tract are received in same mail, application first opened should be accorded priority, except where one of applicants alleges prior settlement, in which event settler's application should be given priority.

In *Heter v. Lindley* (35 L. D., 409), it was held that an application to enter presented in person at the hour of opening the local office is entitled to precedence over a conflicting application received at the same hour by mail.

Under date of January 7, 1916, the Commissioner of the General Land Office correctly instructed the local officers at Cheyenne, Wyoming, as follows:

Where two applicants for the same land appear together at the local office, the application first handed to the officer or clerk waiting on the counter is entitled to priority. Under the assumption that persons desiring to make entry will be waited on in regular order, it is believed that one who requests that an application be prepared for him by the local officers is entitled to priority over one who is next in line, even though the latter may have had his application prepared before reaching the office.

Under the present practice, the probability of two or more applications being simultaneous is very remote, except under the circumstances covered by Circular No. 324 (43 L. D., 254), which circular was supplemented by the instructions of May 17, 1917 (46 L. D., 121).

The local officers erred in allowing Bumpers to make final proof under his application. The fact that he has been to the expense of publishing notice and making final proof can not be made the basis of rejecting Holloway's application, which, having been first taken up, numbered, and entered on the records, in the regular course of business, was entitled to precedence.

The decision appealed from is affirmed.

CHARLES E. BURGESS ET AL.¹

Decided September 14, 1921.

STOCK-RAISING HOMESTEAD—ACT OF DECEMBER 29, 1916.

The terms "own" and "owned," as used in sections 5 and 8 of the stock-raising homestead act of December 29, 1916, are to be construed as mean-

¹ See *Balente Luna* (46 L. D., 28), for construction of term "owner" as used in the enlarged homestead act in connection with the sale of a portion of the entry.

ing an absolute ownership, that is a complete dominion over the property, and not merely an undivided interest therein.

STOCK-RAISING HOMESTEAD—PREFERENCE RIGHT—ACT OF DECEMBER 29, 1916.

An undivided interest in a patented original homestead entry does not constitute such an ownership thereof as will afford a valid basis upon which to predicate a claim of preference right under section 8 of the act of December 29, 1916, to make an additional entry of contiguous lands under section 5 of that act.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

The case of *McHarry v. Stewart* (9 L. D., 344), cited and followed.

FINNEY, *First Assistant Secretary*:

June 4, 1885, Elbridge M. Clymer made homestead entry 1840, for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 9, T. 7 S., R. 21 E., W. M., The Dalles, Oregon, land district, on which final certificate issued May 25, 1892. As shown by the records there is no vacant unappropriated land adjoining this tract.

January 9, 1917, he filed application 017284, to make additional entry under the stock-raising act, for lot 7, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, lots 1, 2, 3, E. $\frac{1}{2}$, NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 7, T. 8 S., R. 20 E., and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 8 S., R. 19 E., W. M., which was rejected by the register and receiver as to the land in section 1, for conflict with prior entries. January 31, 1917, he filed application to have the description amended to read: Lot 7, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 6, lots 1, 2, 3, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 7, T. 8 S., R. 20 E., W. M., and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 12, T. 8 S., R. 19 E., accompanied with a formal application for the land last described and petition for designation covering that description.

December 9, 1898, Charles E. Burgess made homestead entry 6951, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 18, T. 8 S., R. 20 E., W. M., on which cash certificate issued December 2, 1902.

January 11, 1917, he filed application 017504, to make additional entry for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7, NE. $\frac{1}{4}$, Sec. 18, lots 3 and 4, Sec. 8, and lots 1 and 2, Sec. 17, T. 8 S., R. 20 E., W. M., accompanied with a petition for the designation of the lands entered and applied for under the stock-raising act, and an affidavit, in which he alleged that he commuted his original entry fourteen years ago, and afterward in forming a company deeded away one-half interest but owns the other one-half and still controls it. July 12, 1911, he filed supplemental application for the same land.

January 10, 1917, Daniel E. Brehaut filed application 017407, to make an original homestead entry under the stock-raising act, for lots 3, 4, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 8, lots 1, 2, E. $\frac{1}{2}$, and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 17, T. 8 S., R. 20 E., W. M., and July 18, 1917, filed supplemental application for the same land.

The lands entered and applied for were designated under the stock-raising homestead act of December 29, 1916 (39 Stat., 862), effective May 24, 1919.

The NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 7, is embraced in the applications of Clymer and Burgess. Lots 3 and 4, Sec. 8, and lots 1 and 2, Sec. 17, are embraced in the applications of Burgess and Brehaut.

By its decision of April 23, 1921, the General Land Office found and held as follows:

The land embraced in Clymer's application is incontiguous to his original entry and, therefore, he is not entitled to a preferential right under Sec. 8 of the act.

Brehaut's application is for an original entry under the stock-raising act and as Sec. 8 of the act is applicable only to additional applications under sections 4 or 5, he has no preferential right to the land applied for.

The land applied for by Burgess adjoins his original claim and, therefore, if he owned and resided on his original at the time his application was filed he would be entitled to a preferential right under said section 8. However, in a supplemental affidavit filed by him he alleges that after commuting his original entry he formed a company and deeded away a half interest but still owns and controls the other half. As he was the owner of only an undivided one-half interest in his original claim when he filed his application for additional entry, he was not the "owner" thereof within the meaning of Sec. 5 of the act and was not qualified to make additional entry thereunder. Therefore, he was not entitled to a preferential right under Sec. 8 of the act.

No preferential rights are involved for the reasons above indicated and the tracts in conflict must, therefore, be awarded to the party whose application was first filed; accordingly, the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 7, is awarded to Clymer, and lots 3 and 4, Sec. 8, lots 1 and 2, Sec. 17, to Brehaut, and the application of Burgess is rejected as to NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 7, lots 3 and 4, Sec. 8, and lots 1 and 2, Sec. 17, T. 8 S., R. 20 E., W. M., subject to the right of appeal.

Neither Clymer nor Brehaut has complained of that decision, but Burgess has filed an appeal in which he contends that the Commissioner erroneously held that he could not base his claim to a preferred right of entry under section 8 of the stock-raising homestead law for the reason that he only owned an undivided interest in the land originally entered and could not, therefore, make an entry under section 5 of that law on which his application was based.

The primary object of that law was to award to each entryman the surface right of such an area of nontimbered, nonirrigable land, chiefly valuable for grazing and raising forage crops and of such a character that 640 acres are reasonably required for the support of the family. The furnishing of home seekers with a sufficient area to make their farms self-sustaining was, therefore, the purpose that Congress had in view, and inasmuch as entries for less than 160 acres had already been made for nonirrigable lands which were largely arid, section 5 was enacted for the purpose of affording the entrymen of such lands an opportunity to enlarge their holdings

to 640 acres, or to a sufficient amount necessary to the support of their families. It was for that purpose, and not for the mere purpose of enabling persons who had already made entries to enlarge their holdings for the purpose of speculation, that this law was enacted.

That section authorizes additional entries by "persons who have submitted final proof upon, or received patent for, lands of the character herein described under the homestead laws, and who own and reside upon the land so acquired" for such an area as would, with the area theretofore acquired, not exceed 640 acres.

From this it will be seen that before an applicant can be permitted to make entry it must appear that he is the "owner" of the land first entered, and it can not be said that one who holds only an undivided interest in a tract of land is the owner thereof within the meaning of that section. "The term 'owner,' when used alone, imports an absolute owner, or one who has complete dominion of the property owned, as the owner in fee of real property." See Words and Phrases, vol. 6, page 5138.

This conclusion is supported by the decision of this Department in *McHarry v. Stewart* (9 L. D., 344, 348), where consideration was given to the language forming that part of section 2289, Revised Statutes, which authorizes the making of additional farm entries. The object of that statute and the language there used are closely akin to those of section 5 of the stock-raising homestead law, and it was said in that decision that—

The statute (Sec. 2289 Rev. Stat.), authorizing adjoining farm entries, provides, that "every person *owning* and residing on land may, under the provisions of this section, enter other land lying *contiguous* to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres." Statutes are to be read "according to the natural and most obvious import of the language used, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation." (*Waller v. Harris*, 20 Wend., 555; Sedg. on Construction of Stat., and Con. Law, 220). "The natural and most obvious import" of the word "owning" is *absolute* and not *qualified* ownership—"the right by which a thing belongs to some one in particular to the exclusion of all others." (*Bouvier's Law Dic.*; Sec. 679, Codes and Statutes of Cal.), and not a right shared with one or more persons, or restricted in its use, or limited or deferred as to time of enjoyment. There is nothing in the context or subject matter of the statute authorizing a departure from the ordinary meaning of the language employed. On the contrary, an adherence to this meaning would seem to be essential to the enforcement of the law, both in its letter and spirit.

For these reasons the Commissioner was correct in holding in his decision that Burgess was not entitled to claim a preferred right of entry under section 8.

The decision appealed from is therefore affirmed.

LEMLEY v. NEAL.

Decided September 30, 1921.

HOMESTEAD ENTRY—DESERTED WIFE—FINAL PROOF—ACT OF OCTOBER 22, 1914.

The act of October 22, 1914, confers upon a deserted wife, after desertion has continued for more than one year, the right to submit final proof and complete the entry of her husband in lieu of entering the land as a *feme sole*, but it neither deals with the protection of nor does it diminish her rights in the entry in the interim.

HOMESTEAD ENTRY—DESERTED WIFE—RELINQUISHMENT—ACT OF OCTOBER 22, 1914.

The act of October 22, 1914, does not abrogate the departmental ruling enunciated prior thereto that a homestead entryman can not deprive his wife, who is residing upon the land, of the right after her desertion, to make entry in her own behalf as a deserted wife, upon the filing by another of a relinquishment executed by her husband with the view to deserting and dispossessing her, but it permits her to perfect the existing entry instead of making a new entry in her own name.

DESERTED WIFE—ACT OF OCTOBER 22, 1914.

A wife is deserted within the meaning of the act of October 22, 1914, if desertion actually exists, irrespective of the fact that she obtained a divorce as the result of proceedings predicated upon other grounds.

DEPARTMENTAL DECISION CITED AND CONSTRUED.

The case of *Inman v. McCain* (42 L. D., 507), cited and construed.

FINNEY, *First Assistant Secretary*:

On September 28, 1917, Firmin L. Lemley filed enlarged homestead application 014883, Douglas land district, Wyoming, for the W. $\frac{1}{2}$, Sec. 35, T. 35 N., R. 69 W., 6th P. M., containing 320 acres. At the same time he filed additional stock-raising homestead application 014884, accompanied by petition for designation, for the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, said Sec. 35, and lots 3 and 4, Sec. 2, T. 34 N., R. 69 W., containing 320.81 acres. The original entry was allowed October 15, 1917. All the land involved was designated under the stock-raising homestead law effective June 10, 1918.

On August 26, 1919, Birdie Neal filed Lemley's relinquishment covering the land of his original entry and additional application, together with her enlarged homestead application 021816 for the W. $\frac{1}{2}$, said Sec. 35, and additional stock-raising homestead application 021817 for the remainder of the land involved.

On October 15, 1919, Mary E. Lemley, divorced wife of Firmin L. Lemley, filed a formal protest against the allowance of Miss Neal's applications. She alleged that she and her children went upon the land April 13, 1917, and remained there continuously and assisted in making the improvements, and that Lemley had served in the Army during the late war, which service, together with her resi-

dence on the land, made him qualified to submit final proof but he did not do so because he did not want her to share in the land, and that on August 25, 1919, she filed divorce proceedings against him and on the same date obtained personal service thereof and that on the next day Lemley executed a relinquishment and delivered it to Miss Neal, who filed applications for the land August 26, 1919, and that he immediately left the State, and that he did it to defraud her of her rights to any property he might have. She urged that Miss Neal's application should be rejected and that Lemley's entry and application should be reinstated and she permitted to submit final proof thereon.

The Commissioner on November 14, 1919, issued a rule on Miss Neal to show cause why her application should not be denied and the entry of Lemley reinstated. On December 19, 1919, Miss Neal filed answer denying the material allegations and averring that Mrs. Lemley received \$200 of the money paid out by her for the relinquishment. The Commissioner by decision of April 9, 1920, directed that the matter proceed to a hearing. Notices were issued and served and a hearing was held before the register and receiver on May 28, 1920, at which both parties appeared with counsel and submitted testimony.

The register and receiver by joint decision dated December 11, 1920, found that Mrs. Lemley had a superior right to the land and recommended that she should be required to reimburse Miss Neal, tender to her or make satisfactory arrangement with her as to the \$1,100 she had paid for the relinquishment and improvements and that the applications of Miss Neal should be rejected and the entry and application of Lemley reinstated. Mrs. Lemley filed corroborated affidavit alleging tender of cashier's check for \$1,100 which was refused by Miss Neal who demanded \$3,000. Miss Neal in the nature of an appeal filed "Suggestions for the consideration of the register and receiver, and the Commissioner." The Commissioner by decision of April 13, 1921, found that Lemley had a legal right to relinquish and that Mrs. Lemley was not a deserted wife so as to be entitled to any right and protection under the act of October 22, 1914 (38 Stat., 766) and held that the protest should be dismissed subject to the right of appeal. Mrs. Lemley has appealed.

Lemley with his family established residence on the land of his entry April 13, 1917. Mrs. Lemley with her two small children lived continuously on the land even during Lemley's military service. She did much of the work on the homestead and her money was used to make the improvements which are estimated to be worth \$3,000. It appears that Firmin and Mary Lemley owned a farm in Nebraska, title being in both names, which they sold and the money was put into improvements on the homestead. The improvements consisted of a good 2-room house, painted and finished, a barn and

other outbuildings, one and one-half miles of fence, a well and wind-mill, and about eight acres of breaking. Mrs. Lemley testified that after Lemley returned from the Army he engaged in "bootlegging" and was absent most of the time and did not contribute to the support of the family and that they did not live together as man and wife, and that as early as the winter of 1918-19 he tried to sell his relinquishment and sought to keep it a secret from her. Mrs. Lemley found their relations intolerable and sought separation. He promised to give her the relinquishment of the entry and she promised not to seek alimony. On August 25, 1919, she filed divorce proceedings and secured personal service thereof on him the same day. Also on the same day he offered his relinquishment to Miss Neal. She conferred with her relatives and examined the land that day in company with her brother, who knew that the Lemleys contemplated divorce. The next day she paid \$1,100 for the relinquishment and a bill of sale for the improvements. He immediately took a train, left the State, and his present whereabouts are unknown. Miss Neal filed the relinquishment together with applications for the land. Mrs. Lemley, after obtaining service of the divorce proceedings, went to visit her mother until the matter should come up for hearing. Mrs. Lemley was divorced from her husband by decree dated October 6, 1919, as evidenced by an uncertified copy of the decree in the record. On October 15, 1919, she filed protest against Miss Neal's applications. Mrs. Lemley denied that she received \$200 or any of the money paid for the relinquishment. She stated by the way of explanation that she received \$100 from Lemley for a purpose entirely unconnected with the homestead, prior to the divorce proceedings.

Mrs. Lemley in her appeal urges that the Commissioner erred in considering Miss Neal's appeal from the local officers' decision; that said appeal which was styled "Suggestions for the consideration of the register and receiver, and the Commissioner" was not served on her. Said appeal does not show evidence of service on Mrs. Lemley and Miss Neal should have been called upon to show such service before the Commissioner considered the case. Nevertheless the case was before the Commissioner because of Mrs. Lemley's application for extension of time and of her showing claiming compliance with the local officers' decision. Miss Neal calls attention to the fact that Mrs. Lemley obtained the divorce on grounds of drunkenness and not desertion. It is immaterial in this case upon what grounds she chose to predicate the divorce proceeding so long as desertion did in fact exist.

The act of October 22, 1914, *supra*, referred to in the Commissioner's decision has to do with the making of final proof by a deserted wife after desertion has continued for more than one year.

It does not deal with the protection of her rights in the interim. The Department, prior to the above-mentioned act, held in the case of *Inman v. McCain* (42 L. D., 507, syllabus)—

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.

A deserted wife's rights in her husband's homestead were not diminished by the act of October 22, 1914, *supra*. That act gave her right to complete his entry instead of entering the land in her own right as a *feme sole*.

The Commissioner's decision is reversed.

GEORGE W. MARTIN.

Decided September 30, 1921.

OIL AND GAS LANDS—VALENTINE SCRIP—APPLICATION—ACT OF FEBRUARY 25, 1920—OKLAHOMA.

The general leasing act of February 25, 1920, is applicable to oil or gas bearing lands of the United States, if there be any, in the bed of Red River, Oklahoma, adjacent to the Texas boundary, irrespective of the fact that the preexisting mining laws were not in operation in the former State, and an application to acquire such areas by Valentine scrip, unsupported by non-occupancy and nonmineral affidavits, must be denied, inasmuch as such scrip is locatable only on unoccupied, nonmineral public land.

FINNEY, First Assistant Secretary:

George W. Martin has appealed from the decision of May 31, 1921, by the Commissioner of the General Land Office rejecting his application to locate Valentine scrip E-276 (40 acres) on unsurveyed land described by metes and bounds, in the bed of Red River, adjacent to the Texas line, said to contain 41.27 acres, and which, when surveyed, will be in T. 5 S., R. 14 W., in Tillman County, Oklahoma.

It appears that said area is involved in litigation now pending in the Supreme Court of the United States, wherein the State of Oklahoma and various other parties, including the United States, are asserting title, and it has been placed in the hands of a receiver to take care of the valuable oil properties existing therein until the question of title has been determined.

This applicant has declined to furnish the nonmineral—nonoccupancy affidavit necessary in support of such location. His contention is that lands in the State of Oklahoma have been declared to be agricultural in character, and that the mining laws do not apply

there, and the inference is that occupation of such lands for the purpose of extracting oil and gas would be unlawful occupancy.

While the Department in numerous cases has held that the old general mining laws do not operate in said area, it has nevertheless held that if title be declared in the United States said area will be subject to the provisions of the mineral leasing act of February 25, 1920 (41 Stat., 437).

Valentine scrip can be located only on unoccupied, nonmineral land, and as it is not denied that this land contains valuable oil deposits, and as the Department holds that the said leasing act will apply there, if it be decided that the Government has the title, it follows that the rejection of the application was proper.

The appeal contains a request for an opportunity to submit oral argument, but no sufficient reason appears for oral discussion as the written record clearly discloses the issues involved, concerning which the Department is not in doubt. The request is accordingly denied and the decision appealed from is affirmed.

JACKSON HOLE IRRIGATION COMPANY.

Decided October 5, 1921.

WATER RIGHT—RIGHT OF WAY—WYOMING.

A permit to appropriate public waters under State authority does not of itself confer upon the user any interest in public lands, and consequently no vested right of way easement for canals and reservoir sites is obtained as an incident to the appropriation of waters under the statutes of the State of Wyoming.

WATER RIGHT—RIGHT OF WAY—SECTIONS 2339 AND 2340, REVISED STATUTES—WITHDRAWAL.

No such vested right to the use of public waters is obtained by the mere approval of an appropriation permit under a State statute, prior to beneficial use, as will entitle the permittee to a right of way for the construction of ditches and canals under sections 2339 and 2340, Revised Statutes, and a withdrawal of public lands prior to such beneficial use will prevent the granting of an application of a right of way under the act of March 3, 1891.

WITHDRAWAL—ACT OF JUNE 25, 1910—RESTORATIONS.

A withdrawal of public lands under the act of June 25, 1910, made in aid of pending legislation does not become inoperative by reason of the failure of Congress to enact the proposed legislation, but it remains in force until revoked by the President or by an act of Congress.

FINNEY, *First Assistant Secretary*:

The Jackson Hole Irrigation Company has appealed from the decision rendered July 20, 1921, by the Commissioner of the General Land Office holding for rejection its application for easement for certain reservoir sites and canals for irrigation purposes under the act of March 3, 1891 (26 Stat., 1095).

Two reasons were assigned by the Commissioner for the adverse action, namely, that the reservoir sites are located on land withdrawn in aid of proposed legislation to extend the boundaries of the Yellowstone National Park and that the project was apparently designed to irrigate lands designated in application or List No. 97 by the State of Wyoming for segregation under the Carey Act, which application has been rejected, so that the potential purpose of the rights of way application no longer exists.

The record shows that the said Carey Act segregation list was rejected by Secretary Payne January 21, 1921, for the reason that the proposed storage reservoir sites embracing Jenny and Leigh Lakes had been withdrawn and should be retained for an addition to the Yellowstone National Park as they appear to be more valuable to the nation in their present natural condition. A motion for rehearing was denied by Secretary Fall April 30, 1921, upon the ground that the project was of doubtful advisability, as the lands proposed for irrigation are in northeastern Wyoming, at an elevation of 6,000 feet, where frosts are likely to occur in any month of the year, and largely of a rocky, gravelly soil of doubtful character for agricultural purposes. It was further pointed out that the proposed sites are withdrawn and the Department did not feel justified in recommending to the President modification of the withdrawal, which modification would be necessary before rights of way for reservoirs and canals could be granted. The rejection of the State's application accordingly became final.

The present application was filed February 15, 1921, and involves substantially the same issues as were disposed of in the rejection of said application by the State. The applicant claims certain water appropriations made by C. C. Carlisle March 16, 1914, from Lakes Leigh and Jenny and tributary streams, and it is urged that a vested right was acquired by said appropriations, which could not be legally affected by inclusion of that area in a withdrawal under the provisions of the act of June 25, 1910 (36 Stat., 847). This is, of course, untenable, as such rights as were acquired by said appropriations are confined to the use of waters so appropriated and do not embrace any interests in the public lands. Precisely as this Department is without authority to grant appropriations of public waters, so the States are without jurisdiction to dispose of public lands of the United States. No vested interest in a right of way over public lands is obtained as an incident to the appropriation of waters under State authority. It is not claimed that any construction work had been or has been performed. It is not believed that a vested right to the use of waters under the laws of Wyoming is secured by the mere approval of an appropriation permit, nor prior to beneficial use and

then only to the amount so beneficially used. And even a vested right may be forfeited by failure of beneficial use for five successive years. Hence the provisions of sections 2339 and 2340, United States Revised Statutes, have no application here. But if in fact the rights of way applied for are vested rights as an incident to the water appropriations and are unaffected by the withdrawal, as contended, then it must follow that such rights would be likewise unaffected by disapproval of the application.

It is further urged that the withdrawal of July 8, 1918, has ceased to have force, as it specified that its purpose was "in aid of pending legislation embodied in bill H. R. 11661, 65th Congress", which bill failed of enactment, and no similar legislation is now pending.

The Department can not agree with the contention that the purview of the withdrawal order is to be determined solely by the precise provisions of the bill referred to, or that it became *functus officio* when Congress adjourned without enactment of that bill. The bill referred to merely illustrated in a general way the purpose of the withdrawal, and did not necessarily circumscribe or modify its force. But, irrespective of the purpose indicated in the withdrawal order of the President, the withdrawal "shall remain in force until revoked by him or by act of Congress", which is the language of the act of June 25, 1910, *supra*.

Therefore, the said area must be regarded as reserved from appropriation, and the Department is of opinion that it could not be used for the purpose of the application without detriment to its proposed use for a national park.

The decision appealed from is accordingly affirmed.

COLUMBUS C. MABRY (ON REHEARING).

Decided October 5, 1921.

HOMESTEAD—MINERAL LANDS—OIL AND GAS LANDS—FINAL PROOF—BURDEN OF PROOF.

Where the character of land embraced within a homestead entry is placed in issue, that question must be determined as of the time of the submission of final proof, and if the land at that time would be properly regarded, in the absence of any proof whatever, as of known mineral character, the burden of proving it not then known to be mineral rests with the entryman, otherwise the Government must assume the burden of proof.

HOMESTEAD—WITHDRAWAL—ACT OF JUNE 25, 1910—STATUTES.

The character of the land is the test which determines whether or not an entry is "lawful" within the meaning of that term as used in the exception clause of the act of June 25, 1910, which declares that lands included within a lawful homestead or desert land entry previously to their withdrawal are not to be affected by a withdrawal made thereunder.

OIL AND GAS LANDS—WITHDRAWAL—MINERAL LANDS—LAND DEPARTMENT—JURISDICTION.

The Land Department, to which is committed exclusively the determination of the character of the public lands, may, in the exercise of that jurisdiction, select its own instrumentalities and methods, and an executive withdrawal and inclusion within a petroleum reserve of public lands upon a recommendation of the Geological Survey is one mode of classification which presumptively fixes their mineral character, provisionally, however, and subject to revocation upon further investigation or upon sufficient showing by a nonmineral claimant.

HOMESTEAD—OIL AND GAS LANDS—WITHDRAWAL—FINAL PROOF—BURDEN OF PROOF.

A withdrawal and inclusion in a petroleum reserve of public land embraced within a nonmineral entry in support of which final proof had not been previously submitted stamps the land with a presumptive mineral character sufficient to cast upon the entryman the burden of showing the contrary as of the date of submission of final proof.

HOMESTEAD—OIL AND GAS LANDS—WITHDRAWAL—SURFACE RIGHTS—PATENT—ACT OF JULY 17, 1914.

A complete equitable title does not vest in a homestead entryman prior to submission of satisfactory final proof, and where the lands therein are withdrawn and included within a petroleum reserve before the submission of such proof, the patent therefor must contain a reservation to the United States of the oil and gas contents as provided for by the act of July 17, 1914, unless the entryman, upon whom is placed the burden of proof, shows that the lands are in fact nonmineral in character.

COURT AND DEPARTMENTAL DECISIONS CITED AND FOLLOWED—DECISIONS CITED AND DISTINGUISHED.

The cases of Washburn *v.* Lane (258 Fed., 524), James Rankine (46 L. D., 46), State of Louisiana (47 L. D., 366), Cleveland Johnson (48 L. D., 18), Tilmon D. Mabry (48 L. D., 155), cited and followed; cases of Payne *v.* New Mexico (255 U. S., 367), George W. Ozbun (45 L. D., 77), Henry Hildreth, on rehearing (46 L. D., 17), cited and distinguished.

FINNEY, *First Assistant Secretary*:

The Department affirmed on appeal, August 10, 1921, the decision of the Commissioner of the General Land Office of September 29, 1920, denying the application of Columbus C. Mabry for an unrestricted patent, in lieu of the patent issued in his name February 28, 1917, with reservation of certain minerals in pursuance of the act of July 17, 1914 (38 Stat., 509), so far as concerns the lands included therein embraced in his original homestead entry, allowed February 23, 1910, for W. $\frac{1}{2}$ of lot 1, and all of lot 2 of NE. $\frac{1}{4}$, Sec. 4, T. 28 S., R. 27 E., M. D. M., in the Visalia, California, land district, on which entry final proof was submitted August 23, 1915.

On August 19, 1921, counsel for said applicant addressed to the First Assistant Secretary a letter taking exception to said departmental decision, which letter has been treated as an informal motion for rehearing of said case.

It is contended in such motion that said entryman was never given an opportunity to show nonmineral character of the ground at date of submission of final proof, and that the record shows that said land was not classified or known as mineral land at that time.

It appears that on December 1, 1915, the Commissioner instructed the register and receiver to advise claimant—

That patent upon his entry, if issued, will contain reservation of oil deposits in accordance with the act of July 17, 1914, unless . . . he files in your office an application for classification of the land as nonmineral together with a showing . . . that the land applied for *is* not valuable for mineral.

In the event that his application is denied, he will be allowed a hearing, at which the burden will be on him to show that the land *is* not valuable for oil. (Italics supplied.)

On the entryman's appeal to the Department this decision was affirmed April 28, 1916, on the ground that the facts presented by the case were substantially similar to those in the case of George W. Ozbun (45 L. D., 77), and a motion for rehearing was denied by the Department June 14, 1916, on the ground that—

The report of the Geological Survey and the reservation made by the President makes this land presumably mineral. The act allows the claimant to apply for a hearing for its classification as nonmineral land. This is a privilege held out to him, otherwise the entry must fail.

The Commissioner's instruction, it will be observed, extended to the applicant only the opportunity of showing that the land *is* (i. e., at the date of his letter of instructions, December 1, 1915—not earlier) nonmineral. The land might have been of known mineral character at the date of the showing, or at date of the notice of opportunity to make the showing, or at date of the Commissioner's letter of instruction to give such notice, and yet conceivably it might have been shown to have been *not* of known mineral character at the somewhat earlier date of the entryman's submission of final proof, had it not been, as hereinafter pointed out, classified as mineral prior to the submission of that final proof. If the land *is* mineral, knowledge of its mineral character must be held to relate back at least as far as the date of its classification as such.

But the Department can not assent to the corollary deduced, in the argument for the motion, that, under the departmental decision of April 18, 1921, in State of California, Charles M. Griffith, transferee (A-387, unreported), the entryman is entitled to an unrestricted patent.

The Griffith case, *supra*, simply held that the right of the State and its transferee to the selected tract must be determined by the known character of the land at the date when the act of selection was complete, unaffected by the subsequent withdrawal, thus follow-

ing the recent decision of the Supreme Court of the United States in *Payne v. New Mexico*, decided March 7, 1921 (255 U. S., 367).

The question still remains as to the character of the land at date of the selection, or, in this case, at date of final proof; and that question requires for its correct solution the due placing of the burden of proof. If the land would be properly regarded, in the absence of any proof whatever, as at that time of known mineral character, the burden of proving it *not* then known to be mineral would rest on a party so alleging; if otherwise, the burden of proving it of then known mineral character would rest on the Government. Therefore, what had previously been done to characterize the land?

Bulletin 623 of the Geological Survey shows that, in pursuance of a communication of the Director to the Secretary of the Interior, January 23, 1911, to the effect that—

Field examination indicates that the following lands are valuable for oil and gas, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action,

the President, under date of January 26, 1911, ordered—

That the following described lands (including among them those here in question) be and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all the provisions, limitations, exceptions and conditions contained in the act . . . approved June 25, 1910.

This order was designated in its heading as "Petroleum Reserve No. 18—California No. 8."

The act of June 25, 1910, *supra*, authorized withdrawals "for water-power sites, irrigation, classification of lands or other public purposes to be specified in the orders of withdrawal," with an exception from its force of lands previously to such a withdrawal brought within a *lawful* homestead or desert-land entry.

Notwithstanding this exception, the act authorized withdrawals of lands previously brought within a homestead or desert-land entry *not lawful*—i. e., within such an entry of lands not subject to such entries because mineral in character. The character of the lands was thus a test of whether a withdrawal was or was not operative upon those embraced in a previous nonmineral entry; and an examination or inquiry by the Department was necessary in order to determine, by that test, whether that particular land had been operated on by the withdrawal, or stood excepted from its force (although described in the order) by the terms of the act authorizing it.

In this particular instance the withdrawal was not merely *for* classification, but by specification of "other public purposes" in the order—i. e., in its caption—was for a *petroleum reserve*.

The determination of the character of the public lands is committed exclusively to the Land Department, and in exercising that jurisdiction it may select its own instrumentalities and methods. A recommendation of its Geological Survey that specified public lands be withdrawn from entry (nonmineral or other) and placed in a petroleum reserve, if approved by the Department head and acted on favorably by the Executive, is one mode of classification of those lands as mineral in character; provisional, it is true, and subject to revocation, upon further investigation or upon showing by a non-mineral claimant, but, until then, presumptively fixing their mineral character.

In *Washburn v. Lane* (258 Fed., 524), decided in 1919 by the District of Columbia Court of Appeals, it was held that inclusion in a petroleum reserve was a *prima facie* mineral classification, prevailing against a lieu selection of the land as nonmineral, previously initiated but not completed.

A series of decisions of this Department consistently supports this view.

In *George W. Ozbun* (45 L. D., 77), the Department held, April 28, 1916, that a homestead entryman can not be *compelled* to accept a limited patent of lands withdrawn and placed in a petroleum reserve after a homestead entry thereof but before submission of final proof, but should be offered the option, in case he can not procure a reclassification of the land as nonmineral, to accept a limited patent or suffer cancellation of his entry, and amended accordingly paragraph 9 of the regulations of March 20, 1915 (44 L. D., 32, 35), promulgated under said act of 1914, which previously had assumed that in such a case the entryman *must* accept a limited patent unless the withdrawal were revoked or the classification set aside before issuance of patent or unless he showed the land to be nonmineral.

In *Fritz Hilmer* (unreported), the Department had before it the case of a homestead entryman whose entry was subsequently, and, before he submitted final proof, included in a withdrawal and a petroleum reserve. His final proof followed, prior to said act of 1914. Subsequently to that act, the Commissioner, having afforded the entryman opportunity to apply for a nonmineral classification—of which he did not avail himself—issued in his name a patent with the reservation prescribed by said act of 1914, which the entryman declined to receive, and filed a petition asking that the case be reopened and an unrestricted patent issued to him. The Department held, July 26, 1916:

The regulations . . . proceed on the theory that the inclusion of an area within a petroleum withdrawal is *prima facie* evidence of the mineral character of the land withdrawn, and this is correct where such withdrawal is based upon information or *ex parte* evidence supporting such a presumption. In the case

at bar, however, the entryman submitted his final proof August 15, 1913, . . . and subsequently thereto . . . a special agent of the General Land Office made a field examination of the land and reported that no oil development had at that time been undertaken in this immediate region, and that there is no evidence of the mineral character of the land unless it be the existence of anticlinal structure to the north and south thereof.

. . . The Director of the Geological Survey . . . stated that there is no data on hand to indicate that the entryman knew or should have known of the possible mineral character of the land at date . . . of final proof . . . In view of this finding by the special agent of the General Land Office and by the Director of the Geological Survey, upon whose recommendation the petroleum withdrawal was made, the Department is convinced that under the facts and circumstances of this case the withdrawal does not create the presumption that this particular tract of land was known to be mineral in character at date of homestead final proof.

The Department accordingly reversed the Commissioner's denial of said petition for an unrestricted patent and remanded the cause for appropriate action.

In *Henry Hildreth*, on rehearing (46 L. D., 17), the Department, February 5, 1917, vacating its earlier decision of the case (45 L. D., 464), held that where a desert-land entry had been followed by withdrawal and inclusion in a petroleum reserve, and later by final proof, in the absence of mineral discovery upon the land prior to such proof and in view of a mineral inspector's report of a later field examination, indicating no knowledge of mineral character at date of such proof, the entry was to be regarded as upon nonmineral land, excepted, therefore, from the force of the withdrawal by the express terms of said act of 1914 authorizing it.

In *James Rankine*, on reconsideration (46 L. D., 46), however, the Department, in its reconsideration, March 12, 1917, of its previous decisions, set forth a report by the Director of the Geological Survey, based on further field examination subsequent to the withdrawal, that all indications favored the presence of oil within the outboundaries of the withdrawn land. On this basis the Department, distinguishing the case from that of *Hildreth*, *supra*, declined to issue an unrestricted patent.

In *State of Louisiana* (47 L. D., 366), the Department again held, adversely to a claim of the State to lands as falling within the swamp-land grants, that (syllabus)—

Lands embraced within a petroleum withdrawal are thereby impressed with a *prima facie* mineral character; and the burden is upon the State to overcome this or suffer the rejection of its claim thereto under the swamp-land grant, which does not embrace mineral lands.

In *Cleveland Johnson*, on rehearing (48 L. D., 18), the Department, adhering to its previous decision of the case (unreported), denied, February 21, 1921, an application for an unrestricted patent (in lieu of one with the oil reservations that had been issued) of a homestead

entry followed by withdrawal of the land with its inclusion in a petroleum reserve, upon final proof submitted after the withdrawal. The decision quotes from a report of the Geological Survey, based upon further field examination subsequent to the withdrawal, confirmatory of the mineral character of the land.

Lastly, in *Tilmon D. Mabry* (48 L. D., 155), involving land in the same section as that here in question, the homestead entry of November 30, 1909, was followed by final proof December 30, 1914, long subsequent to said withdrawal order of January 26, 1911. Both by the departmental decision of January 27, 1921, and again in the denial of the motion for rehearing, it was held, in effect, that the withdrawal and inclusion in a petroleum reserve properly cast the burden of proof of nonmineral character upon the homestead applicant, and that failing to undertake and sustain it his right was limited to the restricted patent already issued.

It will thus be seen that the Department has held that withdrawal and inclusion in a petroleum reserve stamps public land, final proof of a nonmineral entry of which had not previously been submitted, with a presumptive mineral character (thus casting upon the entryman the burden of showing the contrary as of the date of final proof), in every adjudicated case brought before it, except those of *Fritz Hilmer, supra*, and *Henry Hildreth, supra*; and that in those two cases special facts were set forth countervailing (when coupled with the lack of any mineral discovery prior to final proof) the presumption derived from the Director's report leading to the withdrawal.

Where no such special elements are found in a case, not only have the departmental decisions been uniform and consistent with the regulations prescribed under said act of 1914, *supra* (44 L. D., 32; 45 L. D., 77), but those regulations and decisions are grounded in reason and justice and, as has been shown, are fully conformable to the scope and intent of said legislative act.

The rule above explained applies, of course, only to the cases where final proof of a nonmineral entry is preceded by the withdrawal and reservation, and it is not opposed to anything held in the recent Supreme Court decisions, *Payne v. New Mexico, supra*, and *Wyoming v. United States*, decided March 28, 1921 (255 U. S., 489). Where the final proof has preceded the withdrawal and reservation, the doctrine of those decisions applies, limiting inquiry to the character of the land as known at the time of final proof. In those cases the presumption of mineral character does not obtain, and consequently the burden of proof of mineral character at that time is cast upon the Government, by paragraph 1 of said regulations of March 20, 1915.

The motion for rehearing is denied.

HAWLEY v. MUSTEN, JR.

Decided October 14, 1921.

CITIZENSHIP QUALIFICATION—ALIEN—CONTEST—HOMESTEAD.

An alien who, after declaring his intention to become a citizen of the United States, made a homestead entry, did not forfeit his citizenship qualification as an entryman by claiming exemption from military service as an alien under the selective service act of July 9, 1918, if he was a citizen of a country neither neutral nor enemy and, therefore, not exempted by the act, where, although having subsequently been denied citizenship, his declaration had not been withdrawn or canceled.

CITIZENSHIP QUALIFICATION—ALIEN—CONTEST—HOMESTEAD.

The fact that a declaration of intention to become a citizen of the United States, because of its age and certain errors contained therein, was not sufficient upon which to predicate final citizenship, does not disqualify the declarant as a homestead entryman, where the declaration was *prima facie* good at the time of making entry and a new declaration had been filed after the petition for citizenship had been denied.

FINNEY, First Assistant Secretary:

On October 17, 1913, Charles Musten, jr., made enlarged homestead entry 023332, Havre land district, Montana, for the S. $\frac{1}{2}$, Sec. 33, T. 33 N., R. 5 E., M. M., containing 320 acres.

On December 21, 1918, William B. Hawley filed application to contest said entry, charging that the entryman is not a citizen of the United States and not a qualified entryman and that he can never become a citizen because he claimed exemption from military service as an alien under the selective service law, and that his petition for citizenship was denied with prejudice by the District Court of Hill County, Montana.

Notice was issued and served on the entryman who filed answer admitting that he is not a citizen of the United States but denying that he is not a qualified entryman; that he is disqualified from becoming a citizen and that he claimed exemption from military service as an alien, and stated that if his questionnaire shows such a claim it was due to a misunderstanding on his part and from a lack of familiarity with the English language. He stated that he is a subject of Great Britain by virtue of the naturalization of his father in Canada on October 2, 1908.

The matter went to a hearing before the register and receiver on April 14, 1919, at which both parties were represented by counsel. At the hearing the First National Bank of Chester, Montana, filed a motion to intervene claiming a mortgagee's interest. The motion was denied. George B. Glass, clerk of the District Court of Hill County, Montana, and William B. Hawley, the contestant, testified at the hearing. Glass testified that the petition of Charles Musten, jr., for final naturalization papers was denied with prejudice on

March 26, 1918, because he had claimed exemption from military service on the ground that he was not a citizen of the United States while he had a petition for citizenship pending before the court. Hawley testified that he assisted Musten to fill out his questionnaire and that he claimed exemption on the ground that he was an alien. The entryman moved to dismiss the contest and rested his case. The record also discloses that on July 10, 1916, the International Harvester Company filed notice of mortgagee's interest under a mortgage given by Musten for \$3,292, and on January 25, 1919, the First National Bank of Chester filed a notice of mortgagee's interest under a mortgage given by Musten for \$2,000. The notices state that the money was furnished the entryman for the purpose of making improvements on the land of his homestead.

On April 27, 1920, the register and receiver found that the entryman was not disqualified from becoming a citizen under the act of July 9, 1918 (40 Stat., 845, 885), relied upon, because he was not a citizen or subject of a neutral country but that the entryman's declaration of intention had been canceled by the court's denial of his petition for final citizenship papers, and that the entryman was neither a citizen nor a declarant and not a qualified entryman at the date of contest and recommended cancellation of the entry. The entryman appealed.

The Commissioner of the General Land Office, by decision of February 12, 1921, held that the bank's petition to intervene should have been granted; that action on the contest should be suspended; and that the entryman be afforded opportunity to complete his citizenship within a reasonable time and that, if completed, the contest should be dismissed; otherwise the entry should be canceled and the contestant permitted to exercise his preference right; and directed that copies thereof should be sent to the First National Bank of Chester, Montana, and to the International Harvester Company, Helena, Montana, as well as to the contestant and entryman.

On July 12, 1920, the entryman filed a certified copy of his declaration of intention to become a citizen of the United States, sworn to on May 24, 1920. The clerk in the local office made notation of final naturalization papers filed. On March 26, 1921, after the time for filing appeal had expired, the contestant filed an affidavit in the nature of an appeal showing service thereof on the entryman, setting out that he was misled by the notation, and believing that the entryman had completed his citizenship, he considered it futile to appeal from the Commissioner's decision or to further prosecute the contest, but on learning that the naturalization paper was merely a declaration urged his right of appeal. The Commissioner, by decision of April 14, 1921, allowed the contestant the right of appeal.

The entryman's declaration was not canceled by the court when it denied his petition for admission to citizenship. Being a declarant he had a sufficient citizenship qualification as an entryman. However, said declaration which was sworn to October 18, 1913, because of its age and of several errors appearing therein, was not a good declaration upon which to predicate a petition for citizenship and the entryman made another declaration. It is not shown that he disqualified himself from becoming a citizen under the act of July 9, 1918, *supra*, by withdrawing his declaration, and further, it appears that he was not a citizen of a country neutral in the war but a citizen of Canada and not exempt from military service on the ground of being an alien. The contestant has failed to prove the charge. The contest is dismissed.

The Commissioner's decision is modified accordingly.

REX COCHRAN,¹

Decided October 18, 1921.

STOCK-RAISING HOMESTEAD—DESIGNATION OF LAND—SETTLEMENT—RESIDENCE AND IMPROVEMENTS—FINAL PROOF.

Credit for residence maintained or improvements made prior to designation upon lands entered under the stock-raising homestead act of December 29, 1916, can not be allowed as partial fulfillment of the statutory requirements of that act and final proof in support of such an entry must be rejected as premature if submitted before the lapse of three years from the date of the effective designation of the lands.

DEPARTMENTAL REGULATIONS CITED AND APPLIED.

Paragraph 16, Circular No. 523 (47 L. D., 227, 240), cited and applied.

FINNEY, *First Assistant Secretary*:

Rex Cochran made homestead entry, Pueblo 033255, under the stock-raising homestead act, for S. $\frac{1}{2}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 2, lot 2, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$, Sec. 3, T. 27 S., R. 59 W., 6th P. M., containing 639.40 acres on November 21, 1918.

The claimant submitted final three-year proof on this entry on August 14, 1920, but the local officers rejected the proof on the ground that it was premature and the claimant appealed.

By decision of May 26, 1921, the Commissioner found that the claimant had established residence on May 1, 1917, and that there had been no absences from the land; that no cultivation had been shown but that claimant made oath that he owned an interest in 300 head of stock grazed on the land and that the improvements are valued at \$1,000; that designation of the land became effective June 10, 1918.

¹ See instructions of November 4, 1921, page 293.

The Commissioner held that the stock-raising homestead act specifically provides that the lands should not be occupied prior to designation and that credit for residence or improvements, prior to designation, therefore, would not be allowed; that the proof was premature in that there had not been shown three years' residence since the effective date of designation and further that it had not been shown that improvement of the required value had been placed on the land since designation. Accordingly the Commissioner affirmed the decision of the local officers and held the proof for rejection.

The claimant has appealed from the said decision of the Commissioner and urges that while it is true that under Circular No. 523 it is provided that no settlement or improvements should be made until the land had been designated, yet that such provision was made in order to warn applicants for land not designated that they could obtain no priority over others, prior to designation, by reason of act of settlement; that where land is designated and claimant's application has been accepted and allowed, he should be credited with his actual residence and improvements, on final proof; that under the act of May 14, 1880 (21 Stat., 140), homesteaders on final proof are entitled to credit for the entire period of their occupancy regardless of the date of entry and that there is nothing in the stock-raising homestead act which requires a different rule; that the land here is in a region where it was inevitable the land should be designated; that a claimant who settles gains no preference rights against other applicants, but in case his entry is subsequently allowed, his prior actual occupation should be recognized on final proof; that under the stock-raising act credit is given an additional entry for residence upon a previously patented original entry.

Section 2 of the said stock-raising homestead act provides that a claimant who makes application to enter unappropriated public lands which have not been designated acquires no right to occupy such lands by reason of such application until the lands have been designated as stock-raising lands.

Under paragraph 16 of Circular No. 523 (47 L. D. 227, 240), it is provided that no credit will be given for any expenditure for improvements made prior to the designation of the lands under the said act.

The decision appealed from is affirmed accordingly.

ALBERT N. BACH.*Decided October 31, 1921.***REPAYMENT—DESERT LAND—COAL LANDS—RELINQUISHMENT—ABANDONMENT—WITHDRAWAL—PATENT.**

An application for repayment based upon abandonment and relinquishment of a desert land entry after the inclusion of the land in a coal withdrawal, on the ground that the entryman did not desire to accept a limited or surface patent, must be denied where he reentered the land subject to a reservation of the coal contents to the United States, inasmuch as such action does not amount to an abandonment, but merely a voluntary relinquishment of the first entry.

REPAYMENT—LAND DEPARTMENT.

The Land Department can not sanction an improper and unauthorized repayment merely because it, through lack of knowledge or by oversight, erroneously allowed a similar application under kindred facts.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

The case of Thomas A. Sheppard (46 L. D., 251), cited and distinguished.

FINNEY, *First Assistant Secretary:*

In this case Albert N. Bach bases his application for repayment on the ground that he abandoned and relinquished his desert land entry, Denver 02798, because he did not desire to accept a limited or surface patent to the SE. $\frac{1}{4}$, Sec. 30, T. 1 N., R. 61 W., 6th P. M., which was embraced within and made a part of a coal land withdrawal under the act of June 22, 1910, subsequently to the date of his entry covering that land; and by its decision of July 11, 1921, the General Land Office denied that application on the ground that the applicant's statement as to the reason for his relinquishment is overcome by the fact that he, at the time he filed his relinquishment, applied for and made a homestead entry for the same land subject to the provisions of that act which required him to take a surface patent.

In his appeal from that action the applicant claims that he is entitled to repayment under the rule laid down in the case of Thomas A. Sheppard (46 L. D., 251); that his right to repayment is not affected by the fact that he made the homestead entry; and that his application should be allowed because repayment has heretofore been ordered by the General Land Office under similar circumstances on Ellen C. Witter's entry, Denver 012361.

These contentions can not be sustained because the controlling facts in Sheppard's case are very different from those in this case. Sheppard entirely abandoned the land he had entered after it had been withdrawn subsequently to his entry, and permitted it to be entered by another person after his entry had been canceled on contest, while in this case Bach did not abandon the land at all. For some reason, evidently not the one he later assigned, he found it

either necessary or desirable to abandon his attempt to acquire title under his desert entry and seek it under the homestead laws. His actions very plainly show that the possibility of having to take a surface patent was not the controlling reason for his relinquishment, and he must, therefore, be held to have voluntarily relinquished his entry, and is not, for that reason, entitled to repayment.

This being true it can not be seriously contended that repayment should be made in this case solely because Witter's similar application was erroneously allowed by the General Land Office under kindred facts.

While the record now under consideration does not disclose the grounds on which Witter was allowed repayment it seems reasonable, in view of the Commissioner's action in this case, to assume that the fact that Witter immediately reentered the land she relinquished was not taken into consideration at the time her application for repayment was allowed. But, be that as it may, it certainly should not be urged that this Department ought to sanction an improper and unauthorized repayment in this case simply because the Commissioner, possibly through a lack of knowledge, or by oversight, improperly granted Witter's application.

The decision appealed from was correct and is hereby affirmed.

JAMES H. LEDGERWOOD.

Decided October 31, 1921.

REPAYMENT—DESSERT LAND—WITHDRAWAL—SURFACE RIGHTS—COAL LANDS.

Where land entered under the desert land laws is subsequently included within a coal land withdrawal, the entryman has the right to elect either to take a limited estate or to apply for repayment.

REPAYMENT—DESSERT LAND—COAL LANDS—WITHDRAWAL—RELINQUISHMENT—ABANDONMENT.

A desert land entryman who, having made entry prior to the inclusion of the land within a coal withdrawal, subsequently relinquishes a portion of the entry and elects to take a surface patent for the balance and then relinquishes the latter tract, must be held to have voluntarily abandoned the entry and, therefore, not to be entitled to repayment.

DEPARTMENTAL DECISION CITED AND CONSTRUED:

The case of Thomas A. Sheppard (46 L. D., 251), cited and construed.

FINNEY, *First Assistant Secretary*:

On September 22, 1906, James H. Ledgerwood made desert-land entry 01512 for the NE. 1, Sec. 34, T. 2 N., R. 64 W., 6th P. M.

This land was included in a coal-land withdrawal December 16, 1911, and restored therefrom June 9, 1913.

On November 8, 1912, the entry was relinquished as to the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and on May 2, 1913, it was relinquished as to the N. $\frac{1}{2}$ thereof.

Later and recently the entryman applied for repayment of the purchase money on the theory that his entry came within the rule announced in the case of Thomas A. Sheppard (46 L. D., 251), in which it was held that an entryman who abandoned his land and relinquished his entry after the land had been withdrawn subsequently to the date of the entry for the reason that he did not desire to accept a surface patent, could not be said to have voluntarily abandoned it and was entitled to repayment.

By its decision of July 5, 1921, the General Land Office rejected this entryman's application for repayment because he, on January 27, 1913, and while the land was withdrawn, filed an election to receive a surface patent as to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, which still remained in his entry at that time, thereby indicating that neither his relinquishment of the S. $\frac{1}{2}$, made prior to that date, nor of the N. $\frac{1}{2}$, subsequently to that date, was induced by the fact that the land had been withdrawn and did not for that reason come within the rule in the Sheppard case.

After this land had been withdrawn subsequently to the date of the applicant's entry he had the right to elect either to take a limited estate in the land, or to ask for repayment, and, as was held by the Commissioner, his election to take a surface patent to one-half of the tract established the fact that it was not his aversion to an estate of that kind that induced him to file his relinquishments, and indicated that his filing them was due to some other cause, and more than likely to the fact that he could benefit himself by doing so.

His abandonment of his attempts to acquire title under the desert-land laws must, therefore, be held to have been his free and voluntary act, and he can not, consequently, claim the benefit of the rule in the Sheppard case which is based solely on the ground that Sheppard's relinquishment was induced solely by the withdrawal and was not voluntarily filed.

The decision appealed from, being correct, is hereby affirmed.

INSTRUCTIONS.

November 4, 1921.

STOCK-RAISING HOMESTEAD—RESIDENCE AND IMPROVEMENTS—DESIGNATION OF LAND—STATUTES.

Congress clearly intended by the language which it used in sections 1, 2, and 3 of the stock-raising homestead act of December 29, 1916, that no right whatever should be acquired thereunder by, or credit allowed for, occupancy of land, or consideration given to improvements made thereupon, prior to its designation.

STOCK-RAISING HOMESTEAD—RESIDENCE—SETTLEMENT—FINAL PROOF.

The rule based upon the provision of the act of May 14, 1880, that the right of a homesteader shall relate back to the date of settlement, where under an entryman, on submission of final proof, is given credit for the entire period of his occupancy regardless of the date of his entry, is not applicable to stock-raising homestead entries.

DEPARTMENTAL REGULATIONS ADHERED TO—DEPARTMENTAL DECISION CITED AND FOLLOWED.

The departmental regulations contained in Circular No. 523, July 30, 1919 (47 L. D., 227), adhered to; case of Rex Cochran (48 L. D., 289), cited and followed.

FINNEY, *First Assistant Secretary*:

Reference is made to a letter of the Assistant Commissioner [of the General Land Office] dated October 26, 1921, asking for instructions in respect to a suggested interpretation of certain portions of sections 1, 2 and 3 of the stock-raising homestead act of December 29, 1916 (39 Stat., 862), and of paragraph 16 of Circular No. 523, approved July 30, 1919 (47 L. D., 227, 240, reprint).

The portions of the act referred to that are pertinent to the issues herein raised read as follows:

That from and after the passage of this act it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated unreserved public land in reasonably compact form: *Provided, however,* That the land so entered shall theretofore have been designated by the Secretary of the Interior as stock-raising lands.

* * * but no right to occupy such lands shall be acquired by reason of said application until said lands have been designated as stock-raising lands.

* * * *Provided further,* That instead of cultivation as required by the homestead law the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes, of the value of not less than \$1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof.

Paragraph 16 of Circular No. 523, reads as follows:

No credit will be given for any expenditure for improvements made prior to the designation of the land under this act.

The Assistant Commissioner expressed the view that section 2 of the act of December 29, 1916, intended to preclude an applicant from acquiring any vested interest in the land by settlement thereupon prior to designation such as is given to settlers under the general homestead laws by the act of May 14, 1880 (21 Stat., 140), but that after designation and allowance of the entry, credit should be given by virtue of the doctrine of relation for residence and improvements from date of settlement even though prior to designation; that the requirement incorporated in the last proviso to section 3, that the

improvements must be made prior to final proof, and at least one-half within three years from date of entry, merely fixes the maximum time, not the exact time, within which one-half of the improvements must be completed. He concluded by stating that it is, in his opinion, unwise to insist upon compliance with the present regulations and the construction thereof, and suggested the advisability of issuing new or amended regulations relating to the points in question.

In interpreting the provisions of sections 1, 2 and 3 of the act of December 29, 1916, it is impossible for this Department to escape the conviction that Congress clearly intended that no right should be acquired by or credit allowed for occupancy of the land prior to its designation and that no consideration should be given to improvements made prior to that time. Those points were carefully considered by it both at the time that it issued the regulations of July 30, 1919, *supra*, and also more recently in its decision rendered in the case of Rex Cochran, October 18, 1921 (48 L. D., 289), in which the regulation contained in paragraph 16 of Circular No. 523 (47 L. D., 227, 240), was adhered to.

In view of the foregoing it is concluded that the Department has not given an erroneous construction to the provisions of the act of December 29, 1916, *supra*, and that inasmuch as the intention of Congress was expressed in language clear and unequivocal, the giving of any different interpretation thereto is not warranted.

BREIPOHL, ASSIGNEE OF MINNICK.

Decided November 4, 1921.

RECLAMATION HOMESTEAD—ASSIGNMENT—ACT OF JUNE 23, 1910—STATUTES.

The act of June 23, 1910, which authorizes the assignment of a reclamation homestead, does not require that an assignee shall have the qualifications of a homesteader, nor does it contemplate that the assignment shall in any sense be considered as a "homestead entry," and consequently a transfer thereunder is not invalid for the reason that it embraces two incontiguous tracts.

FINNEY, *First Assistant Secretary*:

The only question presented by the appeal of Herman G. Breipohl in this case which now needs consideration is the one as to whether the General Land Office erred in holding, in its decision of May 25, 1921, that the assignment, Glasgow 058232, under the act of June 23, 1910 (36 Stat., 592) of the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 9, T. 31 N., R. 35 E., M. M. (a part of the land embraced in reclamation homestead 02634, made by Tappey Minnick, June 8, 1908) could not

be recognized because the two tracts conveyed to him are contiguous.

This Department is unable to concur with the Commissioner's conclusion that this assignment is not acceptable because "it is the settled policy of the Department that all homestead entries shall comprise contiguous land."

The requirements of the homestead law as to residence, cultivation, improvements and proof thereof, have here been long ago complied with and this assignment can not, therefore, be said to be in any sense a "homestead entry" because the act under which it is made makes no demand that the assignee shall have the qualifications of a homesteader. It does not require that he shall at any time reside on the land or comply with any other of the general requirements of the homestead law (Instructions of April 2, 1914, 43 L. D., 456), and there is nothing in the pertinent regulations or elsewhere to the contrary. All that is required of such an assignee is that before receiving patent he shall submit proof of the reclamation of the land and pay the charges apportioned.

There is, however, a more serious question in this case than the one suggested by the Commissioner, which arises out of the fact that under the reclamation act an assignee is prevented from at the same time owning or holding more than one farm unit on which all the installments of construction or building and betterment charges have not been paid in full, as is stated in paragraph 41 of the regulations issued under that act (45 L. D., 385, 394).

The tracts here in question have not been designated as, or formed into farm units, and if, as seems probable, they are eventually designated as or form parts of different farm units, this assignee will be confronted by the fact of his disqualification to hold more than one unit, since he has not and can not, until such designation, make the payments mentioned.

However, under the circumstances, it is believed that the assignment may be recognized at this time, subject to future contingencies and such different action as conditions hereafter arising may require; and if it is found later that both tracts can not be patented to this assignee, he can in the meantime relieve himself of possible embarrassment by selling and assigning one of them to some other qualified person.

The decision appealed from is, therefore, hereby modified to conform to the views here expressed and the case is remanded for further and proper action in accordance therewith.

SALE OF ISOLATED TRACTS—ABANDONED FORT BUFORD MILITARY RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., November 8, 1921.

REGISTERS AND RECEIVERS,

MINOT, NORTH DAKOTA, AND MILES CITY, MONTANA:

Your attention is invited to the act of Congress approved August 11, 1921 (Public No. 49, 67th Congress), which provides:

"That the provisions of section 2455, Revised Statutes of the United States, be, and the same are hereby, extended to all nonmineral lands within the abandoned Fort Buford Military Reservation in the States of North Dakota and Montana, which were restored to disposal under the homestead, town site, and desert land laws under the provisions of the Act of May 19, 1900 (Thirty-first Statutes at Large, page 180)."

The sales of isolated tracts within the area affected by the terms of said act are to be governed by the provisions of the said section 2455, Revised Statutes, as amended, and the regulations approved April 16, 1920, Circular No. 684 (47 L. D., 382).

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

KESLER v. JUDGE.

Decided November 10, 1921.

HOMESTEAD—LEAVE OF ABSENCE—CONSTRUCTIVE RESIDENCE—ACT OF JULY 24, 1919—STATUTES.

The so-called drought act of July 24, 1919, while in the nature of remedial legislation, obviously intended that an entryman, claiming credit for constructive residence thereunder should have the requisite qualifications to make the entry and be able to show satisfactory compliance with the law under which the entry was made up to the commencement of the absence period.

CONTEST—ADDITIONAL HOMESTEAD—ABANDONMENT—LEAVE OF ABSENCE.

The granting of an application for leave of absence under the act of July 24, 1919, will not defeat a contest, based upon the charge of abandonment, where it is proven that abandonment actually occurred long prior to the filing of the application for relief.

DEPARTMENTAL DECISION CITED AND CONSTRUED.

The case of *Slette v. Hill* (47 L. D., 108), cited and construed.

FINNEY, *First Assistant Secretary*:

George T. Judge has appealed from a decision of the Commissioner of the General Land Office dated May 31, 1921, holding for cancellation his homestead entry embracing the W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 24, T. 15 N., R. 69 W., 6th P. M., Cheyenne, Wyoming, land district, on the ground of noncompliance with the homestead laws and abandonment of the entry.

The record discloses that George T. Judge made the entry on April 18, 1917, pursuant to the act of February 19, 1909 (35 Stat., 639), as amended by the act of July 3, 1916 (39 Stat., 344), as additional to his previously patented entry.

On June 9, 1920, Taylor B. Kesler initiated a contest alleging that the additional entry is more than twenty miles distant from the original entry; that the entryman had never established or maintained a residence upon said additional entry; that he had abandoned it; and that the default was not due to military service.

The contestant produced testimony at the hearing from which it was indisputably shown that the contestee together with his family went upon the land during September, 1917, and remained there only two or three weeks; that they then returned to the original entry, about forty miles distant, for the reason, as stated, that he was unable to obtain fuel; that he did not again spend any time upon the entry until after the initiation of the contest, and that thereafter the time spent thereon would not exceed two weeks in the aggregate; that the house and other buildings upon the additional entry had been placed there by a prior entryman; that he caused about 20 acres to be broken during 1918 and 1919, which were sowed to rye, and about $1\frac{3}{4}$ miles of fence to be built, but he had never kept any stock upon the place.

The contestee did not offer any testimony in opposition to the contest but at the conclusion of the contestant's testimony demurred to the evidence as being insufficient to support the charge. He also relied upon the fact that an application for relief under the drought act of July 24, 1919 (41 Stat., 234, 271), had been allowed by the General Land Office August 24, 1920, granting him a leave of absence until April 18, 1920. The local officers sustained the demurrer and recommended the dismissal of the contest.

In the decision appealed from the Commissioner, after reviewing the evidence, found that the charge of abandonment had been conclusively proven and held that inasmuch as said abandonment had occurred long prior to the filing of the application for relief under the drought act, the allowance of that application did not excuse the default or defeat the contest.

In the argument of the contestee on appeal it was contended that at the time the contest was initiated the entry was not subject to contest for the reason that it was as fully protected by the leave of absence that the General Land Office granted as it would have been by the entryman's residence during the period covered by the leave; that even though the entryman had not applied for a leave of absence he would have been entitled to credit for such leave, if the facts disclosed that he was entitled to the leave. The departmental decisions in the cases of *Oneale v. Dolling* (unpublished), decided February 15, 1919, and *Slette v. Hill* (47 L. D., 108), were cited as in point.

There is no dispute as to the facts in this case, and if the testimony upon which the Commissioner based his finding that the entry had been abandoned was sufficient to sustain that conclusion, there is but one point to be considered, that is an interpretation of the intention of Congress in the enactment of the act of July 24, 1919 (41 Stat., 234, 271).

The act of July 3, 1916 (39 Stat., 344), which authorizes under certain conditions the making of additional entries by those who have received patents upon their original entries, requires compliance with the homestead laws as to cultivation in every instance and as to residence where the additional entry is more than twenty miles distant from the original entry.

The act of July 24, 1919, *supra*, provided:

"That any homestead settler or entryman who, during the calendar year 1919, finds it necessary to leave his homestead to seek employment in order to obtain food or other necessities of life for himself, family, and work stock, because of great and serious drought conditions, causing total or partial failures of crops, may * * * be excused from residence upon his homestead during all or part of the calendar year 1919, * * *."

While the so-called drought act was in the nature of remedial legislation, it is apparent to this Department that Congress intended to grant relief to only such entrymen as had in good faith complied and were complying with the laws under which their entries were made and that where a homestead entryman claims credit for constructive residence during the leave of absence period provided by that act he must have the requisite qualifications and show satisfactory compliance with the homestead law as to residence and cultivation up to the commencement of said absence period. If he had not met those requirements he was not entitled to the credit. In this case the entryman had spent only two or three weeks upon his entry and considerably more than a year had elapsed between the time that he had last been on the land and the beginning of the leave of absence granted by the General Land Office. He had not, therefore, maintained sufficient residence to satisfy the law under which he made entry and under the circumstances it is impossible to hold otherwise than that

he had by his conduct estopped himself from denying that his continued and prolonged absence from the land constituted abandonment. Consequently he was not entitled to any protection by reason of the drought act as against a contest properly initiated more than a year and a half since the entryman was last on the land. The action of the General Land Office by which his application for leave of absence was allowed did not cure the defect and the contest must be sustained.

The cases cited by the appellant do not appear to be in point as to the issue raised herein. In *Oneale v. Dolling*, *supra*, the entryman had resided upon his entry for approximately two years and was then unavoidably absent for about nine months on account of an accident which incapacitated him. In the case of *Slette v. Hill*, *supra*, the facts were such as to convince the Department that there had been no abandonment by the entryman, although the periods of residence had been brief and intermittent, and inasmuch as sufficient time remained within the statutory period for complying with the residence provision of the law, the contest was dismissed.

The decision of the Commissioner is accordingly affirmed.

INSTRUCTIONS.

November 17, 1921.

COAL LANDS—STATUTES—ACT OF FEBRUARY 25, 1920.

The leasing act of February 25, 1920, contemplates that the word "coal," as used therein, shall be construed according to its generally accepted sense, that is a natural product used for fuel, a deposit of the character subject to disposition under the coal land laws, and not to include asphalt, gilsonite, ozocerite, and other kindred substances.

GOODWIN, *Assistant Secretary*:

By your [Director of the Bureau of Mines] letter of November 9, 1921, you request to be advised as to whether the word "coal" as used in the act of February 25, 1920 (41 Stat., 437), includes asphalt, gilsonite, ozocerite, or similar bituminous substances. You state that the question has arisen in connection with certain mines in Utah which are operating for the recovery of gilsonite and ozocerite.

Coal, and the substances specifically enumerated in your communication are defined and described in Bureau of Mines Bulletin 95, entitled "A Glossary of the Mining and Mineral Industry," as follows:

Coal. A carbonaceous substance formed from the remains of vegetation by partial decomposition. (U. S. Geol. Surv.) A solid and more or less distinctly stratified carbonaceous substance varying in color from dark-brown to black, brittle, combustible, and used as a fuel; not fusible without decomposition and

very insoluble. In its formation the vegetal matter appears to have first taken the form of peat, then lignite, and finally bituminous coal. The latter by the loss of its bitumen has in some places been converted into anthracite or hard coal.

Asphalt. 1. A complex compound of various hydrocarbons, part of which are oxygenated. Related in origin to petroleum. Is brown or brownish black in color, melts at 90° to 100° F., and is mostly or wholly soluble in turpentine. See also Albertite, Elaterite, Gilsonite, Grahamite, Impsonite, Nigrite, Wurtzite (U. S. Geol. Surv.) Also called mineral pitch.

Gilsonite; Uintaite. 1. A brilliant black, very brittle variety of asphalt having a marked conchoidal fracture and a brown streak. Upon exposure to air readily breaks down into a brown powder. Decrepitates but fuses easily in a candle flame, and is soluble in carbon disulphide. (CS₂), alcohol, and turpentine. (U. S. Geol. Surv.)

Ozocerite; Mineral wax; Fossil wax; Native paraffin. Waxlike hydrocarbon, yellow-brown to green in color; translucent when pure; feels greasy. Streak is light to brown, and specific gravity is slightly less than 1. Soluble in carbon disulphide. (U. S. Geol. Surv.)

Merrill in his work entitled, "The Non-Metallic Minerals," states that asphalt is used as a cement in ordinary construction and in roofing and paving compounds, and in a refined form as varnish or paint, as an insulating material and for waterproofing; that gilsonite is used in the manufacture of varnishes for ironwork and for baking japans. The same author describes ozocerite as—

* * * a wax-like hydrocarbon, usually with a foliated structure, soft and easily indented with the thumb nail; of a yellow-brown or sometimes greenish color, translucent when pure, with a greasy feeling, and fusing at 56° to 63° F.; specific gravity, 0.955. It is essentially a natural paraffin.

It will thus be seen that aside from the fact that coal and the other substances mentioned in your letter are hydrocarbons and will burn, they differ widely in physical characteristics, origin, mode of occurrence, and the purposes for which they are used.

Congress in the use of the word "coal" in the leasing act clearly employed it in its generally accepted sense, as meaning a natural product used for fuel and a deposit of the character subject to disposition under the coal-land laws. Moreover, the asphaltic substances mentioned in your letter have been uniformly regarded by the Department and the courts as minerals subject to disposition only under the general mining laws of the United States, except in special cases where other provision has been made by Congress for their disposition. It is clear, therefore, that the word "coal" as used in the leasing act was not intended to include asphalt, gilsonite, ozocerite, and other kindred substances, and you are accordingly so advised.

PREFERENCE RIGHT OF ENTRY UNDER THE ACT OF FEBRUARY
14, 1920—SHOWING AS TO MILITARY SERVICE.

INSTRUCTIONS.

[Circular No. 791.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 18, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Section 4 of Circular No. 678, approved March 31, 1920 (47 L. D., 346, 349), with reference to the showing required to be furnished in order to entitle an ex-service man to preference right of entry under Public Resolution No. 29, approved February 14, 1920 (41 Stat., 434), reads as follows:

"The soldier must show his qualifications to make the entry sought, and in addition thereto, either as a part of his application or by an accompanying statement sworn to before an officer qualified to verify homestead or desert-land applications, that he served in the United States Army, Navy, or Marine Corps on or after April 6, 1917; the approximate period of such service; the unit or units in which such service was performed; that he was honorably separated or discharged from such service or placed in the Regular Army or Naval Reserve, and the date thereof, and that he did not refuse to perform such service or wear the uniform thereof. He should attach to his application a copy of his honorable discharge or separation, or the order placing him in the Regular Army or Naval Reserve, as the case may be, certified as correct by an officer with a seal, but he will not be required to file the original order of discharge or transfer."

As there appears to be some misunderstanding relative hereto, you are hereby advised that the requirement that an ex-service man shall execute an affidavit showing his qualifications in the manner and form required in paragraph 4 of said Circular No. 678, is mandatory; however, the further requirement that he attach to his application a certified copy of his honorable discharge or separation or of the order placing him in the Regular Army or Naval Reserve is directory only; that is, in a case where the original papers have been lost so that a certified copy can not be prepared therefrom, the ex-service man may properly account therefor by furnishing an affidavit showing the fact of such loss and giving his service record, the affidavit to be sworn to before an officer authorized to administer oaths in homestead and desert-land cases.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

HONOLULU CONSOLIDATED OIL COMPANY (ON PETITION).

Decided November 18, 1921.

OIL AND GAS LANDS—WITHDRAWAL—PATENT—PREFERENCE RIGHT—ACT OF FEBRUARY 25, 1920, SECTION 18—STATUTES.

Congress, when it incorporated in the act of February 25, 1920, the relief provision contained in section 18 thereof, authorizing the issuance of preferential leases to oil placer mining claimants for lands withdrawn September 27, 1909, upon fulfillment of the conditions specified therein, intended that such claimants should either pursue patents under the placer mining laws, or leases under that section, not both concurrently.

OIL AND GAS LANDS—WITHDRAWAL—RELINQUISHMENT—PREFERENCE RIGHT—PATENT.

Where a claimant, who is asserting rights under the placer mining laws to withdrawn oil and gas bearing lands, files concurrently an application for a preferential lease, together with a quit-claim deed, pursuant to the provisions of section 18 of the act of February 25, 1920, and a request for a patent it will be held that the claimant elected to accept the benefits conferred by the leasing act.

DEPARTMENTAL AND COURT DECISIONS CITED AND CONSTRUED.

The cases of State of California *et al.* (41 L. D., 592) and State of Wyoming *et al. v. United States* (255 U. S., 489), cited and construed.

FALL, *Secretary*:

This proceeding raises the question of what disposition should be made of claims of the Honolulu Consolidated Oil Company to seventeen mining locations, made and asserted under the placer mining laws and the Pickett Act (act of June 25, 1910, 36 Stat., 847), to the E. $\frac{1}{2}$ and SW. $\frac{1}{4}$ of section 4, all of section 6, all of section 8, the W. $\frac{1}{2}$ of section 12, and all of section 14, in Township 32 South, Range 24 East, M. D. M., Visalia land district, California. It comes before me on the Honolulu Company's petition for exercise of supervisory power and authority, in which that company asks that a departmental decision rendered June 17, 1920, by my immediate predecessor in office, be vacated and patents issued for said seventeen mining locations, "or for such other or further action or relief in these premises as may seem meet, equitable and appropriate."

At the time of the filing of this petition, there were three claimants to the lands above described, viz: the Buena Vista Land and Development Company, the United States, and this petitioner.

The Buena Vista Company was pressing claims here, and in the United States District Court for the Southern District of California, and in the Supreme Court of the District of Columbia, based on certain selections of the lands in question made by the State of California in October, 1906, and June and August, 1907, under sections 2275 and 2276, Revised Statutes, and the act of February 28, 1891

(26 Stat., 796), and in each of the three forums mentioned was asserting that, by virtue of the said State selections, the lands in question belonged to it as by complete equitable title and had ceased to be public lands of the United States as early as September, 1909. This Department had held against this contention February 27, 1913 in *State of California et al.* (41 L. D., 592), in a ruling to the effect that conditions existing at the time when the Secretary of the Interior was called upon to approve the selections controlled the right to the selections and that inasmuch as it appeared on that date that the lands were mineral in character (oil having been discovered thereon and the lands having been withdrawn on September 27, 1909, and December 13, 1912, for that reason), the Secretary had no authority to approve the selections. This decision stood until March 28, 1921, when the Supreme Court of the United States, in deciding the *Ridgley Case (State of Wyoming et al. v. United States of America, 255 U. S., 489)* held that conditions at the time of perfecting lieu selections, not conditions at the time of approval, determine the right to the selections, and that the State's rights under such selections are to be determined without regard to any withdrawal subsequent to such perfected selections. Thus the Buena Vista decision of February 27, 1913, was nullified, and that company immediately became entitled, *at the least*, to have its claims considered on their merits. Accordingly, on April 30, 1921, the cases embracing these selections were remanded to the local land officers at Visalia with instructions to hold a hearing on the question of the character of the land as known or believed to be mineral or nonmineral as of the time of the perfecting of the several selections. But, relying upon the authority of the *Ridgley* case, and upon its suit then pending against the Secretary of the Interior and the Commissioner of the General Land Office in the Supreme Court of the District of Columbia (In Equity, No. 37,620), the Buena Vista Company, through its attorneys, effectually blocked the Visalia hearing until such time as a court decision could be had determining the jurisdiction of this Department under the *Ridgley* case.

The Honolulu Consolidated Oil Company, petitioner herein, claimed the above described lands as the transferee, through William Matson, of rights acquired thereto by locations made in October, November and December, 1908,—that is to say, later than the Buena Vista selections—under the placer mining laws by O. O. McReynolds and B. M. Howe and their associates.

The claims of the United States to the lands in question arose under certain withdrawals. The first of these was the order of September 27, 1909, by which the President of the United States, in aid of proposed legislation, temporarily withdrew all of said lands, and other lands, from location under the public land laws, the order providing,

however, that "all locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination." This withdrawal was ratified and confirmed by the Executive order of July 2, 1910, pursuant to the Pickett Act, *supra*, which provided as to existing claims—

"That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas-bearing lands, and who at such date is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

The third order affecting these lands was that of December 13, 1912, when they and other lands were "subject to valid existing rights," further withdrawn and incorporated into Naval Petroleum Reserve No. 2, to be held for the use and benefit of the United States Navy.

In April, 1915, pursuant to application proceedings by the Honolulu Consolidated Oil Company under the general mining laws, mineral entries were allowed that company upon all the lands above described. The Field Service of the General Land Office made an extensive examination, and, upon consideration of its report, all the entries, except those in section 6, were clearlisted on December 15, 1915, by the Commissioner of the General Land Office as to the character of the land, *bona fides* of the locations, and diligent prosecution of work leading to discovery, at the date of the first withdrawal. In this clearlisting the then Secretary of the Interior, the late Franklin K. Lane, concurred. But, as appears from the records, at the instance of the then Secretary of the Navy and the Attorney General, the issuance of patents to the thirteen claims so clearlisted was withheld and the record in the case was returned to the Commissioner of the General Land Office for further consideration. After an exhaustive reexamination of the entire record, as appears from his findings, the Commissioner adhered to his previous conclusion clearlisting the thirteen claims; and again Secretary Lane concurred, so advising the Attorney General on June 29, 1916.

Thereafter, and, as appears from the records of this Department, pursuant to the suggestion of the President of the United States, Secretary Lane revoked the clearlisting order on January 29, 1917, and reopened the case for further consideration and for the introduction of any new testimony that might be presented. A hearing was ordered and held before the register and receiver of the Visalia land office, and they decided that the Honolulu Company was not in the diligent prosecution of work leading to discovery at the date of the withdrawal of September 27, 1909, and, therefore, was not entitled to patents. Thereafter the Commissioner, upon appeal from the

register and receiver, after hearing argument and considering the evidence, on February 11, 1919, again decided that as to the thirteen claims outside of section 6 the Honolulu Company had earned and was entitled to patents under the mining laws.

From this decision appeals were taken to the Secretary of the Interior by the Department of Justice, on behalf of the Navy, from the Commissioner's decision holding the thirteen locations valid, and by the Honolulu Company from so much of that decision as denied patents to the locations in section 6. Exhaustive arguments were heard by the Secretary for the Navy and for the Company, and, together with the entire record in the case were given unusually careful and thorough consideration by the law officers of the Department of the Interior. As a result, a decision reviewing all the facts in the case was prepared for the consideration of Secretary Lane, who thereafter, in a letter dated February 9, 1920, informed the President—

"I am ready to decide this case and can see no way by which it can be decided consistently with the law and the facts save as it was decided twice by the Commissioner of the General Land Office. I heard a three days' argument, which was also attended by all the members of our Board of Appeals. The latter advised unanimously the confirmation of the Commissioner's opinion."

However, by a most unique intervention of the Chief Executive, Mr. Lane was prevented from putting his conclusion into effect. He resigned from office without promulgating a decision.

Mr. Lane's successor, Secretary Payne, ordered a reargument of the case, and, on June 17, 1920, reversed the Commissioner's decision as to the thirteen claims and affirmed it as to the claims in section 6, on the stated ground that at the date of the first withdrawal, September 27, 1909, the Honolulu Company "was not diligently prosecuting work leading to discovery of oil or gas on any of the locations involved." No fraud was found as to the Honolulu Company or as to its predecessor, William Matson.

Following this decision, denying patents, the Honolulu Company took formal and regular steps preparatory to litigating questions of its validity and correctness in Equity Suit B-46—to which the Government was and is a party plaintiff—pending in the Southern District of California, setting up in its pleadings a more detailed account of the history of the case in this Department and of the events preceding the decision of June 17, 1920, than is necessary to a decision upon this petition.

Similarly, the Buena Vista Company filed in Equity Suit B-46 its petition for leave to intervene therein and litigate its claims to the lands here in question.

Such, in brief, and with one exception to be presently noticed, is the history of this case prior to the date of the filing of the instant petition, and such also was substantially the posture of it on June 15 and 16, when the petition was argued and submitted. Recently, however, the Honolulu Company procured from the State of California and the Buena Vista Company waivers of their claims to all the lands involved herein, thus clearing the records in this Department and in the California and District of Columbia Courts of litigation that threatened to be not only protracted but serious, and which, if the Buena Vista Company had prevailed in this Department on the facts or had brought itself within the decision in the Ridgley case in either the California or District of Columbia court, would not only have resulted in depriving the Honolulu Company of its claims, but, as well, in conclusively divesting the United States of all its right, title and interest in and to the lands in question and in and to the oil and gas therein. But these dangers and delays having been averted and obviated by the procuring of the waivers aforesaid, the main case upon the petition of the Honolulu Company may now be considered and decided.

From the records it appears that this case had unusually exhaustive consideration by this Department upon various occasions prior to the filing of the pending petition, and that the Law Examiners of the General Land Office, the Assistant Attorneys, and the Board of Appeals all decided that under the law and the facts the Honolulu Company had earned and was entitled to patents to the claims clearlisted by the Commissioner on February 11, 1919. Secretary Lane, as before stated, was of the same opinion, but, because of the Executive interference hereinabove referred to, was prevented from officially so deciding.

I, also, have examined the record. It clearly shows that all seventeen of the claims were located long prior to the withdrawal of September 27, 1909,—thirteen of them by O. O. McReynolds and other qualified locators, and four by B. M. Howe and his associates—and that by assignments for valuable consideration they passed eventually to the Honolulu Consolidated Oil Company.

The decisions of the Commissioner of the General Land Office set forth quite fully the work performed by the Oil Company, and it is not necessary to repeat it in detail here. As early as January, 1908, surveys were made for the purpose of locating cabins and well-drilling sites on each of the claims in question and for roads to and across them to be used in the hauling of materials and supplies. The first road was laid out in January, 1908, and was completed in the summer of that year. Prior to the date of the first withdrawal order fourteen or fifteen miles of roads had been constructed leading from one of these locations, and they were actually used for the

transportation of materials and supplies for use upon and about these claims.

The company owned patented section 10, adjacent to the area in dispute, and it chose that section as the site for a central camp and as the place for its first prospect well. The construction of this camp was begun in December, 1908, or January, 1909; the prospect well was begun on January 9, 1909, and on June 16, 1909, developed an enormous flow of gas. Increased activity resulted. By the date of the first withdrawal order, eight hundred thousand feet of lumber had been hauled to and delivered upon those locations, there to be used in the construction of drilling rigs, cabins and other improvements; five drilling rigs had been erected upon five of the locations, and material for rig-patterns had been placed upon each of the remaining locations.

Because of the desert character of the country a water supply had to be developed. By September 27, 1909, 8,300 feet of water pipe had been laid across section 10 to the highland on section 14. It is claimed by the Company that three 5,000-barrel water tanks had been ordered, six miles of four inch water pipe, steel for oil tanks, rig irons and drills. The dates of delivery of this material, considering the rush of orders and the congestion of transportation facilities incident to the great activity in the field at this time, corroborate the claim that it was ordered prior to the first withdrawal, and the Government produced no testimony or evidence showing that the material, supplies and machinery were not ordered when and as claimed by the Company.

Altogether, the evidence clearly shows that by the date of the first withdrawal the Company had expended over \$100,000 in work, supplies and material adapted to and designed for the development of the locations involved, as a group or unit. And all of the work performed by the Company was of a character described as "purposeful" by the Director of the Geological Survey, who visited the property in 1910—the year succeeding the first withdrawal.

In my opinion the Company acted in good faith, proceeded with the work of developing the entire group of claims in a practical, miner-like, economical and businesslike way, and at the date of withdrawal was actually engaged in the diligent prosecution of work leading to discovery.

And this good faith and diligence were continued until and after the withdrawal of December 13, 1912, as is shown by the fact that by February, 1913—less than two months after the inclusion of these lands in Naval Petroleum Reserve No. 2—the Company, at a cost of upwards of \$1,000,000, had brought into existence upon these loca-

tions forty miles of high class roads; a complete water supply and distributing system for all the claims, with pumping plants at Buena Vista Lake; a complete gas distributing system, consisting of some twenty miles of pipe line, for power, heating and lighting purposes; a telephone system about thirty miles in extent; and more than seventeen producing oil wells.

In view of the facts thus briefly stated—borne out and supported as they are throughout the voluminous record herein—were the case before me as an original proposition, free of a complication to be presently mentioned, I should be inclined to hold as the Commissioner of the General Land Office held on February 11, 1919, and as Secretary Lane, in the letter of February 9, 1920, *supra*, stated he would hold—that the Honolulu Consolidated Oil Company is, as a matter of law and right, entitled to patents to the thirteen claims outside of section 6.

But in its present condition the case is not free of other complications. In 1920 the 66th Congress changed the policy of the Government with respect to oil and gas lands by enacting the Oil Land Leasing Law (act of February 25, 1920, Public No. 146, 41 Stat., 437), which substituted for the placer mining laws, in so far as they applied to oil and gas lands of the United States, the issuance of prospecting permits in unexplored territory, and of leases in proven territory. The history of and reasons for the enactment of this law are well known. The plight of citizens who had in good faith located lands believed to contain oil and gas, and who, because of intervening withdrawals, were unable to secure patents under the placer mining laws, was fully presented to Congress during its consideration of the leasing measure, and, as a result, when enacted the act contained several remedial sections. One of these (section 18) provided in substance that upon relinquishment to the United States, filed in the General Land Office within six months after the approval of the act, by those claiming under the placer mining laws, of the right, title and interest claimed and possessed prior to July 3, 1910, and continuously since, to any oil or gas-bearing land, embraced in the Executive order of withdrawal issued September 27, 1909, upon which there had been drilled one or more wells to discovery, they, upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced, should be entitled to a lease from the United States for a period of twenty years at a royalty of not less than 12½ per centum of all the oil or gas produced. As to lands in Naval Reserves, the second proviso to said section 18 stipulated that producing wells thereon only shall be leased, together with an area of land sufficient for the operation thereof. The third proviso to said section authorizes

the President, in his discretion, "to lease the remainder or any part of any such claim upon which such wells have been drilled," and provides that "in the event of such leasing said claimant or his successor shall have a preference right to such lease."

The legislative history of the attempt, finally successful, to secure the passage of an oil-leasing act, shows that at one time the proposed measure contained a provision under which applicants or claimants, situated as was the Honolulu Consolidated Oil Company, would have been permitted to prosecute their claims for patents to a final conclusion, and in the event patents were denied, thereafter would have been allowed six months to apply for a lease under the remedial provisions of the measure. But that provision was stricken out and, as finally enacted, the law expressly requires such claimants to file relinquishments of their mining claims and apply for a lease or leases within six months from the date of the act in any event—that is to say, on or before August 25, 1920.

Holding in mind the history and provisions of the oil leasing law, it is now pertinent to inquire what action the Honolulu Consolidated Oil Company took after the decision of my predecessor on June 17, 1920, denying the application for patents upon all of the locations. The Company had before it two possible courses: that of holding on to its rights to the lands in question and continuing to pursue its patents either in this Department or in the courts, and that of applying for leases under the 18th section of the leasing law. At this juncture the Company took both of these courses: as already stated, it took the necessary formal and regular steps in Equity Suit B-46, pending in the United States District Court for the Southern District of California, to enable it to litigate through the courts the question of the validity and correctness of the decision of June 17, 1920, and, within the six months' period limited in the Oil Leasing Act, it also regularly filed in this Department its application for a lease to twenty-four alleged producing wells upon the locations here involved, and, likewise, supplementary applications for permission to drill additional wells, and for leases "to the remainder of the claims upon which the existing wells are located, or such portions thereof as the President, in his discretion, may designate." Thus, at the present time, the Company is pressing its claims in three different ways and in two different forums: in Equity Suit B-46, in the Southern District of California, it is seeking to overthrow the departmental decision of June 17, 1920, on the grounds of invalidity and incorrectness, and thereby to obtain title to these lands by judicial decree; and in this Department it is asking that the said decision of June 17, 1920, be vacated, as invalid and erroneous, and that patents be issued, or, in the alternative, for such action or relief as may seem meet, equitable and appropriate; and at the same

time its applications for leases, regularly filed prior to August 25, 1920, are still pending. At the time of filing these applications the Company also filed its quit-claim deeds, duly executed and acknowledged, reciting that it had filed applications for oil and gas leases under the provisions of the act of February 25, 1920, and granting, remising and forever quitclaiming to the United States "all the right, title and interest claimed or held by the grantor in and to" the lands here in question. Protest having been filed on behalf of the Navy against the issuance of the leases as applied for, Secretary Payne, on December 23, 1920, after consideration of the matter, dismissed the protest and authorized the granting of leases on fifteen producing oil wells upon the claims involved, and postponed action as to the remaining nine then producing, pending the submission of further evidence, but did not authorize leases for additional wells or for the remainder of the claims. The leases authorized have not yet issued.

The pendency in two different forums of the proceedings above enumerated gives rise to a situation of some complexity. But notwithstanding my inclination to hold, were the case before me in the condition it was in prior to the filing of the applications for leases, that the decisions and conclusion of Commissioner Tallman and Secretary Lane were right and to order accordingly, nevertheless because of the filing by the Company of applications for leases and quit-claim deeds in consideration of a lease or leases as provided for in the said leasing act of February 25, 1920, I am constrained to hold that, so far as this Department is concerned, the Company had elected prior to the filing of this present petition to accept the benefits offered by the leasing act. To hold otherwise would be to hold, in effect, that the Company might in this Department concurrently seek patents or leases, while, in my opinion Congress intended (though the point has not yet been judicially decided) that a claimant should either pursue patents under the placer mining laws or leases under the Oil Land Leasing Act, but not both concurrently. It results, therefore, that so much of the petition before me as prays for the issuance of patents under the placer mining laws is denied.

There remains for consideration the relief to be granted herein, other than patents, which, for the reasons stated, are denied.

It appears from the record herein that William Matson and the Honolulu Consolidated Oil Company pioneered the Buena Vista field at a time when that region was apparently worthless for any purpose; that by the exercise of high good faith and proper diligence, and though ominously threatened upon occasion with failure and consequent financial loss of large magnitude, they created and gave value to this property by discovering and developing its oil producing possibilities at the cost of great outlay in time, effort

and money; and that, without fault on its part, the Company has been involved almost continuously since its organization in litigation, either in this Department or in the courts, in order to preserve at least some part of what it had honestly and in good faith—as has been found by both of my predecessors—created. And what it has done in developing this property is shown in part by the facts set out earlier in this opinion. Aside, therefore, from the legal rights which I believe the Company to have possessed, its good faith, its diligence, its large expenditures upon and for the benefit of this property, and the unique history of the case in this Department constitute equitable considerations which compel the conclusion that, in simple justice, it is entitled to a lease or leases not only to producing wells but also to the seventeen locations or claims described in the first paragraph of this decision. Though it is neither necessary to this decision nor properly within my province to attempt to decide the suit now pending in the Southern District of California, it is properly incumbent upon me to bear in mind the delays necessarily incident to the further prosecution of that suit and the uncertainty of the outcome thereof in the event the Company should see fit to press it to a conclusion. These things, together with the equitable considerations already mentioned, and the desirability of ending, if possible, this apparently interminable controversy, make such a case as in my opinion requires not only that preferential leases or well drilling permits be granted to the remainder of all the claims but also that the royalties to be charged therefor on the thirteen claims clearlisted by the Commissioner in his decision of February 11, 1919, shall not exceed the minimum prescribed by Congress in the said leasing act of February 25, 1920, *supra*. As to the four claims in section 6, with respect to which the good faith and equities of the Company are equally strong, but which, because of irregularities of the original locator, were held by the Commissioner not to warrant the issuance of patents, the Company is entitled to preferential area leases or well permits and the Government to a royalty of 12½ per centum minimum to 25 per centum maximum, dependent upon the amount and quality of the oil produced therefrom. As to gas which may be produced from the land, the royalties will be identical with those on the oil wells and claims.

Accordingly, pursuant to section 18 of the act of February 25, 1920, *supra*, leases are hereby authorized upon all producing wells upon said claims at the royalties stated. As to the remaining lands within the locations, the application of the Company for leases thereof is approved, subject to the approval of the President and, the President approving, leases will be authorized in accordance herewith.

The issuance of these leases will, if they are accepted by the Honolulu Company, dispose of the litigation affecting the title to these lands now pending in California, will retain the fee thereof in the Government and will finally conclude this case.

ESTATE OF CHARLES E. LADD (ON REHEARING).

Decided November 18, 1921.

OIL AND GAS LANDS—APPLICANT—LEASE—ACTS OF AUGUST 25, 1914, AND FEBRUARY 25, 1920.

The granting of an oil and gas lease under section 18 of the act of February 25, 1920, is a matter wholly independent of any contract that may have been entered into pursuant to the act of August 25, 1914, between the Government and the lease applicant or his predecessor in interest with respect to the land, but controversies giving rise to such contracts, as well as suits, must be settled and adjusted in harmony with the provisions of that section.

OIL AND GAS LANDS—LEASE—RELINQUISHMENT—PAYMENT—ROYALTY—ACT OF FEBRUARY 25, 1920—STATUTES.

Neither section 18 of the act of February 25, 1920, which provides that under certain stated conditions a claimant of oil and gas bearing lands may be granted a lease, nor any other provision of the leasing act authorizes either expressly or by implication the collection of payment of royalty on oil and gas produced by the lease applicant from any land other than that in the relinquished area.

OIL AND GAS LANDS—LEASE—PAYMENT—ROYALTY—ACT OF FEBRUARY 25, 1920.

Upon the division of a tract of oil and gas bearing land as the result of the settlement of a controversy involving the question of title, whereunder the claimant receives a patent for a portion of the land and is granted the right to acquire a lease for the remainder under section 18 of the act of February 25, 1920, upon fulfillment of the conditions set forth in that section, the Government is entitled to receive payment of only an amount equal to one-eighth of the value of the oil or gas produced from the relinquished area, notwithstanding the fact that a contract to a different effect had previously been entered into with respect to the distribution of proceeds impounded under an operating agreement.

FINNEY, *First Assistant Secretary:*

On October 23, 1912, Charles E. Ladd filed application 03820, for patent to the Portland Oil Placer Mining Claim embracing the SE. $\frac{1}{4}$, Sec. 5, T. 32 S., R. 23 E., M. D. M., Visalia land district, California, and on February 23, 1916, filed an amended application based upon the earlier Blowout Placer Mining Claim covering the same land, alleged to have been located August 21, 1899, by eight persons and conveyed to the applicant. The tract, it appears, was included in the temporary petroleum withdrawal order of September 27, 1909, and in Petroleum Reserve No. 2, created by the Executive order of July 2, 1910, under the provisions of the act of June 25, 1910 (36 Stat., 847).

After proceedings not necessary to be here detailed, the Commissioner of the General Land Office, by decision of June 12, 1920, found and held that three of the alleged locators of the said Blowout claim had no material interest therein at any time but that there were a sufficient number of *bona fide* locators of said claim to render the same valid to the extent of 100 acres. The application was, therefore, held for rejection as to 60 acres, and the applicant afforded thirty days within which, from the area included in his application, to select, in contiguous tracts of not more than 10 acres each, and not exceeding in the aggregate 100 acres, the land with respect to which he would proceed to entry and patent. The applicant having died, the executors of his estate, on August 17, 1920, filed an election to retain in the application the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, of said Sec. 5, containing 100 acres, and on October 14, 1920, entry was allowed as to said last described area and patent was issued thereon August 15, 1921.

Pending action on the patent application and on June 5, 1915, the applicant entered into a contract with the Secretary of the Interior, under the provisions of the act of August 25, 1914 (38 Stat., 708), which contract provided for the operation of the property included in the application and for the impounding of one-eighth of the proceeds from all oil taken from the entire quarter section after the date of the contract. By section 8 of the contract it was provided that in case a portion of the land should be patented to the applicant and patent denied for the remainder, the escrow deposits and accumulated interest thereon should be paid to the applicant and to the Treasury of the United States in such proportion as the patented area should bear to the area for which patent should be denied.

On August 17, 1920, in connection with their election to retain in Ladd's patent application the area last hereinabove described, the said executors of Ladd's estate filed application 09265 under section 18 of the act of February 25, 1920 (41 Stat., 437), for a lease to the W. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, said Sec. 5, comprising the 60 acres eliminated from the patent application. The lease application was based upon the said Blowout mining location and among other things alleged that Charles E. Ladd and the applicants, as the legal representatives of his estate and his predecessors in interest, had been occupants and claimants of the land under said location ever since August 21, 1899; that 8 wells were drilled upon said claim, 5 of which were on the area now patented, and 3 upon the 60 acres covered by the lease application; that the 3 wells last mentioned, which are designated as wells numbers 5, 6 and 8 were completed respectively in July, 1912, March, 1913, and February, 1917, at a total cost of \$89,078.16. In a supplemental showing it is made to appear

that there was sold from said 3 wells, 115,891 barrels of oil from which were realized the sum of \$84,030.49. It was further alleged in the application that under the agreement of June 5, 1915, hereinabove referred to, one-eighth of the total proceeds of the production of oil subsequent to the date of the agreement from all the wells situated on the entire SE. $\frac{1}{4}$, Sec. 5, had been impounded with a certain national bank in San Francisco, and that the total amount so impounded was in excess of \$50,000; that the applicants acknowledge that the United States is the owner of and entitled to retain out of said impounded funds an amount equal to one-eighth of the value at the time of production of oil or gas produced from said wells numbers 5, 6 and 8, prior to the date of the application, and that the applicants agree to pay to the United States from said impounded funds that proportion only of the said production from said wells.

In connection with the application the claimants filed their relinquishment and conveyance to the United States of all the interest of the estate of Ladd in said land.

Upon considering the lease application the Commissioner of the General Land Office by decision of November 8, 1920, after reciting the facts above set forth found and held that—

It is evident from the above that at the time this operating agreement was entered into the entire SE. $\frac{1}{4}$, said Sec. 5, was regarded as a unit and the interest of the locators or claimants regarded as an undivided interest, hence it was provided that in case a portion of the land should be patented and a portion not patented the impounded proceeds should be divided between the Government and the claimants, not on the basis of the production from the part patented and the part not patented, but rather on the basis of the relative area of such parts. Moreover, the interest acquired by each locator in the location of an association mining claim is a joint and undivided interest in the whole; no particular 20-acre tract belongs to each of the eight locators; likewise, the five-eighths interest to which it was held the claimants were entitled was an undivided interest in the whole; the Government might well have stopped there had it seen fit as a co-owner with the applicants to the extent of a three-eighths undivided interest; but that was hardly practicable, the division of the land and separation of interest being more desirable; hence the Government gave the claimants the privilege of selecting the portion of the area of the whole claim which should be patented. But that does not operate to fix the Government's interest in the proceeds of production from the whole quarter section *prior* to the time the division was made at the production made from that part of the land which the claimants saw fit not to take, as, naturally, they took the part on which there were the more producing wells. Had no leasing act been passed, the Government would clearly have been entitled to three-eighths of the whole amount of money impounded. Now that the leasing act has been passed, it gives the claimants the right to a future lease on the payment of one-eighth of past production. This one-eighth in this case is, therefore, one-eighth of three eighths ($\frac{3}{64}$) of the value of the entire production of the entire quarter section.

He accordingly directed that the claimants be advised that they would be allowed thirty days within which to furnish a complete and detailed statement of the entire production of oil from the said SE. $\frac{1}{4}$, Sec. 5, together with a statement of the value of such oil at the time of production, and to pay into the local office such amount as with the sum already tendered would equal $\frac{3}{64}$ of the value of the production from the entire quarter section to August 17, 1920, provided that if sufficient funds remained in escrow under the operating agreement, an additional tender might be made in lieu of such payment; and that in default the lease application would be rejected.

On appeal from that action the Department by an unreported decision of February 3, 1921, affirmed the same. The case is again before the Department on a motion for rehearing filed by the lease claimants.

Upon a careful reconsideration of the case the Department is of opinion that the decision of the Commissioner was not in accord with the provisions of section 18 of the leasing act under which the application for lease was filed.

The said section reads in part as follows:

That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the preexisting placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than $12\frac{1}{2}$ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost.

The terms "such land" and "thereon" used in the provisions above quoted, clearly refer exclusively to land for which a lease is sought thereunder and required by the said provisions to be relinquished as a condition precedent to a lease. The section, therefore, must be held to authorize the granting of a lease thereunder to a relinquished tract for which a lease is sought, upon the payment as royalty to the United States of an amount equal to the value of one-eighth of all oil or gas with certain prescribed exceptions, produced from the relinquished area, and the fulfillment of other requirements enumerated in the section. There is no other provision in the leasing

act that either expressly or by implication requires the payment of royalty on oil or gas produced from any land other than that relinquished pursuant to the provisions of said section 18 as a basis for a lease under that section.

Moreover, by the fourth paragraph of said section 18 it is provided that—

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the act entitled "An Act to amend an Act entitled 'An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto.

This provision, contrary to the holding of the Commissioner, indicates unmistakably that the granting of a lease under section 18 was intended by the act to be made a matter wholly independent of any contract that might have been entered into by the lease applicant or his predecessor or predecessors in interest with respect to the land, under the provisions of the act of August 25, 1914. It does, however, contemplate that controversies giving rise to such contracts, shall, as well as suits, be settled and adjusted in harmony with the provisions of section 18 of the leasing act and that moneys impounded pursuant to such contracts shall be paid in accordance with settlements and adjustments so made.

The decision of the Department complained of is accordingly recalled and vacated, the decision of the Commissioner herein reversed, and, no other objection appearing, a lease to the land in question will be granted to the said estate of Charles E. Ladd, upon payment to the United States, out of the impounded funds above mentioned, or otherwise, of the prescribed royalty on the oil and gas produced from the land relinquished. Upon the delivery and acceptance of the lease appropriate steps will be taken looking to the payment to the Ladd estate of so much of the impounded funds as may then remain in the hands of the depository.

YRIBAR v. SHELINE (ON PETITION).

Decided November 18, 1921.

SOLDIERS' ADDITIONAL—RELINQUISHMENT—LAND DEPARTMENT—STATUTES.

An entry canceled upon a ruling of the Land Department holding that it was invalid because erroneously allowed, although by a subsequent interpretation of the law entries of that character were held valid, does not constitute a good base for an additional right under section 2306, Revised Statutes,

where, after cancellation, the entryman impliedly acquiesced in such action by the filing of a formal relinquishment, thereby being restored to his full homestead right.

SOLDIERS' ADDITIONAL—MILITARY SERVICE—SECTION 2306—REVISED STATUTES.

The date of muster in, not enrollment, marks the commencement of military service in the army of the United States, for which credit may be accepted as a basis for a claim for an additional right under section 2306, Revised Statutes.

COURT DECISION CITED AS IN POINT—DEPARTMENTAL DECISIONS CITED AND FOLLOWED.

The case of Grimley (137 U. S., 147), cited as in point; the cases of Andrew Fergus (29 L. D., 536), John M. Underwood (31 L. D., 258), John S. Owen (32 L. D., 262), Julian D. Whitehurst (32 L. D., 356), Herbert C. Johnson (34 L. D., 291), Archibald Williams (44 L. D., 244), cited and followed.

FINNEY, *First Assistant Secretary*:

August 4, 1921, this Department on appeal affirmed the decision of the Commissioner of the General Land Office rejecting the application of Pilhef Yribar to enter the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 9, T. 11 S., R. 3 E., B. M., Boise, Idaho, in so far as it was based on the alleged soldiers' additional right of Joseph Sheline. A motion for rehearing was denied October 8, 1921, whereupon a petition for the exercise of supervisory authority of the Department was filed asking for reconsideration.

The application was presented under the provisions of section 2306, Revised Statutes, and is based on the military service of Joseph Sheline in the Civil War and on homestead entry made by him for 140.71 acres February 5, 1868, in the State of Michigan. An additional area of 19.29 acres is claimed but an area of only 13.35 acres thereof is tendered, in connection with portions of other rights, for the purpose of this application.

The Sheline claim for additional right was originally presented several years ago to the General Land Office as a basis for the application of Arthur McBride, but by the Commissioner's letter of September 5, 1901, it was rejected for the assigned reason that Sheline's entry did not constitute a good base for additional right, it having been in conflict with a withdrawal made for the benefit of the Grand Rapids and Indiana Railroad and, therefore, it was considered illegal and was canceled for that reason. It appears that the land embraced in said entry lies within the 20-mile indemnity limits of, and was withdrawn for the benefit of said railroad. However, at the time of the withdrawal the said tract was embraced in the entry of John G. Brown, which was later canceled on April 26, 1867. Under the rulings then in force, it was held that the railroad grant attached upon cancellation of the Brown entry, and Sheline's entry was accordingly canceled by the Commissioner's letter of October 1, 1869,

to the register and receiver for the reason that it was "improperly allowed by the register and receiver upon odd section withdrawn for the Grand Rapids and Indiana Railroad, as per instructions issued October 23, 1866, pursuant to the act of June 7, 1864."

Under date of March 17, 1870, the tract was selected by the said railroad company and the selection was approved June 13, 1870. Under date of November 16, 1871, Sheline formally relinquished his claim to the land embraced in his said entry. Sheline's entry was regarded as illegal under the view of the law which then obtained. It was so adjudged and canceled. The subsequent relinquishment may reasonably be considered as acquiescence in that adjudication. He was, therefore, restored to his full homestead right. The case of John S. Owen (32 L. D., 262) involved the homestead entry of Tharp, which was valid in part and invalid in part, and wherein Tharp had been offered opportunity to elect to retain the one tract subject to entry or to relinquish the entire entry with the privilege of making a new entry for 160 acres, but he took no action and the entry was finally canceled in its entirety for failure to make final proof within the statutory period. With reference to that state of facts the Department said (page 264):

If no such proposition had ever been made to Tharp, and if he, upon learning of the defect in his entry, had relinquished it *in toto* without stating his reason for doing so, such act on his part might reasonably have been construed as an election to take none of the land because he could not get it all, and in such a case he might have been allowed to make another entry for 160 acres, as though the first entry had not been made. In that case he would clearly not have been entitled to the benefit of section 2306 of the Revised Statutes, although as a matter of fact he had made one valid entry for less than 160 acres.

See also Andrew Fergus (29 L. D., 536), John M. Underwood (31 L. D., 258), and Archibald Williams (44 L. D., 244).

The fact that under a later construction of the law the entry of Sheline might have been considered valid did not operate to destroy any portion of his full homestead right which had been restored by the adjudication of invalidity and cancellation of his former entry and his relinquishment of claim thereto. This feature of the present case was not considered in the former decision by the Department on appeal nor on motion for rehearing. It is believed, however, that the facts in this case bring it within the rulings above cited and that Sheline's entry is not a valid base for an additional right.

The issue considered in the former decisions in the instant case relates to the military service of Sheline, and it is again pressed for consideration in the petition.

The point is that Sheline served only 87 days in the Army from the date of muster into the service, whereas the law requires a mini-

mun service of 90 days as a basis for the right claimed. It is contended that he actually served 91 days, and that he was recognized by the War Department as having been in the Army for that length of time and was paid for that period of service. A supplemental report from The Adjutant General of the War Department, dated March 15, 1921, is relied upon, wherein it is stated that Sheline was enrolled February 11, 1865, for one year, was mustered into service February 15, 1865, to date February 11, 1865, as a private in Company A, 152d Regiment, Indiana Infantry, and was mustered out as a private May 12, 1865, and that as viewed by The Adjutant General's office he is considered as having rendered actual military service in the Army of the United States during the entire period from February 11 to May 12, 1865.

There is nothing in the record to indicate that the condition under which this soldier was mustered into the service was peculiar to his case or different from the rules of general application. It has been the undeviating rule of this Department for about 20 years that in crediting military service in the Army as basis for claims under section 2306, Revised Statutes, no time prior to the date of muster into the service can be counted. This rule has become so well established that the Department has long since ceased to discuss it in the adjudication of such cases. But it is brought forth in this case and strongly pressed for consideration in view of the report from the War Department which indicates that the opinion of the present Adjutant General is not in harmony with that rule. But the Judge Advocate General, under date of October 6, 1900, rendered an opinion wherein it was said:

The muster-in is the ordinary means of receiving the volunteer soldier into the service, and when there is a muster-in it marks the date of the beginning of the service. The enrollment of a person for service in the volunteer army is only a proposal to enter such service, a declaration of his readiness to do so. He may or may not carry this out; he may refuse to carry it out, and he does not thereby become a deserter; he has a perfect right to do so . . . and until the person proposing to enlist presents himself to the mustering officer he has not met any one with whom he could enter into a contract which would bind him to the military service of the United States.

This question was thoroughly considered in the case of Julian D. Whitehurst (32 L. D., 356), where the stated rule was applied, citing the said opinion of the Judge Advocate General, also an opinion by the Attorney General, and a decision by Justice Gray while Chief Justice of the Supreme Court of Massachusetts, whose decision was cited with approval by Justice Brewer in the court's opinion in the case of Grimley (137 U. S., 147). The question was again fully discussed and the rule adhered to in the case of Herbert C. Johnson (34 L. D., 291).

No sufficient reason is now seen for disturbing this rule, supported as it is by these high authorities, and which has been consistently applied by the Department for so many years. This construction of the law has been well known to Congress, and proposed legislation has been under consideration for allowing credit in the adjudication of land claims for military service which was accorded recognition by payment therefor by the United States. But Congress has not seen fit to provide a different rule.

The petition is accordingly denied.

PERRY W. ANDREWS.

Decided November 22, 1921.

ABANDONED FORT LARAMIE WOOD RESERVATION—ACT OF MAY 31, 1902—PURCHASER—APPLICATION—STATUTES.

The qualification of a homesteader on the abandoned Fort Laramie Wood Reservation to purchase under the act of May 31, 1902, not exceeding one quarter section of pasture or grazing land within that reservation on the condition that the aggregate area of the lands previously entered together with the lands sought to be purchased shall not exceed 320 acres, is to be determined as of the date of the filing of the purchase application.

ABANDONED FORT LARAMIE WOOD RESERVATION—PURCHASER—APPLICATION—ADDITIONAL HOMESTEAD.

The right of an applicant, qualified at the date of the filing of his application, to perfect the purchase of pasture or grazing land within the abandoned Fort Laramie Wood Reservation under the act of May 31, 1902, is not vitiated by subsequently making an additional entry under section 3 of the enlarged homestead act, even though the applicant may have exceeded his rights by making the additional entry in acquiring more than 320 acres under the public land laws.

DEPARTMENTAL DECISIONS CITED, CONSTRUED AND DISTINGUISHED.

The cases of Marshall F. Hopper (41 L. D., 283), *Cate v. Northern Pacific Railway Company* (41 L. D., 316), cited, construed and distinguished.

FINNEY, *First Assistant Secretary*:

Perry W. Andrews has appealed from a decision of the Commissioner of the General Land Office dated April 30, 1921, denying him the right to perfect his application (013612) filed under the act of May 31, 1902 (32 Stat., 283), to purchase the E. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 22, T. 25 N., R. 71 W., 6th P. M., within the abandoned Fort Laramie Wood Reservation, Cheyenne, Wyoming, land district, on the ground that he was disqualified by reason of his previous acquisition of more than 160 acres of land under the homestead laws.

The record discloses that Andrews, prior to the filing of the above referred to application, made a homestead entry (011431) for 160 acres of land in section 27, same township; that subsequently to the filing of said application he made an additional entry (015826) under section 3 of the enlarged homestead act of February 19, 1909 (35 Stat., 639), for the balance of said section 22; that soon thereafter he submitted proof under his application to purchase, which the General Land Office found to be sufficient, but held suspended to await the submission of satisfactory final proof in support of his original homestead entry, when in the absence of any objections that might then exist, the applicant would be permitted to complete his purchase upon making the requisite payment.

On January 23, 1919, Andrews submitted final proof upon both his original entry and his additional entry and on July 16, 1919, the 320 acres described therein were patented to him.

On October 19, 1920, the local officers issued a final cash certificate upon the application to purchase, the purchase price having been paid.

In the decision appealed from the Commissioner construed the act of May 31, 1902, *supra*, and the departmental instructions issued pursuant thereto, with reference to the case at bar and held that inasmuch as the act itself specifically stated that the land sought to be purchased together with the land entered under the homestead laws could not exceed in the aggregate 320 acres, the applicant by making the additional entry had become disqualified to complete the purchase; that the act of February 19, 1909, *supra*, did not enlarge or change the right of purchase conferred by the act of 1902; and that the proof had been accepted conditionally. The case of Marshall F. Hopper (41 L. D., 283), was relied upon as in point.

In his appeal the appellant contends that the second proviso to the act of May 31, 1902, *supra*, contemplates that the applicant may perfect his purchase if he was entitled to make application for the land at the time that he filed it, and that the making of a subsequent entry under the enlarged homestead act neither abridged nor defeated that right.

There is only one point at issue in this case, that is whether or not the appellant became disqualified to perfect his purchase by reason of his action in subsequently making the additional entry under the enlarged homestead act.

The portions of the act of May 31, 1902, *supra*, that are relevant to the instant case are as follows:

That each person who has or may hereafter exercise the right of homestead entry on the * * * abandoned Fort Laramie Wood Reservation, to

which the homestead laws are hereby extended, in the State of Wyoming, and is residing on said reservations under the provisions and requirements of the homestead law, * * * shall upon proper proof of settlement, homestead, or other legal title upon said reservations, be entitled to the right to purchase, under such rules and regulations as the Secretary of the Interior may prescribe, at one dollar and twenty-five cents per acre, not exceeding one quarter section of the public lands on said reservations as pasture or grazing land not otherwise disposed of: * * * *And provided further*, That said purchase * * * shall not with the land heretofore entered by the applicant, exceed in the aggregate three hundred and twenty acres.

On September 8, 1902, instructions (unpublished) were issued by the Department, paragraph 2, subdivision (b) of which concluded as follows:

* * * and that the land sought to be purchased, with the land on which the applicant so exercised the right of homestead entry, or the right of purchase does not, in the aggregate, exceed 320 acres.

It was also specified in the instruction that if it be found upon examination of the application for the right to purchase, that the entryman has not submitted final proof on his original homestead, said application will be held to await the completion of the prior entry.

On January 29, 1912 (40 L. D., 392), the concluding portion of subdivision (b), paragraph 2 of the instructions of September 8, 1902, *supra*, was amended to read as follows:

* * * and that the land sought to be purchased with the land which the applicant has since August 30, 1890, entered or acquired under the agricultural land laws does not, in the aggregate, exceed 320 acres.

The right to purchase a tract of 160 acres of pasture or grazing land under the act of 1902, was made conditional upon the prior entry of a homestead under that act, and before the purchase could be perfected it was made necessary for the entryman to submit final proof upon his original entry. The second proviso to the act contained the inhibition that he must not possess land *theretofore* entered which, together with the land that he applied to purchase, exceeds in the aggregate 320 acres. The qualification of the applicant was fixed by the act as of the date of the filing of the application to purchase and nothing was said as to the effect that any subsequent change in the status of that qualification would have upon the right. It becomes necessary, therefore, to consider whether or not the subsequent acquisition of an additional tract of land, which together with the lands previously entered and applied for exceeds 320 acres, defeats the right to complete the purchase.

It was aptly said by the Commissioner in the decision appealed from that the act of February 19, 1909, neither enlarged nor changed

the provisions of the act of May 31, 1902. Furthermore, the Department stated in the case of Marshall F. Hopper, relied upon by the Commissioner as being in point, that the qualifications of an applicant to make entry under any of the public land laws are not affected by the enlarged homestead act. However, this Department considers that the conclusion reached in the Hopper case is not applicable to the issue involved in the case at bar. The former case held that one who had entered some three hundred acres of land under the enlarged homestead act was not entitled to make a desert land entry. Reference was made in that decision to the three hundred and twenty acre limitation contained in the act of August 30, 1890 (26 Stat., 371, 391). Conversely the Department held in *Cate v. Northern Pacific Railway Company* (41 L. D., 316), that one who had made a desert land entry for 160 acres was qualified to make an entry under the enlarged homestead act for 320 acres, since under the latter act one is entitled to acquire under the public land laws lands which, in the aggregate, do not exceed in area 480 acres. Subsequently the act of February 27, 1917 (39 Stat., 946), was enacted, authorizing the holder of 320 acres of land under the act of February 19, 1909, *supra*, to make a desert land entry for 160 acres.

From the foregoing presentment of the law and facts this Department concludes that at the time that the appellant filed his application to purchase the land in question, he was qualified to do so, and that his subsequent acquisition of 160 acres under section 3 of the act of February 19, 1909, does not vitiate his right to perfect that purchase. If Congress intended that the three hundred and twenty acre limitation prescribed by the act of August 30, 1890, was to limit the area of lands that could be acquired under the act of 1902, notwithstanding that after the enactment of the act of 1909, more than 320 acres could be acquired under the public land laws, nevertheless the perfection of the purchase here under consideration, together with the perfection of the entry previously made would not be a violation of the act of 1890. If the act of 1902 is to be strictly construed in conjunction with the act of 1890, then Andrews exceeded his rights under the public land laws when he made the additional entry under section 3 of the act of 1909. However, inasmuch as that entry is not now directly under consideration and has passed to patent it is not incumbent upon the Department to decide whether or not it was erroneously allowed.

Accordingly the decision of the Commissioner is reversed and the case is hereby remanded for appropriate action in harmony with the conclusion expressed herein.

WATSON v. BARNEY ET AL.*Decided November 26, 1921.***RECLAMATION—HOMESTEAD—ASSIGNMENT—TRANSFER—CONTEST.**

The departmental regulations relating to an assignment of a homestead entry, within a reclamation project, contemplate that such assignment shall be submitted to the General Land Office for its acceptance or denial and where a party chooses, with the view to effecting a transfer in derogation of law, to proceed contrary to the regulations, he must abide by the consequence of such attempted evasion when the transaction is brought to the attention of the Land Department by contest; and a breach of the law can not be excused on the ground that recognition of the transfer had not been sought.

RECLAMATION—HOMESTEAD—ASSIGNEE—MORTGAGE.

A homestead entry, within a reclamation project, upon which the ordinary requirements of the homestead laws have been completed, is a property subject to mortgage which can not be defeated by acts of the entryman or his assignee, and such entry can not be canceled upon contest in derogation of the right of the mortgagee to comply with the further provisions of the law looking to completion of title.

FINNEY, *First Assistant Secretary:*

T. H. Watson has appealed from the decision of May 12, 1921, by the Commissioner of the General Land Office rejecting his application to contest the reclamation homestead entry embracing the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ (Farm Unit A), Sec. 21, T. 1 N., R. 1 E., G. & S. R. M., Phoenix, Arizona, land district.

It appears that said tract is a portion of an entry made January 11, 1907, by Eugene F. Keesler, for the NE. $\frac{1}{4}$ of said section under the reclamation act, and upon which final proof of compliance with the ordinary provisions of the homestead law was submitted August 20, 1912, and accepted by the General Land Office January 25, 1913. The land was thereafter divided into four farm units and the tract here in question was transferred to George H. Barney by deed executed June 23, 1917. Upon proper showing of the qualifications of the transferee to hold the tract under the provisions of the reclamation law, the transfer was approved by the General Land Office on May 18, 1918. It is shown that Barney and wife under date of June 25, 1917, mortgaged said tract to the Phoenix Savings Bank and Trust Company to secure the payment of \$1,500.

December 4, 1920, T. H. Watson filed application to contest said entry alleging that Barney sold said tract to John Scharbauer, and that in pursuance of said sale Barney and wife, by deed dated January 10, 1918, conveyed the land to Y. L. Holmes, and that Holmes, by quit-claim deed, forthwith conveyed the tract to Scharbauer; that at all times since then Scharbauer has claimed, held and owned, or purported to own, the same. It was further alleged that Schar-

bauer was not qualified to take the land by assignment for the reason that he held water rights in excess of 160 acres under the reclamation law and also that he held at least one other farm unit. It was asserted that Holmes was a mere dummy used by Scharbauer for the fraudulent purpose of acquiring land in violation of the restrictions of the reclamation laws.

Barney answered, denying that he sold to Scharbauer and insisting that he sold to Holmes. Holmes, in his answer, denied that Scharbauer had any interest in the land except the amount of \$2,000 represented by a mortgage which Holmes had given to him to secure that amount borrowed to complete the purchase from Barney. Scharbauer answered, corroborating the statements of Holmes, saying that he loaned the latter \$2,000 to complete the payment of \$4,000 to Barney, and took a mortgage on the land, which mortgage is still a valid subsisting lien on the land, and that he had no other interest in the tract. He admitted that he was at the time of the transaction the owner of at least one farm unit under the reclamation law, upon which payment in full of the reclamation charges had not been made.

The Phoenix Savings Bank and Trust Company was served with notice of the contest but made no answer. It is not shown by the record whether or not its mortgage has been satisfied.

Counsel representing the defendants moved to dismiss the contest on the ground that the allegations did not state a sufficient cause of action; also because they were not sufficiently specific. The local officers denied the motion, but that action was reversed by the Commissioner in his decision, which concluded as follows:

It is not charged that there has been any failure to comply with the requirements of law so as to affect the validity of the entry up to the time of the assignment to George H. Barney, and there is no charge against the validity of the assignment to him. It appears that he has conveyed, or attempted to convey, the land and that there have been other transfers, or attempted transfers, but no one has asked recognition of any assignment and on the records of your office George H. Barney is the claimant. Should the contestant be allowed to proceed and should he prove that the person claiming the land as transferee was not qualified to hold the farm unit by assignment, that would not cause the cancellation of the entry. There is no departmental decision directly on this point, but in the case of *Heinzman v. Letrodec's Heirs* (28 L. D., 497), the Department held that an assignment of a desert-land entry to one disqualified to acquire title under the desert-land law did not render the entry fraudulent, but left the right thereto in the entryman. It is true that said case was overruled in the case of *Bone v. Rockwood* (38 L. D., 253), but therein it was an *assignment recognized by the General Land Office* and the decision was based on that point.

This office is, therefore, of opinion that there is no sufficient cause of action stated and on that ground the application to contest is rejected, subject to the right of appeal to the Department within thirty days from notice.

The cases cited by the Commissioner did not involve entries of the class here under consideration, and they do not aptly represent the conditions in some important particulars appertaining to the instant case.

This entry has been completed so far as concerns the ordinary requirements of the homestead laws. No further personal connection with it is required of the original entryman. It represents a property subject to mortgage which can not be defeated by acts of the entryman or his assignee. The mortgagee thus becomes entitled to make good any default in the matter of payment of reclamation charges, and in case of purchase at foreclosure sale, such mortgagee—purchaser—may, if the land be not redeemed, make proof of compliance with the further requirements of the reclamation law and obtain title.

The general reclamation circular of May 18, 1916 (45 L. D., 385), provides, at page 396:

Relinquishment of a homestead or desert-land 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 a homestead entry or part thereof under the act of June 23, 1910 (36 Stat., 592); nor an assignment of a mortgaged desert-land entry where the records show the land to have been mortgaged, be recognized or permitted unless the assignment specifically refers to such mortgage and is made and accepted subject thereto.

Barney is not claiming any interest in the land. In fact, he disclaims all interest therein. This in effect eliminates him from the contest. Holmes is claiming as *bona fide* assignee, and Scharbauer is claiming an interest as *bona fide* mortgagee. If the contest allegations be established, the entry should be canceled, provided the interest of the Phoenix Savings Bank and Trust Company in the land, if any, be first satisfied. But if the mortgage to the latter institution still remains unsatisfied, the entry can not be canceled to the detriment of that claim. With this understanding, it is believed that a hearing should be allowed for determination of the facts and appropriate action thereon in harmony with the views herein stated.

The regulations contemplate that any assignment of such entries shall be submitted to the General Land Office for acceptance if found in all respects proper, or denial if not found to be in accordance with law. If parties choose to proceed without such official counsel and adjudication and undertake to effect such transfer in derogation of law, they must abide the consequence of their own wrong when such transaction is brought to the attention of the Land Department by contest. Under such circumstances a breach of the law can not be excused on the ground that recognition of the transfer had not been sought, because such excuse itself is based on an evasion of the regula-

tions which were appropriately designed to guard against unlawful transfers.

The decision appealed from is accordingly reversed and the case remanded for the action indicated.

MARSHALL v. WILEY.

Decided July 9, 1921.

MARRIAGE—HOMESTEAD—SETTLEMENT—ACTS OF APRIL 6, 1914, AND MARCH 1, 1921—STATUTES.

The amendatory act of March 1, 1921, which extended the provisions of the act of April 6, 1914, to permit homesteaders who intermarry to perfect under certain conditions settlement claims as well as entries of record at the time of marriage, is to be construed in connection with the adjudication of pending claims of homesteaders who intermarried prior to the enactment of the amendment as though it were incorporated in the original act.

CONTEST—ADVERSE CLAIM—STATUTES.

A contest does not become an adverse right or intervening interest unless and until it results in the cancellation of the entry, and prior to the final determination thereof the contestee is entitled to the remedial benefits of a statute enacted after the initiation of the contest.

GOODWIN, *Assistant Secretary*:

Sarah J. Wiley has appealed from a decision of the Commissioner of the General Land Office of December 23, 1920, holding her homestead entry Havre 036012 for cancellation and her additional application Glasgow 043642 for rejection.

The plat of township 32 N., R. 28 E., M. M., was approved January 31, 1916, and the land opened to entry December 5, following. The plat of township 32 N., R. 29 E., was approved January 31, 1916, and the land opened to entry November 27, following. On November 20, 1916, Sarah J. Wasson, now Wiley, filed in the Havre, Montana, land office her application to make second homestead entry 036012 for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$, Sec. 12, T. 32 N., R. 28 E., as joint application with Glasgow second homestead application No. 043642 for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ (lots 3 and 4), Sec. 7, T. 32 N., R. 29 E. Her application in the Havre land office was suspended because of conflict with homestead application 036013 of Sarah Marshall, formerly Thompson, for the same land. Both applicants claimed prior settlement rights and a hearing was had April 9, 1917, and testimony submitted upon consideration of which application 036013 was finally rejected and homestead application 036012 (being that of Sarah J. Wasson, now Wiley) was returned for allowance. This application was allowed to go of record June 22, 1918.

On November 20, 1916, Sarah J. Wasson, now Wiley, filed in the Glasgow, Montana, land office an application to make second homestead entry 043642 for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ (lots 3 and 4), Sec. 7, T. 32 N., R. 29 E., as joint application with Havre 036012, above referred to. Said application was suspended because of conflict with homestead application 041951 by Sarah Marshall, formerly Thompson, for the same land, both parties claiming prior settlement rights. A hearing was ordered to be had October 23, 1918. A hearing having been had in the Havre land office between these parties relative to their prior settlement rights to the land involved in that land district, and it having been decided June 18, 1918, that Sarah Wasson, now Wiley, had a prior right to that portion of her entry lying within the Havre land district, she filed in the Glasgow land office October 21, 1918, a petition for a writ of certiorari requesting that the hearing ordered by the Glasgow land office, to be had October 23, 1918, be vacated and the preference right of entry to the land in Sec. 7 "be established by reason of the testimony and evidence adduced at said hearing held at Havre, Montana, on the 9th day of April," 1917. The receiver of the Glasgow land office, on October 21, 1918, ordered that—

further proceedings herein be stayed and that hearing shall not be had until further ordered or until such time as the Commissioner of the General Land Office may direct proceedings herein.

On December 3, 1920, the receiver of the Glasgow land office advised the Commissioner of the General Land Office that on January 21, 1919, Earl R. Marshall had filed an application to contest homestead application 043642, and Havre 036012, made by Sarah Wiley, which was suspended because the hearing as to the prior settlement rights between the parties had not been disposed of as to the land lying within the Glasgow land office.

The affidavit of contest by Earl R. Marshall against the entry, Havre series 036012, and the application, Glasgow series 043642, was filed in the Havre land office on January 9, 1919, charging, in addition to the usual nonmilitary averment that—

Sarah J. Wasson, now Wiley, has wholly abandoned the said land; that she has been absent therefrom for more than six months last past; that the entrywoman is not entitled to the benefits of the act of April 6, 1914, relating to the intermarriage of homesteaders, for the reason that neither she nor her husband had complied with the provisions of the homestead law for at least one year prior to their marriage, and for the further reason that at the time of her marriage to Conrad S. Wiley the entrywoman did not have an entry upon the said land as required by the provisions of the said act of April 6, 1914, her marriage to Wiley occurring on January 2, 1918, and her entry not being allowed until June 22, 1918. That her said entry is illegal for the above stated reasons, and its allowance on June 22, 1918, is contrary to law.

Notices were issued and service thereof was had on the entryman and a hearing was had in Havre before the register and receiver on April 25, 1919. At this hearing it was established that contestant was married on January 2, 1918, and since that time had resided according to the election of her husband on his homestead entry. In the year 1918 twenty-five acres were cultivated by the husband upon her claim.

That one question was to be determined in this case appears to have been well settled in the minds of both parties. The testimony is almost wholly applied to the acts of contestee during the year prior to her marriage—the year 1917. Considerable testimony is given as to the character of the homestead house or shack. The witnesses for contestant say it was not habitable and those for contestee say it was. However, it is not material as to the character of the house only as it might indicate good or bad faith in connection with the other acts of the entryman. Contestant's witnesses say the cabin was not roofed in 1917 and contestee's witnesses say it had a rubberoid roof over the boards. There is a like disagreement in the testimony regarding the stovepipe or roof jack. Contestee says the roof jack blew off after she left in the fall of 1917, and contestant says it blew off in the winter of 1916. Contestee and her witnesses say the house was amply furnished and contestant and some of his witnesses say it was unfurnished. There is some testimony that she cooked for her brother a portion of the time during 1917 and slept in the house upon her own claim, and one of the witnesses who could see her house saw a light there frequently in the evening from September to November, 1917.

There was a former contest between the contestee and the wife of the contestant involving the question of prior settlement and right of entry for this identical land. The contest was settled as to the land in the Havre land district and the right of entry accorded to the contestee. It appears that the other claimant continued to reside on another portion of the entry and that since her marriage to the contestant they had made their joint home on the claim of the contestee. There is a possibility that an honest mistake could have been made as to time and that some of the witnesses referred to 1918 instead of 1917, but the record furnishes testimony which clashes directly, except that in some instances the contradictions are negative in character. In view of the one fact that statements by the witnesses for contestee are positive as to the house-furnishings and as to the residence of contestee and those of contestant's witnesses lack in a great degree that positive status, the Department finds that the contestant's charge that the entrywoman had failed to comply with the homestead laws for at least one year prior to her

marriage, and the further charge of abandonment, were not established by a preponderance of the evidence.

In his decision the Commissioner of the General Land Office says:

However, the entry in question was not allowed to go of record until June 22, 1918, and the act of April 6, 1914, specifically provides "that the provisions hereof shall apply to existing entries."

This decision was based upon paragraph 2 of Circular No. 330, approved April 8, 1919 (47 L. D., 116), being the regulations governing cases arising under the act of April 6, 1914 (38 Stat., 312), which says in part—

Where the parties, or either of them, are entitled to credit for such compliance prior to entry, that time may be counted in making up the period of one year, and it follows that neither of the entries need be one year old at the time of marriage.

That departmental interpretation and regulation has, since the Commissioner rendered his decision in this case, been given a broader and larger interpretation by the act of Congress, approved March 1, 1921 (41 Stat., 1193), which amended the act of April 6, 1914, *supra*, by adding the following:

"*Provided further*, That in the administration of this Act the terms 'entryman' and 'entrywoman' shall be construed to include bona fide settlers who have complied with the homestead law for at least one year next preceding such marriage."

A contestant gains no right by the initiation of a contest. The final reward of a successful contest is the preference right of entry. The contest does not become an adverse right or intervening interest unless and until it results in the cancellation of the entry. The application of the interpretative amendment of March 1, 1921, *supra*, is not a retroactive application of the same but an application which can not be denied by the Department to the holder of a valid existing entry.

The decision appealed from is reversed.

MARSHALL v. WILEY.

Motion for rehearing of departmental decision of July 9, 1921 (48 L. D., 328), denied by First Assistant Secretary Finney, November 29, 1921.

SHERIDAN-WYOMING COAL COMPANY AND HOTCHKISS COAL COMPANY.

Decided December 3, 1921.

COAL LANDS—TRANSFEREE—OCCUPANCY—PREFERENCE RIGHT—LEASE—ACT OF FEBRUARY 25, 1920.

One who, on and prior to the approval of the act of February 25, 1920, was, as transferee, in good faith occupying and claiming public coal land theretofore improved by him, for which his transferor had initiated a claim under the preexisting coal land laws, without, however, having taken the requisite steps to perfect the same, is entitled to equitable consideration in the award of a lease under the first proviso to section 2 of that act.

COAL LANDS—OCCUPANCY—LEASE—PREFERENCE RIGHT.

Where at the date of the enactment of the act of February 25, 1920, there were no surface or subsurface improvements of a mining character upon a tract of public coal land tending in any substantial degree to the development of the coal deposits thereunder, or essential to such development sufficient to establish an assertion of constructive occupancy, a claim of preference right to a lease of that tract must be rejected.

COAL LANDS—LEASE—PREFERENCE RIGHT—ACT OF FEBRUARY 25, 1920, SECTION 2.

The purchase of coal land under the belief that an adjoining tract of public coal land, control of which is alleged to be essential to the continued practical operation of the purchased property, could be secured, is not a basis for the assertion of such an equitable right as may be recognized in awarding a preferential lease under the proviso to section 2 of the act of February 25, 1920.

FINNEY, *First Assistant Secretary:*

This is an appeal by the Sheridan-Wyoming Coal Company from the decision of the Commissioner of the General Land Office of May 6, 1921, dismissing its petition for equitable consideration and for a so-called preferential lease under section 2 of the act of February 25, 1920 (41 Stat., 437), for the coal deposits underlying the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, T. 57 N., R. 84 W., 6th P. M., Buffalo land district, Wyoming.

The area described was patented May 17, 1912, to John Birchby and the patent contained a reservation to the United States of the coal deposits therein and the right to mine and remove the same. By deed dated October 17, 1917, Birchby conveyed the land to the Amalgamated Development Corporation, subject to the mineral reservations contained in the patent.

On August 14, 1919, the Amalgamated Development Corporation filed declaratory statement 015517, which, as later amended, described the above mentioned area alleging possession of the land from and after June 15, 1919, and the opening of a mine of coal thereon June 15, 1919, at a cost of \$3,000. No application to purchase, however, was ever filed by said company.

On December 29, 1920, the Hotchkiss Coal Company, a corporation, filed petition 018913, under the provisions of section 2 of the leasing act for the division and classification of the land as a leasing unit and for a lease thereof. It is alleged in the petition and supplemental petitions and affidavits filed on behalf of the company, that the land described is joined on the north, west and south by lands owned by the Sheridan-Wyoming Coal Company and on the east by a 40-acre tract (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22), owned by the petitioner; that said surrounding lands are covered by outstanding patents made without reservation of the coal deposits therein to the United States; that the land in question is underlaid by three workable beds of coal known, respectively, commencing with the uppermost as the Dietz No. 2, Monarch and Carney; that the petitioner is operating a mine on the said NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22, owned by it, the said mine consisting of two parallel drift openings run on the uppermost or Dietz No. 2 bed above mentioned, with cross entries; that one of said openings has been driven in the direction of the land in question and to a point within 100 feet from the east line thereof, and that the land can be reached by means of and through said drift opening; that if a lease be granted to the petitioner the said drift opening will be immediately driven to the land and the coal in the upper bed mined and worked without delay and that upon the exhaustion of the coal in that bed underlying the land, the two lower beds will be successively mined and removed; that the petitioner has upon his own land mining machinery and equipment of the value of \$40,000 and that it has an established market for all the coal that it can mine; that the petitioner's forty is the best, if not the only, outlet for the coal contained in the land.

The Geological Survey, upon a reference to it of the above mentioned petition, recommended that the land be offered for lease at a royalty charge not less than ten cents per ton, and the petitioner expressed its willingness to pay that royalty. It is urged in behalf of the petitioner that unless a lease for the land described can be secured within a reasonable time the petitioner, having practically exhausted its present workings, will have to remove its equipment.

On April 7, 1921, the Sheridan-Wyoming Coal Company filed in the General Land Office a petition for equitable consideration and for a preferential lease for the above described land under the first proviso to section 2 of the act alleging that the Amalgamated Development Corporation, which will be hereinafter referred to as the "Amalgamated," on August 14, 1919, having opened a mine of coal on the land duly filed a coal declaratory statement therefor; that at the time of the filing of the said declaratory statement the Amalgamated was the owner in fee of the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, said Sec. 21, adjoining the land in question; that the

development of a mine upon the land in question was accomplished through an opening on the land owned by the Amalgamated, which opening was followed to and into the premises in question, thereby disclosing the coal; that in this opening the Amalgamated expended more than \$3,000 and mined and disposed of large quantities of coal from the land; that in December, 1919, certain persons whose names are not given, desirous of acquiring the coal properties in the neighborhood of the land in question bargained with the Amalgamated for the purchase of all its properties, including the lands in question, and as a result an agreement for the sale of all of the properties of the Amalgamated was concluded and carried into effect January 4, 1920; that said agreement was afterwards transferred to the then newly created Sheridan-Wyoming Coal Company, which will be hereinafter referred to as the "Sheridan-Wyoming," and that since its incorporation (elsewhere in the record alleged to have been in January, 1920), the said company has had exclusive possession and control of all said properties; that the Sheridan-Wyoming also acquired, among other properties, the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, of said Sec. 21, from the Sheridan Coal Company; that at the time of the acquirement of the said properties, a definite arrangement was concluded with the Amalgamated, whereby it was agreed that in the event the title to the lands here in question should not be perfected by the Amalgamated, it would be available to the said Sheridan-Wyoming; that the leasing act prevented the Sheridan-Wyoming from asserting title to the land under the coal land laws after the passage of the act, and that because of questions affecting only the contracting parties, and then existing financial conditions, it was decided to abandon the idea of making title to the land through the Amalgamated under its previous filings and to look to the United States for a preferential lease of the premises in the name of the Sheridan-Wyoming, because of its equitable position with respect to the property; that in the development of the mine upon the premises large sums of money were expended both by the Amalgamated and the Sheridan-Wyoming; that in such development large quantities of coal had been actually mined from the premises; that in the Sheridan-Wyoming's development of the surrounding property, to which it holds title, the land here in question forms a connecting link, and that so essential is the control of the land in question by the Sheridan-Wyoming, that the possibility of its elimination from the company's control, had it occurred at the beginning of the negotiations, would have caused an abandonment of the project.

In a supplemental affidavit and a plat accompanying the same it is shown that the development operations on the land by the Sheridan-Wyoming consist of an opening driven into the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$,

Sec. 21, from that company's mine situated on the land adjoining said forty on the north, and that from said opening approximately $2\frac{1}{2}$ acres of coal from one bed has been removed by the Amalgamated and the Sheridan-Wyoming.

It is alleged by the Hotchkiss Company, and the showing made by the Sheridan-Wyoming appears to support the allegation, that the coal bed mined by the Sheridan-Wyoming to the north of the land in question and upon which the opening on the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, has been made is the lower of the three beds above named, or the Carney bed.

Upon consideration of the petition of the Sheridan-Wyoming the Commissioner as above stated, dismissed the same, for reasons not necessary to be here recited.

The said section 2 of the leasing act under the first proviso to which the Sheridan-Wyoming claims to be entitled to equitable consideration, and to a preferential right to a lease, reads in part as follows:

That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: *Provided*, That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants.

The showing submitted on behalf of the Sheridan-Wyoming clearly establishes the improvement from a coal-mining standpoint of the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, upon which the mine hereinabove referred to is situated, and the occupancy of and claim to the forty by the company prior to the date of the leasing act. The Hotchkiss Company, while apparently conceding such improvement, occupancy, and claim, challenges the good faith of the Sheridan-Wyoming on the asserted ground that such extensive operations as those shown to have been conducted on the land were unnecessary in view of the well-known existence of the Carney coal bed on the property, and the further fact that no part of the proceeds of the coal removed from the land has ever been paid to the Government. The Department, however, is not persuaded that the good faith of the Sheridan-Wyoming is impeached by the facts recited on behalf of the Hotch-

kiss Company. On the other hand, the Department is of opinion that so far as anything to the contrary is shown, the Sheridan-Wyoming was, prior to the approval of the leasing act, in good faith occupying and claiming the said forty which had theretofore been improved, and that it thereby became possessed of such equitable rights with respect to the forty as may be recognized as entitling it to a lease thereto at a royalty at the rate recommended by the Geological Survey, provided it shall pay to the Government a royalty at the same rate on all the coal already removed from the land.

At the date of the leasing act there appears to have been no surface or sub-surface improvements of a mining character within the limits of the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 21. While the Sheridan-Wyoming was then in possession of the improvements within the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of that section, which improvements appear to have been largely if not exclusively made by the Amalgamated in connection with its claim under the coal land laws to the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, as well as the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, they are not shown to have been at that time of such a nature or extent as to tend in any substantial degree to the development of the coal deposits underlying the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, or to have been essential to such development so as to warrant their occupancy to be regarded as a constructive occupancy by the Sheridan-Wyoming of the coal deposits underlying the said eighty. The Sheridan-Wyoming claims to have been at the date of the act, and doubtless was, in occupancy of the surface of the last described tract under a title from which the coal deposits in the land were reserved, but that was not of itself such an occupancy as is contemplated by the proviso to section 2 of the act, nor would it support a claim to the underlying reserved deposits. The company seeks also to be accorded equitable consideration with respect to the eighty on the ground that it purchased the land adjoining the tracts here in question on the north, west, and south in the belief that it would secure the right to operate said tracts and that the control of the area is essential to the practical operation by it of the land adjoining it on the south. The act, however, makes no provision for the recognition of equitable rights on that ground. In short the Sheridan-Wyoming has not established any facts that would bring its claim for equitable consideration with respect to the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ within the terms of the said proviso, and for this reason it must be held that the Commissioner properly rejected the petition of the company in so far as it related to that tract.

Upon consideration of the showing made by the Hotchkiss Coal Company the Department is of opinion that it is not entitled to a preferential lease as to any portion of the land applied for on account of its operations on the adjoining land. It is true that it is

alleged on behalf of the company that the coal on the forty upon which these mining operations are now being conducted is practically exhausted and that unless it can secure a lease to the land in question it will be necessary to remove its mining equipment. The company, however, alleges that beneath the Dietz No. 2 bed upon which these operations are being conducted are two lower workable beds and the records of the Geological Survey indicate that said beds underlie not only the land here in question but that owned and being worked by the Hotchkiss Company. It would seem, therefore, that only one of the beds on the area owned by the company is nearly exhausted, the other two beds apparently being entirely intact and undisturbed. The N. $\frac{1}{2}$ SE. $\frac{1}{4}$ will, therefore, be offered for lease at competitive bidding on the petition of the Hotchkiss Company pursuant to the provisions of said section 2 of the leasing act, and the decision of the Commissioner is modified to accord with the views herein expressed.

SULLIVAN ET AL. v. TENDOLLE.

Decided December 3, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD—WITHDRAWAL—ACT OF FEBRUARY 25, 1920.

An attempted oil placer location upon lands within an unrestricted homestead entry which remained intact at the time of the passage of the act of February 25, 1920, lacks the element of basic validity requisite as a condition precedent to the granting of an oil and gas prospecting permit under section 19 of that act and constitutes no bar to the allowance of a junior permit application in favor of the homesteader.

COURT DECISIONS CITED AND CONSTRUED.

The cases of Bunker Hill and Sullivan Mining and Concentrating Company (226 U. S., 548), *Neff v. United States* (165 Fed., 273, 281), *McLemore v. Express Oil Company* (112 Pac., 59), cited and construed.

FINNEY, *First Assistant Secretary*:

This is an appeal by E. J. Sullivan and eleven other persons from the decision of the Commissioner of the General Land Office of July 11, 1921, rejecting to the extent of the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 32, T. 58 N., R. 99 W., 6th P. M., Lander, Wyoming, land district, their application 012703, filed under section 19 of the act of February 25, 1920 (41 Stat., 437) for a permit to prospect for oil and gas upon, together with other lands, the tract above described, for conflict with the junior prospecting permit application 013351 of Henry Tendolle, claiming under section 20 of the act.

The said section 32 was by Executive order of December 6, 1915, and pursuant to the provisions of the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497), and

subject to the provisions of the act of July 17, 1914 (38 Stat., 509), withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation and included in Petroleum Reserve No. 41. Prior to such withdrawal, however, and on July 31, 1915, Henry Tendolle made unrestricted homestead entry 07061 of the above described tract, together with the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, and N. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section 32. On November 22, 1920, he filed written consent to the amendment of his entry so as to make the same subject to the provisions, conditions and reservations of the act of July 17, 1914, and on December 8, 1920, submitted final proof on the entry, claiming credit for services in the United States Army for the period from July 13, 1917, to June 20, 1919.

The permit application of Sullivan *et al.* was filed August 25, 1920, and as to the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 32, was based upon an asserted oil placer mining claim known as the Tip No. 7, alleged to have been located by eight of the applicants, November 5, 1915. The application recites a compliance with all of the requirements of section 19 of the leasing act under which it was filed, to entitle the applicants to a permit for the area included in the claim. In connection with the application there was filed evidence of service upon Tendolle, December 9, 1920, of a notice advising him of the filing of the application and warning him that if he desired to exercise or claim any preference right to a prospecting permit for the land in question, he must within 30 days of such service file application therefor.

The permit application of Tendolle was filed June 15, 1921, and embraced the entire area covered by his homestead entry, including N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 32, the applicant asserting a preference right to a permit by virtue of his homestead entry and the provisions of section 20 of the leasing act.

In the decision appealed from the Commissioner found that "from the statements made into the premises by E. J. Sullivan *et al.* it is apparent that they recognized the preference right of Tendolle," and held that although it was obvious that Tendolle's application was filed long after the expiration of the thirty days from the time that the notice from Sullivan was served upon him, "yet in view of all the circumstances and of the fact that no action has hitherto been taken on either of these two cases," the right of Tendolle to a permit for the area in conflict is superior to that of Sullivan *et al.* The application of Sullivan *et al.* was accordingly, as hereinabove stated, rejected as to the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 32.

The appeal challenges the correctness of the Commissioner's decision on the ground that the Commissioner failed to apply the provisions of section 12(a) of the oil and gas regulations approved March 11, 1920 (reprint of October 29, 1920, with amendments), and reject

the application of Tendolle as to said conflict area because not filed within thirty days from service upon him of the said notice of Sullivan *et al.*

The Department concurs in the conclusion reached by the Commissioner, but for reasons other than those assigned by him, to the effect that notwithstanding the failure of Tendolle to file his application within thirty days from the date of service upon him of said notice, the superior right to a permit is in Tendolle.

Section 19 of the leasing act under which the application of Sullivan *et al.* was filed provides, among other things, that the claim upon which the application is predicated must have been initiated while the land was not withdrawn from oil and gas location and that the claimant must have previously performed all acts under then existing laws necessary to a valid location except to make discovery. At the time the asserted location of the Tip No. 7 claim is alleged to have been made, the land in question was included in the *prima facie* valid homestead entry of Tendolle; and said entry has ever since remained intact, and down to November 22, 1920, long after the date of the initiation of the claim under the mining laws to the land, and nine months after the passage of the leasing act, the entry was unrestricted.

The general rule repeatedly announced by the Supreme Court of the United States is that a *prima facie* valid entry of public land under the laws of the United States segregates the land from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until such entry has been canceled of record. See *Neff v. United States* (165 Fed., 273, 281), and cases there cited.

While the cases cited involve conflicts between subsisting agricultural entries and junior nonmineral claims, the Supreme Court, in *Bunker Hill and Sullivan Mining and Concentrating Company v. United States* (226 U. S., 548), declared that the same principle would apply in case of a conflict between an uncanceled homestead entry and an attempted junior mining location. In that case it was urged that certain land covered by the homestead entry of one Messenger, from which timber had been cut by the entryman and sold to the plaintiff in error, was not suited for agricultural purposes and could not be entered under the homestead law; that being mineral land in fact and open to mining location, it was subject to the provisions of the act of June 3, 1878 (20 Stat., 88), which authorizes any citizen of the United States to enter upon public lands open to mineral entry in order to cut timber therefrom; that the homestead entry was void, and that any citizen, the entryman included, could treat the land as public land of the United States and cut the timber thereon. Answering that contention, the court said:

The statute on which the Mining Company relies, applies only to public lands, while this was no longer public in the full sense, although the title remained in the Government which could have canceled Messenger's entry on proof that it was valuable for mineral purposes. *Deffebach v. Hawke*, 115 U. S., 392. But until some such action by the United States, Messenger's entry segregated the land from the public domain and made it so far private as to withdraw it from the operation of the law permitting other citizens to locate mines or cut timber on public mineral lands. *Hastings & D. R. Co. v. Whitney*, 132 U. S., 537; *Shiver v. United States*, 159 U. S., 491, 495. Until his claim was canceled Messenger was entitled to exclude others from the quarter-section. And as they would have been estopped, as against him, from denying that he was lawfully in possession of it as a homestead, so was he estopped from denying that it was a homestead when sued for cutting timber in violation of the law applicable thereto.

To the same effect also is the decision in *McLemore v. Express Oil Co.* (112 Pac., 59). From said decisions it is clear that the land here in question being then covered by the homestead entry was not subject to location at the time the asserted claim relied upon by *Sullivan et al.* was initiated and neither then nor since has the tract been opened to the inception or completion of location rights pursuant to the mining law. Therefore, such attempted location, as to said tract, affords no basis for a permit under section 19 of the leasing act because lacking the element of basic validity in addition to that of discovery and constitutes no bar to the subsequent permit application of Tendolle.

The judgment appealed from is accordingly affirmed, the case closed, and the record returned to the General Land Office.

**REGULATIONS GOVERNING PAYMENT OF ANNUAL RENTAL
UNDER OIL AND GAS LEASES REQUIRED BY SECTION 14 OF
THE ACT OF FEBRUARY 25, 1920.**

[Circular No. 795.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 8, 1921.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Section 14 of the act of February 25, 1920 (41 Stat., 437), relative to oil and gas leases, provides for the payment in advance of an annual rental of \$1.00 per acre in cash on the acreage covered by the lease, the rental paid for any one year to be credited against the royalties as they accrue for that year.

For the purpose of establishing a uniform practice of handling this rental problem the following rules are prescribed:

1. On the first day of each year of the lease, reckoned from the date stated in the first paragraph thereof, the annual rental becomes due and payable in cash. This must be paid directly to the receiver of public moneys of the land district in which the land is situated.

2. In the event the royalty is to be paid in cash, the lessee shall deduct from royalty payments to the local receiver the amount of the rental paid for that year from the first royalty due, until the accrued royalty equals the annual rental paid.

3. If the royalty is to be paid partly in crude oil and partly in cash, the entire deduction necessary to offset the rental paid shall be taken from the first accrued cash royalty only.

4. If the royalty is to be paid in kind only, the lessee shall deduct from the first accrued royalty product such quantity thereof as will, at the approved selling price on the date of deduction, equal in value the cash rental paid for that year.

5. The date, amount, and character of deduction made to offset rental payments must be shown in the itemized monthly statement required in the lease covering the month when the deduction is made.

WILLIAM SPRY,

Commissioner.

Approved:

F. M. GOODWIN,

Assistant Secretary.

ANDREW H. ELAM (ON RECONSIDERATION).

Decided December 10, 1921.

REPAYMENT—RAILROAD LAND—ACT OF MARCH 26, 1908—SECTIONS 2401-2403, REVISED STATUTES.

A claim for repayment of the amount in excess of lawful requirements charged for lands entered under the preemption or homestead laws, erroneously classified as double minimum, and for which payment was made by certificates of deposit to cover costs of surveys, issued under and governed by sections 2401, 2402 and 2403, Revised Statutes, is allowable under the act of March 26, 1908.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED—DEPARTMENTAL INSTRUCTIONS CONSTRUED AND FOLLOWED.

The case of San Francisco Collateral Loan Bank (45 L. D., 29), cited and distinguished; instructions of March 9, 1883 (1 L. D., 533), construed and followed.

FINNEY, *First Assistant Secretary:*

The Department has reconsidered, as upon appeal, the repayment claim of Andrew H. Elam, denied by decision rendered [by the Com-

missioner of the General Land Office] April 20, 1921, in the matter of preemption entry LaGrande No. 576, made November 21, 1879, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 24, T. 4 N., R. 35 E., W. M., Oregon.

The described land was paid for by triplicate certificates of deposit issued under and governed by sections 2401, 2402, and 2403, Revised Statutes, as amended, aggregating \$401.00, or double minimum purchase price. It subsequently developed that said tracts were never lawfully advanced in price, which reason gave rise to the presentation of the repayment claim for excess amounting to \$1.25 per acre, the grant to the Northern Pacific Railway Company never having become effective, but on the other hand forfeited by the act of September 29, 1890 (26 Stat., 496), for failure of the company to construct its road. See Thomas Dorman (47 L. D., 628).

The Department in reviewing the case upon this proceeding has considered the instructions of March 9, 1883 (1 L. D., 533), and in connection therewith the ruling laid down in the case of San Francisco Collateral Loan Bank (45 L. D., 29), and is of the opinion that the instant case is a proper one for allowance of repayment under the act of March 26, 1908 (35 Stat., 48).

Repayment was denied, and properly so, in the San Francisco Collateral Loan Bank case, cited, on the ground that the bank was claiming as assignee of a mere money claim against the Government, repayment being prohibited by section 3477, Revised Statutes. The record discloses that the triplicate certificates acquired by the bank were not utilized as payment of moneys upon filings or entries made under the homestead or preemption laws of the United States, which privilege was accorded the assignee of the certificates by the governing laws, but on the other hand the certificates were tendered by the bank, as assignee, with request for repayment of the moneys representing the face value of the certificates. In the Elam case, as distinguished from the bank case cited, the certificates were surrendered and used as cash in payment of public lands by one qualified to make entry, pursuant to the statutes, and the certificates now in possession of the Government were canceled as satisfied in their entirety notwithstanding that they represented cash amounting to \$1.25 per acre in excess of the price of the land entered by Elam.

The regulations of March 9, 1883, *supra*, pertain exclusively to cases wherein payment was made upon lands by a tender of the certificates of deposit to the Government as cash, said regulations specifically providing that in such cases "where the consideration is carried into the Treasury as cash, and can only be withdrawn by application under the repayment statutes, it seems clear that it must be repaid, in the manner provided by the statutes, out of money in the Treasury not otherwise appropriated. And in cases of excess

(as in the instant case) where they fall within the provisions of the repayment acts, the excess must also be repaid, as provided by the law, out of such moneys."

The Department takes notice of the fact that the regulations of March 9, 1883, cited (antedating passage of the act of March 26, 1908, 35 Stat., 48), authorized repayment of the excess under section 2 of the then existing repayment act of June 16, 1880 (21 Stat., 287). The Department concludes, however, that the sound underlying principles upon which the regulations of March 9, 1883, *supra*, were predicated should likewise be made applicable to the more recent repayment statute of March 26, 1908, *supra*, in so far as authority for repayment of excess moneys is concerned in this class of cases and it is so ordered.

The prior decision rendered herein April 20, 1921, is recalled and vacated, and the approved statement of account allowing repayment to Andrew H. Elam, under the act of March 26, 1908, *supra*, in the amount of \$201.00 is returned herewith.

NORTHERN PACIFIC RAILWAY COMPANY.¹

Decided August 17, 1921.

SELECTION—ACT OF JULY 1, 1898—REINSTATEMENT—COURTS—RES JUDICATA—STATUTES.

The reinstatement of a selection for the exchange of lands under the act of July 1, 1898, which was finally rejected by the Land Department in accordance with the then existing interpretation of the governing laws, will not be allowed on the ground that a different construction was subsequently placed thereupon by the Supreme Court of the United States in a separate and distinct proceeding, involving similar issues, to which the selector was not a party.

SELECTION—ACT OF JULY 1, 1898—REINSTATEMENT—TRANSFEREE—ESTOPPEL—RES JUDICATA.

A plea alleging that by a clerical inadvertence base tendered in support of a selection for the exchange of lands under the act of July 1, 1898, was, to the detriment of the transferee of the selector, erroneously used as base in support of another selection which had passed to patent, is not a sufficient ground for the allowance of the substitution of new base with the view to the reinstatement of the original selection where the selector had become estopped from demanding the reopening of the proceedings by reason of the doctrine of *res adjudicata*.

COURT AND DEPARTMENTAL DECISIONS CITED AND CONSTRUED.

The cases of Payne, Secretary of the Interior, *et al. v. Central Pacific Railway Company* (255 U. S., 228), Thomas Hall (44 L. D., 113), Cumberland Mining and Smelting Company (46 L. D., 433), cited and construed.

EDITOR'S NOTE.—For recent decisions of similar tenor see Honey Lake Valley Company *et al.* (48 L. D., 192), Yribar *v. Sheline* (48 L. D., 317).

¹ See decision on motion for rehearing, page 347.

FINNEY, *First Assistant Secretary*:

The Northern Pacific Railway Company having relinquished its rights to the NE. $\frac{1}{4}$, Sec. 9, T. 14 N., R. 42 E., W. M., Washington, later mentioned in this decision as NE. $\frac{1}{4}$, under the act of July 1, 1898 (30 Stat., 597, 620), by its Selection List No. 7, The Dalles 06622, filed October 26, 1900, selected in lieu thereof a tract of unsurveyed land which, it was supposed at the date of the selection, would eventually be the SE. $\frac{1}{4}$, Sec. 9, T. 19 S., R. 11 E., W. M., Oregon, hereinafter referred to as SE. $\frac{1}{4}$, after it had been surveyed.

On November 20, 1909, the selected tract was temporarily withdrawn for power site purposes and later, on July 2, 1910, it was included within and made a part of Power Site Reserve No. 68.

On April 1, 1910, a plat of the survey of the township was filed in the local office and on April 27 following, the company filed its rearranged list, in which it so conformed its selection to the survey as to make it include the SE. $\frac{1}{4}$, as shown on the plat of the survey.

On July 23, 1913, the SE. $\frac{1}{4}$ was further withdrawn from all forms of disposal under the public land laws and set apart as a first form reclamation withdrawal, under the act of June 17, 1902 (32 Stat., 388).

On March 5, 1915, the company's selection was rejected pursuant to departmental decisions of December 5, 1914, and January 30, 1915, which affirmed a decision of the General Land Office holding that the inclusion of the tract within the power site reserve and the reclamation withdrawal defeated and extinguished the company's rights under its selection.

That action released the NE. $\frac{1}{4}$ from the rejected selection and left it free for the company's use as bases for other selections, and it was accordingly all used for that purpose in separate parts as bases for three other and later selections, as follows:

The NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ as the basis for the selection of the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 17, T. 7 S., R. 59 E., Montana, in Miles City list 496, serial 026207, filed July 6, 1915, upon which patent was issued February 5, 1916, 512019. The NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ as the basis for the selection of the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18, T. 24 N., R. 2 E., Montana, in Great Falls list No. 174, serial 038403, filed August 18, 1915, upon which patent was issued June 21, 1916, 534864.

The S. $\frac{1}{2}$ NE. $\frac{1}{4}$ as the basis for the selection of the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 29, T. 21 N., R. 12 E., Montana, in Great Falls list No. 175, serial 038552, filed September 13, and allowed September 22, 1915, upon which patent was issued June 10, 1920.

Later the Court of Appeals of the District of Columbia held in the case of *Central Pacific Railway Company v. Lane* (later appealed to and affirmed by the Supreme Court of the United States as *Payne v. Central Pacific Railway Company* (255 U. S., 228), that withdrawals similar to those here involved did not adversely affect

or prevent the patenting of perfected pending selection lists which are akin to the list now under consideration.

Soon after that decision was rendered the company, through its attorneys, addressed a letter to the Commissioner of the General Land Office on August 25, 1920, in which it was stated that the company had been unable to effect a settlement with the person to whom it had in 1900 contracted to sell and convey the SE. $\frac{1}{4}$. It was further stated in that letter that the use of the NE. $\frac{1}{4}$ as base for the patented selections was "due to a clerical inadvertence," and for these reasons it was asked in effect that the company be permitted to substitute the NW. $\frac{1}{4}$, Sec. 13, T. 128 N., R. 33 W., 5th P. M., later herein mentioned as NW. $\frac{1}{4}$, in lieu of the NE. $\frac{1}{4}$ as base for the patented selections and let the NE. $\frac{1}{4}$ be still used as the base for the rejected selection 06622.

In this way the company sought to so far revive and rejuvenate the canceled selection as to possibly bring it within the rule announced by the Court of Appeals in its decision, which was later affirmed by the Supreme Court, *supra*.

By its decision of April 15, 1921, the General Land Office denied this request on the ground that the decisions holding the selection for rejection had become final; that the selection had been formally rejected; and that the company had acquiesced in that rejection and in effect abandoned the selection by the use of the NE. $\frac{1}{4}$ as the base for the other and later selections; and for the further reason that new base can not at this time be substituted for the NE. $\frac{1}{4}$ as the base for the patented selections.

The company in its appeal from that decision urges that it was erroneous, petitions for the reinstatement of its canceled selection and asks that the request made in its letter of August 25, 1920, to the Commissioner be granted or that the NW. $\frac{1}{4}$ be substituted in lieu of the NE. $\frac{1}{4}$ as a new base for the original selection.

In the judgment of this Department none of these requests can be granted.

In the first place it may be said that the rejection of the selection was fully sustained by the well-established rule as to the effect of withdrawals upon pending selections, which was in force at the time it was rejected. That being a fact, the decisions adverse to the selection and the rejection of the selection can not now be set aside and ignored for the reason that the Supreme Court has announced a different rule under which the selection might possibly be sustained.

As was said in the case of Thomas Hall (44 L. D., 113), which was quoted with approval and followed in Cumberland Mining and Smelting Company (46 L. D., 433, 434), where it was said that—

It is a well-settled doctrine that a final adjudication will not be later disturbed because of a subsequent change in the construction of the law which governed the case at the time it was originally adjudicated. This rule has been generally enforced by this Department, even in cases where the Department's construction of statutes has been declared erroneous by the Supreme Court. (Frank Larson, 23 L. D., 452; Mee v. Hughart et al., 23 L. D., 455.)

The same doctrine was made the basis of this Department's unpublished decision of January 16, 1919, in Martin H. Kendig against the Northern Pacific Railway Company, where it was held that an application for the reinstatement of a rejected selection would not be granted on the ground that the rule under which it was rejected was no longer in force.

It is suggested that the decisions on which the selection in the present case was rejected should not be considered as having become final, and that the rejection should not be held to have been effective, because those decisions were erroneous and that the selection should not have been rejected at that time for the further reason that "it was well understood" that the several companies interested in like selections intend to go into court to test the correctness of the holding that a withdrawal defeated a selection.

This contention can not be given controlling effect because the courts were open to this selector to question the soundness of the Department's original decision rendered December 5, 1914, and, instead of invoking the aid of the court for that purpose at that time, the company again came to the Department and asked it to review, reconsider, and set aside that decision. And, furthermore, the company had ample time within which to ask the court to restrain the rejection of its selection before it was rejected, and after its motion for rehearing was denied on January 30, 1915, because the selection was not formally canceled until March 5, 1915.

While it is said that several of the companies similarly interested intend to take the mooted question into court in other cases, it is not intimated that this selector proposed to do so with this case; and, as shown by the appeal, the first case of that kind was not taken to court until June 3, 1915. It was after that date that the NE. $\frac{1}{4}$ was used by this company as base for its later selections.

Furthermore, we have as evidence of this company's acquiescence in the decisions not only the fact that it did not take this case into court, and that the NE. $\frac{1}{4}$ was used as base for other selections, but we also have the further fact, stated in the attorney's letter of August 25, 1920, addressed to the Commissioner, that—

Following the departmental decision ordering cancellation of the selection, the company sought to settle the matter with its purchaser, but the purchaser has persistently refused to surrender the contract.

It was not until that letter was written that the company in any way even intimated that the use of the NE. $\frac{1}{4}$ as base for the later selections was "due to a clerical inadvertence," or to any other fact that it intended to abandon the original selection.

For these reasons it must be held that the selection can not be reinstated, and the decision appealed from is, consequently, affirmed.

NORTHERN PACIFIC RAILWAY COMPANY (ON REHEARING).

Decided December 12, 1921.

FINNEY, First Assistant Secretary:

Motion for rehearing has been filed on behalf of the Northern Pacific Railway Company, in the above entitled case, wherein the Department by decision rendered on appeal August 17, 1921 (48 L. D., 343), affirmed the action taken by the Commissioner of the General Land Office, April 15, 1921, denying the application for substitution of base in connection with its rejected list No. 7 (The Dalles 06622), under the act of July 1, 1898 (30 Stat., 597, 620), involving the selection of the SE. $\frac{1}{4}$, Sec. 9, T. 19 S., R. 11 E. W. M., Oregon, in support of which the NE. $\frac{1}{4}$, Sec. 9, T. 14 N., R. 42 E., W. M., Washington, was designated as base.

The Bend Water, Light and Power Company, by its attorney, intervened upon this proceeding and filed brief in support of the railway company's motion, the record disclosing that the latter company, claiming under mesne conveyances, acquired the right of selection of the said SE. $\frac{1}{4}$, Sec. 9, predicated upon the particular base land referred to, namely, NE. $\frac{1}{4}$, Sec. 9, T. 14 N., R. 42 E., Washington.

In the instant case, without restating at length the facts fully and correctly set forth in the decision complained of, it suffices to state that the selection as originally made was properly rejected under the then existing interpretation of the governing laws; and that, after final rejection of the selection, the railway company again proffered the base in support of another selection, which latter selection has been patented.

It is urged by both the railway company and intervener that the Department in the interest of the latter should permit the substitution of new base in support of the original selection, finally rejected March 5, 1915, on the ground that the railway company, through a clerical inadvertence committed in its offices to the detriment of the railway company's transferee, erroneously used the

base in support of the other selection, since patented. The company also contended that final rejection of the selection should not have been promulgated but on the other hand, action thereupon should have been suspended to await decision of the Supreme Court of the United States in the case of *Payne v. Central Pacific Railway Company* which was rendered February 28, 1921 (255 U. S., 228); and further that the rejection of the selection having been in error as evidenced by the Supreme Court's decision subsequently rendered in the *Central Pacific* case, referred to, the company is entitled to reinstatement of the selection and, upon substitution of base, to favorable action thereupon.

The action taken by the Commissioner, March 5, 1915, carrying into effect the Department's order of rejection of the selection was proper, nothing then appearing in the record that would have justified action to the contrary. The Department, moreover, properly held, following the ruling as laid down in the case of *Thomas Hall* (44 L. D., 113), and other cases cited by the decision complained of, that a change by either this Department or the courts, in the interpretation of any law, which different construction was brought about through the diligent prosecution of the claim of another in a separate and distinct proceeding having no bearing upon the instant case, does not justify the reopening of this case properly disposed of at the time adverse action was taken, in accordance with the governing rule or interpretation then in force.

The Department is fully appreciative of the predicament the intervening company finds itself in, but, irrespective of whether or not error was committed by the railway company inadvertently to the detriment of the intervener, the record discloses that the Department fully satisfied the grant to the Northern Pacific Railway Company in so far as the loss of the base land, namely, NE. $\frac{1}{4}$, Sec. 9, T. 14 N., R. 42 E., W. M., Washington, is concerned and such being the case, the relief sought can not be granted.

The motion for rehearing is accordingly denied.

JOHN B. O'ROURKE.

Motion for rehearing of departmental decision of October 6, 1921 (48 L. D., 215), denied by First Assistant Secretary Finney, December 12, 1921.

LOUISE E. JOHNSON.*Decided April 28, 1921.***OIL AND GAS LANDS—ENLARGED HOMESTEAD—APPLICATION.**

An application to make an enlarged homestead entry for land subject thereto, accompanied by the required showing and payment, filed prior to the designation of the land, has, by express provision of the act of March 4, 1915, the segregative effect of an entry, pending designation, and upon its allowance becomes an entry by relation as of the date of the filing of the application, in so far as rights under the oil leasing act of February 25, 1920, are concerned.

OIL AND GAS LANDS—ENLARGED HOMESTEAD—PROSPECTING PERMIT—PREFERENCE RIGHT—WITHDRAWAL.

An entryman whose entry has been allowed under the enlarged homestead act, upon an application, accompanied by the required showing and payment, filed previously to the inclusion by Executive order of the land within a petroleum reserve, is entitled to the exercise of the preference right privilege to an oil and gas prospecting permit accorded by section 20 of the act of February 25, 1920, notwithstanding that the withdrawal was made prior to the allowance of the entry, and that the entry was allowed subject to the reservations of the act of July 27, 1914.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

The cases of Charles C. Conrad (39 L. D., 432), and Rippy *v.* Snowden (47 L. D., 321), cited and applied.

FINNEY, First Assistant Secretary:

May 2, 1916, Louise E. Gendreau, now Louise E. Johnson, filed application 040126 to make homestead entry of the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$, Sec. 23, and the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, T. 24 N., R. 7 W., M. P. M., Great Falls land district, Montana, under the enlarged homestead law and said application was suspended by the local officers to await designation of the land.

It appears, however, that the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, had been designated as subject to disposition under the enlarged homestead law November 16, 1915, and prior to the filing of Mrs. Johnson's homestead application. It further appears that the NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 23, were designated June 16, 1917, such designation becoming effective August 10, 1917; that pending such designation and by Executive order of February 26, 1917, the entire area embraced in the application was withdrawn and included in Petroleum Reserve No. 54. Upon the last designation becoming effective and on August 14, 1917, Mrs. Johnson was notified by the local officers that in view of the petroleum withdrawal it would be necessary for her to consent to the amendment of her application so as to make the same subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), and that on September 6, 1917, the consent to such amendment was filed. Thereupon and on September 10, 1917, entry on said application was allowed.

January 13, 1921, the entrywoman filed application 051996 under the provisions of section 20 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon the said E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 23, and W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, asserting a preference right under said section 20, and alleging that she made her said homestead entry without reservation for land unwithdrawn and unclassified as oil and gas land and not known to be valuable at the date of her entry on account of oil and gas deposits.

Upon consideration of said permit application, the Commissioner of the General Land Office by decision of April —, 1921, found the same to be in conflict with the prospecting permit application 051626 of Robert S. Coe, filed under section 13 of the leasing act within 30 days after February 25, 1920, the date of posting of his notice of intention to apply for such a permit, together with other similar applications; that in the settlement of the conflicting permit applications, Coe agreed to take a permit covering said E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 23, and W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24. He held that inasmuch as Mrs. Johnson's homestead entry was not allowed until after the withdrawal and the filing of her consent to an amendment of her application so as to make the same subject to the provisions and reservations of said act of July 17, 1914, she was not entitled to a preference right under section 20 of the act as to any portion of the land included in her entry; that the permit application of Coe having been filed long prior to the permit application of Mrs. Johnson, the claim of Coe to a permit was superior to that of the former. He accordingly rejected Mrs. Johnson's application in its entirety for conflict with the application of Coe.

The said decision is submitted by the Commissioner for the approval of the Department.

The homestead application of Mrs. Johnson was presented and entry thereon allowed under the provisions of the act of February 19, 1909 (35 Stat., 639), as amended by the act of March 4, 1915 (38 Stat., 1162).

By section 1 of the act of 1909 it is provided—

That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this act, in the States of * * * Montana, * * *, three hundred and twenty acres, or less, of nonmineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided*, That no lands shall be subject to entry under the provisions of this act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

Section 2 of said act prescribes that in addition to the affidavit required by section 2290, Revised Statutes, the applicant shall make

affidavit that the land sought to be entered is of the character described in section 1 and shall pay the fees required to be paid under the homestead laws.

By the amendatory act of 1915 it is provided—

That where any person qualified to make entry under the provisions of the act of February nineteenth, nineteen hundred and nine, and Acts amendatory thereof and supplemental thereto, shall make application to enter under the provisions of said Acts any unappropriated public land in any State affected thereby which has not been designated as subject to entry under the Act (provided said application is accompanied and supported by properly corroborated affidavit of the applicant in duplicate, showing *prima facie* that the land applied for is of the character contemplated by said Acts), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located, and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character; that during such suspension the land described in said application shall be segregated by the said register and receiver and not subject to entry until the case is disposed of; and if it shall be determined that such land is of the character contemplated by the said Acts, then such application shall be allowed.

The homestead application, as hereinabove stated, was filed May 2, 1916. It was accompanied by the necessary fees and by a corroborated affidavit of the applicant showing *prima facie* that the land applied for was of the character contemplated by the act. The affidavit also contained a request that the land be designated as of the class subject to disposition under the act. As a matter of fact, however, 80 acres of the land had been so designated at the time the application was filed and the remaining 240 acres were so designated June 16, 1917, the designation to become effective August 10, 1917. The delay in such designation was in nowise due to any neglect or default on the part of Mrs. Johnson, and pending its designation and on February 26, 1917, nearly nine months after Mrs. Johnson's homestead application and accompanying affidavit were filed, the land was withdrawn and included in a petroleum reserve, so that when the entry was finally allowed it was, in view of the petroleum withdrawal, required to be made subject to the provisions and reservations of the said act of July 17, 1914.

By section 20 of the leasing act it is provided that—

In the case of lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry, * * * the entryman or patentee, * * * if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery.

The question here presented is whether, under all the circumstances, the entrywoman is excluded from the privileges conferred by said section 20 because of the delay in the designation of the land until after it had been withdrawn, as a result whereof the entrywoman

was compelled to consent to the allowance of the entry with an oil or gas reservation or suffer the rejection of her application. The situation here disclosed is similar to that shown in the case of Charles C. Conrad (39 L. D., 432), wherein it appeared that Conrad had on March 5, 1910, filed application to make homestead entry of a certain tract, subject to the provisions of the act of June 17, 1902 (32 Stat., 388), the land having been withdrawn under second form October 17, 1903. The application was accompanied by the required fee but, due to the pressure of business in the local office, the assignment of a number to the application and the otherwise recording of the entry was not possible until August 2, 1910. In the meantime and on June 25, 1910, there was approved an act providing that no entry should thereafter be made and no entryman should be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior should have established the unit of acreage and fixed the water charges and the date when the water could be applied and made public announcement of the same. Prior to the passage of that act the irrigable lands within a reclamation project were subject to homestead notwithstanding the withdrawal under the reclamation act. The Commissioner held the entry of Conrad for cancellation as having been allowed in violation of the provisions of said act of June 25, 1910, but the Department in the decision cited said—

Under these circumstances it is the opinion of this Department that Conrad's entry was in fact made when he filed his application, accompanied by the required showing, including the fees, the land being then subject to his application; that his rights should in nowise be prejudiced by the inability of the local officers to formally allow the same for five months thereafter, and that as a consequence his entry was not made in violation of the provisions of section 5 of the act of June 25, 1910. If no other objection appear, therefore, his entry should be permitted to stand.

To the same effect also is the decision in *Rippy v. Snowden* (47 L. D., 321).

In the case at bar, had it not been for the long delay in designating the land as subject to disposition under the enlarged homestead law, for which delay the entrywoman was in nowise responsible, her entry would have been allowed prior to the petroleum withdrawal of the land and she would have been entitled under the express terms of section 20 of the leasing act to a preference right to a permit for the entire area included in her entry. In view of the provisions of the above-quoted act of March 4, 1915, requiring the segregation of lands included in an application thereunder pending their designation and of the fact that Mrs. Johnson had made timely compliance with all of the requirements of the enlarged homestead law, the Department is of opinion that her rights under section 20 of the leasing act should be governed by the principle announced

by the Department in the cases above cited and hence that, so far as the said provisions of section 20 are concerned, her rights thereunder should be deemed to relate back to the date of the filing of her homestead application or, in other words, that for the purposes of the leasing act her entry should be deemed to have been allowed as of the date the application was presented and without a reservation of oil and gas deposits. But even if the entry had been so allowed at the time of the presentation of the application it would nevertheless have been necessary after the withdrawal for her to have consented to an amendment thereof so as to make it subject to the provisions and reservations of the act of 1914.

For the reasons stated the decision of the Commissioner herein is reversed and Coe will be required to show cause why his permit application to the extent that it conflicts with the permit application of Mrs. Johnson should not be rejected and that of Mrs. Johnson allowed.

In this connection, however, a distinction is to be noted between applications presented under the enlarged homestead law as to which the act in express terms gives a segregative effect, and applications under the stock-raising homestead law with respect to which no such provision is made by Congress. For not only was there no intent disclosed by the act to recognize any segregative effect to a stock-raising homestead application for undesignated land but the act itself contains in section 2 thereof a positive prohibition of the occupation of land embraced in a stock-raising application pending the designation thereof. See 47 L. D., 629. Moreover, the provisions of section 20 of the leasing act, as the Department has repeatedly held, have no application to entries allowed at any time under the stock-raising homestead law.

ALLEN v. SCANNELL.

Decided December 12, 1921.

DESERT-LAND ENTRY—RESIDENCE—ACT OF MARCH 4, 1915.

A desert-land entryman who elects to acquire title under the relief provisions of the act of March 4, 1915, by complying with the requirements of the homestead law as to residence, cultivation, and improvements in accordance with the provisions of the third paragraph of section 5 of that act, is entitled to credit for residence maintained by him on the land at any time, either before or after the relief has been granted.

JURISDICTION—CONTEST—REGISTER AND RECEIVER—COMMISSIONER OF THE GENERAL LAND OFFICE.

The failure of the receiver to join with the register in an opinion rendered in a contest case does not affect the jurisdiction of the Commissioner of the General Land Office to render his decision in the case.

DEPARTMENTAL DECISION CITED AND APPLIED.

The case of Guy J. Gay (48 L. D., 145), cited and applied,

FINNEY, *First Assistant Secretary*:

This appeal by Simon E. Allen presents the question as to whether the General Land Office erred in dismissing his contest by its decision of April 23, 1921, on the ground that he had failed to prove his charge that Jewell, E. Scannell had failed to establish and maintain a residence on the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 27, T. 30 S., R. 48 W., 6th P. M., embraced in her desert-land entry, Lamar 013095, to which she had in September 1917 elected to acquire title under the relief act of March 4, 1915 (38 Stat., 1138, 1161), by complying with the requirements of the homestead law as to residence, cultivation and improvements.

The contest was filed January 19, 1920, and in her answer she denied the charge and averred that she had resided on the land prior to filing her application for relief.

The register who presided at the hearing ruled that the entrywoman's motion to dismiss on the ground that the charge had not been proved should be sustained, and later both he and the receiver in their joint decision recommended the dismissal of the contest on that ground.

The testimony offered by the contestant related to the time subsequent to the granting of the relief; and the evidence given by his witnesses tended to show that residence had not been maintained on the land for as much as seven months during each of the years 1917, 1918, and 1919, but the knowledge of the witnesses did not enable them to swear positively to even that fact.

The practically uncontradicted evidence offered by the entrywoman showed that she lived on this land during 1913, 1914, and 1915, after the date of her entry and before she applied for relief, and her witnesses swore that she and her husband lived there as much as six months during each of the years 1917, 1918, and 1919. It is practically conceded and fully established that the cultivation and improvements were amply abundant. The appeal is based on the contestant's contentions (1) that the action of the register in holding that the motion to dismiss should be sustained was erroneous because the receiver did not join with him in that holding; and (2) that the entryman is not entitled to claim credit for residence maintained prior to the granting of the relief.

Neither of these contentions can be sustained. The receiver joined with the register in his final decision, and even if he had not done so that fact would not have prevented the General Land Office from rendering a decision in the case.

The second contention is equally without merit.

The third paragraph of section 5 of the act of March 4, 1915, provides that any entryman entitled to relief under that act may be

allowed "five years from notice within which to perfect the entry in the manner required of a homestead entryman"; and paragraph four of section 5 of the act gives any such entryman the privilege of purchasing the land outright at the price there prescribed upon his showing within five years from the date of his application to purchase that "he has upon the tract permanent improvements conducive to the agricultural development thereof of the value of not less than \$1.25 per acre, and that he has, in good faith, used the land for agricultural purposes for three years."

In construing and applying the provisions of the fourth paragraph of that section, this department has repeatedly held, as was said in the syllabus to the decision in the case of Guy J. Gay (48 L. D., 145), that—

A desert land entryman who applies to purchase the land under the relief provisions of the act of March 4, 1915, need not show that he continued cultivation after the privilege of making the purchase was granted, if he has in good faith used the land for agricultural purposes for at least three years at any time since making his original entry, and has upon the tract permanent improvements conducive to the agricultural development thereof, of the value of at least \$1.25 per acre.

And there is no good reason why, through the application of that rule, an entryman who elects to acquire title under the provisions of the third paragraph of section 5 should not be permitted to show, and be given credit for residence maintained by him on the land at any time, either before or after relief has been granted under his entry.

It was upon that theory that this Department announced in paragraph 43 of its pertinent regulations (45 L. D., 372), that—

If a claimant establishes residence upon his entry prior to the allowance of his application for relief and continues to maintain it in good faith as required by the homestead law, full credit will be allowed for the period during which such residence is so maintained.

For these reasons, the decision complained of was entirely correct and it must be and is hereby affirmed.

CHARLES R. HAUPT.

Decided December 12, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—SECRETARY OF THE INTERIOR—DISCRETIONARY AUTHORITY—SECTION 13, ACT OF FEBRUARY 25 1920.

The denial of an application for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, is a proper exercise of the discretionary authority under that act, if the lands to be prospected were at the time of the filing of the application within a known geological structure, although not designated as such until subsequently thereto.

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—DOCTRINE OF RELATION.

When the limits of a producing oil and gas field are determined by the Geological Survey, and the same designated by it as such, the designation

relates back to the time that the production began, and the filing of an application for a prospecting permit for lands then known to be within a producing oil field, although not yet designated, does not confer upon the applicant any vested right or constitute a ground upon which the granting of a permit under section 13 of the act of February 25, 1920, can be enforced by him.

OIL AND GAS LANDS—PROSPECTING PERMIT—REINSTATEMENT—APPEAL—PRACTICE—SECTIONS 13 AND 19, ACT OF FEBRUARY 25, 1920.

An application for a prospecting permit under section 13 of the leasing act, once denied in connection with favorable action upon conflicting applications under section 19 of that act, will not be reinstated to the prejudice of the competing applicants, if the defeated applicant did not first seek his remedy under the original application by appeal or otherwise.

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD—PREFERENCE RIGHT—SECTION 20, ACT OF FEBRUARY 25, 1920.

A homestead entryman, whose entry was made subsequently to the enactment of the act of February 25, 1920, does not acquire thereby a preference right to a prospecting permit under section 20 of that act.

DEPARTMENTAL DECISIONS CITED AND FOLLOWED—COURT DECISIONS CITED AND CONSTRUED.

The cases of *A. W. Mason* (48 L. D., 213), *George Watson* (48 L. D., 214), cited and followed; the cases of *Payne v. Central Pacific Railway Company* (255 U. S., 228), *Payne v. State of New Mexico* (255 U. S. 367), *Payne v. United States ex rel Newton* (255 U. S., 438), *Wyoming v. United States* (255 U. S., 489), cited and construed.

FINNEY, *First Assistant Secretary*:

Charles R. Haupt has appealed from the decision of the Commissioner of the General Land Office, of July 15, 1921, denying his petition for reinstatement of his application, serial 044044, for an oil and gas prospecting permit, under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), embracing NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26, T. 15 N., R. 30 E., M. M., in the Lewistown, Montana, land district; said application for a permit having also been based on the provisions of sections 17 and 20 of said leasing act.

Haupt's original application, based on notice posted on the land March 1, 1920, and made solely under the provisions of said section 13 of said act, was filed March 5, 1920. Earlier on the same day he filed a "second homestead" application, serial 044041, covering the same lands. On March 6, 1920, the application for a permit was suspended by the register, "pending action on second homestead affidavit." On April 1, 1920, said applicant filed an amended application for a permit. On May 24, 1920, the register rejected said amended application. On April 2, 1920, the Director of the Geological Survey defined the known geological structure of the Cat Creek oil field as embracing said lands, his report thereon being transmitted to the Commissioner April 15, 1920, and advice thereof

being received by the local office, from the General Land Office, April 29, 1920.

On appeal, the Commissioner affirmed the register's rejection of the application, upon the grounds (1) that the said land had been designated, April 15, 1920, as being within the known geological structure of the producing Cat Creek oil field, and hence was not subject to a permit under section 13 of said leasing act, and (2) that said lands so designated were not subject to a permit under section 17, but only to a lease pursuant to competitive bidding, and (3) that said claimant could have no preference right to a permit under section 20 of said act as a second homestead entryman of the surface, his application for such entry having been made subsequently to the passage of said leasing act.

On appeal to the Department, said Commissioner's decision was affirmed on October 30, 1920 (47 L. D., 588), with little discussion of the grounds thereof except that last mentioned—as to which, the later departmental decision of September 30, 1921, in George Watson (48 L. D., 214) is confirmatory.

Said applicant filed his petition for reinstatement of his said application, urging the same upon the ground that, his application having been filed on March 5, 1920, he became thereby vested with a right to a permit under section 13 of said leasing act, prior, because first in time, and unaffected by the subsequent designation of said land as within said producing oil field.

The Commissioner, considering said petition for reinstatement, ascertained from the Geological Survey that, while said lands were defined as being within the producing structure of Cat Creek oil field only on April 2, 1920, as a matter of fact the field was known to be producing on February 19, 1920—a date prior to the approval of said leasing act as well as to the filing of Haupt's said application. Thereupon the Commissioner, July 15, 1921, denied said petition for reinstatement. The petitioner has appealed to the Department.

On September 30, 1921, in A. W. Mason, on petition (48 L. D. 213), this Department held that (syllabus)—

Prospecting permits can not be granted within the geological structure of a producing oil or gas field, and the Land Department did not intend by its instructions of April 23, 1921, to recognize any right in an applicant who applied under section 13 of the act of February 25, 1920, to prospect lands which, because of delay in action upon the application, are subsequently designated as within such field, although not designated yet so known and existing at and prior to the filing of the application.

In view of the decision last quoted it would be useless to reinstate Haupt's application for a prospecting permit, as its former denial was correct. The application for a permit was filed subsequently

to the date (February 19, 1920) when the field embracing the land became productive. Only the extent of that field was determined subsequently—necessarily always a determination some time following the beginning of production, as determination of the limits of the geological structure, like other steps in the classification and administration of the public lands, requires time for investigation. When the limits of a producing field are determined, the determination must necessarily relate back to the time when the production began. Those who during that interval apply for permits under section 13 of the leasing act, covering lands in the neighborhood of where production was begun, are unavoidably at risk of rejection of their applications by reason of the belated inclusion of the lands sought within the field of production.

In Haupt's appeal, it is claimed that this application of the doctrine of relation to determination of the extent of a producing oil field is, in its operation upon intervening applications for prospecting permits under said section 13 of the leasing act, contrary to the doctrine laid down in the recent decisions of the United States Supreme Court in *Payne v. Central Pacific Railway Company*, decided February 28, 1921 (255 U. S., 228), *Payne v. State of New Mexico*, decided March 7, 1921 (255 U. S., 367), *Payne v. United States ex rel. Newton*, decided March 14, 1921 (255 U. S., 438), and *State of Wyoming v. United States*, decided March 28, 1921 (255 U. S., 489); and it is pointed out that it is declared in the administrative order of April 23, 1921 (48 L. D., 97), that the further adjudication of cases controlled by said decisions will be in harmony with the principles announced therein.

But the principles announced in said decisions do not control the case now presented. The principle running through and governing said decisions is that where a selector or other applicant for public land has done all that is requisite on his part, the approval of his selection or other claim shall be made according to the status of the land at the time of completion of the claimant's act, unaffected by any withdrawal or other change of status occurring prior to the actual making of such approval.

Here, the field reached a productive status not only prior to the claimant's application for a prospecting permit, but even prior to the enactment of said leasing act; the only thing remaining was the determination, by administrative action committed exclusively to this Department, of the extent of the field which had become thus productive. Whatever might be finally determined, upon geological considerations, as to the extent and limits of such field, all lands within it were excepted, by the terms of said leasing act, from prospecting permits in pursuance of section 13 thereof.

Moreover, the granting of a permit under said section 13 is made, by the interpretation placed by the Department upon the act, discretionary with the Secretary of the Interior (Oil and Gas Regulations of March 11, 1920, Sec. 1, closing paragraph, subdivision 2); and in the exercise of such discretion he will not grant permits under said section 13 to prospect upon lands which he has determined, through the Geological Survey, to lie within a known geological structure within the limits whereof production had begun before the enactment of said leasing act.

Nor in any case can a reinstatement of the appellant's application for a permit under said section 13 now be permitted to the prejudice of William Miller *et al.*, applicants in Lewistown 044035, under section 19 of said leasing act, to prospect the SE. $\frac{1}{4}$ of said Sec. 26, and of Wright Harvey *et al.*, applicants under said section 19 in Lewistown 044944, to prospect the NE. $\frac{1}{4}$ of said Sec. 26. Said applications, which were in conflict with that of Haupt, were adjudicated favorably in connection with the adjudication adverse to Haupt's application under said section 13, and Haupt did not elect to carry his contentions further by appellate proceedings or otherwise, whereupon final action was taken favorably to said conflicting applications.

It would upset all finality of rights acquired and recognized were a defeated rival applicant permitted to renew his conflict by a petition of reinstatement of his application after the award to other applicants, during the period of his apparent submission to defeat, of rights inconsistent with those claimed by himself.

From what has been said it necessarily follows that said applicant for a prospecting permit can not have his application reinstated, and that the former denial of said application is adhered to. The Commissioner's order of July 15, 1921, denying the request for such reinstatement, was proper and is hereby affirmed.

DOUGHERTY v. STATE OF MINNESOTA.

Decided December 13, 1921.

SWAMP LAND—CEDED CHIPPEWA INDIAN LANDS—SELECTION—ADVERSE CLAIM—CHARACTER OF LAND—CONTEST—MINNESOTA.

Under a rule of administration adopted by the Land Department, based upon an agreement with the State of Minnesota, the character of ceded Chippewa Indian lands selected by the State under the swamp land grant of March 12, 1860, is to be determined by an examination in the field, and where the selected lands, as the result of such examination, have been classified as swamp, the right of an adverse claimant to contest the classification does not exist.

SWAMP LAND—CEDED CHIPPEWA INDIAN LANDS—SELECTION—HOMESTEAD—SETTLEMENT—MINNESOTA.

A selection by the State of Minnesota of ceded Chippewa Indian lands, which a field examination shows are swamp in character, segregates the lands and

precludes the allowance of a homestead application based upon prior settlement, unless the settlement was initiated before the filing of the selection list in the local office.

FINNEY, *First Assistant Secretary*:

This is an appeal by Patrick Dougherty from a decision of the Commissioner of the General Land Office, dated August 9, 1921, rejecting his application filed September 21, 1920, to make homestead entry for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 33, T. 145 N., R. 25 W., 5th P. M., Cass Lake, Minnesota, land district, because of conflict with the swamp land claim of the State of Minnesota asserted by list No. 154, filed May 29, 1905, based upon the field notes of survey. The lands were also returned as swamp after examination in the field, pursuant to departmental order of February 19, 1909.

While not alluded to in the Commissioner's decision, it appears that the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, is also embraced in Indian allotment No. 920, in the name of Omnok-Kuck-eence upon which trust patent has issued.

The appellant alleges settlement upon the lands in the fall of 1920, after receiving information from the State auditor that they did not belong to the State; that he has a good log house and a root cellar, well and pump, one acre cleared and grubbed and about two and one-half acres cleared but not grubbed. Claimant asserts that the lands are not swamp in character and that the State is not entitled thereto, and with respect to the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, that the Indian has abandoned it and has been allotted other land in lieu thereof.

The showing made by the appellant affords no warrant for the Department to ignore or disregard the State's claim under its grant contained in the act of March 12, 1860 (12 Stat., 3). The adjustment of the State's grant, as to these ceded lands, is by agreement, based upon an examination in the field, which has been had, and pursuant to which the lands involved were classified as swamp. Under a rule of administration adopted by the Land Department, the right to dispute this classification by an adverse claimant does not exist and no contest will be entertained except in cases where settlement is alleged prior to the time the list of selections based upon the field examination was made up and filed in the local land office. The fact that appellant has made improvements upon the land does not entitle him to make entry therefor. The swamp selection segregates the land and the return of the field examination must control the adjustment save as above stated, in instances where an adverse claim by settlement was initiated prior to the filing of the list in the local office.

The statement that the Indian has been allotted other lands in lieu of the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, said Sec. 33, is not borne out by the records of the General Land Office. The appellant has apparently been mis-

informed in that regard. But even if the Indian allotment had been changed, this would not operate to remove the claim of the State.

The Commissioner properly rejected Dougherty's application and the decision appealed from is affirmed.

JOHNSON v. BUNDREN.

Decided December 13, 1921.

RESIDENCE—HOMESTEAD—CONTEST.

Failure timely to establish residence upon a homestead entry can not be excused on the ground of poverty and a personal injury subsequently incurred while at work elsewhere in gaining a livelihood, especially where the poverty existed at the date of the entry and the entryman had no reasonable assurance that it would not continue.

DEPARTMENTAL DECISIONS CITED AND FOLLOWED.

The cases of *Smith v. Husted* (35 L. D., 376), and *Benjamin Chainey* (42 L. D., 510), cited and followed.

FINNEY, *First Assistant Secretary*:

On February 8, 1918, Thomas A. Bundren made homestead entry Helena 018530 for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 29, T. 10 N., R. 11 E., M. M., Helena, Montana, land district, against which David Johnson on March 13, 1920, filed contest alleging that the entryman had failed to establish residence upon or cultivate the land.

After the case had been regularly tried, the register and receiver and later the General Land Office on July 20, 1921, found that the charges had been amply proved and held the entry for cancellation.

The testimony shows, in fact the entryman admits, that he did not establish residence on the land until sometime in the spring of 1920, after the notice of contest had been served. He also admits that he did not make any preparations to establish residence other than the putting of a few logs in place for the side walls of a house in 1918. In 1919, the remainder of the logs were put in place, house was roofed, and the chimney was built, but it was not supplied with doors, windows, floor or chinking between the logs until after the contest was filed.

In appealing from the Commissioner's decision, the entryman urged that his failure to timely establish residence on the land was due to his poverty at the time he made the entry and subsequently thereto.

He states that he had to work away from the land for wages in order to support himself and his family; that he received a personal injury while working for a railroad in the fall of 1918, which prevented him from doing hard labor in the following winter and spring. He also states that he was hindered by sickness in his family.

These facts can not be accepted either in lieu of residence or as excusing the entryman's absence. The law required this entryman

to establish residence on this land within six months after the date of the entry and to thereafter actually reside and make his home on the land for seven months during each of three years.

While sickness may, under proper circumstances, be urged as a defense against a contest, it does not appear that there has been a sickness of such length as to justify the dismissal of this contest on that ground; and while poverty may be taken into consideration in measuring an entryman's good faith, it can not be accepted as excusing the residence for more than two years after the date of entry. This is especially true, where, as in this case, the poverty existed at the date of the entry and the entryman had no reasonable assurance that it would not continue. In the recent decision in the case of *Raymond A. Larson v. George Crawford*, decided October 29, 1921 (unreported), this Department held that conditions and hindrances existing at the date of an entry can not be urged as justifying the entryman's failure to comply with the law. In that case, the entryman set up that his permanently crippled condition prevented him from making a living on the land, and it was there held that his misfortune could not be urged as a defense against the contest for the reason that it existed at the date of the entry, and he knew it would continue. It was also reannounced in that case that the fact that the entryman's situation was such as to prevent him from making a living on the land can not be accepted as defeating the contest. See *Benjamin Chainey* (42 L. D., 510), and *Smith v. Husted* (35 L. D., 376).

The decision appealed from being correct is hereby affirmed.

YAKUTAT AND SOUTHERN RAILWAY v. SETUCK HARRY, HEIR OF SETUCK JIM.

Decided December 13, 1921.

INDIAN LANDS—ALLOTMENT—OCCUPANCY—PREFERENCE RIGHT—ACT OF MAY 17, 1906—NATIONAL FORESTS—WITHDRAWAL—ALASKA.

Actual occupancy and continuous use of a tract of land by an Alaskan native prior to its inclusion within a national forest confers upon the occupant a preference right to an allotment homestead under the act of May 17, 1906, which is not affected by the withdrawal, although the application for the allotment was filed subsequently to the issuance of the proclamation creating the reservation.

INDIAN LANDS—ALLOTMENT—RIGHT OF WAY—ALASKA—ACTS OF MAY 14, 1898, AND MAY 17, 1906.

A right of way granted under the act of May 14, 1898, is not adversely affected by the allowance pursuant to the act of May 17, 1906, of an allotment homestead to an Alaskan native upon an application predicated upon prior occupancy and continuous use of the land, where the map of definite location of the right of way was approved prior to the passage of the act which authorized the allotment.

FINNEY, *First Assistant Secretary*:

On December 12, 1911, Setuck Jim filed application 01490, Juneau land district, Alaska, for an allotment under the act of May 17, 1906 (34 Stat., 197), for a tract of land described by metes and bounds containing 115.33 acres situated on the left bank of the Setuck River, about eight miles from Yakutat, Alaska. The applicant set forth that he was a full-blood Indian, or Eskimo, and head of a family, born and residing in Alaska, and that he had occupied the land applied for since 1885. The register rejected the application because the land was withdrawn from settlement or other occupancy, and included in the Tongass National Forest by proclamation of February 16, 1909 (35 Stat., 2226).

On February 10, 1912, he filed an appeal stating that he and his brother, Setuck Harry, had recently learned of the act of May 17, 1906, *supra*, and had had their claims surveyed. He stated that he was over fifty years of age, and that he was born, and had resided on the Setuck River all his life, and had hunted and fished on the land, and that he had applied for it in order to provide a living for his family, as the white fishermen were trying to crowd them off of the Setuck River, and that he wanted to acquire title in order to have a place of his own to fish and haul his net, and to provide for his family, so that they would not be a burden on the Government. He states that he had no knowledge that the land was in the Tongass National Forest, and that the timber was scrubby and poor, and not fit for commercial purposes.

On February 23, 1912, protest was filed against the allotment by the Yakutat and Southern Railway Company setting forth that the land applied for covered a portion of the company's right of way, and terminal grounds. The protest was supported by several affidavits to the effect that Setuck Jim had not used the land as a residence or habitation during the past eight years. The register forwarded the papers to the Commissioner of the General Land Office for instructions.

The company is operating under the act of May 14, 1898 (30 Stat., 409), which provides for rights of way in Alaska. Section 5 thereof provides that upon approval by the Secretary of the Interior, the map of location shall be noted upon the records of the local office "and thereafter all such lands over which such right of way shall cross shall be disposed of subject to such right of way."

The Commissioner by decision of November 26, 1919, found that the company's rights were in no way affected, and dismissed the protest, and also called upon the Indian to show the use and occupation of the land made by him prior to the establishment of the national forest.

On February 7, 1920, the Commissioner held the allotment application for rejection because the Indian had failed to show settlement prior to February 16, 1909. On January 3, 1921, Setuck Harry made an affidavit that Setuck Jim died in 1914, and that he is his full-blood brother, and only heir. He states that he and his brother were born on the Setuck River over fifty years ago, and lived there continuously, and that the tract applied for is where they had their homes, and that Setuck Jim established a residence on the land at least thirty years prior to February 16, 1909, and that he, Setuck Harry, is still occupying the tract.

The company appealed from the dismissal of its protest. The Commissioner by decision of March 11, 1920, found that the Indian has a *prima facie* right to the land, and further called upon the company to file evidence of service upon the Indian of its appeal. The company filed an appeal, showing service thereof, from said decision. The appeal is from the holding that the Indian has a *prima facie* right to the land.

The act of May 17, 1906, *supra*, provides—

That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

The company's map of definite location of its right of way was approved by the Secretary January 4, 1905. The land applied for was occupied by the Indian prior to the forest proclamation, and owing to his continuous use, it appears that he is entitled to a preference right as granted by the statute. The company's right can not be adversely affected by the allotment because it would be subject to the right of way. The protest was properly dismissed. The Indian has a *prima facie* right to the land. The decisions appealed from are affirmed.

It appears that Setuck Jim made application as the head of the family. His brother, Setuck Harry, gives notice of his death, and claims to be his only heir. Further information should be secured in order to determine the heirs. The Indians in Alaska are under the supervision of the Bureau of Education. Notices of the proceedings in this case have been sent to Charles W. Hawkesworth, Superintendent of the Bureau of Education at Yakutat, but he has failed in each instance to appear or to take any action. See Circular No. 749, approved April 16, 1921 (48 L. D., 70). Notice of this

decision should be sent to the Bureau of Education and to the Forest Service, as well as to the parties named in the caption.

DAY v. CUTSHALL.

Decided December 15, 1921.

CONTEST—CONTESTANT—RELINQUISHMENT—HOMESTEAD—PREFERENCE RIGHT—BURDEN OF PROOF.

Where the question arises, after a relinquishment of a homestead entry is filed subsequently to the initiation of a contest, as to which of two applicants is entitled to enter the land, one basing his claim upon the contest, the other upon the filing of the relinquishment, the presumption will obtain that the contest induced the relinquishment, and the contestant will be recognized as entitled to a preference right which 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.

CONTEST—HOMESTEAD—ABANDONMENT—RELINQUISHMENT—MILITARY SERVICE.

An application to contest a homestead entry, the relinquishment of which was procured by a third party after the initiation of the contest, will not be rejected for failure to comply with the nonmilitary and nonnaval averment requirement of the act of July 28, 1917, where abandonment of the entry is charged and it is clearly established by evidence that the entryman's absence was not due to military or naval service.

FINNEY, *First Assistant Secretary:*

On January 30, 1917, Andrew J. McMillen made homestead entry 09751 for N. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 22, and N. $\frac{1}{2}$ S. $\frac{1}{2}$, and S. $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 23, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 26, T. 29 N., R. 37 W., 6th P. M., Valentine, Nebraska, land district, against which Melissa Cutshall on February 11, 1920, filed contest charging that said—

Contestee has wholly abandoned said land and lives and resides elsewhere other than upon the said land for more than six months last past; also that the said contestee has not taken this land as a home for himself but for speculative purposes and has offered to sell the said land as soon as satisfactory proof could be made. Also that said contestee has wholly abandoned the said land for more than six months last past; that his absence is not due to military service in the United States Army or Navy and that his laches remain wholly uncured to this date.

February 18, 1920, Curtis T. Day filed McMillen's relinquishment of that entry and presented his application 018893 to enter the land. That application was suspended to await action on Cutshall's application to contest. Pursuant to the instructions of April 1, 1913 (42 L. D., 71), Cutshall was notified of her presumptive preference right to enter the land.

Later, and inasmuch as notice of contest had not been served on McMillen, the register and receiver ordered and held a hearing to determine the relative rights of the adverse applicants. That hear-

ing resulted in a decision by the register and receiver in which they found, after fully and carefully abstracting the testimony, that Cutshall's application should be allowed and Day's application to enter should be rejected.

By its decision of August 6, 1921, now up for consideration on Cutshall's appeal, the General Land Office after fully reciting the pertinent facts, dismissed the contest on the ground that in an attempt to allege McMillen's default, Cutshall had stated that it "is not due to military service in the Army or Navy" when he should have alleged that "it was not due", etc.

This Department can not concur in that conclusion. While it is true that under usual circumstances, a sufficient nonmilitary and non-naval allegation should be made, the absence of such an allegation, under the peculiar facts of this case does not call for the rejection at this time of the application to contest. The original entryman has no interest in this case, and the present adverse claimants are the only persons interested. Day went to trial without raising any question as to the sufficiency of the contest application, and did not, even in his appeal from the decision of the local office, raise that question. And moreover it is clearly established by the evidence that McMillen's absence was not due to military or naval service.

Day, in opposing the present appeal, proceeds largely on the assumption that the burden was on Cutshall to show that the contest charges were true and that McMillen's relinquishment was induced by the fact that he had a knowledge of the contest before the relinquishment was filed. In making these contentions, Day was in error. This case is not controlled by the former rules applicable in such case to which he calls attention, but it must be disposed of under the instructions of April 1, 1913 (42 L. D., 71), paragraph 3 of which is applicable to this case and declares that a contest such as the one here involved gives the contestant a presumptive preference right to enter the land and that "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." Under a further provision of that paragraph, the burden of establishing these issues was upon Day.

From this it will be seen that the only issues left for determination at this time are as to whether Day has shown by a preponderance of the evidence that the contest charges were not true, that Cutshall is not qualified to make the entry she has applied for or that the land is not subject to entry under her application.

An examination of the evidence very clearly shows that Day has failed to meet and carry the burden placed upon him by the instructions mentioned and the decision of the Commissioner must, therefore, be and is hereby reversed.

KERN PETROLEUM COMPANY.

Decided December 19, 1921.

**REPAYMENT—ACT OF MARCH 26, 1908—OIL AND GAS LANDS—MINING CLAIM—
FRAUD—TRANSFEEEE.**

A transferee of a placer oil claim, to whom a patent is denied for the reason that the preliminary location was fraudulently made, is entitled to repayment under the act of March 26, 1908, of the moneys deposited by him pursuant to the requirements of the placer mining laws, where it does not appear that he or his legal representatives were guilty of any fraudulent action or either had knowledge or were chargeable with knowledge that fraud had been perpetrated by his predecessor in interest.

FINNEY, *First Assistant Secretary:*

In 1910 the Haight and Masonic oil placer claims were located in the names of twenty persons, and later they were transferred to the California Petroleum Lands Company, and in turn conveyed to the Kern Petroleum Company by which application, Visalia 08226, for a patent was presented, and under which final certificate issued in March, 1919, after the Kern Petroleum Company had made all the necessary payments under that application.

Later, and after a hearing had been regularly ordered and held on charges attacking the *bona fides* of the original locations, the entry was canceled.

By its decision of June 23, 1921, the General Land Office denied the Kern Petroleum Company's application for repayment on the ground that the entry was canceled for the reason that "the evidence shows beyond doubt that the locations were made for the benefit of said California Petroleum Lands Company and constitute a fraud upon the Government."

In its appeal from that action the Kern Petroleum Company urges that it is entitled to repayment under the act of March 26, 1908 (35 Stat., 48), which authorizes repayment to an applicant whose application, entry, or proof has been rejected, "and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application."

This suggestion is based on the applicant's contention that the fraud upon which the cancellation was based was not committed by it, and that its application should not be rejected because of a fraud perpetrated by its predecessor in interest.

In the opinion of this Department this position is well taken, and must be sustained. It is nowhere contended that there was any fraud whatever in connection with the Kern Petroleum Company's application to enter, or that that company or its legal representatives were at any time guilty of any fraudulent action, or that it or they either had knowledge, or were so far charged with knowledge of the fact

that preliminary locations were fraudulently made, as to call for the rejection of this application.

The decision appealed from must, therefore, be and it hereby is, reversed.

REGULATIONS TO GOVERN THE LEASING OF LANDS IN THE CROW RESERVATION, MONTANA, FOR MINING PURPOSES.

Section 6 of the act of June 4, 1920 (41 Stat. L., 751-753), reads:

That any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes, upon the request of the tribal council under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, but no lease shall be made for a longer period than 10 years, but the lessees shall have the right to renewal thereof for a further period of 10 years upon such terms and conditions as the Secretary of the Interior may prescribe: *Provided, however,* That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *And provided further,* That at the expiration of 50 years from the date of approval of this act, unless otherwise ordered by Congress, the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs.

1. To carry this provision of law into effect the following regulations are prescribed:

Hereafter no leases covering any of the land above referred to will be offered for lease until the Crow Council shall have passed a resolution requesting the Secretary of the Interior to lease the land for mining purposes. Should any person or corporation desire to have any particular tract of land offered for lease, written request to that effect should be submitted to the superintendent or other officer in charge of the Crow Reservation in order that such tract may, if deemed advisable, upon the request of the Crow Council, be included in the next advertisement of leases.

2. At such times and in such manner as the Secretary of the Interior may direct, the superintendent shall publish notices that specific tracts will be offered at public auction to the highest responsible bidder for a bonus consideration in addition to stipulated royalties.

3. The successful bidder must deposit with the superintendent on the day of sale a certified check on a solvent national bank in an amount equal to 20 per cent of the bid as a guaranty of good faith. The superintendent after each sale shall furnish a list of all successful bidders to the Commissioner of Indian Affairs, and leases shall

be entered into with the successful bidders by the superintendent, who shall submit same for departmental approval.

The right is reserved by the Secretary of the Interior to reject any and all bids, and to disapprove and reject any lease made on an accepted bid. Should any lease be disapproved and rejected after deposit made by bidder, the deposit shall be immediately returned.

4. A successful bidder shall file an application for approval of lease (Form A), giving the information called for therein, and will be allowed 30 days from date of notice of acceptance of bid within which to execute leases and otherwise comply with these regulations. Failure on the part of an applicant to comply with the requirements shall operate as a forfeiture of the amount deposited as a guaranty of good faith. Delivery of lease shall be withheld pending payment of balance of any bonus, and if such balance be not paid within 20 days after notice by the superintendent of the approval of the lease the approval shall be revoked and the deposit forfeited, in the discretion of the Secretary of the Interior.

5. All leases shall be executed in triplicate, and when filed with the superintendent shall be accompanied by a filing fee of \$6. The superintendent shall place all such fees in a special fund, to be expended under the direction of the Commissioner of Indian Affairs for the necessary expense of leasing and of supervising mining operations.

6. Every application for the approval of a lease (Form A) shall affirm that the lease is taken in good faith for development and operation, not for speculation or transfer; shall set forth any interest the applicant may have in mining leases upon restricted Indian lands in the Crow Reservation; and shall show briefly his business experience, his competence to fulfill the obligation of the lease, and his aggregate assets and liabilities. If the applicant is a corporation, it shall file evidence of authority of its officers to execute papers, and with its first application it shall also file:

(I) A certified copy of its articles of incorporation, and, if foreign to the State in which the lands are located, evidence showing compliance with the corporation laws thereof.

(II) Lists of officers and stockholders, with post-office addresses and number of shares held by each.

(III) A sworn statement of the proper officers showing:

(a) The total number of shares of the capital stock actually issued and the amount of cash paid into the treasury on each share sold; or, if paid in property, the kind, quantity, and value of the same paid per share.

(b) Of the stock sold, how much remains unpaid and subject to assessment.

(c) The amount of the cash the company has in its treasury and elsewhere, and from what source it was received.

(d) The property, exclusive of cash, owned by the company, and its value.

(e) The total indebtedness of the company and the nature of its obligations.

7. Statements of changes in officers and stockholders shall be furnished by a corporation lessee to the superintendent on January 1 of each year and at such other times as may be requested. Affidavits may also be required of individual stockholders at any time, setting forth in what corporations or with what persons, firms, or associations such individual stockholders are interested in oil and gas mining on the Crow Reservation, and whether they hold such interest for themselves or in trust.

8. Lessees shall furnish with each lease a bond (Form C) with two or more personal sureties, or with an acceptable company authorized to act, as sole surety. Such bond shall be in amount as follows: For less than 80 acres, \$1,000; for 80 acres and less than 120 acres, \$1,500; for 120 acres and not more than 160 acres, \$2,000; and for each additional 40 acres or part thereof above 160 acres, \$500; provided that a lessee may file one bond (Form D) in the sum of \$15,000 covering all leases on the Crow Reservation to which he is or may become a party. The right is reserved to increase the amount of a bond above the sum named in any case where the Secretary of the Interior deems it proper to do so.

9. The superintendent may, either before or after approved of a lease, call for any additional information desired to carry out these regulations. If a lessee shall fail to furnish the papers necessary to put his lease and bond in proper form for consideration, the superintendent shall forward such lease for disapproval.

10. Oil and gas leases shall be made for a period of 10 years from the date of approval by the Secretary of the Interior, and as much longer thereafter as oil or gas shall be found in paying quantities, provided that such extension shall not exceed an additional 10 years. Leases for other minerals shall be for a period not longer than 10 years, with the privilege of renewal for an additional period of 10 years in the case of producing leases.

11. Without special permission of the Secretary of the Interior, which may be obtained only when the conditions of mining or operation are very exceptional—

(a) No lease on deposits of the nature of lodes or veins containing ores of gold, silver, copper, lead, zinc, or other useful metal shall be granted for less than 20 acres nor for more than 960 acres.

(b) No lease for beds of placer gold, gypsum phosphate, asphaltum, iron ores, or other useful minerals other than coal, oil, and

gas shall be granted for less than 40 acres nor for more than 960 acres.

(c) Leases for oil and gas shall be made wherever practicable on units of 160 acres, but leases on larger tracts may be made with the consent of the Secretary, and no individual, corporation, partnership, company, or association shall hold leases for oil and gas mining purposes on lands in the Crow Reservation in excess of 4,800 acres.

12. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by the lease, and shall drill at least one well thereon within one year from the date of approval of the lease by the Secretary of the Interior, or shall pay to the officer in charge, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed 10 years from the date of such approval, in addition to the other considerations named in the lease, a rental of \$1 per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender the lease by executing and recording a proper release thereof and otherwise complying with paragraph 7 of the lease on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of \$1 per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of 15 days after it becomes due at the end of any yearly period during which a well has not been completed, as provided herein, shall be a violation of one of the material and substantial terms and conditions of the lease and be cause for cancellation of such lease under paragraph 9 thereof: but such cancellation shall not in anywise operate to release or relieve the lessee from the covenant and obligation to pay such rental or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as he may designate for the purpose, to drill and operate wells to offset wells on adjoining tracts and within 300 feet of the dividing line, or in case of gas wells the lessee may have the option of paying on each proposed well a sum equal to the royalty which, under these regulations, would be payable on the well to be offset instead of drilling such offset well. Offset wells must be drilled, or royalties paid in lieu of drilling, within 30 days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of the lease.

13. Lessees shall pay on each oil and gas lease annually in advance from the date of approval by the Secretary of the Interior royalties as follows: Fifteen cents per acre per annum for the first and second years, 30 cents per annum for the third and fourth years, 75 cents per annum for the fifth year, and \$1 per acre per annum for each succeeding year during the life of the lease. The advance royalty for the first year shall be paid to the officer in charge at the time of filing the lease, and all such payments shall be credited on the stipulated royalties for the particular year for which they are made.

14. Lessees other than oil and gas lessees shall pay on all leases annually in advance for the first year a rent of 15 cents per acre; for the second year 30 cents per acre; for the third year 50 cents per acre; and for the fourth and each succeeding year \$1 per acre. All sums paid as rental in any one year shall be credited after production begins on the royalty for that year if such royalties on production exceed the advance annual rental.

On all leases of class (a) there shall be expended annually in development work a sum which, with the annual rental, shall make an amount not less than \$5 per acre.

On all leases of class (b) there shall be expended annually in development work a sum which, with the annual rental, shall make an amount not less than \$100 for each 160 acres or fraction thereof included in the lease.

Each lessee shall file with the officer in charge of the reservation an annual report in duplicate within 20 days after the close of each calendar year, showing the character and value of the development work performed in that year, such report to be verified by affidavit of the lessee or his representative in charge of the work.

15. For substances other than gold, silver, copper, lead, zinc, tungsten, coal, asphaltum, and allied substances, oil, and gas, the lessee shall pay quarterly a royalty of not less than 10 per cent of the value, at the nearest shipping point, of all ores, metals, or minerals marketed.

16. For gold, silver, copper, lead, zinc, and tungsten, the lessee shall pay quarterly a royalty of not less than 10 per cent, to be computed on the gross value of the ores as shown by reduction returns after deducting freight and treatment charges. Duplicate reduction returns shall be filed by the lessee with the superintendent or other officer in charge of the reservation within 10 days after the ending of the quarter within which such returns are made.

17. For coal the lessee shall pay quarterly a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called "slack."

18. For asphaltum and allied substances the lessee shall pay quarterly a royalty of not less than 10 cents per ton of 2,000 pounds on crude material and of not less than 60 cents per ton on refined substances.

19. For oil the lessee shall pay a royalty of not less than $12\frac{1}{2}$ per cent of the gross proceeds of the oil produced, and payment shall be made at the time of sale or removal of oil.

20. The minimum rate of royalty for gas shall be \$300 per well per annum, payable in advance, calculated from date of commencement of utilization: *Provided*, That the royalty shall be $12\frac{1}{2}$ per cent of the gross proceeds of the sale of the gas, and which shall not be less than the value of same at the well, to be determined by the Secretary of the Interior, in the event such amount exceeds \$300 per annum for each year from date of commencement of utilization, after deducting the gas used for fuel in operating the lease. Where the lessee desires to retain the gas producing privilege of any well, but not to utilize the well for commercial purposes, he shall pay an annual rental of \$100 in advance, beginning from the date of discovery of gas, and to be paid within 20 days therefrom.

21. The royalties on all products except gas, coal, oil, gold, silver, copper, lead, zinc, and tungsten shall be based on sworn quarterly reports, and shall be paid within 20 days after the close of each quarter.

22. The lessee shall keep books of account showing the amount of ore shipped or oil or other mineral substance sold or treated, and showing also the amount of money received from the sale of ores, oil, etc. The books of the lessee shall be open to inspection, examination, and verification by any officer of the Interior Department assigned to such duty by the Secretary of the Interior, and it is distinctly understood that the duly authorized agents of the Government shall be permitted freely to make transcripts of all the accounts and other books of lessee.

23. All royalties or payments due under leases issued under these regulations shall be paid to the superintendent or other officer in charge of the reservation in cash or by certified check or other suitable form of exchange.

ASSIGNMENTS.

24. (a) Leases hereafter approved, or any interest therein, may be assigned or transferred only with the approval of the Secretary of the Interior, and to procure such approval the assignee must be qualified to hold such lease under existing rules and resolutions, and shall furnish a satisfactory bond for the faithful performance of the covenants and conditions thereof.

(b) No lease or any interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly, by working or drilling contract or otherwise, without the consent of the Secretary of the Interior.

(c) Assignments of leases and stipulations modifying the terms of existing leases shall be filed with the superintendent within 30 days after the date of execution. A filing fee of \$6 for each assignment and \$2 for each stipulation shall be paid to the superintendent, to be expended under the direction of the Commissioner of Indian Affairs for the necessary expense of leasing and of supervising mining operations.

CANCELLATION.

25. A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated. When the lessee applies for cancellation of an approved lease, he shall pay a surrender fee of \$1, and all royalties and rents due to the date of completion of such application must be paid before the same will be considered, and the parts of the lease held by the lessor and the lessee shall be surrendered, together with a properly executed and recorded release of record if the lease has been recorded. No part of any advance royalties shall be refunded to the lessee, nor shall he be relieved from his obligation to pay advance royalties and rentals in lieu of development annually when due, by reason of any subsequent surrender or cancellation of the lease. Upon cancellation of a lease the lessor shall be entitled to take immediate possession of the land.

OPERATIONS.

26. Operations upon land covered by any lease requiring the approval of the Secretary of the Interior will not be permitted until after such lease is regularly approved, delivered, and official notice thereof given.

DUTIES OF LESSEES.

27. In mining operations the lessee shall keep the mine well and sufficiently timbered at all points where necessary, in accordance with good mining practice, and in such manner as may be necessary to the proper preservation of the property leased and safety of the workmen, compatible with economical mining.

28. On expiration of the term of a lease, or when a lease is surrendered, the lessee shall deliver to the Government the leased ground

with the mine workings in good order and condition, and bondsmen will be held for such delivery in good order and condition, unless relieved by the Secretary of the Interior for cause. It shall however, be stipulated that the machinery necessary to operate the mine is the property of the lessee, but that it may be removed by him only after the condition of the property has been ascertained by inspection by the Secretary of the Interior or his authorized agents.

29. The Secretary of the Interior may, in his discretion, cancel any lease if the mining operations are conducted wastefully and without regard to good mining practice.

30. Before actual drilling or development operations are commenced on the leased lands, or within not less than 30 days from the date of approval of these regulations, in case of producing leases or leased lands on which such operations have been commenced prior to such approval, the lessee or assignee shall appoint a local or resident representative within the State, on whom the superintendent or other authorized representative of the Department of the Interior may serve notices or otherwise communicate with in securing compliance with these regulations, and shall notify the superintendent of the name and post-office address of the representative so appointed.

In the event of the incapacity or absence from the county of such designated local or resident representative, the lessee shall appoint some person to serve in his stead, and in the absence of such representative or of notice of the appointment of a substitute any employee of the lessee upon the leased premises, or the contractor or other person in charge of drilling or related operations thereon, shall be considered the representative of the lessee for the purpose of service of orders or notices as herein provided, and service upon any such employee, contractor, or other person shall be deemed service upon the lessee.

31. Five days prior to the commencement of drilling operations lessee shall submit, on forms to be furnished by the superintendent, a report in duplicate showing the location of the proposed wells.

32. Lessee shall keep upon the leased premises accurate records of the drilling, redrilling, or deepening of all wells, showing formations drilled through, casing used, together with other information as indicated on prescribed forms to be furnished by the superintendent, and shall transmit such and other reports of operations when required by the superintendent.

33. Lessee shall furnish on the 1st day of January and the 1st day of July of each year a plat, in manner and form as prescribed by the superintendent, showing all wells, active or abandoned, on the leased lands, and other related information. Blank plats will be furnished upon application.

34. Lessee shall clearly and permanently mark all rigs or wells in a conspicuous place with the name of the lessee and the number or designation of the well, and shall take all necessary precautions for the preservation of these markings.

35. Lessee shall not drill within 300 feet of boundary line of leased lands, except with the consent of the superintendent. Lessees shall not locate any well or tank within 200 feet of any public highway or any building used as a dwelling, granary, barn, or established watering place, except with the written permission of the superintendent.

36. Lessee shall notify the superintendent in advance of intention to use the mud fluid process of drilling, so that an inspector of the Interior Department may approve the method and material to be used, in the event the operator is not familiar with this process.

37. Lessee shall provide a properly prepared slush pit into which all sand pumpings and other materials extracted from the well during the process of drilling shall be deposited. Such sand pumpings and materials shall not be allowed to run over the surface of the land. The construction of such pits shall be subject to the approval of the inspector.

38. Lessee shall effectually shut out and exclude all water from any oil or gas bearing stratum and take all proper precautions and measures to prevent the contamination or pollution of any fresh-water supply encountered in any well drilled for oil or gas.

39. Lessee shall protect to the satisfaction of the inspector each productive oil or gas bearing formation drilled through for the purpose of producing oil or gas from a lower formation.

40. When natural gas is encountered in commercial quantities in any well, lessee shall confine such gas to its natural stratum until such time as the same can be produced and utilized without waste, it being understood that commercial quantity of gas produced by a well is any unrestricted flow of natural gas in excess of 2,000,000 cubic feet per 24 hours: *Provided*, That if, in the opinion of the superintendent, gas of a lesser quantity shall be of commercial value, the superintendent shall have authority to require the conservation of said gas. Water shall not be introduced into any well where such introduction will operate to kill or restrict the open flow of gas therein.

41. Lessee shall separate the oil from the gas when both are produced in commercial quantities from the same formation, or under such conditions as might result in waste of oil or gas in commercial quantities.

42. Lessee shall not use natural gas from a distance or separate stratum for the purpose of flowing or lifting the oil.

43. Lessee shall prevent oil or gas, or both, from escaping from any well into the open air, and not permit any oil or gas well to go wild or to burn wastefully.

44. Lessee shall not use natural gas in place of steam to operate engines or pumps under direct pressure, except with the special permission of the superintendent.

45. Lessee shall not use natural gas in flambeau lights, save as authorized or approved by the superintendent.

46. Lessee shall use every possible precaution, in accordance with the most approved methods, to stop and prevent waste of natural gas and oil, or both, at the wells and from connecting lines and to prevent the wasteful utilization of such gas about the well.

47. Lessee shall notify the superintendent a reasonable time in advance of starting work of intention to redrill, deepen, plug, or abandon a well; and whenever the superintendent or inspector has given notice that extra precautions are necessary in the plugging of wells in a particular territory, lessee shall give at least three days' advance notice of such intended plugging.

48. Lessee shall not abandon any well for the purpose of drilling deeper for oil or gas unless the producing stratum is properly protected, and shall not abandon any well producing oil or gas except with the approval of the superintendent or where it can be demonstrated that the further operation of such well is commercially unprofitable.

49. Lessee shall plug and fill all dry or abandoned wells on the leased lands in the manner required, and where any such well penetrates an oil or gas bearing formation it shall be thoroughly cleaned to the bottom of the hole before being plugged or filled, and shall then be filled with mud-laden fluid of a consistency approved by the superintendent, from the bottom to the top thereof, before any casing is removed from the well, or, in lieu of the use of such mud fluid, each oil and gas bearing formation shall be adequately protected by cement, and the well filled in above and below such cement or plugs with material approved by the superintendent.

Where both fresh water and salt water are encountered in any dry or abandoned well which is not being filled with mud-laden fluid as hereinbefore provided, the fresh water shall be efficiently protected against contamination by cement or approved plugs, or by both such cement and plugs, to be placed at such points in the well as the superintendent shall approve for the protection of the fresh water.

50. If such abandoned or dry well be in a coal bed or other mineral vein deposit, or be in such condition as to warrant taking extraordinary precautions, the superintendent may require such variations in the above-prescribed methods of plugging and filling as may be

necessary in his judgment to protect such seam or deposit against infiltration of gas or water and to protect all other strata encountered in the well.

51. The manner in which such mud-laden fluid, cement, or plugs shall be introduced into any well being plugged, and the type of plugs so used shall be subject to the approval of the superintendent.

In the event the lessee or operator shall fail to plug properly any dry or abandoned well in accordance with these regulations, the superintendent may, after five days' notice to the parties in interest, plug such well at the expense of the lessee or his surety.

52. All B-S or water from tanks or wells shall be drained off into proper receptacles located at a safe distance from tanks, wells, or buildings, to the end that same may be disposed of by being burned or transported from the premises.

Where it is impossible to burn the B-S, or where it is necessary to pump salt water in such quantities as would damage the surface of the leased land or adjoining property, or pollute any fresh water, the lessee shall notify the superintendent, who shall give instructions in each instance as to the disposition of such B-S or salt water.

53. Lessee shall make a full and complete report to the superintendent of all accidents or fires occurring on the leased premises.

54. Lessee shall provide approved tankage of suitable shape or accurate measurement, into which all production of crude oil shall be run from the wells, and shall furnish the superintendent copies of accurate tank tables and all run tickets, as and when requested.

55. The superintendent may make arrangements with the purchasers of oil for the payment of the royalty, but such arrangements, if made, shall not relieve the lessee from responsibility for the payment of the royalty, should such purchaser fail, neglect, or refuse to pay the royalty when it becomes due: *Provided*, That no oil shall be run to any purchaser or delivered to the pipe lines or other carrier for shipment, or otherwise conveyed or removed from the leased premises, until a division order is executed, filed, and approved by the superintendent, showing that the lessee has a regularly approved lease in effect, and the conditions under which the oil may be run. Lessees shall be required to pay for all oil or gas used off the leased premises for operating purposes; affidavit shall be made as to the production used for such purposes and royalty paid in the usual manner. The lessee or his representative shall be present when oil is taken from the leased premises under any division order and will be responsible for the correct measurement thereof and shall report all oil so run.

The lessee shall also authorize the pipe line company or the purchaser of oil to furnish the superintendent with a monthly statement,

not later than the 10th day of the following calendar month, of the gross barrels run as common-carrier shipment or purchased from his lease or leases.

56. Lessee will not be permitted to use any timber from any Crow lands except under written agreement with the owner, and in all cases where lands are restricted such agreement shall be subject to the approval of the superintendent. Lessee shall, when requested by the superintendent, furnish a statement under oath as to whether the rig timbers were purchased on the leased tract; and if so, state the name of the person from whom purchased, and give such other information regarding the procurement of timber as the superintendent may desire.

57. The use of and damage to surface of land shall be settled as provided in the lease.

58. Failure to comply with any provision of the lease or of these regulations shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a fine of not more than \$500 per day for each and every day the terms of the lease or the regulations are violated, or the orders of the superintendent pertaining thereto are not complied with, or to both such fine and cancellation, in the discretion of the Secretary of the Interior: *Provided*, That the lessee shall be entitled to notice and hearing with respect to the terms of the lease or of the regulations violated, which hearing shall be held by the superintendent, whose finding shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the superintendent's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

59. These regulations shall become effective and in full force from and after the date of approval, and shall be subject to change or alteration at any time by the Secretary of the Interior: *Provided*, That no regulations made after the approval of any lease shall operate to affect the terms of lease, rate of royalty, rental, or acreage, unless agreed to by both parties to the lease.

60. Applications, leases, and other papers must be upon forms prescribed by the Secretary of the Interior, and the superintendent will furnish prospective lessees with such forms at a cost of \$1 per set.

Form A.—Application for lease, including financial showing.

Form B.—Oil and gas lease.

Form C.—Mining lease other than oil and gas.

Form D.—Bond.

Form E.—Authority of officers to execute papers.

Form F.—Assignment.

Form G.—Collective bond.

All sums received from sale of forms shall be placed in a special fund, to be expended under the direction of the Commissioner of Indian Affairs for the expenses necessary to carry out these regulations.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS.

The foregoing regulations are respectfully submitted to the Secretary of the Interior with the recommendation that they be approved.

CHAS. H. BURKE,
Commissioner of Indian Affairs.

Approved: December 19, 1921.

E. C. FINNEY,
Acting Secretary.

LOYD WILSON.

Decided December 21, 1921.

AMENDMENT—WATER EXPLORATION PERMIT—ENTRY—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

The Secretary of the Interior may, through the exercise of his supervisory power, sanction the amendment of a permit to explore for water granted under the act of October 22, 1919, inasmuch as such a permit is an "entry" in the sense in which that term is used in the administration of the public land laws relating to the amendment of entries.

AMENDMENT—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY—STATUTES.

The enactment by Congress of particular statutes making it mandatory for the Secretary of the Interior to grant amendments of entries under specified circumstances does not deprive him of the exercise of his supervisory power to grant amendments on other grounds not provided for by those statutes, and that power should be liberally exercised in cases where entries have been improperly applied for and allowed because of misinformation given to applicants.

AMENDMENT—ENTRY—WORDS AND PHRASES.

The word "entry," when used in the statutes and departmental regulations relating to amendments, is to be construed in its generic sense and treated as signifying an appropriation of public lands generally.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

The cases of North and South Alabama Railroad Company (2 L. D., 681), Crail Wiley (3 L. D., 429), Samuel Meek (18 L. D., 213), Josiah Cox (27 L. D., 389), William A. Calderhead (36 L. D., 446), Elbert S. Sibert (40 L. D., 434), cited and applied.

FINNEY, *First Assistant Secretary:*

The failure of the local officers to note the allowance of certain desert-land entries on their records caused Loyd Wilson to later present his application, Carson City 012346, under the act of October

22, 1919 (41 Stat., 293), for a permit to drill, or otherwise explore for water on the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 26, T. 37 N., R. 25 E., M. D. M., and other lands, and resulted in the erroneous granting of that permit by this Department on December 23, 1920, as to those tracts.

Later, and after Wilson's attention had been called to the fact that his permit was in fatal conflict with those entries, he presented his application to have his permit so amended as to include therein other and unappropriated tracts adjoining the lands not in conflict in lieu of the tracts named; and by its decision of August 25, 1921, the General Land Office denied that application on the ground that "there is no authority in law for the amendment of" such permits.

The case is now before this Department for consideration and it must be held that that decision is erroneous for the reason that it is well settled that the Land Department may at any time take any action that may be necessary to correct its errors while the land involved remains subject to its jurisdiction.

There is another, and a fundamental reason why this Department can not concur in the Commissioner's conclusion that this amendment should be rejected because there is no statute which, in terms, authorizes the amendment of such permits as to the one here in question.

While the word "entry" is generally used in the statutes and departmental regulations relating to amendments, that word, when so used, should be taken in its generic sense and treated as "signifying an appropriation of public lands" generally, as was said in *North and South Alabama Railroad Company* (2 L. D., 681, 682), where it was held that the word "entry" as used in the repayment statutes included "selection."

For this reason, and for the purposes of the present consideration, this permit must be considered and treated as an entry, and it has been long settled that the Secretary of the Interior has, through the exercise of the power given by section 441 of the Revised Statutes to supervise the Government's business relating to public lands, the inherent or incidental power to sanction in his discretion, the amendment of entries of any kind on equitable grounds, and for the purposes not only of correcting mistakes but to prevent unmerited loss or hardship on the part of the entryman, and it is well settled that he has that power independent of any statute specifically authorizing such amendments. *William A. Calderhead* (36 L. D., 446), paragraph 10 of instructions of April 22, 1909 (37 L. D., 655, 657). And it has been repeatedly held that that power should be liberally exercised and not abridged, particularly by technical rules or in cases where entries have been made, as in this case, through misinformation given entrymen, or for similar reasons. *Crail Wiley* (3 L. D., 429), *Samuel Meek* (18 L. D., 213), *Josiah Cox* (27 L. D., 389).

It is true that Congress has enacted certain laws providing for the amendment of entries under certain circumstances, such as section 2372 of the Revised Statutes, but it was for the purposes of making it mandatory upon the Secretary to grant such amendments as are specified in these statutes, and not for the purpose of taking away by implication or otherwise his inherent power, to which reference has been made, that those statutes were enacted. Elbert S. Sibert (40 L. D., 434). For these reasons, it must be held that the decision appealed from was erroneous and it is consequently hereby reversed.

RESTORATION TO SETTLEMENT AND ENTRY OF LANDS WITHDRAWN FOR THE TOWNSITE OF TALKEETNA, ALASKA.

INSTRUCTIONS.

[Circular No. 797.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., December 22, 1921.

THE REGISTER,
Juneau, Alaska:

By Executive order No. 3472, dated May 25, 1921, it is ordered that certain lands therein described be, and the same are, eliminated from the operation of Executive order No. 1919 $\frac{1}{2}$, dated April 21, 1914, withdrawing and reserving certain lands for the townsite of Talkeetna under the act of Congress approved March 12, 1914 (38 Stat., 305); and it was ordered that the said lands be restored to entry, with the exception of those lands embraced in survey No. 1260.

It should be observed, however, that this restoration does not modify nor otherwise affect any other withdrawals or reservations of the lands or any portion thereof.

Pursuant to said order of restoration of May 25, 1921, and subject to valid rights and the terms and conditions of any other withdrawals or reservations, the lands hereinafter described shall, if non-mineral, be opened to homestead entry, in accordance with Joint Resolution No. 29, of February 14, 1920. (41 Stat., 434), and Departmental regulations issued thereunder, of March 31, 1920, Circular No. 678. (47 L. D., 346), only by qualified ex-service men and women, of the War with Germany, for a period of sixty-three (63) days, and thereafter any of said lands remaining unentered shall be opened to appropriation under the land laws of the United States as applicable to Alaska, and special Alaskan acts, in the manner and subject to the following considerations:

(a) Soldiers' Preference.—From February 15, 1922 to April 18, 1922, inclusive, certain lands will be subject to entry under the homestead laws by qualified ex-service men and women of the War with

Germany, who have been honorably discharged or separated from the Service, or placed in the Army or Naval Reserves, provided, that such soldier preference applicant may file applications to enter at any time during the twenty (20) days prior to the date on which said restoration becomes effective, that is, from January 26, 1922 to February 14, 1922, inclusive, all such applications, together with those filed on February 14, 1922, to be treated as filed simultaneously, and conflicting applications to be disposed of by lot. Circular No. 324, dated May 22, 1914 (43 L. D., 254).

The preferences above provided for are subject to valid prior settlement rights or equitable claims recognized by existing laws, but to avoid confusion, any such right or claim should be asserted during the twenty (20) days simultaneous filing period provided for above.

(b) General Disposition.—Any of said lands not taken under paragraph (a), above, will become subject to appropriation, beginning April 19, 1922, in accordance with said order, subject to any applicable law in the district of Alaska, and applications may be received during the twenty (20) days prior to that date, or from March 31, 1922 to April 19, 1922, inclusive, to be treated as simultaneous applications.

Subsequent to this order and prior to the date of the restoration to general disposition as herein provided, no rights may be acquired to the lands to be restored, by settlement, in advance of entry or otherwise, except strictly in accordance herewith.

On receipt of this, you will, from your records, make up, for use by the public, a list of the lands in your land district, which are hereby opened to entry or appropriation in pursuance hereof.

You will also make proper notations of this order upon your records, post a copy in your office, and give as much publicity to this restoration as possible, as a matter of news, without expense to the Government.

The lands affected by this order as hereinabove set forth, which are eliminated from Executive order No. 1919½, dated April 21, 1914, are as follows:

All that portion of land in Executive order No. 1919½, which embraces the tract at the confluence of the Susitna and Talkeetna Rivers, described by metes and bounds, and reserved for the town site of Talkeetna, excepting from said elimination 260 acres embraced in survey No. 1260, in Secs. 24 and 25, T. 26 N., R. 5 W., Seward Meridian, reserved for railroad, town site, and cemetery purposes. The land restored approximates 4,914 acres.

This order shall not affect any other lands withdrawn by said Executive order No. 1919½ or by any other order.

Approved:

E. C. FINNEY,

First Assistant Secretary.

WILLIAM SPRY,
Commissioner.

STATE OF CALIFORNIA, ROBINSON, TRANSFEREE.¹

Decided November 4, 1921.

SCHOOL LAND—INDEMNITY—MINERAL LANDS—OIL AND GAS LANDS—PATENT.

A vested right attaches under a State indemnity school selection as soon as the selector has done everything required of him preliminary to the passing of title, and where the question of the mineral or nonmineral character of the land subsequently becomes involved, the adjudication of that issue is to be governed by the known character of the land as of the date of the completion of the selection.

SCHOOL LAND—INDEMNITY—OIL AND GAS LANDS—SURFACE RIGHTS—PATENT—RECORDS.

A proceeding relating to the reformation of title papers is governed by principles of equity, and a selector of indemnity school land, who, after having done everything necessary to acquire title, afterwards files a waiver of the oil and gas deposits in accordance with a requirement of the Land Department then in force and accepts a restricted patent, will not be granted an unrestricted patent after it has been judicially determined in an action involving similar facts, but to which the patentee was not a party, that the ruling under which the requirement was made was erroneous.

COURT DECISION CITED AND CONSTRUED.

The case of *Wyoming v. United States* (255 U. S., 489), cited and construed.

FINNEY, *First Assistant Secretary*:

The State of California on September 16, 1907, filed indemnity school selection, Visalia 0383, embracing among other tracts the SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 22, T. 28 S., R. 27 E., M. D. M. Said tract was included in Petroleum Reserve No. 18, by Executive order of January 26, 1911.

By letter of July 6, 1915, the Commissioner of the General Land Office directed the register and receiver to notify the State that in case of the approval of said selection the oil and gas deposits would be reserved to the United States under the provisions of the act of July 17, 1914 (38 Stat., 509), unless application was made within 30 days from notice for classification of the land as nonmineral, and proper showing as a basis for that action, citing circular of March 20, 1915 (44 L. D., 32). In pursuance of that ruling the State filed application for nonmineral classification, which application was denied by the Commissioner and his action was affirmed by the Department, May 29, 1916.

On August 2, 1916, the State was required to consent to accept the surface or limited title under the provisions of the act of July 17, 1914, *supra*, or to apply for a hearing for the submission of evidence to show the nonmineral character of the land. Such hearing was had on application of F. W. Robinson claiming as transferee, and upon the evidence adduced the local officers rendered an opinion June 28, 1918, finding the land to be mineral in character and recommending that limited title only be granted under the act of 1914. In the

¹ See decision on rehearing, page 387.

absence of appeal, the Commissioner by decision of October 31, 1918, affirmed the action of the local officers and closed that feature of the case, and at the same time, called upon the State to consent to reservation of the oil and gas deposits to the United States, otherwise the selection would be canceled. Under the circumstances mentioned, the State filed its waiver of all mineral rights and elected to receive approval of the selection under the act of July 17, 1914, *supra*. The selection was accordingly approved March 3, 1920, subject to the provisions of said act.

August 11, 1921, F. W. Robinson, the said transferee, filed in the local land office a petition for reopening of the case and for unrestricted title, which petition was transmitted to the Department with the Commissioner's letter of September 22, 1921, asking for instructions.

The petitioner urges that a vested right was secured by the filing and completion of the selection in accordance with the law and regulations, and that any inquiry as to the mineral character of the land should relate to the date of the filing and should not extend to the period after such completion, citing the recent decision of the United States Supreme Court in the case of *Wyoming v. United States*, rendered March 28, 1921 (255 U. S., 489). It is further contended that this tract was not of known mineral character at the time of selection nor prior to July 1914, when its probable oil value was established.

The inquiry at the time of the hearing as to the mineral character of said tract was directed to its known character at that time, under the then existing ruling of the Department that a vested right in a selection of this kind was not obtained until approval of the selection by the proper officer of the United States. See administrative ruling of July 15, 1914 (43 L. D., 293). That doctrine was disaffirmed by the Supreme Court in the Wyoming case wherein it was held that a vested right attaches as soon as the selection has been completed. The question now presented is whether the claimant is entitled to an adjudication as to the known character of the land, whether mineral or nonmineral, at the date when the selection was completed, that is, when everything had been done by the selector necessary to the passing of title. If this were an incompleting transaction, the selector would clearly be entitled to an adjudication of that question and to insist upon the granting of an unrestricted title, in case it be found that the land was not of known mineral character at the time of the completion of the selection, under the rule announced in the Wyoming case. But this is a completed transaction. The State has accepted a limited title, with waiver of claim to the possible oil and gas deposits. The present proceeding is in the nature of a petition for the reformation of the title papers and must be governed by

principles of equity. The basic nature of a selection of this kind is a claim for agricultural land, and not mineral land. If mineral in fact be secured under such a claim, it is the result of miscarriage of law, due to lack of timely knowledge of the facts. In this case, the mineral, oil and gas, has been reserved to the Government by reason of lack of timely knowledge of the law. The result is precisely as it should have been if both the law and the facts had been known at the time of the completion of the selection. Certainly, equity does not demand that the condition be changed.

Assuming for present purposes, but not admitting, that this land was not of known mineral value at the time of the completion of the selection, and that the State had obtained a vested right to an unrestricted certification of title, nevertheless the claim for full title was resisted by the Department, and in consideration of the passing of a restricted title, the right to the possible oil and gas deposits was surrendered by waiver.

The surveyor general of the State, in electing to receive approval of the selected tract under the provisions of the act of July 17, 1914, acted under the legislative authority conferred in the act of April 14, 1915, by the State Legislature of California, which provides:

The surveyor general of the State of California is hereby authorized and empowered to accept the benefits of the act of Congress approved July 17, 1914, entitled: "An act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals," and on behalf of the State of California, or of any assignee of the State of California, to accept and receive lists and patents to lands selected by the State of California as agricultural lands, which were subsequently withdrawn, classified or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, and containing a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine and remove the same, as provided in said act of Congress.

The election and waiver by the surveyor general are contained in his letter of November 12, 1918, which reads as follows:

UNITED STATES LAND OFFICE,
Visalia, California.

GENTLEMEN:

Referring to General Land Office letter of October 31, 1918, allowing thirty days within which to file an election to accept surface title only for the W. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 22, T. 28 S., R. 27 E., M. D. M., embraced in State Selection 5000, Visalia Land District, Serial 0383, I beg to advise you that pursuant to the authority vested in the Surveyor General by an act approved April 14, 1915, being Chapter 66, Statutes of California, 1915, I hereby accept the benefits of the Act of Congress approved July 17, 1914, entitled:

"An act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals,"

and on behalf of the State of California and of its transferees, elect to accept and receive lists and patents to the W. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 22, T. 28 S., R. 27 E., M. D. M., embraced in State Selection 5000, Visalia Land District, Serial 0383, as provided in said Act of Congress, and I hereby elect to receive approval of said selected lands under the provisions of said Act of Congress approved July 17, 1914 (38 Stat., 509), and do hereby waive all mineral rights in and to the land.

Yours respectfully,

W. S. KINGSEBURY,
Surveyor General and ex officio
Register of the State Land Office.

The rule of estoppel is stated in Anderson's Law Dictionary, page 415, in the following words:

A man shall always be estopped by his own deed, and not permitted to aver or prove anything in contradiction to what he has once solemnly and deliberately avowed.

The rule of estoppel is no different as between individuals and a State where the State has acted through its duly constituted authorities of the people themselves. The legislative assembly is the duly representative authority of the State empowered to act for and on behalf of the people of the sovereign State. In view of the election and waiver by the State of California, *supra*, the principle of estoppel applies and the State is estopped by its own election and waiver in this matter. For these reasons adjustment should not be reopened for further adjudication as to any tracts which have been certified and the petition is therefore denied.

STATE OF CALIFORNIA, ROBINSON, TRANSFEREE (ON REHEARING).

Decided December 29, 1921.

SCHOOL LAND—INDEMNITY—OIL AND GAS LANDS—SURFACE RIGHTS—WAIVER—ESTOPPEL—RES JUDICATA.

Where the possible mineral deposits, oil or gas, in public lands embraced in an indemnity school selection, have been waived by the selector and a restricted certificate of title has been accepted under the provisions of the act of July 17, 1914, the State is estopped from further claim and the case is *res adjudicata*, notwithstanding that the mineral value of the land as of the date when the selection was completed was not established prior to the waiver and election to take a restricted patent.

FINNEY, *First Assistant Secretary:*

By decision of November 4, 1921 (48 L. D., 334), the Department denied the application of the State of California, F. W. Robinson,

transferee, for certification of unlimited title to the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22. T. 28 S., R. 27 E., M. D. M., Visalia land district.

The reason for such rejection was that the State had accepted limited title with reservation of the oil and gas deposits to the United States under the provisions of the act of July 17, 1914 (38 Stat., 509). A motion for rehearing was filed, and oral argument thereon has been heard.

The substance of the contentions made, appear to be that the act of July 17, 1914, *supra*, has no application for the reason that this selection was completed before the date of the existing withdrawal on account of the supposed oil and gas deposits; that the claimant was in effect coerced into election to take limited title by threat of the Government to cancel the selection upon failure to so elect; that the right to title without restriction had accrued prior to the withdrawal, and therefore there was no consideration for the waiver of the oil and gas deposits; that under the circumstances of the case the principle of estoppel does not apply.

This is merely enlargement on the argument formerly presented and considered in connection with the former decision. It is mere assumption to claim that the land was not known mineral land at the time of the completion of the selection. That question has never been adjudicated. The hearing which showed the mineral character of the land in 1918, was not directed to the question of its known mineral character as of 1907, when the selection was made and completed, because the latter date was not then regarded as controlling. The Department can not assent to the contention that the election to take surface patent under the act of July 17, 1914, may not be properly allowed without prior adjudication that the land was of known mineral character at the time of completing the selection. Section 3 of the act expressly permits the issuance of limited patent upon application therefor by the selector, where, subsequently to the selection, the lands have been withdrawn, classified, or reported as being valuable for oil, gas, or certain other minerals therein specified. It is not necessary that the fact of mineral value shall have been first established.

In the issuance and acceptance of the limited title, both parties acted in the light of the facts and the law as then understood. There was no coercion in the sense that the Department forced the selector to relinquish known legal rights. It is quite possible that no legal right was relinquished, and in view of the adjustment of the claim by certification in accordance with the waiver, the State is estopped from further claim, and the case may be properly regarded as *res adjudicata*.

The motion is accordingly denied.

SUGGESTIONS TO HOMESTEADERS AND PERSONS DESIRING TO MAKE HOMESTEAD ENTRIES.

[Circular No. 541.]

[In this revision of the Suggestions to Homesteaders changes were made in the following paragraphs from the form in which they appeared in the revision of April 6, 1917, Circular No. 541 (unpublished): 5, 6, 8, 9, 17, 27, 28, 30, 32, 35, 36, 37, 43, 45, 47, 50, and 51.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 16, 1922.

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, phosphate, nitrate, potash, oil, gas, or asphaltic minerals) 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. (a) 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.

(b) Under the law relating to ordinary lands a homestead entry is limited to 160 acres, but this area may sometimes be slightly exceeded where the tract is made up of irregular subdivisions. However, an entry of land which has been designated under one of the enlarged-homestead acts may contain 320 acres (see par. 43), and an entry of land designated under the stock-raising act may contain 640 acres. In western Nebraska 640 acres may be entered under the Kinkaid Act (explained in a special circular) without any designation of the land.

4. (a) 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. A settlement right on not exceeding 640 acres of unsurveyed land designated as subject to the stock-raising act may be obtained by establishment and maintenance of residence thereon, provided the boundaries of the tract claimed are plainly marked on the ground.

(b) Where a settlement claim has been duly initiated upon a tract of unsurveyed, unreserved, unappropriated public land by a person qualified to make homestead entry therefor, the settler is entitled to one or two leaves of absence during each residence year, aggregating not more than five months in each year after establishment of residence, in the same manner and upon the same conditions as persons having entries of record, as explained in paragraph 26. Detailed information regarding such leaves of absence is given in a special circular.

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. Such declaratory statements may also be filed in person by those who have been honorably discharged after 90 days' service in the Army, Navy, or Marine Corps during the operations on the Mexican border or in the war with Germany, but they can not file such statements by agent. 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. If the soldier dies without having filed application for entry following his declaratory statement, such entry may be made by his widow, or in case of her death or remarriage by his minor orphan children, but *not* by his heirs or devisees.

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 minors who served in the Army or Navy during the World War, who may make entry under section 8 of the act of August 31, 1918 (40 Stat., 954).
- (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. Exception is made, however, as to an entry under one of the enlarged homestead acts, which may be allowed provided applicant's claims under the timber and stone, desert land, and preemption laws do not make up approximately 320 acres, and do not with the homestead claim aggregate more than 480 acres; also, as to an entry under the stock-raising law, which may be allowed, provided its area does not make up with such other claims more than 800 acres, and that said claims do not contain as much as 320 acres. The rules as to limitation on the area of additional entries under the last-mentioned act are set forth in the special circular issued thereunder.

EFFECT OF MARRIAGE ON WOMEN'S RIGHTS.

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 of the marriage; and this last condition does not apply if each party has had compliance with the law for one year next before the marriage and neither one abandons the land prior to filing application for entry.

8. The marriage of an entrywoman will not defeat her right to acquire title to the land if she continues to reside thereon and otherwise comply with the law; but ordinarily the failure of her husband to live upon the homestead with her is treated as an evidence of bad faith, requiring testimony for its rebuttal. Husband and wife can not maintain separate residences on their respective homestead entries, and if at the time of marriage each is holding an unperfected entry on which residence must be had in order to acquire title, they can not hold both entries unless they are entitled to the benefits of the act of April 6, 1914, as amended by the act of March 1, 1921 (41 Stat., 1193), explained in the next paragraph.

9. Where a homestead entryman or settler and a homestead entrywoman or settler intermarry after each has fulfilled the requirements of the law for one year, the husband may (under the provisions of the act mentioned, Appendix No. 18) elect on which of the entries the home shall be made, after which their residence there shall constitute compliance with the residence requirements as to both homesteads. Instructions regarding the method of procedure under the act are found in a special circular.

10. Where the wife of a homestead settler or entryman, while residing upon the homestead claim and prior to the submission of final proof, has been abandoned and deserted by her husband for more than one year, she may, under the provisions of the act of October 22, 1914 (Appendix No. 20), submit proof (by way of commutation or otherwise) on the entry and secure patent in her own name, being allowed credit for all residence and cultivation had and improvements made, either by herself or by her husband. As to the method of procedure under that act, a special circular is issued.

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.

ENTRIES BY SOLDIERS AND SAILORS.

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

ADDITIONAL ENTRIES.

13. (a) Regardless of the question whether the land involved has been designated as subject to the enlarged-homestead act or the stock-raising homestead law, any person otherwise qualified who has made

final proof on an entry 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; the applicant therefor must give such data as will serve to identify his first filing. Residence, cultivation, and improvement must be performed as in the case of an original entry.

(b) Regardless, also, of designation of the land involved, an additional homestead entry may be made by a person for such an amount of public lands adjoining lands then owned and occupied 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. In connection with such an entry, all residence and cultivation may be had (before or after its date) on the original tract, provided the entryman continues to own it during the period in question.

(c) Where a person is entitled to make additional entry, as explained in paragraph 13 (a), he may enter land which has been designated under the enlarged-homestead act of an area double that to which he would be otherwise entitled. (Appendix No. 13.)

(d) A person who has perfected a homestead entry for land of the character contemplated by the enlarged-homestead acts, or who has a pending entry for such land, may make an additional entry for land of like character, as explained in paragraphs 47 and 48.

(e) A person who has perfected a homestead entry for land of the character contemplated by the stock-raising act, or who has a pending entry for such land, may make an additional entry for land of like character to make up in the aggregate not more than 640 acres, as explained in a special circular issued under said act. See paragraph 51.

SECOND ENTRIES.

14. (a) Where a person commuted a homestead entry before June 5, 1900, or paid the Indian price of the land entered before May 17, 1900, his homestead right is restored. See acts of June 5, 1900, and May 22, 1902 (Appendix No. 4), and the act of May 17, 1900 (Appendix No. 3).

(b) Where a person has made a homestead entry or entries but failed to perfect them, his right to make another homestead entry is governed by the act of Congress of September 5, 1914, which provides that the applicant must show to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited, or abandoned because of matters beyond his control, and that he has not speculated in his right, nor committed a fraud or attempted fraud in connection with such prior entry or entries. A special circular is issued regarding the procedure under said act.

(c) Where a person before February 20, 1917, made entry for land embraced in a ceded Indian reservation, and has at any time submitted proof thereon and has paid the full price of the land, being \$4 or more per acre for the tract, he is entitled to make a second homestead entry. (Appendix No. 5.)

(d) Where a person's homestead right is restored under the conditions mentioned in this paragraph, he may make an entry under the general law, under the enlarged-homestead act, or under the stock-raising law, at his option.

ADJOINING FARM HOMESTEAD.

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. In connection with an entry of this character, there must be shown the required amount of residence and cultivation after the date thereof, but both residence and cultivation may be had on the original tract.

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 the judge or 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. An application is not acceptable if executed more than 10 days before its filing at the land office.

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. Additional statements as to the character of the land must be made in applications under the enlarged-homestead acts and under the stock-raising law; but in the latter case, as the mineral in the land is reserved to the Government, no allegation as to same is made, but claimant must state that no part of the land is claimed, occupied or being worked under the mining laws.

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 soliders, 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 without having filed application for entry, the right to enter the land covered by his settlement passes to his widow. If there be no widow, said right passes to his heirs or devisee. See paragraph 4 for the general rules regarding settlement claims.

22. If a homestead entryman dies without having submitted final proof, his rights under the entry pass to his widow, or, if there be none, then to his heirs or devisees. However, if all the heirs be

minor children of the entryman or entrywoman, and their other parent be dead, the entry is not subject to devise. In such a case the right to a patent vests in the children at once upon proof only of the death of both parents and that they are the only children of the homesteader, provided, as to a male homesteader, that there be no widow. The law provides, in the alternative, that the executor, administrator, or guardian may, within two years after the death of the surviving parent, sell the land for the benefit of the children, in accordance with the law of the State where they are domiciled. In such cases it is required that there be furnished record evidence of an order for the sale made by a court of competent jurisdiction. In any event, publication and posting of notice of intention to submit proof or to ask issuance of patent to the purchaser is required.

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 file a declaratory statement in the manner explained in paragraph 5 and 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. If the widow files a declaratory statement and dies without having applied for entry, entry may be made on behalf of the minor children, but *not* by her devisees or other heirs.

RESIDENCE AND CULTIVATION REQUIRED UNDER THE HOMESTEAD LAWS.

25. With the exception of adjoining farm homestead entries and additional entries allowed under certain conditions pursuant to the general law, the enlarged homestead acts and the stock-raising law, a homestead entryman must establish residence upon the tract entered within six months after date of the entry, unless an extension of time is allowed, as explained in paragraph 35, and must maintain residence there for a period of three years. However, he may have credit for residence as well as cultivation before the date of entry if the land was, during the period in question, subject to appropriation by him or included in an entry against which he had initiated a contest resulting afterwards in its cancellation. Moreover, he may absent himself for a portion or portions of each year after making entry and establishing residence, as more fully explained in paragraph 26.

When proof is submitted it must be shown that the homesteader is a citizen of the United States, provided, however, that a homestead entrywoman who is a citizen when she makes her filing and thereafter marries an alien need not show that her husband is an American citizen, but must show that he is entitled to become one.

26. During each year, beginning with the date of establishment of actual residence, the entryman may absent himself from the land for not more than two periods, aggregating as much as five months. In order to be entitled to such absences the entryman need not file applications therefor, but must each time he leaves the land file at the local land office (by mail or otherwise) notice of the time of leaving; and upon his return to the land he must notify said office of the date thereof. If he has returned after an absence of less than five months and filed notice of his return, he may, without any intervening residence, again absent himself—pursuant to new notice—for the remaining part of five months within the residence year. However, two absences in different residence years, reckoned from the date when residence was established, must be separated by substantial periods if they together make up more than five months.

27. (a) Cultivation of the land for a period of at least two years is required, and this must generally consist of actual breaking of the soil, followed by planting, sowing of seed, and tillage for a crop other than native grasses. However, 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 (without sowing of seed) where that manner of cultivation is necessary or generally followed in the locality.

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 must be had. These requirements are the same as to homesteads under the general law and under the enlarged homestead acts, and the years in question begin to run, not from the establishment of residence, but from the date of the entry. A larger amount of cultivation is required on entries under section 6 of the enlarged homestead acts (see paragraphs 49 and 50), and the above-mentioned rules are not applicable to entries under the reclamation act. No cultivation whatsoever is required under the so-called Kinkaid Act, which affects only Nebraska, while the stock-raising homestead law requires no specific area of cultivation, only that the land has been actually used for raising stock and forage crops, and that it has been improved under certain conditions.

(b) The Secretary of the Interior is authorized to reduce the requirements as to cultivation. This may be done if the land entered is so hilly or rough, the soil so alkaline, compact, sandy, or swampy, or the precipitation of moisture so light as not to make cultivation of the required amounts practicable, or if the land is generally valuable only for grazing. An application for reduction upon the grounds indicated must be filed at the proper local land office on the form prescribed therefor, and should set forth in detail the special physical conditions of the land on which claimant bases his right to a reduction.

A reduction may be allowed also if the entryman, after making entry and establishing residence, has met with misfortune which renders him reasonably unable to cultivate the prescribed area. In this class of cases an application for reduction is not to be filed, but notice of the misfortune and of its nature must be submitted to the register of the local land office, under oath, within 60 days after its occurrence; upon satisfactory proof regarding the misfortune at the time of submitting final proof a reduction in area of cultivation during the period of disability following the misfortune may be permitted.

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 foregoing applies to lands containing valuable or merchantable timber and will not preclude the reduction of area of cultivation on proper showing in cases where the presence of stumps, brush, lodge pole pine, or other valueless or nonmerchantable timber prevents the clearing and cultivation of the prescribed area.

(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.

CREDIT ON ACCOUNT OF MILITARY SERVICE.

28. (a) A soldier or sailor of one of the classes mentioned in paragraph 5 who makes entry 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 an 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 a habitable house has been placed upon the land.

(b) In each year of residence required of the soldier he is entitled to the same absence privilege as is enjoyed by other homesteaders.

(c) If the soldier's military service was sufficient in duration to require only one year's residence and improvement upon the claim, the entryman must perform such an amount of cultivation as to evidence his good faith as a homestead claimant. A soldier with 19 months' or more military service will be required to reside on the land at least 7 months during the first entry year; with more than 12 and less than 19 months, he must reside on the land 7 months during the first year and such part of the second year as, added to his excess over 12 months' service, will equal 7 months, and must cultivate one-sixteenth of the area the second year; with 7 and not

more than 12 months, he must reside upon the land 7 months during each of the first and second years, and cultivate one-sixteenth of the area the second year; with 90 days and less than 7 months, he must reside upon the land 7 months during each year for the first and second years, and such part of the third year as, added to his service, will equal 7 months, and cultivate one-sixteenth of the area the second year and one-eighth the third year; and with less than 90 days' service, will receive no credit therefor in lieu of residence and cultivation. If he delays the submission of proof beyond the period of residence required, the cultivation necessary for the years elapsing before the submission of proof must be shown. He may apply for and receive a reduction in the area to be cultivated, in the same manner and under the conditions required of other applicants. Where the entry is made under the stock-raising provisions of the homestead law, the above rule with respect to residence will be applicable, but the soldier must make the improvements on the land required of other persons under that law, and show in lieu of cultivation that he actually used the land for raising stock and forage crops during the period that he was required to reside on the land. He must show, in any entry under the homestead laws, that he had a habitable house on the land at the date of submitting proof. These rights are conferred by section 2305 of the United States Revised Statutes as amended by act of June 6, 1912 (37 Stat., 123), and act of February 25, 1919 (40 Stat., 1153).

(d) The act of June 16, 1898 (30 Stat., 473), copied in Appendix No. 21, provides that where a person has settled on the public lands under the homestead laws, his service in the Army, Navy, or Marine Corps during any war in which the United States may be engaged shall be construed as equivalent to residence and cultivation for the same length of time upon the tract entered or settled upon; also that no contest initiated against a homestead entry on the ground of abandonment shall be sustained, unless it be alleged and proved that the settler's alleged absence from the land was not due to his employment in such service.

(e) By the joint resolution of August 29, 1916 (39 Stat., 670), the provisions of said act are made "applicable in all cases of military service rendered in connection with operations in Mexico or along the borders thereof, or in mobilization camps elsewhere, whether such service be in the military or naval organization of the United States or the National Guard of the several States now or hereafter in the service of the United States."

(f) Section 1 of the act of July 28, 1917 (40 Stat., 248), grants credit for constructive residence and cultivation to homesteaders absent because of military or naval service during the World War and protects them from a charge of abandonment during such period; and section 2 of said act provides that where a homestead settler, applicant, or entryman dies while actually engaged in the military or naval service of the United States during any war in which the United States may be engaged, his widow, if unmarried, or in case of her death or marriage, his minor orphan children, or his or their legal representatives may proceed forthwith to make final proof upon the entry or application thereafter allowed, the death of the soldier or sailor while so engaged in the service of the United States being

equivalent to a performance of all requirements as to residence and cultivation upon such homestead.

(g) The act of March 1, 1921 (41 Stat., 1202), authorizes homestead settlers, applicants, or entrymen who enlisted prior to November 11, 1918, in the United States Army, Navy, or Marine Corps during the war with Germany and were honorably discharged or separated because of physical incapacities due to service and for that reason are unable to return to the land, to make proof without further residence, improvements, and cultivation, at such time and place as may be authorized by this office.

(h) The act of September 29, 1919 (41 Stat., 288), grants to persons who after discharge from the military or naval service during the war against Germany are furnished a course in vocational training under the terms of the vocational rehabilitation act approved June 27, 1918 (40 Stat., 617), and who before entering upon such course made settlement, application, or entry under the homestead laws, a leave of absence from the land for the purpose of undertaking training by the Federal Board for Vocational Education, and such absence while actually engaged in such training may be counted as constructive residence on the land, but no patent may be earned by such homesteader until he can show that he has complied with the residence, improvement, and cultivation requirements for a period of at least one year. Homesteaders entitled to the benefits of this act should forward to the local officers notice of their absence from the land and of the fact that they have been admitted to take a course thereunder.

(i) 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 3 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. The widow or minor orphan children have no right to make entry based on service during the World War only.

COMPLETION OF ENTRY BY WIDOW OR HEIRS.

31. Persons who make entry as the widows, heirs, or devisees 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. They must in all cases show that they are citizens of the United States regardless of the question whether the entryman was himself a citizen. Moreover, the entry may not be completed by the widow, heirs, or devisee of a homestead entryman unless he himself had complied with the law in all respects to the date of his death, and they must also show, at the time of final proof, that there is a habitable house on the land.

HOLDERS OF PUBLIC OFFICE.

33. Homestead entrymen are not entitled to any special privileges whatsoever in connection with their claims by reason of the fact that they are appointed or elected to public offices, the duties of which require their residence elsewhere than on the homesteads.

ENTRYMEN WHO BECOME INSANE.

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. However, if the entryman regains his sanity before the expiration of three years after the date of the entry, he is required to reestablish residence on the land and comply with the law; and he must himself submit proof unless the unsoundness of mind recurs.

LEAVES OF ABSENCE.

35. (a) Where, for climatic reasons, or on account of sickness, or other unavoidable cause, residence can not be established on the land within six months after the date of the entry, additional time, not exceeding six months, may be allowed. An application for such extension must include the affidavits of the entryman, and two witnesses acquainted with the facts, which may be executed before any officer authorized to administer oaths and having a seal of office, through outside of the county or land district where the entry is situated. The application should set forth in detail the grounds upon which it is based, including a statement as to the probable duration of the hindering causes and the date when the claimant may reasonably expect to establish his residence.

If the extension is granted, it protects the entry from contest on the ground of the homesteader's failure to establish residence within the first six months' period, unless it be shown that the order for extension was fraudulently obtained. But the failure of the entryman to apply for an extension of time does not forfeit his right to show, in defense of a contest, the existence of conditions which might have been made the basis for such an application.

(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. Application 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. It 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. The period during which a homesteader is absent from his claim pursuant to a leave duly granted can not be counted in his favor.

(c) The act of February 25, 1919 (40 Stat., 1153), authorizes the register and receiver of the local land office to grant to such homesteaders as make proper showing in their applications that the climatic conditions make residence on the homestead for 7 months in each year a hardship a reduction in the terms of residence to 6 months in each year over a period of 4 years, or to 5 months in each year over a period of 5 years; but the total residence required need not exceed 25 months, not less than 5 of which shall be in each year and proof must be submitted within 5 years. Instructions under said act are printed in Circular No. 636.

COMMUTATION OF HOMESTEAD ENTRIES.

36. (a) 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.

(b) The entryman, or his statutory successor, must, as a general thing, show substantially continuous residence upon the land, was maintained until the submission of the proof or filing of notice of intention to submit same, the existence of a habitable house upon the claim and cultivation of not less than one-sixteenth of its acreage. However, the proof may be accepted where actual residence for the required period is shown, even though slightly broken, provided it be in reasonably compact periods; and the failure to continue the residence until filing of notice to submit proof will not prevent its acceptance if the Land Department be fully satisfied of entryman's good faith, and provided no contest or adverse proceeding shall have been initiated for default in residence, or other good cause, prior to

filing such notice. Credit for residence and cultivation before the date of entry may be allowed under the conditions, explained in paragraph 25, as to three-year proof.

(c) Where a contest is initiated against an entry, prior to filing of notice to submit commutation proof, the entry will be considered under sections 2291 and 2297, Revised Statutes, as amended, and the homesteader's absence will not be excused upon the ground that he has complied with the law for 14 months and is under no obligation to further reside upon the land. However, a contest for abandonment can not be maintained if the absence after the 14 months' residence is pursuant to a leave of absence regularly and properly granted under the act of March 2, 1889, or under conditions which would have entitled the entryman to such leave upon formal application therefor, and such absence will not prevent the submission of acceptable commutation proof.

(d) An entryman submitting commutation proof may add together, to make up the 14 months, periods of residence before and after an absence under a leave of absence regularly granted, or an absence of not exceeding five months of which he had given notices as provided by the act of June 6, 1912.

(e) 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.

(f) The claimant must show full citizenship, as in case of three-year proof.

(g) The provisions of law explained in paragraph 27 (f) apply to commutation proof also.

(h) 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, Appendix No. 4); second entries allowed under the act of June 5, 1900 (31 Stat., 267; Appendix No. 4); second entries allowed under the act of May 22, 1902 (32 Stat., 203; Appendix No. 4), when the former entry was commuted; entries within forests under the act of June 11, 1906 (34 Stat., 233); or entries under the stock-raising act of December 29, 1916 (39 Stat., 862).

WHEN PROOF MAY BE SUBMITTED.

37. Either final or commutation proof may be made at any time when it can be shown that there is a habitable house upon the land and that the required residence and cultivation have been had. Proof must be submitted within five years. 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.

WHO MAY SUBMIT PROOF.

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 10, 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.

HOW PROOFS MAY BE MADE.

39. 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 issue a notice naming the time and place for submission of proof and cause same to be published at entryman's expense for 30 days preceding submission of proof in the newspaper designated by the register. If this be a daily paper, the publication must be inserted in 30 consecutive issues; if daily except Sunday, in 26; if weekly, in 5; and if semiweekly, in 9 consecutive issues.

The first day of publication must be at least 30 days before the date set for proof, and a copy of the notice must be posted in a conspicuous place in the office of the register for at least 30 days before said date.

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 possible to do so, appear on the day mentioned in the notice.

FEEES 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 less than 81 acres, or \$10 if he enters 81 acres or more. 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 and under the stock-raising homestead act are the same as above, but the commissions are based upon the area of the land embraced in the entry. (See par. 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 (see Appendix No. 1), 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 (extended by later legislation to additional States), and of June 17, 1910 (Appendix No. 13), provide for the making of homestead entries for areas of not exceeding 320 acres of public land in the States of Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, 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.

Lands containing merchantable timber, or valuable minerals other than coal, phosphate, nitrate, potash, oil, gas, or asphaltic minerals, 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. Entry may be allowed for the surface only of lands containing any of the minerals named. A legal subdivision will not be regarded as irrigable and excluded from designation under these acts because a minor portion of it is susceptible of irrigation unless said portion is at least one-eighth thereof. Where there is an application for additional entry after submission of final proof on the original the land covered by the original will not be regarded as irrigable, and excluded from designation, upon the ground that more than one-eighth of any subdivision is irrigable, unless said original embraces the equivalent of 20 or more acres of land in a reasonably compact body that can be thoroughly irrigated and reclaimed.

DESIGNATION OF LANDS—PETITIONS.

44. 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 of designation, a date is fixed on which it will become effective, and at that time the land becomes subject to entry under the act.

Under the act of March 4, 1915 (38 Stat., 956, Appendix No. 17), a person may file an application for entry under the enlarged-homestead act of a tract of surveyed land which has not been designated thereunder, accompanied by a petition for its designation, or he may file application for additional entry, though part of the land involved has not been designated, accompanied by like petition. He thus secures a preference right of entry if the land be thereafter designated. Attention is directed to the fact that an additional entry can not be allowed unless the tract first entered, as well as the one sought to be added, is designated, and therefore petitions should in all cases cover so much of both tracts as has not already been designated.

Instructions prescribing the procedure under the act mentioned are found in a special circular; the act itself is copied in Appendix No. 17.

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.

COMPACTNESS—FEES.

45. A tract included in an entry under the enlarged-homestead act or in an entry under the general law, and an additional under said act, should be in compact form, and such claim may not be permitted to entirely surround a subdivision of unappropriated lands subject to entry under said act.

The acts provide that the fees shall be the same as those now required to be paid under the homestead laws; therefor, 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. See paragraph 41.

FILING OF APPLICATIONS.

46. Applications to make entry under these acts must be submitted on forms prescribed by the General Land Office; in case of an original entry, Form 4-003, and of an additional entry, Form 4-004.

The affidavit of an applicant as to the character of the land must be corroborated by two witnesses. It is not necessary that such witnesses be acquainted with the applicant, and if they are not so acquainted their affidavit should be modified accordingly.

The affidavit of the witnesses, as well as that of the applicant, must be executed before an officer authorized to administer oaths in homestead cases. See paragraph 16.

ADDITIONAL ENTRY FOR CONTIGUOUS LAND.

47. (a) Under section 3 of the enlarged-homestead acts a person who has entered less than 320 acres of land which is of the character described therein, and which has been so designated by the Secretary of the Interior, may make entry of adjoining lands, also so designated, which will not, together with the tract first entered, exceed 320 acres in area. Where proof has not already been submitted on the original claim at the time application for additional entry is filed, residence upon and cultivation of the tract first entered will be accepted as equivalent to residence upon and cultivation of the additional.

(b) Where a person makes entry under the general provisions of the homestead laws, and before submission of proof on said entry makes 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 (b) 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.

(f) As above indicated, persons who have already submitted proof on their original entries are not, for that reason, deprived of the privilege of making additional entries. However, if a person makes entry for a tract contiguous to the one originally entered, he is required to show that he still owns and occupies (not necessarily resides upon) the tract first entered; in submitting proof on the additional filing, he is accorded credit for all residence on either tract, but must show cultivation of the additional tract itself to the extent and for the period (after the date of the additional entry) required by law. A special circular is issued under the act of March 3, 1915, allowing such additional entries (38 Stat., 956, Appendix No. 13).

ADDITIONAL ENTRY FOR INCONTIGUOUS LAND.

48. (a) Under section 7 of the enlarged-homestead acts, added thereto by the act of July 3, 1916 (39 Stat., 344), and the act of September 5, 1916 (39 Stat., 724), a person who has submitted final proof on a homestead entry for less than 320 acres of land of the character contemplated by said acts, has the right to enter sufficient land of similar character, not contiguous to his first entry, to make up therewith not more than 320 acres. He is required to have the same residence and cultivation and a habitable house on the additional entry as though it were an original filing, except where the second tract is within 20 miles of the first, in which case residence and a habitable house on either tract will be accepted. A special circular is issued relating to such additional entries. The act of

July 3, 1916 (extended to Idaho by that of Sept. 5, 1916), is printed in Appendix No. 21.

(b) Where a person has perfected a homestead entry for less than 160 acres and is entitled to an additional entry for sufficient land to make that area, he may enter under the enlarged-homestead act a tract designated thereunder of an amount double that which he would be entitled to appropriate of land not so designated. (Act of Feb. 20, 1917, 39 Stat., 925, Appendix No. 13.)

ENTRIES NOT REQUIRING RESIDENCE.

49. The sixth section of the act of February 19, 1909 (35 Stat., 639, Appendix No. 15), provides that not exceeding 2,000,000 acres of land in the State of Utah, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of that act; with the exception, however, that entrymen of such lands need not reside 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.

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.

The rules relating to petitions for designation of lands, referred to in paragraphs 44 and 47, apply to section 6 of the enlarged-homestead act; applications to make entry thereunder will not be received until the date fixed in the order designating the land as subject to entry under said section, except when accompanied by petitions for designation, complying with the rules with reference thereto.

50. The sixth section of the act of June 17, 1910 (36 Stat., 531), as amended by the act of August 10, 1917 (40 Stat., 273), provides for the designation of 1,000,000 acres of land in the State of Idaho of the same character contemplated by section 6 of the act of February 19, 1909. One-sixteenth of the cultivable area of the entry must be cultivated during the first year of the entry, one-eighth of the area during the second year, and one-fourth of the area during the third and each succeeding year. Entries made under section 6 of the act prior to August 10, 1917, may be perfected without a showing as to cultivation during the first year, but entryman must show cultivation of one-eighth of the area of the entry during the second year, one-fourth of the area of the entry during the third year and until submission of final proof; but in such cases the entryman must show that he resided within 20 miles from the land in his entry, whereas under the act as amended it is required that "after six months from the date of entry and until final proof the entryman shall be a resident of the State of Idaho."

STOCK-RAISING HOMESTEADS.

51. (a) The act of December 29, 1916 (39 Stat., 862), provides that the Secretary of the Interior may designate unappropriated, unreserved public lands as "stock-raising lands," where the surface thereof is, in his opinion, chiefly valuable for grazing and raising forage crops, provided they do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, are of such character that 640 acres are reasonably required for the support of a family, and contain no water holes or other bodies of water needed or used by the public for watering purposes.

(b) Where lands are thus designated, any person qualified to make entry under the homestead laws may make a homestead entry for not exceeding 640 acres thereof, and the fact that the tract sought may be valuable for coal or other minerals is not material, since all minerals are reserved to the United States.

(c) There is required compliance with the provisions of the general law with respect to residence and the erection of a habitable house. No specific amount of cultivation is required, but it must be shown, on submission of proof, that the entryman has made permanent improvements upon the tract, tending to increase its value for stock-raising purposes, of the value of not less than \$1.25 per acre, half of which improvements must be placed there within three years after entry; also that the land has been used for three years for raising stock and forage crops.

(d) Preference right of entry through applications accompanied by petitions for designation may be secured in substantially the same manner as under the enlarged-homestead law.

(e) The act provides for additional entries and for entries conditioned on the surrender of former filings. These matters, as well as the preferential right for additional entry of contiguous lands, are explained in a special circular issued under this act.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

HENRY CHAMBERLAIN.

Decided January 23, 1922.

TIMBER AND STONE ACT—OIL AND GAS LANDS—SURFACE RIGHTS—FINAL PROOF—
PATENT—BURDEN OF PROOF—EVIDENCE.

A complete equitable title becomes vested upon the claimant's full compliance with the law and the final certificate upon a stone entry is *prima facie* evidence of that title, and thereafter such entryman can not be compelled to accept a limited patent pursuant to the act of July 17, 1914, because of a subsequent report that the land is valuable for oil or gas, unless the Government makes the charge and shows upon assumption of the burden of proof that the land was of known mineral character at the date of the perfection of the claim.

TIMBER AND STONE ACT—OIL AND GAS LANDS—FINAL PROOF—EVIDENCE—NOTICE—HEARING.

A report by a field agent, after the issuance of a final certificate upon a stone entry, charging that the land contains oil and gas and was so known at the date of final proof, may be used as a basis for Government proceedings against the claim, but it is not competent evidence upon which final action adverse to the claimant may be taken, without charges, notice and an opportunity for a hearing.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Payne v. New Mexico* (255 U. S., 367), *Wyoming v. United States* (255 U. S., 489), *Charles W. Pelham* (39 L. D., 201), *Richard P. Ireland* (40 L. D., 484), *George F. Goodwin* (43 L. D., 193), *Tilmon D. Mabry* (48 L. D., 155), cited and applied.

FINNEY, *First Assistant Secretary*:

Henry Chamberlain, who on September 20, 1920, made stone entry 032486, for lot 3, Sec. 5, T. 4 N., R. 17 W., S. B. M., Los Angeles, California, land district, has appealed from the decision of the Commissioner of the General Land Office dated June 17, 1921, requiring him to file an application for classification of the land as nonmineral, or to consent to the amendment of his final certificate so as to reserve the oil and gas deposits or suffer cancellation of his entry.

October 25, 1919, Chamberlain filed his application to purchase under the timber and stone act. February 12, 1920, the appraisal of the land was filed and accompanied by a report that the tract was nonmineral. Notice for publication issued on March 6, 1920, and on April 9, 1920, the chief of field division reported that he had no information warranting field investigation. May 26, 1920, Chamberlain made final proof and payment for the land. The proof was suspended because of the contest affidavit filed on April 7, 1920. That contest abated and the case was closed and on September 20, 1920, entry was allowed and certificate issued.

In the decision appealed from it was said:

This office is in receipt of a report from a mineral examiner dated March 31, 1921, in view of which you will notify the claimant in accordance with paragraphs 9 and 10(b) of departmental instructions of March 20, 1915, Circular 393 (44 L. D., 32), as amended by Circular 481 of June 27, 1916, under the act of July 17, 1914 (38 Stat., 509), that he is allowed thirty days from service of notice hereof in which to (1) file in your office application for classification of the land as nonmineral, making the showing prescribed in paragraph 10 of said circular, or (2) in which to file consent to have the amendment of the certificate to contain the following:

"Patent to contain the provisions, reservations, conditions and limitations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas," or, (3) of his right of appeal to the Secretary of the Interior, and that in the event of his failure to take action within the time allowed, his entry and final certificate, hereby held for cancellation, will be finally canceled without further notice to him from this office.

The Commissioner also stated in effect that if the application for a nonmineral classification was filed and denied, the claimant would be allowed thirty days within which to apply for a hearing, at which the burden of proof would be upon the Government to establish the mineral character of the land.

The report referred to by the Commissioner is one dated March 31, 1921, by a mineral examiner, in which it is stated that the land is valuable for oil and was so known at the date of final proof. The entry certificate was issued six months before said report was made and nine months prior to the Commissioner's action thereon. That certificate is *prima facie* evidence of a vested interest and full equitable title to the land in the claimant. The burden rests on the Government to show, if it can, by proper proceeding, and upon due notice that such certificate is bad and should be canceled, and that equitable title did not accrue.

In the case of Charles W. Pelham (39 L. D., 201), it was held by the Department (syllabus)—

After full payment of the purchase price and the issuance of final certificate upon a timber and stone entry, the land department is without jurisdiction over the land except to determine whether it was subject to such entry at the date thereof and whether the entryman was qualified to make the entry and had in all respects complied with the law; and subsequent withdrawal of the land in anticipation of proposed legislation affecting the disposition of power sites is unauthorized and not sufficient ground for withholding patent upon the final certificate.

See also the cases of Wyoming *v.* United States (255 U. S., 489), and Payne *v.* New Mexico (255 U. S., 367).

Section 3 of the act of July 17, 1914 (38 Stat., 509), which act provides for agricultural entry of lands withdrawn, classified, or reported as containing oil or gas, prescribes in substance that any person who shall enter or purchase under the nonmineral land laws any lands which are subsequently withdrawn, classified, or reported as being valuable for oil or gas, may upon application therefor and making satisfactory proof, receive a patent containing a reservation of such mineral deposits. The section is primarily applicable to incomplete and unperfected entries. The concluding paragraph of the regulations of March 20, 1915 (44 L. D., 32, 37), reads as follows:

A withdrawal or classification will be deemed *prima facie* evidence of the character of the land covered thereby for the purposes of this act. Where any nonmineral application to select, locate, enter, or purchase has *preceded* the withdrawal or classification and is incomplete and unperfected at such date, the claimant, not then having obtained a vested right in the land, must take patent with a reservation or sustain the burden of showing at a hearing, if one be ordered, that the land is in fact nonmineral in character and therefore erroneously classified or not of the character intended to be included in the withdrawal. Where the agricultural claimant has completed and perfected his claim and becomes possessed of a vested right in the land which *subsequent*

thereto is withdrawn or classified, the burden will rest upon the Government to show that the land is in fact mineral in character and was so known at the date of final completion and perfection of the claim. See Charles W. Pelham (39 L. D., 201).

Amended paragraph 9 (45 L. D., 79), and paragraph 10 (b) of the regulations cited by the Commissioner can not be directly invoked to challenge the validity of the final certificate which *prima facie* evidences an outstanding equitable title, and which was duly issued prior to the mineral withdrawal, classification or report. Furthermore, as against a perfected claim carrying on its face a vested right and equitable title to the land, a subsequent adverse report by a member of the field service is not alone competent or sufficient to justify the requirements made by the Commissioner. See cases of George F. Goodwin (43 L. D., 193), and Richard P. Ireland (40 L. D., 484). Such a report may be properly utilized as the basis for charges, notice, and a hearing. As against a final entry or perfected claim, a later adverse report as to oil or gas stands on no different footing than does a like report as to gold, copper, or other minerals, and should be treated in accordance with the usual practice. The principle involved in this regard has been repeatedly announced. In the appendix to the oil leasing regulations (47 L. D., 437, 471), there appears the following:

RESERVATION OF MINERAL—WHEN REQUIRED.

Where a homestead entry (not under the grazing act) is made without a reservation of the oil to the Government and the land is withdrawn or classified as oil land before completed final proof is submitted, the entryman must take patent with a reservation of the oil, unless he can procure a reclassification of the land by the department or a removal of the withdrawal, or unless he can show at a hearing (the burden of proof being on him) that the land was not of a known mineral character at date of final proof.

But where, in the case last stated, their withdrawal or classification as mineral was not made until after final proof was submitted, the entryman will be entitled to a patent without a reservation, unless the Government can show (the burden of proof being on the Government), at a hearing if necessary, that the land was of known mineral character at the date of final proof. If the Government can show this, the result will be the same regardless of whether there has been a withdrawal or classification.

The above excerpt is cited and quoted in the recent case of Tilmon D. Mabry on rehearing (48 L. D., 155, 158).

The action of the Commissioner herein can not be sustained. The case is remanded with directions that proceedings be instituted against the entry, based on proper charges to the effect that the land was of known oil character at the time of proof and payment and that it was not chiefly valuable for timber or stone. The decision appealed from is reversed.

COPE v. DOCKERY.

Decided January 25, 1922.

CONTINUANCE—PRACTICE—CONTESTANT—HEARING.

Personal attendance of a contestant at the hearing is presumptively essential to the proper presentation of a contest, and a motion for continuance and change of place, while a matter within the discretion of the local officers, should be considered from the standpoint of the ability of the contestant to attend under the circumstances, where he makes showing that, owing to sickness or some other unavoidable happening, he will be unable to be present at the hearing.

CONTINUANCE—RULES OF PRACTICE—CONTESTANT—HEARING.

Action on a motion for continuance of a hearing on the ground that the contestant will be unable to attend on account of sickness or some other unavoidable circumstance is not to be governed by the general provisions contained in the Rules of Practice relating to continuance on account of absent witnesses, which are inapplicable, but should be dependent upon the facts in each case.

DEPARTMENTAL DECISIONS CITED AND CONSTRUED.

The cases of *Uppendahl v. White* (7 L. D., 60), and *John N. Dickerson* (35 L. D., 67), cited and construed.

FINNEY, *First Assistant Secretary*:

Nellie S. Cope has appealed from the decision of the Commissioner of the General Land Office, rendered February 17, 1921, affirming the action of the register and receiver of July 27, 1920, denying her motion for a continuance and change of place of the hearing ordered in connection with her contest against the homestead entry 016125 of Jasper C. Dockery, embracing the NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29, T. 8 N., R. 25 E., N. M. M., Tucumcari, New Mexico, land district.

It appears that the proceeding giving rise to the present issue was initiated by Nellie S. Cope, who filed an application to contest the entry of Dockery May 5, 1920; that subsequently the General Land Office, at the instance of an unfavorable report made by one of its agents as the result of an investigation, directed adverse proceedings against the entry May 17, 1920; that the proceedings upon the Government charge were held in abeyance pending the result of the private contest; that the local officers ordered a hearing to be held on July 30, 1920, before a United States Commissioner at Puerto de Luna, New Mexico; that on July 26, 1920, the contestant, through her attorney, presented a motion for a continuance, which was denied; that on July 28, 1920, the motion was renewed and a request also made for designation of another place and officer before whom it should be held; that the latter motion and request were also denied; that neither the contestant nor her attorney appeared at the

hearing; that the contest was thereupon dismissed on motion of the contestee on the ground of default.

An appeal was taken from the action of the local officers, whereupon the Commissioner held that the showings made for a continuance failed to comply with the Rules of Practice; that either the contestant or her attorney should have attended the hearing and presented such evidence as was then available; that an application could then have been submitted for a time to take by deposition the evidence of the witnesses whose attendance could not have been procured.

It is alleged that the contestant, owing to ill health, was temporarily outside of the State when the place and time for the hearing were fixed; that neither she nor her attorney were consulted relative to the setting of the hearing; that notice thereof did not reach her until about July 26, 1920; that even if she had had ample notice, the place at which the hearing was to be held was not suited for the attendance of a young single woman in bad health, inasmuch as there was no hotel or other means of lodgment and sustenance except through the setting up and maintenance of a camp, in a stifling hot canyon at that season of the year; that it was possible to select another place in the vicinity of the land at which there were hotel accommodations, where clerical services could have been obtained.

The contestant submitted affidavits of two physicians dated July 28th and 29th, 1920, respectively, certifying to the fact of her ill health, and that she would not, in their opinion, be able to attend to any business matters for some time thereafter.

In the decision appealed from, the Commissioner stated that it had not been shown to his satisfaction that the contestant was too ill to attend the hearing, as she had traveled, a few days previously thereto, from Kansas to New Mexico; that the matter of granting a motion for continuance rests in the sound discretion of the local officers; that the exercise of such discretion should not be interfered with unless abuse thereof is shown; that the showing made by the contestant was not sufficient to warrant a demand, as a matter of justice, that the hearing should be postponed and a change of place designated for her benefit and to the additional expense and disadvantage of the contestee.

The sole question raised by the issue herein is that of the right of a contestant to have a suitable time and place fixed for a hearing in order that personal attendance thereat may not be made impossible or intolerable. The Rules of Practice do not contain any specific provision relating to that point. The rules pertaining to continuance, Rules 17-19, inclusive, have particular reference to the continuance of hearings on account of absence of witnesses. This case does

not involve the question of the evidence of witnesses so much as it does the right of the contestant herself to be present.

The Department held in the case of *Uppendahl v. White* (7 L. D., 60), that the personal attendance of the contestant at the hearing is presumptively essential to the proper presentation of his case, and that a contest should be reinstated where it was dismissed in the absence of the contestant, such absence being caused by the fault of the claimant.

The principle enunciated in the case of *Uppendahl v. White*, *supra*, is applicable to the instant case. It is to be presumed that the attendance of the contestant was essential to the proper presentation of her case, and while it is not to be disputed that the local officers are clothed with discretion as to the fixing of the place for a hearing and the setting of the time thereof and in allowing or denying motions for continuance on account of absence of witnesses, yet in a case where it is shown that the contestant, owing to sickness or some other unavoidable circumstance, is unable to be present at the hearing, and requests a continuance, giving the reason therefor, the motion should be considered from the standpoint of the ability of the contestant to attend under the circumstances.

In the instant case the action of the local officers, in the opinion of the Department, amounted to a denial to the contestant of her opportunity of being present at the hearing. If the judgment, which directed the dismissal of the contest, is permitted to become final, the burden is thrown upon the Government of supporting its charge which was held in abeyance because of the initiation of the private contest.

The nature of a contest is clearly set forth in the case of *John N. Dickerson* (35 L. D., 67, 70), in language as follows:

Every contest in the general sense is a proceeding by the Government, whether it is prosecuted through the accredited officials, or by the agency of individual contests. In either case it is a proceeding exercised by the Land Department in virtue of its supervisory control over the disposal of the public lands, and in fulfillment of its duty to investigate every entry, for the purpose of protecting the rights of the people as well as to do justice to all claimants (*Knight v. Land Association*, 142 U. S., 161; *John N. Dickerson*, 33 L. D., 498, 500).

After consideration of the presentment of this case on appeal, it is concluded that, in view of the physical condition of the contestant at the time, the order setting the hearing at Puerto de Luna, was improvident. The decision of the Commissioner is, therefore, reversed and the case remanded to the end that the contest be reinstated and further appropriate proceedings be directed accordingly.

RUSSELL v. UNITED STATES BORAX COMPANY (ON PETITION).

Decided January 25, 1922.

SCHOOL LAND—MINERAL LANDS—LIEU SELECTION—SURVEY—ACT OF FEBRUARY 28, 1891—STATUTES—CALIFORNIA.

Neither the act of February 28, 1891, which granted to the State of California the option to waive its right to such school sections in place as should be discovered subsequently to the approval of the official survey to be of mineral character, and take lands in lieu thereof, nor the legislative act of that State of April 1, 1897, permitting mineral prospecting and location of mining claims thereupon, revested the United States with title to those lands, but merely authorized a right of exchange, prior to the exercise and acceptance of which the Government is without authority to make disposition thereof.

SCHOOL LAND—MINERAL LANDS—LIEU SELECTION—MINERAL ENTRY—REINSTATEMENT—ADVERSE CLAIM—SURVEY—CALIFORNIA.

Lands within a school section in the State of California, which were found to be of mineral character subsequently to the approval of the official survey, are not subject to mineral entry under the United States mining laws unless and until exchange thereof for other lands has been perfected pursuant to the act of February 28, 1891, and where a mineral entry for such lands has been canceled because invalid when made, a reinstatement thereof after an exchange of the lands has been approved will not be permitted to the prejudice of an intervening adverse claim, if the claimant submitted without protest to the cancellation of the entry and failed to renew his claim after title revested in the United States.

DEPARTMENTAL DECISIONS CITED AND CONSTRUED.

The cases of State of California (33 L. D., 356), and Sewell A. Knapp, on petition (47 L. D., 156), cited and construed.

FINNEY, *First Assistant Secretary*:

July 19, 1921, the Department on appeal rejected the application of the United States Borax Company for reinstatement of mineral entry 332 embracing lands in sections 25 and 36, T. 26 N., R. 2 E., S. B. M., California, known as the Clara lode claim, Independence 06256. That decision became final in the absence of a motion for rehearing. December 14, 1921, the said company filed a petition for the exercise of the supervisory authority of the Department and for reconsideration.

The said claim was located April 26, 1900, and a mineral survey was afterwards made and patent applied for. After due publication and proof, final certificate was issued December 14, 1905. About three-fourths of the claim, including the discovery point and all the development work, are within section 36, a school section.

November 21, 1906, the Commissioner of the General Land Office required the claimant to show cause why the entry should not be canceled as to the portion in section 36, which presumably belonged to the State under its school grant in the absence of a showing that

it was known mineral land at the time of the official survey which was made prior to the location of this claim. In response to that requirement the claimant stated under date of August 20, 1907, that it could not make any showing to overcome the presumption in favor of the rights of the State and that it would not ask to have the matter kept open any longer.

March 25, 1908, the Commissioner held that cancellation of that portion of the entry in section 36 would defeat the entry *in toto* because all of the improvements and discovery point were on that portion. The entire entry was accordingly held for cancellation.

April 6, 1908, counsel for the company admitted that no work had been done on the claim since the original application was filed, and waived the right to make further showing. The entry was accordingly canceled by the Commissioner's letter of April 24, 1908.

It also appears that on February 12, 1908, the State of California filed a selection list offering as base the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, said section 36. That selection was rejected by the Commissioner March 15, 1913, for the reason that the said mineral entry had been canceled and that presumably the land offered was not proper base.

June 1, 1919, W. S. Russell and his associates located certain placer claims in the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said section 36, covering land included in the said Clara lode claim.

February 3, 1920, the State filed its selection list offering as base the said NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 36, which selection was approved June 24, 1921.

February 26, 1920, the said Borax Company filed application for reinstatement of its said canceled mineral entry, and on June 3, 1920, the said W. S. Russell filed protest against said application for reinstatement. The protestant alleged abandonment of the mining claim by the said company, and it was held in the former decision that reinstatement of the application for patent would be of no avail, as it could only be effective from the date of formal application for republication of notice, and that the matters in issue between the parties can be determined in the event that one of them files an application for patent and the other asserts claim through an adverse proceeding in the manner provided by statute.

The petition urges that error was made in not recognizing that the said company had a vested right to patent under its old entry; that the requirement made by the Commissioner of the claimant to show that the land was known mineral land at the time of the survey was an unlawful requirement; that the entry was not duly and legally canceled. Recent Supreme Court decisions are cited in support of the contention that a vested right had been obtained which could not be destroyed by cancellation of the entry.

Departmental decision in the case of the State of California (33 L. D., 356), is cited in support of the contention that it was error to require the company to show that the land involved was of known mineral character at the time of the official survey. The gist of that decision is given in the syllabus which reads as follows:

Under the provisions of the act of February 28, 1891, amending section 2275 of the Revised Statutes, the State may, if it so elects, waive its right to portions of sections sixteen and thirty-six in place, and select other lands in lieu thereof, upon proof showing the present character of the lands to be mineral, without regard to their known mineral character at the date of their identification by the lines of the public survey.

It will be observed that said decision recognized the principle that the title to the school sections in place passed to the State if they were not known to be mineral at the time of the official survey, but that the State has the option under the provisions of the act of February 28, 1891, to waive its right to such sections upon proof of present mineral character and take lands in lieu thereof. This is merely a right of exchange and not strictly an indemnity right to satisfy a loss, for there is no loss under the circumstances stated, as the State is not compelled to select other land but may retain the mineral land should it desire to do so. The United States is not at liberty to dispose of such tracts until it has been determined that the school grant did not attach, or if it did attach, that an exchange has been made.

In this connection the petition further relies on the legislative act of California of April 1, 1897 (California Statutes, 1897, p. 438), which provides in part as follows:

The sixteenth and thirty-sixth sections belonging to the state, in which there may be found valuable mineral deposits, are hereby declared to be free and open to exploration, occupation, and purchase of the United States, under the laws, rules, and regulations passed and prescribed by the United States, for the sale of mineral lands.

Lindley on Mines, Vol. 3, 3d Edition, p. 2452, contains the following comment on that law:

The peculiarity of these provisions deserves notice. Formerly mineral lands within 16th and 36th sections were sold by the state under special laws, which are repealed by this act. Title of the state to these sections vests upon approval of the survey if at that date the lands were not known to be mineral (ante, S 142). If they were then known to be mineral, the state received no title. The act, therefore, can have no possible application to any lands except 16th or 36th sections wherein mineral has been discovered subsequent to the approval of the survey and vesting of title in the state. What is the object of the act? The title gives no clue. It does not purport to re-vest title in the federal government. If it did it would not be effectual for any such purpose without the consent of congress. States have no power to compel the United States to resume sovereignty over such lands nor impose upon the national government

the obligation to include such lands within its public land system without some concurrent congressional legislation, accepting the burden. In re State of Montana, 27 L. D. 474.

See also case of Sewell A. Knapp, on petition (47 L. D., 156), wherein the Department expressed a similar view in reference to the act of the State of Nevada of like nature.

The Department is clearly of the opinion that the said mineral entry was made for land (as to section 36) then belonging *prima facie* to the State, and that the requirement made by the Commissioner was proper. Furthermore, the claimant acquiesced in that ruling and admitted its inability to comply with the requirement. It did not renew its claim after the State filed selection in lieu of the land involved, but submitted without protest to the cancellation of the entry. It is estopped from now disputing the correctness of that action. If it has abandoned its claim so as to permit other *bona fide* rights to intervene and attach, as alleged, it would be manifestly unjust and illegal to reinstate the old entry.

The petition is accordingly denied.

STATE OF MISSISSIPPI v. UNITED STATES, JAMES W. BUFORD ET AL., INTERVENERS.

Decided December 21, 1921.

SWAMP LAND—SURVEY—LAND DEPARTMENT—JURISDICTION—EVIDENCE—MISSISSIPPI.

An agreement between the State of Mississippi and the United States whereby the character of specific tracts of land as of the date of the swamp act of September 28, 1850, should be determined by the showing of the field notes and plats of the Government survey, does not preclude the Land Department, in the exercise of its judicial function in determining whether or not lands were of the character that passed under that grant, from admitting evidence to show their true conditions at the time that the grant became operative, where the official survey was made prior to the passage of the act and there was no reason for the surveyor to make particular note of the swamp or nonswamp character of the lands.

SWAMP LAND—EVIDENCE—HEARING—ACT OF SEPTEMBER 28, 1850.

Where it becomes necessary to determine by a hearing whether or not lands were of the character that were granted by the swamp act of September 28, 1850, expert testimony of Government witnesses, based upon evidence now available, from which the inference may be reached that the soil environment and the former forest conditions were such as to negative the possibility that the lands could ever have been of a swamp character, is not sufficient to counteract the direct testimony of witnesses familiar with the land at the date of the passage of the act.

FINNEY, *First Assistant Secretary*:

These cases come before the Department on cross-appeals from the decision of the Commissioner of the General Land Office, rendered

June 14, 1921, in a proceeding instituted by the State of Mississippi to obtain a patent, pursuant to the provisions of the swamp land act of September 28, 1850 (9 Stat., 519), to Sec. 15, T. 19 N., R. 2 E., Choctaw Meridian, in Carroll County, Mississippi, and in the Jackson land district. A chronological sketch of the material facts touching the history of said tract will best lead up to its present status and the issue presented on the appeals.

Said township, which was a part of the "Choctaw Cession," was officially surveyed in 1832, only the exterior boundaries of said section 15 being then traced, as indicated by the field notes. Section 16 of said township (normally a school section) was embraced in an Indian patent issued prior to said survey. On the official plat of said survey filed in the district land office, "reserved for section 16" was noted upon said section 15, but it does not appear when or by whose authority said notation was made. No such notation appears on the official plat of said township on file in the General Land Office, nor does any such reservation appear ever to have been made by authority of the General Land Office so far as its records disclose; and later the State of Mississippi made an approved selection, as indemnity for said lost school section, of land in another township and range.

In 1848, two years before the date of said swamp-land act, "the Board of school lands for T. 19 N., R. 2 E." bargained to convey a leasehold interest in said Sec. 15 for the term of 99 years, to Greenwood Leflore, and in fulfillment of said bargain said board, June 1, 1857, made such a lease, with covenant of warranty for its term to expire April 8, 1947. Said section was held by persons claiming under said lease (but all residing upon adjoining or neighboring lands), until the adverse homestead entries below mentioned were made.

On May 18, 1914, James W. Buford made homestead entry, serial 06488, for the SE. $\frac{1}{4}$, and William M. Mosley, serial 06489, for the NE. $\frac{1}{4}$, of said Sec. 15. The entrymen, having gone upon said respective parcels, were arrested for trespass at the instance of the claimants under the lease, and litigation in the Mississippi State courts between said claimants and said entrymen ensued, resulting adversely to the entrymen.

In the month of December, 1914, the State of Mississippi filed its application for a patent, under the swamp land act, for said section 15, supported by affidavits as to the character of the land at the date of said act, made by sundry persons including some residents born before said date and claiming to have been familiar, in their boyhood and early youth, with the character of the land at that date and subsequently. Action on the application was deferred by the General Land

Office, at the request of the homestead entrymen, until final conclusion of the litigation in the State courts. Meanwhile, on October 27, 1917, Clifton E. Mosley made homestead entry, serial 07716, for the NW. $\frac{1}{4}$ of said Sec. 15, claimed and allowed as preferential by reason of his having successfully contested an earlier homestead entry by Everett M. Hemphill, serial 06497, allowed May 25, 1914. Following the cancellation, February 2, 1919, upon default of an answer to charges preferred by the General Land Office, of a homestead entry, serial 07721, allowed August 28, 1917, a homestead entry, serial 08076, for said SW. $\frac{1}{4}$, Sec. 15, was made by William C. Mosley March 3, 1919.

On October 2, 1919, the General Land Office directed the local officers to set down a hearing on the conflicting claims to said section, with leave to the parties to stipulate for the incorporation into the record of testimony taken in the State court suits between them. A hearing was had accordingly, beginning February 23, 1920, before a commissioner at Carrolton, upon the swamp-land application of the State, which acted in the interest of the claimants under the lease, the homestead entrymen intervening to resist said application, and besides voluminous testimony introduced in evidence, the township plats and field notes, as well as a transcript of the records in said State court suits, were put in evidence. Further testimony was taken at the final hearing before the local officers, April 3, 1920.

The local officers rendered their joint decision (not dated), about November 12, 1920, finding adversely to the contention of the State that said land at the date of said act was such as was intended to be granted thereby. The State of Mississippi appealed to the Commissioner, who, on June 14, 1921, rendered his decision affirming that of said local officers in denying said application of the State, but holding for cancellation all four of said homestead entries, upon the ground that, as had been held in *Jones v. Arthur* (28 L. D., 235, syllabus),—

Land in the actual possession and occupancy of one holding the same under claim and color of title is not subject to homestead entry.

The State of Mississippi appealed from said Commissioner's decision, and said intervening homestead entrymen appealed from so much thereof as held their homestead entries for cancellation.

The testimony adduced at said hearing shows that said section 15 in its natural condition, prior to and at the passage of said swamp land act, was a tract of ground with its surface generally low-lying relatively to the surrounding land, but with ridges running through it at somewhat higher levels, separated by "draws" of lower level (natural drains for the surplus water), in large part covered by forest trees and brush of such character as usually grow upon such land, and hedged in between two creeks, Big Sand on the north and Palusha

on the south, running westerly near said respective section lines from hills marking the easterly limit of the low ground, about one-half mile to the eastward of the east line of said section, while to the westward of said section the gradient of the surface presently ceased, insomuch that there was apparently no discharge from Goose Pond, a small body of water formed by the creek and overflow waters, situated mainly in section 16 but reaching back some distance into section 15. Thus section 15 was a basin, the lowest part of low country comprising it on all sides, and forming part of what was locally known as the "Flat Woods."

Such a basin, in the Yazoo Delta, must of necessity have been originally of a swampy character, although not necessarily marshy. Swamp land differs from marsh land in usually sustaining certain kinds of forest growth, while marsh produces only a growth of certain herbage. Webster, *sub-nom.* Swamp.

Swamp lands, within the meaning of said act, include marsh lands, but they cover more; embracing also all land, whether forested or not, that is of soft spongy character, retaining excessive moisture and either by reason thereof or by reason of being subject to overflow is unfit for cultivation.

The holding in *Heath v. Wallace* (138 U. S., 573), as to lands "subject to periodical overflow" was simply that this phrase, noted on certain lands embraced in the township plat, was not necessarily equivalent to "swamp and overflowed lands" because, says the court (p. 584-5)—

It was never intended that all the public lands which perchance might be temporarily overflowed at the time of freshets and high waters, but which, for the greater portion of the year, were dry lands, should be granted to the several States as "swamp and overflowed" lands. At any rate, the question whether or not lands returned as "subject to periodical overflow" are within the descriptive terms of those granted by the swamp land act—that is, whether they are "swamp and overflowed"—is a question of fact properly determined by the land department.

Not only did the witnesses, who had been living at the date of said act on and near said land involved and had been familiar with conditions on the land at that time through their youthful wanderings thereon, testify to its then wet and consequently inaccessible condition. The lay of the ground, as this confirmatory testimony shows, made the "Flat Woods" a sink into which whatever moisture escaped from the creek channels drained and out of which, it being a little below the surrounding country, such drained-in water and that due to the local rainfall had no opportunity of escape. Such conditions are ideal for the formation of a swamp and they are competent evidence tending to show the character of the land at the date of said act. *Archer v. Williams* (26 L. D., 477, 479); *State of Illinois* (30 L. D., 128, 132).

The fact of periodical overflow of the land by the creek waters was an additional condition excluding the overflowed areas from the lands cultivable, and was not of itself the cause of such uncultivability. Had the creeks never gone beyond their banks, the land in section 15 would not have been cultivable, because it was a sink hole retaining the moisture that reached it from whatever source and unable to discharge it because all the country surrounding it was a little higher. Being land that could not be cultivated to agricultural crops without drainage it fell within the intent of the swamp land grant of 1850. *State of California v. Fleming* (5 L. D., 37, 38); *Poweshiek County* (9 L. D., 124, 127); *The State of Iowa* (9 L. D., 640, 642); *Rake v. The State of Iowa* (13 L. D., 344, 346).

The ditch cut by Leflore about 1861 with a view to guiding water away from his quarters on section 10, which appears to have diverted such water southwardly onto said section 15, imposed upon said section 15 an additional cause of wetness; but the previous conditions shown were of themselves enough to classify the land as swampy and unfit for cultivation at the date of said act.

The relevancy of all the evidence along the lines heretofore discussed was challenged by counsel for the homestead entrymen upon the ground that the Governor of the State of Mississippi in the year 1884 had agreed that the right of the State to public lands as granted by said act of September 28, 1850, *supra*, should be thenceforth determined by the showing of the field notes and plats of the Government survey as to the character of specific tracts. Testimony was admitted over said objections.

The grant made by said act operated *in praesenti*. *Railroad Company v. Smith* (9 Wall., 95, 99). *Wright v. Roseberry* (121 U. S., 488, 496). *Michigan Land and Lumber Company v. Rust* (168 U. S., 589, 591). But the identification of the lands operated upon by that grant was a matter for determination by the Land Department, exercising a judicial function recognized as belonging to it, and aided in that exercise by any evidence applicable, not merely by the evidence of its lands surveys—especially not merely by a survey made 18 years previous to the grant and when there was, therefore, no special occasion to record, in the field notes, or on the plat, the character of the land surveyed as “swamp and overflowed,” or as “wet and unfit for cultivation,” or otherwise. *State of Oregon* (7 C. L. O., 53); *State of Louisiana* (5 L. D., 514, 519); *State of Mississippi* (13 L. D., 117); *State of Minnesota* (13 L. D., 736); *State of Louisiana* (32 L. D., 270). Consequently the testimony of the witnesses was properly received and should be considered in connection with the evidence of the field notes and township plat.

Against the views above expressed, which are based on the testimony of said elderly witnesses who had been familiar with the actual

condition of said section in 1850, there is to be considered the testimony of the governmental Special Agent Groves, to the effect that his examination of said section in 1920 disclosed old stumps of hardwood timber growth, arguing that ecological relations between such growth and its environing soil and conditions negated the idea that said land could ever have been of a swampy character. The testimony of McFarren, a Government geologist, was corroborative of Groves and indicated the slope and consequent drainage of each forty-acre subdivision of said section.

This testimony derives its weight from the theoretical inferences from the observed present conditions. Ecological inferences are valuable, but are dependable only as to the soil and moisture of the particular site on which a tree grew and its immediate surroundings. The "Flat Woods" appear to have held a general level or rather general slope northwesterly, but to have been intersected by many slight depressions (the natural "drains" referred to by the witnesses), and intervening slight ridges, of ground somewhat exceeding in elevation the general level. The old trees of "upland" character, and the stumps of such trees, referred to by these two Government witnesses, were located, as their testimony shows, upon the ground having different slight elevations above the general level. They furnish, therefore, no dependable basis for the inference that forest growth generally upon the lands here involved was, prior to the changes of drainage through human intervention since September, 1850, of a character inconsistent with the land having been at the date of said act of a swampy nature. Such an inference, at all events, is not of sufficient weight to counteract the direct testimony of witnesses familiar with the land at, before, and shortly after the date of said act.

Weighing all the evidence submitted, therefore, the Department is constrained to hold, notwithstanding the concurrent decisions of the local officers and, on appeal, the Commissioner, that at the date of said swamp land act, September 28, 1850, said section 15 was of a character bringing it within the terms of said act. The later history of said section is one of gradual raising of its surface by the deposit of alluvium carried from the uplands to the eastward down to and partly beyond said section, by Palusha and Big Sand Creeks, respectively, near its southern and northern lines, coupled with some change in its drainage slope through the construction of Leflore's ditch running from section 10 southerly, and some similar changes due to the conversion of part of abandoned "Harris road," built at first through said section, into one of the ditches constructed for the drainage of said sink hole. But these later influences are not shown to have been responsible, to the exclusion of the earlier natural condition, for the swampy character of the land.

Upon these grounds the decision of the Commissioner, adverse to the application of the State of Mississippi, is reversed, and a swamp land patent for said section will issue to said State in due course.

The foregoing decision necessitates the affirmance of that part of the Commissioner's decision which holds for cancellation the homestead entries of the several interveners. The intervener, Clifton E. Mosley stands in a somewhat different position from the others, in that his entry was in the exercise of a statutory preferential right consequent upon his having successfully contested a previous homestead entry. But this difference can avail him nothing inasmuch as, by the foregoing decision, the land had been open to homestead entry at no time and by no person, whether under preferential right or otherwise, but has been the property of the State of Mississippi ever since the date of said swamp land act.

STATE OF MISSISSIPPI v. UNITED STATES, JAMES W. BUFORD ET AL., INTERVENERS.

Motion for rehearing of departmental decision of December 21, 1921 (48 L. D., 421), denied by First Assistant Secretary Finney, January 28, 1922.

PROOFS UPON CLAIMS INITIATED UNDER THE DESERT LAND LAWS BY INCAPACITATED SOLDIERS—ACT OF DECEMBER 15, 1921.

INSTRUCTIONS.

[Circular No. 805.]

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

Washington, D. C., February 3, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

The act of December 15, 1921 (Public 111), amends the act of March 1, 1921 (41 Stat., 1202), by adding at the end thereof, the following matter, designated as section 2 of the said act:

"Sec. 2. That any entryman under the desert land laws, or any person entitled to preference right of entry under section 1 of the Act approved March 28, 1908 (Thirty-fifth Statutes at Large, page 52), who after application or entry for surveyed lands or legal initiation of claim for unsurveyed lands, and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the war with Germany, who has been honorably discharged and because of physical incapacities due to service is unable to ac-

comply with reclamation of and payment for the land, may make proof without further reclamation thereof or payments thereon under such rules and regulations as may be prescribed by the Secretary of the Interior, and receive patent for the land by him so entered or claimed, if found entitled thereto: *Provided*. That no such patent shall issue prior to the survey of the land."

2. The benefits of this amendment extend to persons who, prior to November 11, 1918, and during the war with Germany, were actually engaged in the United States Army, Navy, or Marine Corps, regardless of the date of their enlistment, provided they entered the service after having filed an effective desert land application or made a desert land entry for surveyed lands, or acquired a preference right to make entry under the desert land laws, of unsurveyed land, and who, having been honorably discharged, are unable to accomplish reclamation of and make payment for the land on account of physical disabilities due to such service.

3. If the land is unsurveyed and entry is not yet allowable, a claimant having a preference right of entry should file his application therefor on form 4-274, accompanied by his sworn statement, corroborated by two persons having personal knowledge of the facts, setting forth in detail the date when he took possession of the land and what acts he performed thereon touching the matter of its reclamation and improvement. You will assign to the application the current serial number. Final proof can be submitted and accepted but the final certificate will not be issued until adjustment to legal subdivisions, after the filing of an approved plat of survey.

4. Notice of intention to submit proof must be given in the usual manner by posting and publication; and in case of unsurveyed land, affidavit evidence must be filed showing posting of notice in a conspicuous place on the land.

5. The proof shall consist (a) of affidavit of the claimant (taken before any officer at any place who is authorized to administer oaths and who uses an official seal), showing that he is unable to return to the land on account of physical incapacity due to service in the United States Army, Navy, or Marine Corps during the war with Germany, and describing the nature and extent of such disability and reason for inability to make payment; (b) of the testimony of two witnesses taken in similar manner corroborating the statements in that regard and of these witnesses at least one must be a practicing physician; (c) of a certified copy of his discharge from the Army, Navy, or Marine Corps, or an affidavit showing all the facts regarding his service and discharge. In each case the facts will be verified so far as possible from the records of the War Department.

6. No payment of moneys will be required in connection with any application made, or proofs offered, other than testimony fees, when the testimony is taken before your office, where the applicant satis-

factorily shows that by reason of physical incapacities due to such service he is unable to accomplish reclamation of and make payment for the land.

7. Where the proof appears satisfactory, in the absence of protest, and entry for the land has already been allowed, the register will issue final certificate. In cases where entry has not yet been allowed, or protest filed, all the papers will be forwarded to the General Land Office for consideration.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

THE DAILEY CLAY PRODUCTS COMPANY.¹

Decided November 28, 1921.

OREGON AND CALIFORNIA RAILROAD LANDS—MINERAL LANDS—POWER SITES— WITHDRAWAL.

Lands within the forfeited grant to the Oregon and California Railroad Company, that have been classified as "power site lands" under the authority conferred by section 2 of the act of June 9, 1916, and included within a power site reserve by Executive order issued pursuant to the act of June 25, 1910, as amended by the act of August 24, 1912, are open to exploration, discovery, and purchase under the United States mining laws only so far as those laws apply to metalliferous minerals, and are not, therefore, subject to location of a claim based upon discovery of deposits of fire clay or kaolin.

POWER SITES—WITHDRAWAL—JURISDICTION—WATER POWER.

The President retains jurisdiction over lands withdrawn by him as power sites until an application for water-power privileges is filed therefor.

FINNEY, *First Assistant Secretary:*

The Dailey Clay Products Company has appealed from the decision of the Commissioner of the General Land Office dated February 4, 1921, affirming the action of the register and receiver rejecting its mineral application filed November 20, 1919, for claim No. 2 covering the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, T. 6 S., R. 2 E., W. M., Portland, Oregon, land district, alleged to be valuable for its deposits of fire clay or kaolin. The claim, with three others not here involved, was located July 5, 1913, and again on December 14, 1916.

It appears that the SE. $\frac{1}{4}$, said Sec. 1, fell within the grant to the Oregon and California Railroad Company, successor in interest to the Oregon Central Railroad Company, and was patented to the

¹ See decision on rehearing page 431.

company July 12, 1871. Title to the land was revested in the United States under the provisions of the act of June 9, 1916 (39 Stat., 218). Section 2 of this act authorized and directed the classification of the lands as (1) power-site lands, (2) timber lands, and (3) agricultural lands, provision being made for reclassification of any of said lands "if because of a change of conditions or other reasons such action is required to denote properly the true character and class of such lands."

Section 3 provided that the classification authorized by the preceding section "shall not operate to exclude from exploration, entry and disposition under the mineral land laws of the United States, any of said lands, except power sites, which are chiefly valuable for the mineral deposits contained therein, and the general mineral laws are hereby extended to all of said lands, except power sites."

Pursuant to said act of 1916, the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, was classified as power site lands and included in Power Site Reserve No. 661 by Executive order of December 12, 1917, under the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497), which provides "that all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery and purchase under the mining laws of the United States so far as the same apply to the metalliferous minerals."

November 26, 1919, the local officers rejected the mineral application as to claim No. 2, assigning the power site withdrawal as cause for so doing. The mineral applicant appealed from this action to the Commissioner, filing therewith a petition for reclassification of the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, averring that said land is without value for power site purposes, which petition was transmitted under date of December 2, 1920, to the Director of the Geological Survey for consideration.

The Director returned the petition under date of January 14, 1921, without action, stating "under the ruling of the Federal Power Commission, it is impossible for land to be released from power site reserves except by act of Congress or under the provisions of section 24 of the Federal Water Power Act."

The Commissioner thereupon by his letter of February 4, 1921, held the application for rejection, stating:

The S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, said Sec. 1, was not subject to location July 5, 1913, for the reason that on that date, the title to the lands was not vested in the Government, and the classification of the lands as power site lands under said Act of June 9, 1916, precluded its appropriation under the United States mining laws, and Section 2 of said Act of June 25, 1910, as amended by the Act of August 24, 1912, under which the land was placed in Power Site Reserve No. 661, expressly excepts lands so reserved from appropriation under the United States mining laws, unless the lands contain valuable deposits of metalliferous

minerals. Fire clay is not a metalliferous mineral. Accordingly, the location embracing the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ is invalid.

Appeal from this action brings the case before the Department where the matter has been carefully considered, and inasmuch as no error is found the decision of the Commissioner is affirmed.

It was held, however, in an opinion by the Attorney General dated September 2, 1921, that the President retains jurisdiction over lands withdrawn by him as power sites and not yet subject to any application for water-power privileges. Under these circumstances the Department sees no objection to again submitting the Dailey Company's application for reclassification to the Geological Survey for consideration, but the said company should be advised that it can not be accorded preferential treatment or equitable or legal preference in the event the land is reclassified and restored.

THE DAILEY CLAY PRODUCTS COMPANY (ON REHEARING).

Decided February 6, 1922.

OREGON AND CALIFORNIA RAILROAD LANDS—MINERAL LANDS—ADVERSE CLAIM—POWER SITES—WITHDRAWAL.

An attempted location of a mining claim for lands within the forfeited grant to the Oregon and California Railroad Company, prior to their classification, but which were later classified as "power site lands" under the authority conferred by section 2 of the act of June 9, 1916, is void *ab initio* and no rights are acquired thereby which prevent a subsequent withdrawal of the lands for water-power purposes.

COURT AND DEPARTMENTAL DECISIONS, CITED.

The cases of *Payne v. Central Pacific Railway Company* (255 U. S., 228), and *Donald C. Wheeler* (48 L. D., 94), cited.

FINNEY, *First Assistant Secretary*:

The Dailey Clay Products Company has filed motion for rehearing in the matter of its application for mineral patent, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, T. 6 S., R. 2 E., W. M., Portland, Oregon, land district, wherein the Department by decision dated November 28, 1921 (48 L. D., 429), affirmed the decision of the Commissioner of the General Land Office, rejecting said application because the company's location was invalid and void, the lands not being subject to location, sale, or entry.

It is urged upon this motion that the decision overlooks certain essential facts in the record and certain orders and decisions of the Department and the courts, which are applicable to these facts, notably, the case of *Payne v. Central Pacific Railway Company* (255 U. S., 228); Administrative Order of April 23, 1921 (48 L. D., 77); and the case of *Donald C. Wheeler* (48 L. D., 94); which are to the

effect that one who has complied with all the terms and conditions necessary to the securing of title to public lands acquires rights against the Government which can not be divested by any subsequent withdrawal of said lands.

The argument, however, overlooks the fact that the company's location was void *ab initio* inasmuch as section 3 of the act of June 9, 1916 (39 Stat., 218), expressly excluded from exploration, entry, and disposition under the mineral land laws all lands of class 1, that is, lands chiefly valuable for water-power sites. True, in the case at bar, classification was not made until December 12, 1917, subsequently to the attempted location of the lands by the Dailey Clay Products Company, but it would nullify an express provision of the law to hold that in the period between the date of the forfeiture act and the issuance of a formal order of classification, while necessary field examinations were being made, all lands regardless of character or condition became subject to exploration and to appropriation under the mining laws without qualification, limitation, or restriction.

Manifestly the act of 1916, *supra*, extended the mining laws only to lands of classes 2 and 3, that is, timberlands and agricultural lands, and prohibited the appropriation of such as were primarily valuable for water-power purposes.

An attempted location of such lands was a nullity and conferred no right.

**OPENING OF ABANDONED FORT SABINE MILITARY RESERVATION,
LOUISIANA, UNDER ACT OF AUGUST 23, 1894, AS AMENDED.**

INSTRUCTIONS.

[Circular No. 806.]

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

Washington, D. C., February 6, 1922.

REGISTER AND RECEIVER,

BATON ROUGE, LOUISIANA:

Fort Sabine Military Reservation in Ts. 14, 15 and 16 S., R. 15 W., and Ts. 14 and 15 S., R. 16 W., Louisiana Meridian, established by Executive order dated December 20, 1838, was abandoned, relinquished and turned over to the Department of the Interior March 25, 1871, pursuant to the act of February 24, 1871 (16 Stat., 430). A resurvey of said reservation was approved February 14, 1919, and an appraisalment of the lands therein was made from April 14, to April 16, 1919, which appraisalment is hereby approved. A schedule of the land in question is hereto attached, there being excluded, however, from such schedule land granted to the State for school

purposes and land reserved for lighthouse purposes hereinafter mentioned.

The reservation embraces 20,426.57 acres, appraised at \$41,745.14, the prices ranging from \$1.50 to \$20 per acre.

Sec. 16, T. 15 S., R. 15 W., containing 640 acres, in the absence of valid settlement rights, inured to the State of Louisiana as a school section under the act of April 23, 1912 (37 Stat., 90), the said section being shown on the plat of survey by protraction prior to the date of the said act. In this connection see Departmental decision of January 19, 1900 (29 L. D., 418).

Secs. 4, 5, 6, 7, 8, 9, 10, 15, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29, 32, 33, and 34, T. 15 S., R. 15 W., within said reservation, were approved July 1, 1884, to the State of Louisiana as swamp, list No. 26. under the act of March 2, 1849 (9 Stat., 352). By letter "K" of September 4, 1919, citing 33 L. D., 13, and 211 U. S., 70, 77, you were advised that the approval of said list was of no effect, and that the lands within said Fort Sabine Abandoned Military Reservation were subject to disposal only under the laws applicable to abandoned military reservations. You will, therefore, disregard the said swamp approval.

Fractional Sec. 32, T. 15 S., R. 15 W., containing 45.56 acres, within said reservation was reserved for lighthouse purposes by Executive order of April 22, 1919. Said section, therefore, is not subject to disposition.

Lots 2, 3, and 4 of the original survey (Lots 6, 7, and 8 on the latest plat), Sec. 30, T. 14 S., R. 15 W., are embraced in homestead entry 18426, New Orleans series, made by Sublett Berwick August 18, 1897, upon which commutation proof was submitted July 15, 1899, embracing Lots 2 and 3, said Sec. 30, for which two lots cash certificate 17625, New Orleans series, issued July 18, 1889. You will allow no disposition of the land described in the original entry pending adjudication thereof in this office.

The area of the reservation being more than 5,000 acres, the agricultural lands therein will be disposed of under the provisions of the act of August 23, 1894 (28 Stat., 491), as amended by the act of February 15, 1895 (28 Stat., 664).

Lands containing valuable mineral deposits are subject to disposal under the mineral laws of the United States.

Effective twenty-eight days from the date of this circular, the lands described in the attached schedule, with the exceptions above noted, are restored to homestead entry under the said act of August 23, 1894, in the manner and subject to the conditions following:

(a) *Soldier's Preference*.—For a period of *ninety-one (91) days following the date on which this restoration becomes effective as*

aforesaid, said lands will be subject only to entry under the homestead laws by qualified ex-service men of the war with Germany who have been honorably discharged or separated or placed in the regular army or naval reserve; *Provided*, That such soldier-preference entrymen may file their applications to enter at any time during the twenty (20) days prior to the date on which said restoration becomes effective, all such applications to be treated as filed simultaneously and conflicting applications to be disposed of by lot. Such applicants will be required to accompany their applications by an affidavit showing that the tracts applied for are not occupied by a *bona fide* settler entitled to a preference right of entry.

(b) *Restricted Entry by General Public*.—For the period of *twenty-one (21) days following the expiration of said soldier-preference period* [paragraph (a) above], any of said lands remaining unentered will be subject to *homestead entry only* by any qualified entryman; *Provided*, That applications therefor may be filed at any time during the twenty (20) days preceding said twenty-one (21) day period, such applications to be considered as filed simultaneously.

(c) *General Disposition*.—Any of said lands not taken under paragraphs (a) and (b) above, will become subject to settlement and entry under the homestead laws on the expiration of, but not before the period of twenty-one (21) days provided for in paragraph (b) above [one hundred and twelve (112) days from the date this restoration becomes effective as stated in the first paragraph of these regulations].

The preferences above provided for are subject to valid settlement rights or equitable claims recognized by existing laws, but to avoid confusion any such right or claim should be asserted during the twenty (20) day simultaneous period provided in paragraph (a) above.

Subsequent to these regulations and prior to the date of restoration to general disposition as herein provided, no rights may be acquired to said lands by settlement in advance of entry, or otherwise, except strictly in accordance herewith.

Homestead entrymen will be required to make payment for the lands entered at the appraised price which may be cash in full at the date of the acceptance of proof upon their entries, or at the option of the entryman, payment may be made in five equal installments, the first payment to be made one year after the acceptance of his final proof and the subsequent payments to be made annually thereafter, with interest at the rate of 4 per cent per annum, from date of acceptance of such proof. They will be allowed, however, to pay one or more even installments at any time, with interest to date of such payment. If commutation proof is submitted, payment must be made in full at time of acceptance of proof, when a certificate of

entry may be issued. Upon acceptance of three-year proof, a final certificate may be issued only in case full payment is made; otherwise, the certificate will not be issued until the final payment has been made. Publicity will be given this restoration by giving a copy of these regulations to newspapers for publication, if desired, as an item of news, without incurring expense to the Government. You will also post a copy in your office and will transmit a copy to the postmaster nearest the land for posting in his office. Also transmit a copy to the register of the State Land Office.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

CHARLEY CLATTOO.

February 8, 1922.

INDIAN LANDS—ALLOTMENT—ALASKA—ACT OF MAY 17, 1906—STATUTES—WORDS AND PHRASES.

An allotment granted to an Alaskan native under the act of May 17, 1906, constitutes a "vested right" that should be construed in the ordinary significance of that term, that is, as including "an immediate and fixed right to present and future enjoyment."

INDIAN LANDS—ALLOTMENT—WITHDRAWAL—ALASKA.

The approval by the Secretary of the Interior of an allotment homestead to an Alaskan native pursuant to the act of May 17, 1906, for a tract of unsurveyed land, subject to adjustment to the lines of survey, confers upon the allottee a vested right in the land which is not affected by the subsequent issuance of an Executive order reserving that tract together with other lands for the common use of a native Alaskan village.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

The case of Charlie George *et al.* (44 L. D., 113), cited and distinguished.

GOODWIN, *Assistant Secretary:*

By your [Commissioner of the General Land Office] letter (Juneau 01285, "K," CRR) of January 21, 1922, you call attention to the fact that certain unsurveyed land embracing about 68 acres covered by the allotment homestead approved to Charley Clattoo, an Alaskan Native, under the act of May 17, 1906 (34 Stat., 197), is now within the boundaries of a tract of approximately 800 acres later reserved by an Executive order for the common use of the natives of the village of Klukwan, and ask an expression of opinion by this Department as to—

Whether the departmental approval of the allotment application of Clattoo was such a final approval of this claim under the act of May 17, 1906, as

constitutes in him a vested right to the land described in his application, subject to adjustment to the lines of survey, which was not defeated by the inclusion of the land within the exterior limits of the reservation created by the Executive order.

Notwithstanding the fact that this allotment was regularly approved by the Secretary of the Interior as long ago as 1910, pursuant to the pertinent regulations then in force (37 L. D., 615), it appears to have lately been referred to, and investigated through a chief of field division of your office under the later regulations of November 6, 1917 (46 L. D., 226), which require all "applications for allotment, and all papers filed in connection therewith" to be subjected to a field examination as to certain facts specified in those regulations.

As the result of that reference the chief of field division "recommended that the application be disapproved and the case closed," and in your letter, which appears to have been induced by that recommendation, you appear to express the opinion that the Secretary of the Interior now has the power to take the action suggested for the reason that the allotted tract is still unsurveyed. This Department can not concur in that conclusion, and this statement calls for a careful consideration of the question as to the quality and extent of Clattoo's interest in this land.

The chief of field division seems to have proceeded on the erroneous assumption that this case should be treated as one in which an application for an allotment had recently been filed, and he evidently overlooked the fact that the allotment was formally applied for and regularly long before the reservation was created, and in strict accordance with the regulations then in force which directed that a "certificate of the approval" be issued and delivered to the allottee (37 L. D., 615).

It is needless to here inquire as to whether the approval of the allotment prevented the extinguishment of the allottee's interest by the issuance of the Executive order, or otherwise, because that order contained the express declaration that the tract of 800 acres "is hereby reserved, subject to any vested rights," and your apparent conclusion that the order defeated the allotment seems to be based on the assumption that Clattoo did not secure such a "vested right" through the approval of the allotment as brought his interests in this land within the terms of that order.

The fact that Congress has in numerous statutes proscribed the acquisition of rights or the exercise of privileges by others which would in any way infringe upon or affect the possessory rights of the natives of Alaska, and that this Department has strictly enforced them, fully justifies the conclusion that there was no intent that the words "vested rights" should be construed as not including rights held under approved allotments.

Again it must be assumed that those words were used and intended to have their ordinary significance and be taken as including "an immediate and fixed right to present and future enjoyment," especially since the statute conferring the right does not limit the period of its exercise or make it dependent on any uncertain event. See 8 Words and Phrases, 7307, and the numerous cases there cited.

That Congress did not intend that an allottee's right should be less than a "vested right," or be subject to extinction at the pleasure of the Executive branch of the Government, is very clearly shown by the fact that it went further in the act conferring that right than it has done in other kindred statutes by declaring in emphatic words that "the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity."

The most that this Department has ever said on this subject was its declaration in the case of Charlie George *et al.* (44 L. D., 113, syllabus) that—

An allotment to an Indian or Eskimo in Alaska under the act of May 17, 1906, creates a perpetual reservation of the lands for the allottee and his heirs, but the title to the lands remains in the United States; and money recovered for a timber trespass upon such lands does not go to the allottee, but must be deposited to the credit of the United States.

It is true that it was said in paragraph 11 of the instructions of January 31, 1914 (43 L. D., 88, 89), that the surveyor should, preliminary to the making of a survey of an allotment—

satisfy himself as to the good faith and qualifications of the allottee at that time, to hold the same, and shall report thereon in his returns; and if the native be found no longer entitled under said law, the surveyor general will notify the register and receiver, who will then require the allottee to show cause within 60 days why the allotment should not be canceled by the Department.

But there is not even an intimation in that case that the allottee was not qualified to take this allotment, that the allotment was not properly approved to him, or that he has done anything to forfeit his rights thereunder. On the contrary the chief of field division appears to have reported that he is now "living on the land in peace and harmony."

In conclusion you are informed that in the opinion of this Department, Clattoo had and has such a vested right in this land as was not defeated or in any way adversely affected by the fact that it is within the boundaries of the tract reserved by the Executive order mentioned, and also that there is no need for a further approval of that allotment by this Department.

FORMS FOR FINAL PROOFS ON STOCK-RAISING HOMESTEAD ENTRIES.

INSTRUCTIONS.

[Circular No. 807.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 9, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

On January 7, 1922, the department approved Forms 4-369b (testimony of claimant) and 4-369c (testimony of witnesses), for final proof on stock-raising homestead entries. A supply of these forms is being sent to all district offices.

On and after April 1, 1922, you will not accept such proofs made on other forms except as hereinafter provided.

Because of the fact that unofficial forms for stock-raising homestead proofs, not differing materially from the official forms now furnished, have been published and no doubt widely distributed among proof-taking officers, you are authorized to accept, until October 1, 1922, proofs made on such forms.

In the interest of economy and good administration, you will not hereafter furnish official forms of affidavits, applications, proofs, etc., to agents, attorneys, proof-taking officers, or others, except that sample copies may be supplied for printing. You will, however, furnish any necessary form to an actual applicant or claimant for public land upon his request.

Circulars Nos. 374 (43 L. D., 494), and 443, and any other circulars or instructions in conflict herewith are modified accordingly.

A copy hereof should be sent to each proof-taking officer and recognized agent or attorney in your respective districts.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

**SECTION 8 OF COAL LAND REGULATIONS AND SECTION 6 (C) OF
MINING LEASE, RELATING TO BONDS, CIRCULAR NO. 679,
AMENDED—CIRCULAR NO. 789, REVOKED.**

[Circular No. 809.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 15, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

The regulations governing coal mining leases, permits and licenses under the act of February 25, 1920 (41 Stat., 437), Circular No. 679, approved April 1, 1920 (47 L. D., 489), are hereby amended, by adding to section 8 thereof, the following provisions:

“In case of lease for a small area, where the investment to be made is \$10,000 or less, the lessee shall furnish one bond to cover both the investment and compliance with the terms of the lease, such bond to be in half the amount of the investment to be made, but in no case shall it be less than \$1,000. The bond executed by the lessee shall be with approved corporate surety or with two qualified individual sureties, together with affidavits or justification by the sureties that each of said sureties is worth double the sum specified in the undertaking over and above their just debts and liabilities in real property exempt from execution, and a certificate by a judge or clerk of a court of record, a United States District Attorney, a United States Commissioner, or a United States Postmaster, as to the identity, signatures and financial competency of the sureties.”

Accordingly Circular No. 789 of October 31, 1921 (48 L. D., 243), amending said section 8 is revoked and superseded hereby.

Paragraph 6 (c) of the lease form is hereby amended to read as follows:

“Paragraph 6 (c). That on the termination of this lease, pursuant to the last preceding paragraph, the lessor, his agent, licensee, or lessee shall have the exclusive right at the lessor's election to purchase at any time within six months thereafter, at the appraised value, any or all buildings, machinery, tools or other property placed by the lessee in or on the lands leased hereunder, save and except all underground timber and such other supports and structures as are necessary for the protection and preservation of the mine, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to be paid for said buildings, machinery, equipment, tools or other property to be purchased as aforesaid shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party hereto and the third to be selected by the two so designated), the valuation so determined by the three or a majority of them to be conclusive and binding upon both parties; that pending such election to purchase within the said period of six months none of the buildings or other property shall be removed from their normal position; that if such valuation be not requested or the lessor shall affirmatively, in writing, elect not to purchase

within said period of six months, the lessee shall have the privilege of removing said buildings, machinery, equipment, tools and other property within 90 days after being notified in writing by the lessor that the said lessor does not elect to purchase any or all of the buildings, machinery, equipment, tools or other property and in case of failure, to so remove the said property within 90 days after receipt of such notice, then said buildings, machinery, tools or other property shall become the property of the United States."

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

PETER FREDERICKSEN.

February 16, 1922.

FORT PECK LANDS—INDIAN LANDS—COAL LANDS—ALLOTMENT—ACT OF FEBRUARY 25, 1920, AND SECTIONS 2347-2352, REVISED STATUTES—STATUTES.

The surplus coal lands within the Fort Peck Indian Reservation, Montana, the disposal of which after allotment was authorized by the special act of May 30, 1908, are not "public lands" or lands "owned by the United States" within the meaning of the general leasing act of February 25, 1920, and are not, therefore, subject to the operation of the latter act, but are still to be disposed of under the provisions of the coal land laws, sections 2347-2352, Revised Statutes.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

The cases of *Ash Sheep Company v. United States* (252 U. S., 159), and *Frank A. Kemp* (47 L. D., 560), cited and applied.

FINNEY, *First Assistant Secretary*:

The General Land Office has submitted for departmental consideration, with a request for instructions, the question whether the leasing act of February 25, 1920 (41 Stat., 437), applies to coal lands within the Fort Peck Indian Reservation and supersedes the coal land laws extended to that area by the act of May 30, 1908 (35 Stat., 558), which provided for the survey and allotment of the Fort Peck Indian Reservation lands and the sale and disposal of all the surplus lands after allotment. This question is directly involved in connection with the matter of coal declaratory statement 058723 filed November 5, 1920, by Peter Fredericksen for N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 22, T. 32 N., R. 54 E., M. M., Glasgow, Montana, land district, who alleges that he went into possession on October 12, 1920, and thereafter opened up a mine of coal with an expenditure of \$75.

The Fort Peck act above referred to in brief provides for an examination of the lands with respect to the practicability of an Indian irrigation project and the survey and allotment of tracts to the In-

dians. After the completion of making allotments a commission was to classify and appraise the surplus lands, but mineral lands were not to be appraised. The classified lands were made subject to disposition under the general provisions of the homestead, desert land, mineral and town site laws, except sections 16 and 36, which were granted to the State. The classified lands were to be opened to settlement and entry by proclamation of the President. Section 11 of the act provided that all lands opened to settlement remaining undisposed of at the end of five years from the date of the President's proclamation "shall be sold to the highest bidder for cash at not less than one dollar and twenty-five cents per acre." And that any lands remaining unsold ten years after opening "shall be sold to the highest bidder for cash, without regard to the minimum limit above stated." The lands of the reservation, however classified, after sixty days from the opening, were made subject to 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. Section 13 is as follows:

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.

After the deduction of specified expenses the net proceeds of sales were to be paid into the Treasury and placed to the credit of the Indian tribe, to draw interest at 4 per cent, both principal and interest to be expended by the Secretary of the Interior for the benefit of the Indians in their education, civilization, the construction and maintenance of irrigation ditches and suitable per capita cash payments. Within three years after the completion of the Indian irrigation systems the balance remaining in all funds credited to the Indians was to be allotted in severalty to the members of the tribe.

The foregoing act is specific in detail and comprehensive in its scope. It contemplated the ultimate disposal of all the reservation lands by allotment, sale, or otherwise and the final distribution in severalty of the tribal funds, all within specified time limitations. It is to be noted that no agreement with the Indians and no Indian cession is here involved as is the case of certain other reservations. The act is in the nature of a declaration of trust. It in terms states that the United States shall act as trustee for said Indians to dispose of their lands and to expend and pay over the proceeds.

The leasing law is a general act to promote the mining of coal and certain other minerals upon the public domain. It prescribes that deposits of coal and lands containing such deposits owned by the United States shall be subject to disposition only in the manner and form therein provided. The coal leasing regulations of April 1, 1920 (47 L. D., 489), pursuant to the act state that the law applies to coal lands in ceded or restored Indian reservations, the proceeds from the disposition of which are the property of the United States but that it does not include lands or deposits in Indian reservations nor ceded or restored Indian lands, the proceeds from the disposition of which are credited to the Indians. Similar language was contained in the first oil leasing circular of March 11, 1920, but in the amended regulations (47 L. D., 437), it is stated that the application of the act to ceded Indian lands depends on the laws controlling their disposition. In this connection see the case of Frank A. Kemp (47 L. D., 560), in which it was held that the leasing act did apply to certain Ute Indian lands in Colorado.

In the case of the Ash Sheep Company *v.* United States (252 U. S., 159, 166), involving Crow lands ceded pursuant to the agreement and trust declaration contained in the act of April 27, 1904 (33 Stat., 352, 361), the Supreme Court said:

Taking all of the provisions of the agreement together we can not doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R. R. Co. v. Harris*, 215 U. S., 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat., 352, and as to this point the case is ruled by the *Hitchcock* and *Chippewa Cases*, *supra*. Thus we conclude, that the lands described in the bill were "Indian lands" when the company pastured its sheep upon them, in violation of Section 2117 of Revised Statutes, and the decree in No. 212 must be affirmed.

The Fort Peck Indians have made no formal cession of their right of possession, use, and occupancy to the Government. With stronger reason, therefore, it may be said that their surplus lands are not "public lands" or lands "owned by the United States" within the purview of the leasing act, but are "Indian lands" subject to disposition only in the manner prescribed by Congress pursuant to the special act opening the reservation. The sale provisions of the Fort Peck act are wholly inconsistent with any leasing of those lands under the leasing law. By the instructions of May 4, 1918 (46 L. D., 380), the Department announced that under section 11 of the act,

five years after the opening, the undisposed of lands became automatically withdrawn from disposition under the homestead and desert land laws for the purpose of sale for cash. It may not be assumed that Congress intended to or did alter or modify the trust conditions specifically set forth in the special Fort Peck act by the leasing provisions contained in the general leasing enactment of February 25, 1920.

For the reason that the Fort Peck surplus coal lands are Indian lands and are not essentially public lands or lands belonging to the United States and because the general leasing act does not by implication repeal, modify, or abridge the special Fort Peck act, the Department concludes that the tract here involved, if in other respects available, was and still is, subject to the operation of the general coal land laws (sections 2347-2352, Revised Statutes), and is not subject to the act of February 25, 1920.

HEALY RIVER COAL COMPANY.

February 16, 1922.

COAL LANDS—RIGHT OF WAY—ACTS OF MARCH 12, 1914, AND OCTOBER 20, 1914—ALASKA—STATUTES.

A coal lease granted under the provisions of the leasing act of October 20, 1914, which is in terms restricted to the Territory of Alaska, is subject to the reservations contained in the act of March 12, 1914, authorizing the construction and operation of railroads by the United States in that Territory.

COAL LANDS—MINERAL LANDS—RIGHT OF WAY—ADVERSE CLAIM—ALASKA.

A railroad company having a right of way over mineral lands is entitled to the support of its easement, roadbed and rolling stock, and the right to take ore underneath the surface thereof must yield, if, in order to take it, the support of the roadbed will be impaired.

COAL LANDS—RIGHT OF WAY—ADVERSE CLAIM—ACT OF OCTOBER 20, 1914—ALASKA.

The action of Congress in authorizing the construction and operation by the United States of the Alaskan Railroad in effect created a legal easement with a corresponding servitude imposed on the adjoining land held by the grantor for support of the surface with the superimposed structures, and the road is entitled to lateral or adjacent support as well as to vertical or subjacent support from one who leases coal lands pursuant to the act of October 20, 1914.

COAL LANDS—RIGHT OF WAY—POSSESSION—ADVERSE CLAIM—ALASKA.

Section 13 of the Alaskan coal leasing act of October 20, 1914, provides that the possession of the lessee shall be deemed the possession of the United States for all purposes involving adverse claims to the leased property, and where questions arise as to the conflict of rights between a right of way grantee and the coal lessee, said disputes should be arbitrated in accordance with Article VII of the mining lease.

COURT DECISION CITED AND APPLIED.

The case of *St. Louis and San Francisco Railroad Company v. Yankee*: (124 S. W., 18; 140 Mo. App., 274), cited and applied.

FINNEY, *First Assistant Secretary*:

I have before me your [Director of the Bureau of Mines] two letters of December 5, 1921, relative to the mining of coal pursuant to Government lease by the Healy River Coal Company in the Nenana Field, Alaska. It appears that a report was submitted to your Bureau in which it was stated that said company had mined under the roadbed of the Government owned railroad at Healy, as a result of which it was thought that there might possibly be a subsidence of the roadbed with endangerment of the lives of persons and damage to railway equipment.

You suggested that the matter be called to the attention of the Alaskan Engineering Commission and that an opinion also be rendered for the benefit of the field representatives as to the rights of a coal lessee to mine under a railroad right of way. The following questions were propounded:

1. Where the railway has been granted the right of way, and the leasing units extend on either side, can the lessee or permittee drive tunnels or drifts through and under the right of way for transportation and ventilation purposes without permission from the railway?

2. Can coal beds or other mineral in place be mined out, or be extensively removed from under the right of way:

(a) Where it may cause subsidence and endangerment of the tracks?

(b) Where it is at such depth or mined in such a way by back-filling that it is not believed, in the opinion of the Mining Supervisor, there will be endangerment?

3. Where a coal lease or permit has been given prior to the granting of a railway right of way, can mining under right of way be done by the lessee or permittee if it does not endanger the tracks?

4. Where a railway passes over a Government lease or permit in such relation to the geologic formation that is more or less parallel to the steep pitching coal bed underlying same, and thorough extraction of the coal on the dip side, although it be outside of the right of way, is likely to cause subsidence of the tracks, what control may be exercised to prevent endangerment of the tracks?

The attention of the Alaskan Engineering Commission was called to the matter and a reply was received from that commission to the effect that a slight settlement of the railroad track at Healy had occurred, but that the mine workings are so shallow that the damage was of slight consequence. The coal company agreed to stand the expense of raising the track.

In view of the report from the engineering commission it is obvious that no summary action need be taken at this time either by your Bureau or by the Department. However, that the officials in charge of the supervision of coal mining operations on public lands

may have an understanding of the respective rights of the lessor and of the lessee in such a case as that presented by the report to which you referred in your letters, the general principles of the law pertaining thereto are set forth herein.

Section 13 of the act of October 20, 1914 (38 Stat., 741, 745), provides that the possession of the lessee shall be deemed the possession of the United States for all purposes involving adverse claims to the leased property. If the statute had *not* contained that provision, the fact that the Alaskan Railroad is owned and controlled by the United States would make it incumbent upon the Government to see that its property and the safety of the public are protected.

The Government, as a rule, will not interfere in cases involving conflicts of interest of parties who have acquired rights in public lands but will leave the settlement of such issues to themselves or by resort to the local courts, if necessary. However, any attempt to set forth herein what action, if any, should be taken by the Government, were the right of way easement in the control of a privately owned railroad, when considered in connection with section 13 of the Alaskan coal leasing act, would give rise to such perplexities that it is not deemed advisable to express any opinion thereupon at this time. Therefore, the principles of law set forth hereafter will be considered as particularly applicable to such a case as the one presented by you.

The act of March 12, 1914 (38 Stat., 305), under which the Alaskan Railroad was acquired and is operated, after providing that the right of eminent domain may be exercised, makes the following reservations with reference to the public lands:

Terminal and station grounds and rights of way through the lands of the United States in the Territory of Alaska are hereby granted for the construction of railroads, telegraph and telephone lines authorized by this Act, and in all patents for lands hereafter taken up, entered or located in the Territory of Alaska there shall be expressed that there is reserved to the United States a right of way for the construction of railroads, telegraph and telephone lines to the extent of one hundred feet on either side of the center line of any such road and twenty-five feet on either side of the center line of any such telegraph or telephone lines, and the President may, in such manner as he deems advisable, make reservation of such lands as are or may be useful for furnishing materials for construction and for stations, terminals, docks, and for such other purposes in connection with the construction and operation of such railroad lines as he may deem necessary and desirable.

Section 11 of the act of October 20, 1914 (38 Stat., 741, 744), under which coal lands in Alaska are leased, contains the following provision relative to the reservation of easement rights:

That any lease, entry, location, occupation, or use permitted under this Act shall reserve to the Government of the United States the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the

same or other coal lands by or under authority of the Government and for other purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted in so far as said surface is not necessary for use by the lessee in extracting and removing the deposits of coal therein. If such reservation is made, it shall be so determined before the offering of such lease.

The form of coal mining lease used under the act of October 20, 1914, Article I, Section 1 (45 L. D., 123), contains the following reservation:

The lessor expressly reserves unto itself the right to grant or use such easements in, over, through or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government and for other purposes; also the right to use, lease, or dispose of so much of the surface of the said lands as may not be actually needed, or occupied by the lessee in the conduct of mining operations.

The purpose of a reservation in the leasing act and in the lease is to permit railroads, tramways, water lines, or other necessary means of transport and communication to be constructed and operated through blocks of land not reached by these means of transportation at the time the blocks were leased. Wherever there may be material interference the amount of damages to be paid to a damaged lessee is to be determined by a board of arbitrators. Provision is made for the settlement of disputes by arbitration in Article VII, Section 7 (45 L. D., 134), of the mining lease.

It is apparent from the foregoing that the Government retains the possession of the surface except so much thereof as may be incidental to the conduct of the mining operations. Furthermore, the mining leases are granted, in the opinion of the Department, subject to the reservations contained in the act of March 12, 1914, *supra*. There are created, therefore, two separate estates—(1) the surface estate, which is vested in the lessor, and (2) the subsurface estate or right to extract the coal, which is vested in the lessee.

It does not appear to be necessary to answer your questions *seriatim* for the reason that the subject may be treated under two heads, (a) the protection which a surface owner is entitled to, and (b) that to which a lateral or adjacent surface owner is entitled.

The controlling weight of authority is that the owner of the surface of land from which the title to the minerals has been severed has, in the absence of a contrary agreement, an absolute right to have it supported as it was in its original state, and one mining under it is answerable for damages arising from failure to properly support it. This rule obtains without reference to the nature of the strata or the difficulty of substituting artificial for natural support. The

right of the subjacent support exists entirely independent of the question of negligence on the part of the mine owner.

The courts have held that a railroad or pipe-line company having a right of way over mineral lands is entitled to the support of the surface of its right of way, its road and rolling stock, or pipe lines, and at its suit the owner of the minerals will be enjoined from mining thereunder. If the railroad was there at the time he acquired his estate, he took subject to this right. When the right of way is subsequently acquired by right of eminent domain the mine owner must leave proper support for the railroad, but he will be entitled to damages incurred by such interference. It was held in the case of *St. Louis and San Francisco Railroad Company v. Yankee et al.* (124 S. W., 18; 140 Mo. App., 274) that the right to take ore underneath the surface of a railroad right of way must yield, if, in order to take it, the surface right of the road will be impaired.

From the tenor of the court decisions it seems that an operator of a coal mine does not have the right to undermine a railroad property if the road bed is to be damaged thereby.

The right of lateral or adjacent support is founded on the same general principles as that of vertical or subjacent support. The right of lateral support is an absolute one. It seems, however, that in the majority of cases the right is limited to the support of the soil in its natural state. But it has been held that where a grant of land is made expressly for the purpose of erecting buildings thereon or where in contemplation of the parties the land conveyed is to be enjoyed in a particular manner or for a particular purpose, a legal easement is created in favor of the land purchased and a corresponding servitude imposed on the adjoining land held by the grantor for support to the land with the superimposed structures. The Department is of the opinion that this latter principle is applicable with reference to mining leases embracing lands adjacent to the Government owned Alaskan Railroad.

Doubtless questions arising as to the conflict of rights between the lessor and lessee under the coal leasing act in Alaska may be arbitrated as provided for in the lease. In the event that such questions can not be settled by arbitration, the Department is of the opinion that where serious damage to the railroad roadbed is threatened an injunction may be obtained. Furthermore, the public safety is also concerned and should damage be incurred by the public as a result of the undermining of the railroad property, the mining operator would be liable to persons who receive injuries while traveling on the trains of the railroad.

CHRIST C. PRANGE AND WILLIAM C. BRAASCH.

February 16, 1922.

FORT BERTHOLD LANDS—INDIAN LANDS—COAL LANDS—ACT OF FEBRUARY 25, 1920—STATUTES.

Congress, when it provided in section 2 of the act of August 3, 1914, that the surplus coal lands in that portion of the Fort Berthold Indian Reservation, North Dakota, which was opened to disposition by the act of June 1, 1910, should be "subject to disposal by the United States in accordance with the coal land laws in force at the time of such disposal" and specified how the proceeds from their disposal, or from the "leasing" thereof, should be deposited, had in definite contemplation that the coal land laws then in force might be, or would be superseded by a leasing law; consequently, the general leasing act of February 25, 1920, upon its enactment, became operative as to the undisposed of surplus coal lands therein.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

The cases of *Ash Sheep Company v. United States* (252 U. S., 159), and *Frank A. Kemp* (47 L. D., 560), cited and applied.

FINNEY, *First Assistant Secretary*:

November 20, 1920, Christ C. Prange and William C. Braasch filed their coal application 016204 for the coal deposits in the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 20, T. 149 N., R. 87 W., 5th P. M., Minot, North Dakota land district, formerly within the Fort Berthold Indian Reservation. The local officers have reported that they allowed the application under the act of February 27, 1917 (39 Stat., 944), which authorized surface entries on surplus Indian coal lands and the disposal of the coal deposits. After notice and payment of \$400, the coal purchase price, entry was allowed on January 14, 1921. The General Land Office has submitted the case and asked for instructions upon the question as to whether the coal land law or the leasing act of February 25, 1920 (41 Stat., 437), applies.

The township mentioned is east and north of the Missouri River and in that part of the reservation which was open to sale and disposition under the act of June 1, 1910 (36 Stat., 455). Under that act, if the examination by the Geological Survey disclosed coal or mineral lands, they were to be reserved by the Secretary from allotment or other disposition until Congress should provide for their disposal. A commission was to classify the surplus lands as agricultural, first and second class, grazing, timber, and mineral land, and to appraise all except the timber and mineral lands. The surplus lands were to be disposed of under the provisions of the homestead, mineral and townsite laws pursuant to proclamation opening them to settlement and entry. The net proceeds from the sales were to be paid into the Treasury to the credit of the Indians. The last section of the act reads as follows:

That nothing in this Act contained shall in any manner bind the United States to purchase any of the land herein described, except sections sixteen and

thirty-six or the equivalent in each township, or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreement not inconsistent with the provisions of this Act.

Joint resolution of April 3, 1912 (37 Stat., 631), authorized allotments to the Indians on the surplus coal lands with the reservation of the coal and subject to the proviso that when such deposits were open to disposition by Congress, the coal prospector should furnish the proper bond. The act of August 3, 1914 (38 Stat., 681), opened to limited disposition, pursuant to the act of June 1, 1910, after classification and appraisal of the surface agricultural estate, the reserved coal lands. Patents therefor were to contain a reservation to the United States of the coal contained in the land "to be held in trust for the Indians." Section 2 provided—

That the coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, and the proceeds arising from the disposal of such coal deposits or from the leasing or working thereof shall be deposited in the Treasury of the United States and shall be applied in the same manner as the proceeds derived from the disposition of the lands embraced in the Fort Berthold Indian Reservation. (Italics supplied.)

Later in the section above mentioned reference is made to any person qualified to acquire the right to mine and remove the coal under the laws of the United States, and also to any person who has acquired the right to mine and remove the same. The terms found in the first section of the act are substantially that the reserved coal lands "shall be subject to disposal" under the act of 1910 with a reservation of the coal deposits. As shown by the above quotation, the coal land laws were extended to the coal deposits in identically the same terms. The evident intent of Congress was to open both the surface and the coal deposits to separate disposition for the benefit of the Indians. That the coal deposits were to be subject to disposition is further indicated by the proviso to section 2, which gives the surface owner the privilege of mining coal for domestic use upon the land "at any time prior to the disposal by the United States of the coal deposits." The Department in considering certain Fort Berthold allotments (44 L. D., 382, 384), in reference to this act said,—“Provision was also made for the disposal of the reserved coal deposits.” The surface estate of the reserved coal lands was opened to disposal pursuant to the proclamation of September 17, 1915 (44 L. D., 452), but therein no mention was made of the disposal of the coal deposits.

The Department is of opinion that section 2 of said act of August 3, 1914, rendered the coal deposits subject to disposition under the coal land sections of the Revised Statutes, and furthermore that Congress, as is evidenced by the language used, had in definite contemplation that the coal sale law might be, or would be superseded at some future time by a leasing law, for there is set forth the specific provision that proceeds arising from the leasing or working of the coal deposits shall be deposited and applied as are other proceeds from the surplus lands. Many of the features of this special Fort Berthold act of 1914 are found embodied in the later and more general surface act of February 27, 1917 (39 Stat., 944), which authorizes agricultural entries on surplus coal lands in Indian reservations. Section 3 of that act provides that if the coal land laws have been or shall be extended over the lands, the coal deposits therein shall be subject to disposal in accordance with the provisions of the coal land laws in force at the time of such disposal. By section 4 the net proceeds of disposals under the act were to be paid in and credited the same as were other proceeds from the surplus lands of the reservation.

These Fort Berthold surplus coal lands are not in the technical sense public lands or a part of the public domain any more than were the Crow lands involved in the case of Ash Sheep Company v. United States (252 U. S., 159), but are held for disposal by the Government in trust for the Indians. Congress by said act of August 3, 1914, *supra*, supplemental to the act of June 1, 1910, has declared definitely how the trust with respect to these coal lands is to be administered. It was clearly competent for Congress in its legislation to anticipate the future and to provide for the leasing of these lands if and when a general leasing law should be enacted. From 1914 until February 25, 1920, the coal deposits were subject to purchase and entry under the provisions of the coal land laws then in effect, but after the last mentioned date the method of disposal became that in general operation as the coal land law in force at that time, namely, the leasing act. The proceeds of leases, however, must go to the Indians as specifically provided by Congress and are not subject to the distribution set forth in section 35 of the leasing act. In the case of Frank A. Kemp (47 L. D., 560, 564), it was held by the Department that certain Ute ceded lands in Colorado were subject to the provisions of the leasing act "notwithstanding the fact that pursuant to the terms of the agreement with the Indians, they would be entitled to receive the proceeds from any disposition that may be made thereof."

The Department, therefore, concludes that at the time the coal application here involved was filed (November 20, 1920), and when entry was allowed (January 14, 1921, not 1920 as erroneously appears upon the face of the entry certificate), the coal deposits were not

subject to purchase and entry but were subject to leasing pursuant to the general provisions of the act of February 25, 1920. Further proceedings with respect to this case will be taken in harmony with the views above set forth with due notice to the claimants. The papers are returned.

CAMP v. BENSON.

Decided November 4, 1921.

STOCK-RAISING HOMESTEAD—SETTLEMENT—PREFERENCE RIGHT—APPLICANT.

An applicant under the stock-raising homestead act of December 29, 1916, does not acquire a preference right of entry before designation of the land, either by reason of his prior settlement or by purchase of the possessory rights and improvements of another who had previously made settlement thereupon.

STOCK-RAISING HOMESTEAD—ENLARGED HOMESTEAD ACT—SETTLEMENT—BOUNDARIES—PREFERENCE RIGHT—APPLICANT.

An applicant who has applied to enter and have designated lands under the stock-raising homestead act acquires a right of entry, when the land is designated, superior to that of a subsequent applicant under the enlarged homestead act, who is asserting a preferential claim by reason of prior settlement, as to the lands outside of the particular legal subdivision or subdivisions upon which the improvements of the latter are situated, unless the exterior boundaries of the asserted settlement claim had been plainly marked.

FINNEY, *First Assistant Secretary*:

Cicero C. Camp has appealed from the decision of the Commissioner of the General Land Office rendered May 18, 1921, in the above entitled case, dismissing his contest against enlarged homestead entry 016286, made by Mannie H. Benson, January 11, 1918, for the N. $\frac{1}{2}$, Sec. 28, T. 12 S., R. 2 E., N. M. P. M., Las Cruces land district, New Mexico.

The record discloses that Camp, on March 2, 1917, filed homestead application 015852, under the stock-raising act for the whole of said Sec. 28, accompanied by petition for designation.

Benson filed his homestead application, March 29, 1917, alleging settlement from October 10, 1916, upon the N. $\frac{1}{2}$ of said Sec. 28. All the land was designated under the enlarged homestead act, May 1, 1913, and stock-raising act, November 5, 1918.

Subsequently to the allowance of Benson's entry by the local officers, January 11, 1918, based upon his allegation of settlement, Camp filed contest and hearing was held before the local officers, May 24, 1920, pursuant to directions of the Commissioner of the General Land Office, issued September 6, 1919.

The local officers by joint decision of August 2, 1920, found in favor of the entryman, Benson, which action was affirmed by the

Commissioner of the General Land Office on the ground that Benson was a *bona fide* settler upon the N. $\frac{1}{2}$ of said Sec. 28, and Camp's application under the stock-raising act, for undesignated land, although filed about twenty-seven days earlier than Benson's application, did not operate to defeat Benson's enlarged homestead application for lands previously designated under the act of February 19, 1909 (35 Stat., 639), upon which he had settled as alleged.

Upon this proceeding Camp contends that at the time Benson claims to have made settlement upon the N. $\frac{1}{2}$ of said Sec. 28, one Holland was occupying and claiming the NE. $\frac{1}{4}$ thereof, and that he, Camp, purchased and paid \$300 for Holland's possessory rights and improvements consisting of a dwelling house, tank, corral, and six or seven acres in cultivation, and that, therefore, Benson acquired no rights by his alleged settlement and that he, Camp, was entitled to a settlement right at the time he purchased the possessory rights and improvements of Holland.

It suffices to state that Holland is not a party to the record upon this proceeding, and it is immaterial in so far as Benson's rights are concerned, whether Holland had any rights in the premises prior to the date Benson commenced actual settlement upon the land.

It is elementary that one can not under the stock-raising homestead law obtain any rights by settlement prior to the designation of the land applied for under the act of December 29, 1916 (39 Stat., 862). The Commissioner, therefore, notwithstanding the purchase of Holland's possessory rights and improvements by Camp, properly ruled that the latter acquired no rights in the premises by settlement superior to those of Benson.

Upon careful consideration of the testimony, the Department concludes, however, that Benson's settlement was confined to merely the NW. $\frac{1}{4}$ of said Sec. 28, and that he did not plainly mark the exterior boundaries of the entire N. $\frac{1}{2}$ of said section prior to the date Camp's rights attached under his stock-raising application.

It is, therefore, directed that Camp's application be allowed as to the NE. $\frac{1}{4}$, and S. $\frac{1}{2}$ of said Sec. 28, and that Benson's entry be canceled as to the said NE. $\frac{1}{4}$, and allowed to remain intact as to the NW. $\frac{1}{4}$ thereof.

The decision appealed from is modified accordingly.

CAMP v. BENSON.

Motion for rehearing of departmental decision of November 4, 1921 (48 L. D., 451), denied by First Assistant Secretary Finney, February 15, 1922.

CHARLOTTE STROMMER.

Decided January 10, 1922.

CHEYENNE RIVER INDIAN LANDS—PAYMENT—HOMESTEAD—ACTS OF MAY 29, 1908, AND JANUARY 27, 1921.

An entryman whose invalid homestead entry for ceded Cheyenne River Indian lands was validated by the act of January 27, 1921, is not relieved by that act, either expressly or by implication, from payment of the unpaid installments of the purchase price, in the form and manner specified in the act of May 29, 1908, as subsequently amended, under which the entry was made.

FINNEY, *First Assistant Secretary*:

Andrew W. Strommer, who made homestead entry for the NE. $\frac{1}{4}$, Sec. 9, T. 12 N., R. 19 E., B. H. M., Timber Lake, South Dakota, land district, was sentenced to the penitentiary while he was residing on the land, and his wife, Charlotte Strommer, continued to live thereon, offered final proof, and asked that patent be issued in her name, but her request was denied by the General Land Office.

On Mrs. Strommer's appeal the Department found that the action of the General Land Office was correct, but because of the large equities in her favor, suspended further action in the matter and called the case to the attention of Congress with a strong recommendation that she be granted relief. That recommendation and similar ones in other kindred cases resulted in the passage of the act of January 27, 1921 (41 Stat., 1090).

After the passage of this act the General Land Office, through the register and receiver, called on Mrs. Strommer to make payment of certain installments of the purchase price of the land, and after her failure to do so, by its decision of August 19, 1921, held the entry for cancellation subject to her right to thereafter make the payments.

In her appeal from that action, now up for consideration, Mrs. Strommer contends that the act of January 27, 1921, *supra*, did not require her to make the payment demanded and that she is, therefore, entitled to the immediate issuance of a patent.

The act in question reads, in that part pertinent to this case, as follows:

That the Secretary of the Interior be, and he is hereby, authorized to issue patents upon the entries hereinafter named upon which proof of compliance with law has been filed: * * *

Homestead entry, Timber Lake, South Dakota, numbered naught five thousand and twenty-three, made by Andrew W. Strommer on March 27, 1911, for the northeast quarter of section nine, township twelve north, range nineteen east, Black Hills meridian, such patent to be issued to Charlotte Strommer.

Strommer's entry was made under the act of May 29, 1908 (35 Stat., 460), which, in recognition of the right of the Indians in the

land, directed that the entryman pay a price therefor to be fixed as provided in the act. The act of January 27, 1921, *supra*, passed, as stated, at the instance and upon the recommendation of this Department, was, as clearly appears from the title and that part of the act above quoted, intended to validate this and other applications, entries, and proofs which were, under the laws pursuant to which they had been attempted to be filed or made, utterly invalid. The Department, in its report upon the bill, advised the Congress, as a reason for the validation of this entry, that the *requirements of the homestead law* had been met, and that the improvements on the land were valued at \$1,500; but neither in that report, in the reports of the Public Lands Committees, nor in the act, was there any statement or suggestion that the requirement of the act of May 29, 1908, *supra*, as to payment had been met or that such requirement was waived. Under no known rule of statutory construction can the mandatory provisions of a law be held to be repealed through mere implication, by a subsequent act passed for a specific purpose wholly independent of and compatible with the earlier law. Especially is this true with respect to provisions of the earlier law under which others have substantial rights.

The decision appealed from was clearly right and is affirmed.

CHARLOTTE STROMMER.

Motion for rehearing of departmental decision of January 10, 1922 (48 L. D., 453), denied by First Assistant Secretary Finney, February 18, 1922.

STOCK-RAISING HOMESTEADS — CONTESTS BASED ON ALLEGATIONS OF FRAUD AND MISREPRESENTATION IN SECURING DESIGNATION.

INSTRUCTIONS.

[Circular No. 810.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 18, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

In view of the departmental decision of July 21, 1919, in *Dominguez v. Cassidy* (47 L. D., 225), you will not allow, without instructions from this office, any application to contest an entry under the stock-raising homestead act where fraud and misrepresentation in securing the designation of the land are alleged.

On receipt of such an application to contest, you will transmit the papers to this office by special letter with a request for instructions, making appropriate reference hereto.

Such applications to contest will be rejected where it appears, from the records of the Department, that the designation of the land was preceded by and based on a field investigation.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

FORT HALL LANDS.

September 29, 1921.

FORT HALL LANDS—INDIAN LANDS—ALLOTMENT—ALIENATION—SECRETARY OF THE INTERIOR.

The acts of May 27, 1902, March 1, 1907, and June 25, 1910, granting authority to the Secretary of the Interior to approve sales of lands allotted to Indians and to otherwise remove restrictions against alienation by the issuance of certificates of competency, are applicable to lands allotted to the Indians of the Fort Hall Reservation, Idaho, thus removing the requirement of approval by the President imposed by the act of February 23, 1889, with respect to the alienation of lands allotted in severalty within that reservation.

BOOTH, *Solicitor*:

You have requested my opinion on the question whether lands allotted to Indians of the Fort Hall Reservation, Idaho, may be sold, or the restrictions against alienation otherwise removed, with your approval, or is action by the President necessary.

An agreement with the Fort Hall Indians, ratified by the act of February 23, 1889 (25 Stat., 687, 688), under which this reservation was allotted, provides *inter alia*:

Fifth. The Government of the United States shall cause the lands of the Fort Hall Reservation above named to be properly surveyed and divided among the said Indians in severalty and in the proportions hereinbefore mentioned, and shall issue patents to them respectively therefor so soon as the necessary laws are passed by Congress. The title to be acquired thereto by the Indians shall not be subject to alienation, lease or incumbrance, either by voluntary conveyance of the grantee, or his heirs, or by the judgment, order or decree of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President may see fit to remove the restriction, which shall be incorporated in the patent.

The patents issued under this, and similar legislation, are commonly referred to as "restricted fee patents," as distinguished from "trust

patents"; the legal title under the latter being retained by the Government for a definite period coupled with a promise to convey the fee, by patent, to the allottee or his heirs. So, also, allotments in the former class are known as "restricted allotments" while those falling within the latter class are known as "trust allotments." The Fort Hall allotments, of course, come within the first class, but as a matter of fact both classes are "restricted" in that the allottees under neither class have any power to alienate without the approval of some higher authority.

Returning to the provision quoted, and looking to this alone, it appears that the allotments at Fort Hall were to remain inalienable for a period of twenty-five years and after the expiration of that period, but not until then, the President might remove the restrictions. This twenty-five year period not yet having expired as to any of the allotments at Fort Hall, unless authority can be found in some subsequent law, there appears to exist no power, even in the President, to remove the restrictions. None of the subsequent acts relating specifically to the Fort Hall Reservation authorizes the President or any other executive officer to terminate the twenty-five year restricted period imposed by the act of February 23, 1889, on these allotments. We can only turn, therefore, to such general law as may be available.

The act of May 27, 1902 (32 Stat., 245, 275), contains this provision:

"That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee."

In the act of March 1, 1907 (34 Stat., 1015, 1018), we find:

"That *any* noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under *any law or treaty*, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the *Secretary of the Interior* may prescribe." (Italics supplied.)

The act of June 25, 1910 (36 Stat., 855), confers sundry powers on the Secretary of the Interior with respect to Indian allotments. Without quoting in its entirety even section one of that act, which is somewhat voluminous, it is sufficient to point out that Congress thereby conferred on the Secretary of the Interior jurisdiction to determine the heirs of deceased Indian allottees dying "before the

expiration of the *trust* period and *before* the issuance of a fee simple patent." The jurisdiction so conferred is not only final and exclusive (*Bond v. United States*, 181 Fed., 613, and *Hallowell v. Commons*, 239 U. S., 506); but it also includes "restricted allotments" as well as those covered by "trust patents." See *United States v. Bowling*, decided by the Supreme Court, June 1, 1921 (41 Sup. Ct. Rep., 561). The following language, however, found in section one of the act of June 25, 1910, is deemed material to such an extent as to require reproduction here:

"All sales of lands allotted to Indians authorized by this or any other act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe. * * * *Provided further*, That the Secretary of the Interior is hereby authorized in his discretion to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent."

It should be noted that in each of these laws the authority to act is vested in the Secretary of the Interior; not in the President or any other executive officer. Also, it may not be amiss here to advert briefly to the general policy of Congress with respect to matters of this kind. During earlier times the Indians were practically confined on reservations and controlled by the strong arm of the Military. The President as "The Great White Father" was looked to as the protector of their interests, and was charged with many responsibilities and duties in their behalf. Gradually, by specific statute in some cases, but more rapidly within comparatively recent times by general legislation, that responsibility and duty has been lodged elsewhere,—notably in the Secretary of the Interior. This policy of individualization by allotment in severalty and subsequent dealings with the property rights created thereby has been a matter of progressive evolution by successive legislative enactments. The general allotment act of February 8, 1887 (24 Stat., 388), on which most of our Indian "trust allotments" are founded, directs that the lands allotted shall be held in trust for a period of twenty-five years; at the expiration of which a patent in fee would issue to the allottee or his heirs. Evidently this act contemplated that the allotments made thereunder should remain inalienable and nontaxable for the full period of twenty-five years, as no provision is to be found in that act, or in any contemporaneous legislation, under which that period could be abridged or which would permit of any alienation of the allotments so made. Naturally many of the original allottees died, and their heirs having allotments in their own names were in no great need of additional lands. They did need funds, however, with which to improve their individual holdings. The act of May

27, 1902, relieved this situation by permitting the heirs to sell, with the approval of the Secretary of the Interior. This was soon found to be insufficient. Aged and indigent living allottees, having no inherited interests which could be sold, needed funds in many cases to provide the common necessities of life. Congress again came to the rescue and the act of March 1, 1907, lodged in the Secretary of the Interior, authority to extend relief in such cases. Considerable doubt, confusion, and uncertainty seems to have existed as to the matter of jurisdiction over various questions pertaining to Indian allotments, such as rights of possession between conflicting disputants claiming as heirs. Necessarily, this involved a determination of the rightful heirs. *McKay v. Kalyton* (204 U. S., 458), shows that in the absence of legislation by Congress, questions of this kind are not primarily cognizable by any court, State or Federal. The act of June 25, 1910, gives the Secretary of the Interior exclusive jurisdiction to determine the heirs of deceased Indian allottees and, in effect, it also practically gives that officer jurisdiction to fully administer their estates. The logical deduction from all this is that as a matter of policy Congress intended to clothe the Secretary of the Interior with all necessary power to act in matters of this kind, and, as said by the Supreme Court in the case of *Levindale Lead and Zinc Mining Company v. Coleman* (241 U. S., 432), "a statute should, if possible, be construed in the light of its obvious policy."

But we need not dwell longer on the external question of policy. The acts themselves contain sufficient elements on which the decision may be founded. Under the act of May 27, 1902, with the approval of the Secretary of the Interior, the heirs of *any* deceased Indian "to whom a trust or other patent containing restrictions against alienation" has been issued, may sell the allotment of the decedent. The act of March 1, 1907, also with the approval of the Secretary of the Interior permits "any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty *under any law or treaty*," or who has an inherited interest in any such allotment, to sell, etc. Clearly these acts include both "trust" and "restricted" allotments. Where an act says under any law or treaty, can we disregard that plain provision by holding that it applies to trust allotments only? I think not. The act of June 25, 1910, but confirms the authority previously vested in the Secretary of the Interior to approve sales of Indian allotments by providing that the sales of all such allotments, "authorized by this or any other act" shall be under such rules and regulations as that officer might prescribe. This act goes even further and authorizes the Secretary of the Interior, in his discretion, to issue certificates of competency to living allottees holding "patents

in fee with restrictions against alienation," and it is further expressly declared that the issuance of such certificate shall operate to remove the restrictions. This is simply analogous to the authority previously conferred on the Secretary of the Interior by the act of May 8, 1906 (34 Stat., 182), to issue patents in fee to competent Indians holding allotments under "trust patents."

I am not unmindful of the rule of construction that special legislation is not usually modified by subsequent general law unless the intent so to do is clear. Here, however, the intent is so manifest that I find no difficulty in holding that the allotments at Fort Hall come within the acts of May 27, 1902, March 1, 1907, and June 25, 1910, *supra*, and that the Secretary of the Interior has authority under those acts to approve sales of such allotments, or to otherwise remove restrictions against alienation by the issuance of certificates of competency to members of this tribe found capable of managing their own affairs.

Approved:

F. M. GOODWIN,

Assistant Secretary.

OIL PROSPECTING PERMITS IN POWER SITE RESERVES.¹

September 30, 1921.

OIL AND GAS LANDS—PROSPECTING PERMIT—WATER POWER—WORDS AND PHRASES—STATUTES.

An oil and gas prospecting permit or a lease consequent thereon, granted pursuant to the act of February 25, 1920, does not constitute an "entry," "location," or "other disposal" of the land included therein, within the meaning of those terms as contemplated by section 24 of the water power act of June 10, 1920.

OIL AND GAS LANDS—PROSPECTING PERMIT—RESERVATION—WITHDRAWAL—FEDERAL POWER COMMISSION—SECRETARY OF THE INTERIOR—JURISDICTION.

The authority conferred upon the Federal Power Commission by subdivision (h) of section 4 of the act of June 10, 1920, to make such rules and regulations not inconsistent with the purposes of the act as may be necessary and proper for the purpose of carrying out its provisions, does not clothe that commission with jurisdiction to require the insertion of restrictions in oil and gas prospecting permits and leases consequent thereon, issued by the Secretary of the Interior pursuant to the act of February 25, 1920, for lands in power site withdrawals and reserves for power purposes.

BOOTH, *Solicitor*:

My opinion has been requested as to whether in oil prospecting permits and leases granted under and in pursuance of the act of February 25, 1920 (41 Stat., 437), involving the use of lands in-

¹ See instructions of April 7, 1922 (48 L. D., 628).

cluded in power site withdrawals and reserves for power purposes, the provision adopted by the Federal Power Commission on February 28, 1921, which reads as follows:

"There shall be excluded from the operation of this permit so much of any lands reserved or classified as power sites as are included within the limits of any power project authorized or for which there is a pending application, and this permit is subject to the express condition that in the event the use of any power site lands, authorized by this permit, are required for a power project before the expiration of such permit, or of any lease consequent thereon, then the permittee, if notified so to do, will promptly vacate the same and will remove any property he may have placed thereon, and that no right shall rest in the applicant and no claim against the United States or its permittee or licensee under the Federal Water Power Act, or otherwise, shall be founded upon such removal."

shall be inserted in lieu of the provisions of the present paragraph 10 of such permits (47 L. D., 437, 442), which read as follows:

"This permit is granted on the express condition that if any of the land covered thereby is embraced in a forest, reclamation, power, or other withdrawal, or is segregated for any particular purpose, operations under this permit shall be so conducted as not to interfere with the administration and use of the land for the purpose for which withdrawn or segregated to a greater extent than may be determined by the Secretary of the Interior to be necessary for the most beneficial use of the land."

and is a sufficient reservation to preserve the rights for water power sites and can be approved by the Department without reference to the Federal Power Commission.

The history of the provision proposed by the Federal Power Commission is briefly: On February 28, 1921, the executive secretary of the Federal Power Commission presented a memorandum recommending that the provision first above quoted be inserted in all permits (and leases) that should thereafter be granted of lands involving Federal water power reservations. The Commission approved the recommendation of the executive secretary and in pursuance of their action the executive secretary on April 21, 1921, transmitted to the Department of the Interior a certified copy of the proceedings of the Federal Power Commission, notifying the Department of such action.

Paragraph 10 of the form of oil and gas permits (and leases) was drafted by the Department of the Interior and has been approved and is in use as one of the approved provisions of the regulations of the Department of the Interior in its administration of the act of February 25, 1920.

The consideration of the question presents two distinct questions: First, the authority of the Federal Power Commission to authorize and determine the regulation in question and make necessary its adop-

tion by the Interior Department; second, is the provision one which is proper as practical administrative action?

Under the act of February 25, 1920, the Department of the Interior was granted the authority to administer the so-called leasing act. Section 1 of the leasing act, in so far as pertinent to this inquiry, reads:

"That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the act known as the Appalachian Forest act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act."

Section 13 of the act of February 25, 1920, in so far as pertinent to this inquiry, reads as follows:

"That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field."

The Federal Water Power Act of June 10, 1920 (41 Stat., 1063), sought to provide for the development of water power and the use of public lands in relation thereto and granted certain *limited* authority to the Federal Power Commission, who, under the law, are charged with the administration of said act. Subdivision (h) of section 4 of said act reads as follows:

"(h) To perform any and all acts, to make such rules and regulations, and to issue such orders not inconsistent with this Act as may be necessary and proper for the purpose of carrying out the provisions of this Act."

Section 24 of the Federal Water Power Act reads as follows:

"That any lands of the United States included in any proposed project under the provisions of this Act shall from the date of filing of application therefor be reserved from *entry, location, or other disposal* under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by *location, entry, or selection* under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to *location, entry, or selection*, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the commission, for the purposes of this Act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from

the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Act, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the commission: *Provided, That locations, entries, selections, or filings* heretofore made for lands reserved as water-power sites or in connection with water-power development or electrical transmission may proceed to *approval or patent* under and subject to the limitations and conditions in this section contained." (Italics supplied.)

It can not be questioned that deposits of oil in public lands within power site reserves and withdrawals are "owned" by the United States. It is equally clear that if the Federal power act were not enacted no question could possibly arise as to the authority of the Interior Department to grant prospecting permits on such lands "under such necessary and proper rules and regulations as he (you) may prescribe." It is necessary, therefore, to determine whether the lands to which the leasing act applies, are within and under the jurisdiction of the water power act.

Under the provisions of section 24 of the water power act any lands of the United States included in any proposed project become "reserved from *entry, location or other disposal* under the laws of the United States," from the date of the filing of application therefor. If the Commission determines that the value of such lands, reserved or classified as power sites, will not be injured or destroyed for the purpose of power development by "*location, entry or selection* under the public land laws," the Secretary of the Interior shall declare such lands open to "*location, entry or selection*" subject to certain conditions.

Unless, therefore, a prospecting permit or lease falls within the terms "entry, location, or other disposal" lands within the terms of the leasing act remain under the jurisdiction of the Secretary of the Interior and are not withdrawn for disposition upon filing of an application for a proposed project under the water power act. The words *entry* and *location* have definite meanings in the parlance of the public-land laws. They are the initial steps looking to the final acquisition from the Government of the title to the lands included therein. An entry is a contract by the United States with the entryman to convey title. (Mary C. Sands, 34 L. D., 653; Alice M. Reason, 36 L. D., 279, 280; United States v. The Northern Pacific Railway Company, 204 Fed., 485, 487; Words and Phrases, Vol. 2, page 283; 32 Cyc., 806.) *Location* is a term used to denote the act of selecting and in reference to the land laws is recognized by the Government as an appropriation, and the term has been held as interchangeable with the word *selection*. (Bagnell v. Broderick, 13 Peters, 436, 447.)

Neither a permit to prospect for oil nor a *lease* to extract oil from lands owned by the United States will secure to the permittee or lessee the right to *finally acquire* title to the lands included in the permit or lease from the Government. Neither can be considered as a *location* or *selection* which will become an *appropriation* of public lands.

A *permit* is merely a license or the liberty to do an act, the granting of authority or lease to do some definite thing.

A *lease* is nothing more than a contract and is governed by the same rules as other contracts. The word has a settled technical import. It is a contract by which a person divests himself of possession, *not the title* to lands. The granting of a lease presupposes that the grantor reserves in himself the title to the property included therein. What is generally meant when we say property is leased is that the *use* of it is transferred.

A right to prospect for oil or a contract for the possession of oil lands is not for the purpose of acquiring title to the lands and is not included within the terms *entry*, *location* or *selection* unless falling within the phrase "*or other disposal*" under the laws of the United States.

The more general and comprehensive expression "*or other disposal*" embraces only agencies "*ejusdem generis*," that is of a kind with those specifically enumerated. The more general words "*or other disposal*" following the specific words "*entry*" or "*location*" upon a settled rule of statutory construction, a large legislative intent not being clearly expressed, must be construed as extending only to a disposition *ejusdem generis* with an entry or location. The words "*or other disposal*" are not to be extended to any and every act of the Government which may be said to be a disposition. It would be a departure from the rule not necessary to give effect to the legislative intent and not within it, to give the general words "*or other disposal*" a meaning so loose and expansive as to include within them any act not akin to an "*entry*" or "*location*" or "*selection*," not intended as and not having in it any of the properties of a parting with or the acquisition of title to property from the United States.

The doctrine or rule of "*ejusdem generis*" is a principle of statutory construction recognized and acted upon with respect to civil rights and duties and is thus stated in section 422, Lewis' Sutherland Statutory Construction, Second Edition:

"That where words particularly designating specific acts or things are followed by and associated with words of general import comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They (the general words) are to be deemed to have been used not in the broad sense which

they (the general words) might bear if standing alone but as related to the words of more definite and particular meaning with which they are associated." (Words in parentheses supplied.)

See also *Alabama v. Montague* (117 U. S., 602, 609); 3 Words and Phrases, 804; 19 Corpus Juris, 1255; 21 Am. & Eng. Encyclopædia of Law, Second Edition, 1011; *People v. Dolan* (39 Pac., 752, 755); *Pulom v. Dold Packing Company* (182 Fed., 356, 358); *Maxwell v. State* (37 So., 266); *Hills v. Joseph* (229 Fed., 865, 870); *United States v. Florida East Coast Railway Company* (222 Fed., 33, 34); *In re Crook* (219 Fed., 979, 980).

Under this established rule of construction the clause "*other disposal*" should be read "*other such like disposal*" so that the things comprised may be read as "*ejusdem generis*" with and not of a quality superior to or different from those specifically enumerated.

Lichter v. Thiers (121 N. W., 153); *Vasey v. Spake* (65 S. E., 825).

Under this rule the term "*or other disposal*" must be construed in connection with the words "entry" and "location." The words "entry" and "location" are the initial steps looking to the final acquisition of title from the Government. They comprise only two of the several methods by which title can be secured from the United States. The act itself refers to another method—"selection"—and title may be secured by purchase, by grant, under the Carey land act, or any of the several laws of the United States, and it must be taken that Congress by using the phrase "*or other disposal*" intended only to provide for and cover such other methods to acquire title to Government land as might be provided by law.

Aside from the foregoing consideration the word "disposal" in itself means as used in the section referred to, an *alienation* of property. The word "disposal" being a word of broad and varied significance its meaning is determined by its connection with other clauses. In this instance the word "disposal" being used in connection with the words "entry" and "location" is subject to but one meaning, i. e.—an investiture of title. This construction is upheld by uniform adjudications of the meaning of the word wherein it is held to mean an alienation by sole gift or devise. *Koerner v. Wilkinson* (96 Mo. App., 510).

In *Herold v. State* (21 Neb., 50) a statute using the word "disposal" was held to signify the passing of property over into the control of another; parting with it, exercising finally one's power of control over it. A provision in the law that a county court had power to order the renting, sale, "*or other disposal*" of certain property, was held not to include the power to mortgage, for the reason that while "disposal" has no technical meaning, it necessarily means a transfer of the estate itself. A mortgage may create a power which may lead to a disposal, but it is not in itself a dis-

posal of real estate. In short, it was held the word "disposal" signified a complete divestiture of title and power over the property. *Trutch v. Bunnell* (11 Ore., 58). In *Ironside v. Ironside* (150 Ia., 628), it was held the word "disposal" indicates absolute disposition. The word "disposal" as used in section 2387, Revised Statutes, in *Scully v. Squier* (13 Idaho, 417), was held to mean "distribution" when applied to lots of land that were actually occupied and possessed, for the reason that they had become the property of the occupants and "the occupant of a town lot, at the time of the entry of the town site, is its real owner;" in other words, implying again an investiture of the title itself in the person to whom disposal is made.

In *Arant v. State of Oregon* (2 L. D., 641), Secretary Teller said:

"A disposal of a tract of public land involves an adjudication—a determination of its status and condition and alienation. * * * *Disposal* in this sense is equivalent to sale and alienation."

In consideration of the foregoing views it must be concluded that the granting of a permit to prospect for oil or a lease consequent thereon, not being an act of alienation of property or granting a divestiture of title is not a "disposal" of the land in any proper sense.

This construction finds support from other provisions of section 24 of the water power act which provide for the opening of land which will not be injured for power purposes by "entry," "location," or "selection," and the act in its concluding sentence provides that *locations, entries, selections, or filings* heretofore made may proceed to an "approval" or "patent" subject to the reservations and limitations of the section. It is evident, therefore, that Congress did not intend that the inclusion of lands in a proposed project or any power site withdrawal or reserve should not be subject to the provisions of the leasing act. Congress is presumed to know existing statutes and the state of the law relating to the subjects with which they deal. It must be presumed that Congress would expressly abrogate any prior statute which they intended to repeal by new legislation. Where there is no express repeal none is deemed intended unless there is such inconsistency as precludes this assumption. The learned Attorney General in an opinion dated September 2, 1921 (33 Op. A. G., 34, 38-39), construing section 24 of the Federal water power act, uses this language:

"The first two sentences of section 24 apparently deal with water-power sites automatically withdrawn from entry and disposal by the mere filing of an application for water power privileges; and such power sites are to be reserved from disposal under other laws until otherwise directed by the commission or by Congress. As to all other power site reservations the only authority given

to the Commission is to make findings which will result in authorizing the disposal of the lands subject to their future possible use for water power purposes upon making compensation for improvements, etc.

"* * * It is also clear that in respect to the final disposition of water-power sites withdrawn by the President, and not yet subject to any application for water power privileges, no provision whatever is made by the water power act. In other words, this act does not cover the whole subject or provide a complete system of law displacing all others."

Subdivision (h) of section 4 of the water power act confers the power upon the Commission "to make such rules and regulations" as may be necessary and proper for carrying out the provisions of the act. In view of the conclusion reached that neither a permit to prospect or lease consequent thereon come within the scope of section 24 of the water power act, no rule or regulation could be based upon the authority of subdivision (h) of section 4 referred to.

It is my opinion that the sole authority to determine what, if any, provisions should be inserted in a permit for prospecting for oil or any lease granting the privilege to remove oil from lands owned by the United States relating to the possible power value of lands involved, rests with the Secretary of the Interior under the power conferred by the act of February 25, 1920.

Even were it possible to conclude that the reservation passed by the Federal Power Commission on February 28, 1921, was authorized, the provision is subject to several objections.

First, the reservation contained in the resolution of the Federal Power Commission of February 28, 1921, from an administrative standpoint seems to me to be unreasonable in requiring that a permittee shall contract that in the event the lands are needed for power purposes he will in effect abandon his oil operations. I believe the suggestion of the Federal Power Commission would render permits to prospect for oil on these lands undesirable and would doubtless prevent exploration. To my mind the question of the relative value of the lands for oil purposes or for water power purposes should be considered in determining what action is necessary. It might be that the reduction of the power potentialities of the power project would be less valuable than the oil production value. As an illustration an oil operation might be conducted on the extreme edge of the area to be flooded by the power project and a reduction of the capacity of the reservoir or the height of the dam might be immaterial as compared to the value of the lands for oil purposes. Again, it may occur that delay in the construction of a power project to a time after the removal of the oil contents of the lands would be of material advantage to the Government and those who receive the royalties under the leasing act.

Second, the reservation contained in the provision submitted by the Federal Power Commission is not within the purview of sec-

tion 24. If the Power Commission were empowered to prescribe the form of reservation it could in no event be more comprehensive than the statute authorizing it to be made. Section 24 provides:

“subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary,”

but the act further provides when and under what conditions the United States or any licensee may enter upon such lands by “payment of any damages to crops, buildings, or other improvements caused thereby.” The section further provides that the patent issued is subject to the “limitations and conditions in this section contained.” Hence the only authority conferred by section 24 as to reservations is as above quoted and the Federal Power Commission can not exceed the express limitations of power therein conferred. The provision submitted is more comprehensive than the authority conferred and, therefore, not consistent with section 24. The only power conferred to make reservations in permits to prospect or lease consequent thereto is found in section 13 of the act of February 25, 1920, and the power therein conferred is without limitation such as contained in section 24 of the water power act.

It is my judgment that the provision adopted by the Federal Water Power Commission should not receive your approval. The present reservation provision contained in paragraph 10 in the form of prospecting permits is sufficient to adequately protect the interests of the United States Government in its power withdrawals and will at the same time permit the exploration of the land for oil purposes. The provision designated as section 10 in the present form of permits is not open to the objections made to the provision adopted by the Federal Power Commission. The reservation clause, as now used, leaves open for your determination, when the question arises, whether as to a particular tract of land the oil or the power value is of primary and controlling importance to the Government, and under what conditions either or both purposes may be best subserved. For these reasons I am of the opinion that the provision contained in subdivision 10 of oil permits should stand as at present and that, if any change is to be made at all, there be no change other than to add a clause of the following effect:

“He further agrees that in the event of discovery of oil or gas within the permit area appropriate conditions for the protection of the power development and use may be incorporated in any lease or leases to be issued to him or his successors.”

Approved:

ALBERT B. FALL,

Secretary.

FLATHEAD LANDS.

October 22, 1921.

FLATHEAD LANDS—INDIAN LANDS—RECLAMATION—ACT OF APRIL 23, 1904.

The irrigation systems on the Flathead Indian Reservation, Montana, constructed under the act of April 23, 1904, do not constitute a "reclamation project" as contemplated by the reclamation act and amendments thereto, although a large part of the irrigable lands have passed from Indian ownership and the engineering work is performed by the Reclamation Service.

FLATHEAD LANDS—INDIAN LANDS—RECLAMATION—LEASE—WITHDRAWAL—ACT OF JULY 19, 1919.

The provision contained in the sundry civil act of July 19, 1919, directing that the proceeds derived from a lease of lands withdrawn under the reclamation law shall be covered into the reclamation fund, is to be regarded as relating primarily to "reclamation projects," and not to Indian irrigation projects, in the absence of a clear intent to include projects of the latter character.

FLATHEAD LANDS—INDIAN LANDS—RECLAMATION—LEASE—WITHDRAWAL—PAYMENTS.

Congress intended by the act of April 23, 1904, to impress a trust upon the proceeds derived from the sale of unallotted lands in the Flathead Indian Reservation, Montana, and the general provision contained in the sundry civil act of July 19, 1919, directing that the proceeds derived from a lease of lands withdrawn under the reclamation law shall be covered into the reclamation fund, has no application to moneys derived from the leasing of lands for agricultural and grazing purposes in that reservation, withdrawn as power and reservoir sites under authority of section 22 of the act of March 3, 1909.

COURT DECISIONS CITED AND APPLIED.

Cases of United States *v.* Nice (241 U. S., 591), and Ash Sheep Company *v.* United States (252 U. S., 159), cited and applied.

BOOTH, *Solicitor.*

Some question having arisen between the Indian Service and the Reclamation Service over the use of proceeds derived from leasing lands withdrawn for reclamation purposes within the Flathead Indian Reservation, Montana, you have requested my opinion in the matter.

This reservation was created by treaty dated July 16, 1855, with the confederated Flathead Tribes (12 Stat., 975), and remained practically intact until the passage of the act of April 23, 1904 (33 Stat., 302), which, among other things, provided for a survey of the reservation, allotments in severalty to the Indians, and a classification, appraisal and sale of the unallotted lands, the proceeds from the latter to be deposited to the credit of the Flathead Tribe. Provision was also made for expending a part of such proceeds in the construction of irrigation facilities for the Indians. The reservation being large, comparatively, and the number of Indians entitled to allotment considerable, necessarily some delay occurred in placing the surplus lands on the market. As the purchasers of those lands were re-

quired to pay only one-third of the appraised value in cash, at the time of sale, and the remainder in five equal annual installments, the prospect of early receipt of funds with which to construct irrigation facilities did not appear bright. The need for reasonably prompt action in this respect becoming somewhat urgent, Congress by the act of April 30, 1908 (35 Stat., 70, 83), advanced \$50,000 for the purpose of making preliminary surveys, plans, and estimates of an irrigation system to supply water to both allotted and unallotted irrigable lands within this reservation. Reimbursement of the appropriation so made was to be had "from the proceeds derived from the sale of the lands within said reservation"—i. e., tribal funds. It soon developed that successful irrigation here would require storage and section 22 of the act of March 3, 1909 (35 Stat., 781, 796), authorized the Secretary of the Interior to reserve from entry, sale, or other disposal, any lands within the Flathead Reservation valuable chiefly for power or reservoir purposes. Under this, comparatively large areas (approximating 50,000 acres in the aggregate) have been withdrawn for such purposes. Subsequent detailed surveys, and changes in plans, indicating that some of these lands were not suitable for the purposes for which withdrawn, or would not be needed, the withdrawals, in some instances, were vacated and the lands restored to their former status.

Various Indian appropriation acts between April 30, 1908, and May 18, 1916, appropriated large additional sums, aggregating over \$1,500,000, for continuing the construction of these irrigation works; all made reimbursable out of Indian tribal moneys received from the sale of surplus lands. As many of the Flathead allottees received no irrigable land in allotment, for this and doubtless other good and sufficient reasons, Congress decided to shift the burden of the cost of this irrigation work from the tribal fund to the individual owners of the land benefited. Accordingly, the act of May 18, 1916. (39 Stat., 123, 139-141), directed that the tribal funds theretofore covered into the Treasury of the United States in partial reimbursement of the appropriations made for constructing these irrigation systems should again be placed to the credit of the Flathead Tribe, and the Secretary of the Interior was directed to apportion the cost of such work, on a per acre basis, against the lands benefited, in such manner that each acre of land would bear its proper proportionate part of the cost of the system through which irrigated.

The record now before me indicates that some of the areas within this reservation withdrawn as power and reservoir sites have been leased from time to time for agricultural and grazing purposes. The revenue derived therefrom has usually been treated as tribal funds and deposited to the credit of the Flathead Tribe. Some

\$3,320, however, received by the Reclamation Service from such a lease of "The McConnell Reservoir Site"—since abandoned—has been covered into the reclamation fund "to the credit of the Flathead Project." Authority for so doing is given as an item in the sundry civil act of July 19, 1919 (41 Stat., 163, 202), which reads:

"The proceeds heretofore or hereafter received from the lease of any lands reserved or withdrawn under the reclamation law or from the sale of the products therefrom shall be covered into the reclamation fund; and where such lands are affected by a reservation or withdrawal under some other law, the proceeds from the lease of land and the sale of products therefrom shall likewise be covered into the reclamation fund in all cases where such lands are needed for the protection or operation of any reservoir or other works constructed under the reclamation law, and such lands shall be and remain under the jurisdiction of the Secretary of the Interior."

Looking to this alone and placing a broad or even a literal construction thereon it would appear that the funds derived from leasing any lands withdrawn for reclamation purposes are to be covered into the reclamation fund, regardless of the prior status of such land. Other considerations, however, must not be overlooked. We are here dealing with an Indian reservation created by treaty. In the act of April 23, 1904, Congress not only recognized the right of the Indians to the proceeds derived from a sale of their lands but also expressly disclaimed any intention on the part of the United States to buy any of said lands (except Secs. 16 and 36), or to guarantee to find any purchasers therefor, it simply being the intention that the Government would act as trustee for the Indians in the disposal of their property for their benefit. (33 Stat., 305.) Under circumstances somewhat similar the Supreme Court has recognized not only the right of the *cestui que* trust to the proceeds derived from a sale of the lands, but also to any revenue derived therefrom while in the hands of the trustee. *Ash Sheep Company v. United States* (252 U. S., 159).

Again, the irrigation systems on the Flathead Reservation do not constitute a "reclamation project" *per se*, as contemplated by the reclamation act and the amendments thereto. This remains true even though a large part of the irrigable lands under the Flathead systems has now passed from Indian ownership and even though the engineering work, as a matter of convenience or otherwise, is being handled by the Reclamation Service. Practically all appropriations in behalf of this work are found in the Indian appropriation acts, while appropriations for our reclamation projects are usually carried in the sundry civil acts. The item found in the sundry civil act of July 19, 1919, therefore, is to be regarded as relating primarily to "reclamation projects" rather than to Indian irrigation projects, unless the intent to include the latter is clear. Here such an intent is by no means manifest, and the printed hearings on the sundry civil bill which

resulted in the act of July 19, 1919, indicate that the committee having charge of this bill did not have in mind that the item referred to included lands within Indian reservations (House Hearings, Sundry Civil Bill, 1920, vol. 1, p. 829).

Turning again to the act of May 18, 1916, *supra*, we find that after shifting the burden of the irrigation work from the tribal fund to the individual landowners benefited Congress expressly declared that—

“The cost of constructing the irrigation systems to irrigate allotted lands of the Indians on these reservations shall be reimbursed to the United States as hereinbefore provided, and no further reimbursements from the tribal funds shall be made on account of said irrigation works except that all charges against Indian allottees or their heirs herein authorized, unless otherwise paid, may be paid from the individual shares in the tribal funds, when the same is available for distribution, in the discretion of the Secretary of the Interior.”

If by diversion to the reclamation fund we forestall an accretion that would otherwise go to the Indian tribal fund we clearly run counter to this plain provision of the act of May 18, 1916. From a practical standpoint it makes but little difference whether we take a given sum from the tribal fund and apply it to the irrigation work, or divert for such purposes a similar sum to which the Indians are entitled, before it reaches their hands. Congress has expressly directed that this should not be done. The Supreme Court in the case of *United States v. Nice* (241 U. S., 591), says that “legislation affecting the Indians is to be construed in their interests, and a purpose to make a radical departure is not lightly to be inferred.” Again, “words in a statute, although general, must be read in the light of the statute as a whole and with due regard to the situation in which they are to be applied.” These views do not lead to the conclusion that a general provision found in the sundry civil act of July 19, 1919, which, although admittedly broad, is to be construed as depriving the Indians of a valuable tribal resource. As previously shown, the aggregate area within the Flathead Indian Reservation withdrawn “for reclamation purposes” is large. Some of these lands may contain valuable tribal assets, such as mineral or timber. Are these resources lost to the Indians by inclusion of their lands in power and reservoir sites, in the absence of an express declaration by Congress to that effect? I think not. Again, when we credit the revenue derived from any of these lands to “the Flathead Irrigation Project” we not only deplete the tribal fund to that extent but we also relieve the white land owners under the project, in part, from paying their proportionate share of the costs of the work. In other words, the white man is being benefited at the expense of the Indian. This is contrary to the intent of the legislation dealing with this matter, which clearly contemplates that the cost of each system shall

fall equally on the shoulders of the individual landowners thereunder, both Indian and white.

I find no difficulty, therefore, in holding that the general item found in the sundry civil act of July 19, 1919, *supra*, does not include revenue derived from leasing lands withdrawn for reclamation purposes in the Flathead Indian Reservation, Montana.

As to the question of jurisdiction over such lands—whether to be exercised by the Reclamation Service or the Indian Service—this is a matter of administrative control on which I see no need for expressing an opinion. Both bureaus are subject to the supervision of the Secretary of the Interior, and in the absence of some controlling statute, which I do not find, the matter of jurisdiction rests in the sound discretion of the administrative officers of this Department.

Approved:

E. C. FINNEY,

First Assistant Secretary.

CHIPPEWA LANDS.

October 29, 1921.

CHIPPEWA LANDS—INDIAN LANDS—ALLOTMENT—ALIENATION—PATENT—WILL—
SECRETARY OF THE INTERIOR.

Approval by the Secretary of the Interior, under authority conferred by the act of February 24, 1913, of a will by a Chippewa allottee, devising Indian lands held under a restricted fee patent issued pursuant to the Treaty of September 30, 1854, does not remove the restrictions against alienation of such lands, imposed by the provisions of that treaty.

CHIPPEWA LANDS—INDIAN LANDS—ALLOTMENT—PATENT—WILL—FEES—SECRETARY OF THE INTERIOR.

The acts of May 18, 1916, and February 14, 1920, authorize the Secretary of the Interior to collect certain fixed fees upon the approval of a will of an Indian allottee, and the fees prescribed by law become due and collectible upon approval of the will of a Chippewa Indian devising lands held under a restricted fee patent issued pursuant to the Treaty of September 30, 1854.

BOOTH, *Solicitor*:

Two questions presented by the Commissioner of Indian Affairs relating to wills by allottees of the Chippewa Tribe have been referred to me for opinion, viz:

1. Does the approval of a will by the Secretary, devising Indian lands held under the treaty of September 30, 1854, entirely remove the restrictions therefrom or does the land continue in trust after such approval the same as in case of a trust patent as provided in the act of February 14, 1913 (37 Stat., 678)?

2. Where a will is approved by the Secretary held under a patent issued in pursuance of the treaty of September 30, 1854, is the office justified in collecting a fee the same as in case of trust patent lands under existing law?

Allotments to these Indians carry restrictions against alienation without consent of the President (10 Stat., 1110), and fall within that class known as "restricted fee" as distinguished from "trust allotments." The essential difference between these two kinds of allotments was pointed out in my prior opinion of September 29, 1921 (48 L. D., 455), relating to allottees of the Fort Hall Reservation, Idaho, wherein it was held that the Secretary of the Interior under authority found in the acts of May 27, 1902 (32 Stat., 245, 275), March 1, 1907 (34 Stat., 1015, 1018), and June 25, 1910 (36 Stat., 855), has the power to approve sales or to otherwise remove the restrictions against alienation of both these classes of allotments. While my prior opinion did not specifically mention the subject of wills by Indians, yet under date of October 8, 1921, the Commissioner of Indian Affairs was instructed that the prior ruling is sufficiently broad to include the disposal of Indian property by will as well as by any other form of alienation. Legislation germane to the subject-matter shows this conclusively. With the approval of the Secretary of the Interior and under such rules and regulations as that officer may prescribe, any Indian of the age of twenty-one years or over was permitted, by section 2 of the act of June 25, 1910, *supra*, to dispose of his allotment by will "prior to the expiration of the trust period and before the issuance of a fee simple patent." Experience soon demonstrated that this was not sufficiently broad in that it apparently applied to "trust allotments" only but did not include those large number of Indian allotments held under "restricted fee patents." Again, the power to so convey was confined to the testator's individual allotment and did not extend to any inherited land, money, or other of his property over which the Government retained control. I understand also that it was early ruled administratively that the approval of an Indian's will terminated the restrictions against alienation—a result not always to be desired—although on what theory that ruling was based is not altogether clear. True, disposal by will is a form of alienation in that the law recognizes but two primary methods by which real property can be lost or acquired, namely, "by descent" and "by purchase." Acquisition under a will not being by descent necessarily it falls within the only remaining class, by purchase. To that extent at least it constitutes a form of alienation. This being so, and the "alienation" of an Indian's allotment usually carrying with it removal of restrictions against further alienation, ordinarily it would follow that property acquired under an Indian will would come into the hands of the beneficiary free from the restrictions. Against this, however, rests the fundamental rule of law that an individual can convey no greater title to property than he himself has. Hence, an Indian allottee could convey by will to his beneficiary no greater title than the Indian testator himself possessed, whether that be a

“trust” or a “restricted fee.” Clearly it was within the power of the approving officer, if he chose to exercise it, to stipulate by regulation or otherwise that his approval of an Indian’s will should not operate to remove the restrictions or to ripen the trust or restricted title into an absolute fee. Further discussion along this line, however, has become academic, for by the act of February 14, 1913 (37 Stat., 678), Congress amended section 2 of the act of June 25, 1910, so as to read (pertinent parts only reproduced)—

That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator. * * * *Provided further,* That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees, either in whole or in part from time to time as he may deem advisable, or use it for their benefit.

Analyzing this inversely, it is clear that the approval of an Indian’s will does not terminate the trust or restricted period; that the Secretary of the Interior has the power to approve or disapprove, and that this power extends to both classes of allotments, whether held under trust or restricted fee patents. I am of the opinion, therefore, that the Secretary of the Interior has authority to approve or disapprove wills by members of the Chippewa Tribe holding allotments under the treaty of September 30, 1854, *supra*, and that the approval of such wills does not remove the restrictions against alienation.

In passing it may be noted that none of the supplemental legislation found in the acts of May 27, 1902, March 1, 1907, June 25, 1910, *supra*, or in any amendments thereto, in express terms either curtails or enlarges any power previously vested in the President over matters of this kind, but as more fully pointed out in my prior opinion these acts do clothe the Secretary of the Interior with all necessary authority to act in the premises, thus to some extent at least relieving an overburdened officer of detailed duties which have doubtless long since become onerous.

As to the matter of fees, this is controlled by legislation found in the acts of May 18, 1916 (39 Stat., 123, 127), and February 14, 1920

(41 Stat., 408, 413), in the latter of which the Secretary of the Interior is authorized to collect certain fixed fees for determining "the heirs to any trust or restricted Indian property" or on approval by said Secretary "of any will covering such trust or restricted property." Needless of course, to add, on approval by the Secretary of the Interior of a Chippewa allottee's will the fees provided by law then become due and collectible.

Approved:

F. M. GOODWIN,
Assistant Secretary.

FLATHEAD LANDS.

November 15, 1921.

FLATHEAD LANDS—INDIAN LANDS—RECLAMATION—PAYMENTS—SECRETARY OF THE INTERIOR.

The irrigation systems on the Flathead Indian Reservation, Montana, do not constitute a "reclamation project" as contemplated by the reclamation act, and consequently neither section 3 of the act of August 13, 1914, the Indian appropriation act of February 14, 1920, nor any other act of Congress authorizes the Secretary of the Interior to impose a money penalty or obligation to pay interest upon land owners in that reservation who fail to pay the stated charges as and when due.

COURT DECISIONS CITED AND APPLIED.

Cases of *Morrill v. Jones* (106 U. S., 467), *Choate v. Trapp* (224 U. S., 665), *Swigert v. Baker* (229 U. S., 187), cited and applied.

BOOTH, *Solicitor*:

My opinion has been requested on the question whether an interest or money penalty can be assessed against landowners under the irrigation systems on the Flathead Indian Reservation, Montana, where stated charges are not paid as and when due.

This arises in connection with an item found in the Indian appropriation act of February 14, 1920 (41 Stat., 408, 409), which reads:

The Secretary of the Interior is hereby authorized and directed to require the owners of irrigable land under any irrigation system heretofore or hereafter constructed for the benefit of Indians and to which water for irrigation purposes can be delivered to begin partial reimbursement of the construction charges, where reimbursement is required by law, at such times and in such amounts as he may deem best; all payments hereunder to be credited on a per acre basis in favor of the land in behalf of which such payments shall have been made and to be deducted from the total per acre charge assessable against said land.

Tentative regulations covering partial repayment of the construction charge by landowners under the systems on the Flathead Indian Reservation are before me, wherein after stating the sum per acre to be paid annually, the following appears:

* * * and to all charges not paid on the due date there shall be added a penalty of one per centum thereof and a like penalty of one per centum on the

first day of each month thereafter so long as such default shall continue, and no water shall be delivered to any of said land while any such charge or portion thereof remains due and unpaid for one year.

All principal sums paid hereunder, excluding penalties, will be credited upon the construction charge per irrigable acre hereafter to be announced by public notice.

It should be noted that the statute referred to does not in specific terms authorize the addition of interest or the imposition of a money penalty for failure to promptly pay, hence we must look to such other legislation as may be germane to the subject matter. The penalties suggested are doubtless founded on section 3 of the act of August 13, 1914 (38 Stat., 686), as they are identical with the penalties imposed thereby on delinquent landowners under reclamation projects. As pointed out in my opinion of October 22, 1921 (48 L. D., 468), however, the irrigation systems on the Flathead Indian Reservation do not constitute a reclamation project as contemplated by the reclamation act of June 17, 1902 (32 Stat., 388), and the amendments thereto. The question now before me being of a somewhat different nature, necessitates a further discussion of the situation, and particularly as to the essential difference between a reclamation project and an Indian irrigation project.

A reclamation project is one constructed primarily out of funds received from the sale of public lands in certain states, the cost of each project to be assessed against the property benefited thereby, which cost as and when paid could again be used for the construction of other works, thus in effect creating a "revolving fund" for use in constructing works of this kind, which fund was not subject to diminution for the benefit of any one project nor to increase by way of interest. *Swigert v. Baker* (229 U. S., 187, 197). Indian irrigation projects, however, are on an essentially different basis. From time to time and beginning at an early date, Congress has appropriated comparatively large sums for use in constructing irrigation facilities for the benefit of Indians. Frequently these appropriations were of general application, without reference to the particular place of use and, during earlier times at least, were purely gratuitous, reimbursement not being required. The act of August 1, 1914 (38 Stat., 582, 583), did change this policy at least to the extent of requiring reimbursement where the Indians have adequate funds with which to repay. With these general statutes, however, we are not now directly concerned other than to observe that none of them provide for the collection of interest on the advancements made by Congress in behalf of such work.

Other sundry acts dealing with particular tribes or reservations required reimbursement of the appropriations made for irrigation work, either from tribal moneys or from the sale of unallotted tribal

lands, which in the final analysis means the same thing. Among this class of "projects" we find the irrigation systems on the Flathead Indian Reservation, for the construction of which prior to May 18, 1916, Congress advanced some \$1,875,000.00. Inclusive of and subsequently to that date additional sums aggregating \$2,650,000.00 were made available for similar use. Before considering the manner of reimbursement, it may be well to mention here that the unallotted lands in this reservation having been opened to public entry (36 Stat., 2494), we must deal with two classes of landowners under these systems—Indian, and other than Indian, the latter for the sake of brevity being referred to as "whites." The acts in which the various appropriations for this work are to be found are all "Indian appropriation acts," hence these systems or projects retain their essential characteristic as an Indian irrigation project even though a large part of the irrigable area thereunder has passed into private ownership.

Prior to May 18, 1916, reimbursement of the cost of these irrigation systems assessable against the land in Indian ownership was to be had from the tribal fund, and the act of May 29, 1908 (35 Stat., 444, 449), required white landowners to repay their proper proportionate part of the cost of such work, in addition to paying the appraised value of the land itself. As observed in my prior opinion, many allottees within this reservation received no irrigable lands in allotment, yet their prospective share of the tribal fund was continually being hypothecated and depleted in order to reimburse the cost of the irrigation systems, to the substantial benefit of their more fortunate brethren who perchance did obtain allotments within the irrigable areas. Finding this inequitable and possibly for other good reasons as well, Congress decided to shift the entire burden to the shoulders of the individuals benefited, both Indian and white. This was done by the act of May 18, 1916 (39 Stat., 123, 139, *et seq.*), which not only directed that the tribal funds theretofore covered into the Treasury of the United States in partial reimbursement of the cost of this work should again be placed to the credit of the Flathead Tribe, but also directed the Secretary of the Interior to apportion the cost of this work on a per acre basis against the lands benefited in such manner that each acre of irrigable land would bear its proportionate part of the total cost of the system through which irrigated. It is significant here also to note that none of these acts relating specifically to the Flathead Reservation requires the payment of interest on the advancement made in behalf of the irrigation work, hence, under these acts the ultimate amount to be repaid to the Government is the amount actually expended—no more nor no less.

I am not unmindful of course of the broad powers conferred on the Secretary of the Interior to require repayment of these expen-

ditures "at such times and in such amounts as he may deem best," nor of the familiar rule of construction that in case of doubt, that doubt is to be resolved in favor of the Government. We must recognize the fact, however, that administrative officers are without power to alter or amend existing law (*Morrill v. Jones*, 106 U. S. 466, 467), and unless the law clearly authorizes the addition of an interest or money penalty for failure to pay, then such can not be imposed. As to resolving doubts in favor of the Government, where the Indians are concerned, the Supreme Court has said:

But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases. (*Choate v. Trapp*, 224 U. S., 665, 675.)

Nor do I find sufficient legal grounds for discriminating between Indian landowners and white landowners under this irrigation project. They stand equally on the same footing, with respect to repayment of the cost of this work; each acre of irrigable land, regardless of ownership to bear its proper proportionate part of the total cost of the work.

From a practical standpoint, of course, it makes but little difference to individual landowners whether we term an additional money charge as "interest" or as a "penalty." The effect is the same, but as to penalties equity finds these still more abhorrent. Unless clearly authorized by law they can not be imposed, and where the law fixes one penalty, the parties concerned even by agreement can not substitute another. As to penalties against the land in white ownership, the act of May 29, 1908, *supra*, subjects the entry and water right application of such landowners to cancellation for failure to promptly pay the charges when due, together with a forfeiture of all sums previously paid. Under the act of May 18, 1916, delivery of water to any tract may be refused where the landowner fails to pay the charges as and when due, or, in the discretion of the Secretary of the Interior the amount due can be collected by a suit as for money owed. These are the penalties provided by law and I find no authority for the substitution of others therefor. If these penalties are too hard, unjust or unsatisfactory, the matter is one for further consideration by Congress.

It follows of course that the question presented is answered in the negative.

Approved:

E. C. FINNEY,

First Assistant Secretary.

BIG LARK.

November 22, 1921.

CROW LANDS—INDIAN LANDS—ALLOTMENT—ACT OF JUNE 4, 1920.

A member of the Crow Tribe of Indians who was enrolled on June 4, 1920, but who died subsequently thereto, comes within the class entitled to a *pro rata* distribution of the remaining unallotted allotable lands of the Crow Reservation, Montana, authorized by the act of that date, regardless of whether or not a selection was made prior to death.

CROW LANDS—INDIAN LANDS—ALLOTMENT—HEIRS—DEVISEE—SECRETARY OF THE INTERIOR.

An "expectancy" consisting of the right to share in the final division of the unallotted lands in the Crow Reservation, Montana, is a descendible right which in case of intestacy inures to the benefit of the heirs, and may be devised, subject to the approval of the Secretary of the Interior, pursuant to section 2 of the act of June 25, 1910, as amended by the act of February 14, 1913.

BOOTH, *Solicitor*:

Big Lark, Crow allottee No. 1541, died October 23, 1920, leaving a will in which, among other things, she devised the allotment previously made to her on the Crow Reservation, Montana, together with all inherited lands of which she died possessed, to her three sons equally. To this clause in her will the testatrix appended the following:

"And this shall include any and all further land which I may be allotted on this reservation at any future time."

Some question having arisen as to this provision, you have requested my opinion on the questions (1) whether the decedent is entitled to an additional allotment as a member of the Crow Tribe, and (2) if so, whether she could dispose of such "expectancy" by will.

For a long time it has been the uniform rule of this Department that a deceased Indian is not ordinarily entitled to an allotment of land in severalty unless a selection of the lands wanted was made prior to death (14 L. D., 463; 17 L. D., 142; 30 L. D., 532; 35 L. D., 145; 40 L. D., 4; 42 L. D., 446; and 45 L. D., 568). The necessity for some such rule is apparent. By sundry acts from time to time Congress has directed that allotments in severalty be made to the Indians of designated reservations. Those acts usually carry no special provision with reference to allotments to deceased members of the respective tribes. So also the general allotment act of February 8, 1887 (24 Stat., 388), contains no legislative direction controlling this matter. Hence, if we recognize the right to an allotment of an Indian who died a week previous to a fixed event, we should recognize a similar right in one who died a year previously to that event, ten years previously, and *ad infinitum*. Manifestly no such rule could obtain. Accordingly, it was administratively determined at an early date

that the right of an Indian to participate in a prospective distribution of tribal land is but a mere "float," an inchoate right only, vesting in members of the tribe no such right as would in case of death, descend to his heirs unless a selection of the land wanted was made prior to death. In other words, in the absence of some controlling legislation to the contrary, death *ipso facto* terminated the right unless the conditions stated had previously been fulfilled. That rule is not only well founded but it has been so recognized and upheld by the courts. *United States v. La Roque* (198 Fed., 645; affirmed 239 U. S., 62).

With these general observations in mind we take up the situation with respect to the Crows. The reservation created originally for these Indians by the treaty of May 7, 1868 (15 Stat., 649), has been successively reduced by three substantial "cessions" made under the acts of April 11, 1882 (22 Stat., 42), March 3, 1891 (26 Stat., 989, 1039), and April 27, 1904 (33 Stat., 352). Each of these provided for allotments in severalty to the Indians, and a disposal of the unallotted lands under our public land laws. Upwards of 2,500 members of the Crow Tribe have previously been allotted something over 500,000 acres of land, but the diminished reserve still contains over 1,500,000 acres of unallotted tribal land. During the Sixty-first Congress bills were introduced looking to the opening to public entry of this remainder (Senate 3373 and H. R. 1246). To such action the Indians were bitterly opposed and their opposition was finally voiced in such an effective manner that a counter measure was proposed (Senate 6995, same session). Under the latter the remaining tribal lands, instead of being opened to public settlement, were to be prorated among the members of the Crow Tribe substantially similar to the procedure had with respect to the Osage Indians in Oklahoma under the act of June 28, 1906 (34 Stat., 539). None of these bills were enacted, however, but similar measures were introduced in several subsequent sessions of the Congress. Without attempting to trace the legislative history in detail, sufficient to say that the matter culminated in the act of June 4, 1920 (41 Stat., 751), by which, among other things, the Secretary of the Interior is directed to allot lands in severalty to the members of the Crow Tribe as follows:

" * * * one hundred and sixty acres to the heirs of every enrolled member entitled to allotment, who died unallotted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to *prorate* the remaining unallotted unallotable lands and allot them so that *every enrolled member living* on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allotable tribal lands for his total allotment of land of the Crow Tribe." (Italics supplied.)

In an apparent effort to facilitate the work, however, section 3 of the same act provides:

"That the Secretary of the Interior shall, as speedily as possible, after the passage of this Act, prepare a complete roll of the members of the Crow Tribe who died unallotted after December 31, 1905, and before the passage of this Act; also, a complete roll of the allotted members of the Crow Tribe who six months after the date hereof are *living* and are heads of families but have not received full allotments as such; also, a complete roll of the unallotted members of the tribe *living* six months after the approval of this Act who are entitled to allotments. Such rolls when completed shall be deemed the final allotment rolls of the Crow Tribe, on which allotment of all tribal lands and distribution of all tribal funds existing at said date shall be made." (Italics supplied.)

A brief examination discloses considerable conflict between these two provisions, but with a broad understanding of the situation on which the legislation is founded that conflict largely disappears. For convenient reference the various classes of allottees will be designated by alphabetical symbols, those who died after December 31, 1905, and before June 4, 1920, being referred to as class A; those "heads of families" who have not previously received full allotments as such, as class B, and the unallotted members living six months after the approval of the act as class C. Doubtless the latter class is intended mainly to provide for children born within the period stated to enrolled members of the tribe. No immediate conflict appears between sections 1 and 3 of the act as to class A. So also the two sections are in accord as to class B except that in section 3 the date on which their status as "heads of families" is to be determined has been advanced from June 4 to December 4, 1920. Class C appears in section 3 but not in section 1. The chief difficulty arises from the fact that section 3 apparently contemplates that these three rolls or classes will constitute "the final allotment rolls of the Crow Tribe" on which the distribution of all tribal land and money is to be based. An analysis of the true situation, however, discloses otherwise. Confining the distribution to these three classes would leave unprovided for a large component part of the tribal membership living on June 4, 1920, class D, who do not appear either in class A or C, and possibly a few only of whom appear in class B. Section 1 of the act undoubtedly contemplates that those appearing in class D shall share in the final division.

While accurate figures are not now available yet the result can be foreseen with some degree of accuracy. Where the purpose is illustrative only, even arbitrary figures can be used with safety. The allotment roll showing the members in class A has reached the Indian office. It contains 358 names. The population of the Crow Tribe on June 30, 1920, as shown by the report of the Commissioner of Indian Affairs for that year, was 1,719, of whom 970 were adults and 749 minors. Births for the year appear as 61 and the deaths as 59. Even assuming that one-half the adults were "heads of fami-

lies" either on June 4 or December 4, 1920, we must still deduct from that number those who have previously received allotments as such. The resultant figure may be small but placing it even as high as 300, and assuming that 30 (one-half of 61 disregarding fractions) will fairly represent the number of children born within the six months' period, the total of classes A, B, and C would then be 688. But the tribal membership on June 4, 1920, plus the estimated births between that date and December 4, 1920, approximates 1,800. Hence, if we confine the final distribution to classes A, B, and C, it would exclude from such distribution something over 1,000 members of the Crow Tribe living on June 4, 1920, who, under section 1 of the act, clearly are entitled to share. Again, a distribution so made would include in the final division those members appearing in class A, a proceeding which section 1 of the act also contemplates should not obtain. Manifestly, therefore, this construction is untenable.

Proceeding on a different hypothesis we reach a far more happy solution. In *Peck v. Jenness* (7 How. 612, 623) the Supreme Court says:

"But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

Considering the act of June 4, 1920, as a whole, therefore, and viewing it in the light of its obvious policy, the legislative intent becomes clear. The "final rolls of the Crow Tribe" embrace classes A, B, C, and D. After having first satisfied the prior rights of classes A and B by allotting 160 acres to each member whose name appears in those classes, and fulfilling other requirements of the act, such as adjusting the school land grant to the State, reserving the areas needed for administrative purposes, etc., the "unallotted allotable lands" still undisposed of are then to be pro-rated among the members whose names appear on the *remainder* of the final rolls—that is, classes C and D. True, some of those members will appear in both B and D, but if their rights as class B allottees are first satisfied, their inclusion in class D so as to receive a *pro rata* share in the final division of the allotable lands but carries out the intent of the act. Big Lark, the allottee here involved, undoubtedly appears in class D. She may also appear in class B as "the head of a family" but the facts now before me are not sufficient to determine that issue. Her rights, however, as a class D allottee to share in the final distribution of the allotable tribal lands can at least now be determined.

The situation here is strikingly analogous to that obtaining among the Osage Indians in Oklahoma. The act of June 28, 1906, *supra*,

directed that the roll of the Osage Tribe as it existed on June 1, 1906 (with certain additions, including children born to enrolled members between January 1 and July 1, 1906), should constitute the final roll of the Osage Tribe on which the distribution of tribal land and money should be based. The right of deceased members who, prior to death, failed to receive their distributive share of the tribal lands, has been recognized and confirmed. *Levindale Lead and Zinc Mining Co. v. Coleman* (241 U. S., 432, 437); *Kenny v. Miles et al.* (250 U. S., 58, 64). The question naturally arises, therefore, in the final division of the Crow lands under the act of June 4, 1920, are we to follow the rule first herein stated, that a deceased member is not entitled to share unless a selection of the lands wanted was made prior to death, or, are we to follow the rule which obtained with respect to the Osages?

In attempting to follow the rule first stated, we encounter serious difficulty. A *pro rata* division can not well be made without having a fixed number who are entitled to share. If that number is subject to change from time to time, as deaths occur, we have a "floating divisor" which yields a fluctuating quotient. This renders a *pro rata* division physically impossible. A single death upsets the entire calculation and we must then begin anew. Applying this principle to the situation at Crow, with, say 1,800 members entitled to share, if the right to participate is then founded on an individual selection of the lands wanted, before those selections can be made and recorded, intervening deaths will upset the entire basis of the distribution. Successive efforts would meet with no better result.

Aside from this administrative difficulty, which admittedly is serious, there are other considerations which should not be overlooked. Usually the acts of Congress relating to matters of this kind provide for allotments in given areas, as 40, 80 or 160 acres, etc., and it has been customary to make allotments to children born to enrolled members of the tribe as long as the allotting crews remain in the field. Where the tribal membership is large frequently several years are required to complete the allotment work, during which time the allotment roll is materially increased by virtue of births and selections in behalf of new-born children. Here, however, a different situation obtains, for clearly there is no authority to add to "the final rolls of the Crow Tribe" any children born after December 4, 1920. Again, under our other acts, the lands remaining after completion of the allotment work either become subject to public sale and entry, or else remain Indian tribal property subject to future disposition by Congress. Here theoretically at least, no allotable lands are to remain, as they must be prorated in such manner as to give members of the tribe living on a certain date an equal share.

Administrative officers being without power to alter or amend existing law, we can not change the requirements of the act in this

respect, and if we strike from the final roll the names of those members who have died since the date specified in the act, or accomplish the same result by refusing to make allotments to such members, who died without making a "selection prior to death," we would, in effect, substitute for the date fixed by Congress a different one of our own creation. I am satisfied, therefore, that the legislative intent of the act of June 4, 1920, is that the enrolled members of the Crow Tribe living on June 4, 1920, together with the *unallotted* members living on December 4, 1920, (classes C and D), constitute "the final rolls" of the Crow Tribe in so far as the *pro rata* distribution of "the remaining unallotted allotable lands" are concerned, and that in making such distribution each member whose name appears on that roll is entitled to share, regardless of whether a "selection" was made prior to death. In other words, the right so to share is a descendible one which, in case of death intestate, inures to the benefit of the heirs. Big Lark, as an enrolled member of the Crow Tribe living on June 4, 1920, is entitled to a distributive share of the final division of the Crow allotable lands.

The second question—the right to dispose of a so-called "expectancy" by will—presents far less difficulty. If the expectancy consists of a mere "float" which ceases at death, then there is nothing for a testator to convey by will. If the right, however, is a descendible one which in case of intestacy inures to the benefit of his heirs, the rule is now otherwise. As pointed out in my opinion of October 29, 1921 (48 L. D. 472), the matter of Indian wills, generally, is controlled by section 2 of the act of June 25, 1910 (36 Stat., 855), as amended by the act of February 14, 1913 (37 Stat., 678). In its original form this legislation limited the power of an Indian to dispose of his property by will to his individual "trust allotment" only. Experience demonstrating this to be too narrow the amendatory legislation broadened the Indians' testamentary capacity so as to include:

"Any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation, or individual Indian moneys or other property held in trust by the United States."

According to a familiar rule, statutes relating to Indians are to be construed in their favor. *United States v. Nice* (241 U. S., 591.) Big Lark, being entitled to an additional allotment on the Crow Reservation, and those lands, in effect, being held in trust by the United States for her benefit, I am of the opinion that, subject to the approval of the Secretary of the Interior, as required by the legislation herein last referred to, she had the power to dispose of such additional allotment by will.

Approved:

F. M. GOODWIN,

Assistant Secretary.

STOCK-RAISING HOMESTEADS—ACT OF DECEMBER 29, 1916.

INSTRUCTIONS.

[Circular No. 523.]¹

[In this reprint changes have been made in paragraphs 6, 9, 12(e), 13(d), and 14 of Circular No. 523, approved July 30, 1919 (47 L. D., 227); which was a revision of combined Circulars Nos. 523 and 538, as published January 27, 1917 (45 L. D., 625). The supplemental instructions amending the above enumerated paragraphs have heretofore been published. See Circular No. 660, October 20, 1919 (47 L. D., 248), Circular No. 673, March 15, 1920 (47 L. D., 343), and Circular No. 782, October 13, 1921 (48 L. D., 225). In the forms of original and additional applications changes have been made as required by Circular No. 738 of March 7, 1921, unpublished.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 14, 1921.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

The following instructions are issued under the provisions of the act of December 29, 1916, relating to stock-raising homesteads as amended by the act of October 25, 1918 (40 Stat., 1016), and the act of September 29, 1919 (41 Stat., 287):

WHAT LANDS SUBJECT TO ACT.

1. The Secretary of the Interior is authorized, pursuant to application or otherwise, to designate unreserved public lands in any of the public-land States, but not in Alaska, as "stock-raising lands." This includes ceded Indian lands, unless entries therefor are limited to a smaller area by the acts governing their appropriation; but it does not include lands in national forests. From time to time lists of land thus designated will be sent to the registers and receivers in the districts wherein the land is situated, and they will be advised of the dates when the designations become effective.

2. The lands to be designated are those the surface of which is, in the opinion of the Secretary of the Interior, chiefly valuable for grazing and raising forage crops, which do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that 640 acres are reasonably required to support a family. The classification will be made, so far as practicable, to exclude lands that are not chiefly valuable for grazing and raising forage crops, either because too valuable for such use or too poor for such use. Lands which are capable of producing valuable crops of grain or other food cereal or fruit are not subject to designation, being, if otherwise subject to entry, disposable under the 160-acre or 320-acre homestead law, according to their character. No tract may be designated which contains a water hole, or other body of water, needed or used by the public for watering pur-

¹ For interpretative instructions pertaining to the stock-raising homestead act, see Circular No. 665, December 19, 1919 (47 L. D., 250), Instructions of March 2, 1921 (48 L. D., 28), Circular No. 740, March 16, 1921 (48 L. D., 38), Instructions of May 3, 1921 (48 L. D., 107), and Circular No. 810, February 18, 1922 (48 L. D., 454).

poses, and such tracts may be reserved by the President and kept open to the public use under rules prescribed by the Secretary of the Interior. Whether the land will or will not support a family is not guaranteed in any manner by the designation of the land as subject to this act. The homesteader himself must take the burden of accepting the land designated as of a character that meets the requirements of the law.

FEES AND COMMISSIONS.

3. The fee and commissions on all entries under this act are calculated on the same basis as other entries. For a tract of less than 81 acres the fee is \$5, and for that area or more it is \$10. The commissions, both on making the entry and on submitting final proof, amount to 3 per cent on the Government price (\$1.25 or \$2.50 per acre, as the case may be) of the land, in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, and to 2 per cent in the other States. For example, on an entry for 640 acres in Washington, not within granted railroad limits, and therefore \$1.25 land, the payment on making entry would be \$34 and on submitting proof would be \$24, in addition to testimony fees and publication fees payable to a newspaper.

QUALIFICATIONS FOR ENTRYMEN.

4. (a) Any person qualified under the general laws to make homestead entry (that is, who has not exercised his right, or who is entitled to restoration of his right under general provisions of law) may make a stock-raising homestead entry for not exceeding 640 acres of unappropriated surveyed land, in reasonably compact form, which has been designated by the Secretary as above indicated. No rights can be acquired by an application for unsurveyed land; but where a tract of unsurveyed land has been designated, a settlement right on not more than 640 acres may be established and maintained if the boundaries are plainly marked on the ground.

(b) A person, otherwise qualified, who has partially exhausted his homestead right, securing title to a tract of land, is entitled to make an original entry under the stock raising act for such an area as will not, with said tract, make up more than 640 acres; and the distance between the two tracts involved is immaterial: To illustrate, if he has a patented entry covering 120 acres he may make original stock-raising entry for a tract containing as much as 520 acres; if his patented entry covers 240 acres of land designated under the enlarged homestead act, he is still a qualified entryman under that act and is, therefore, entitled to enter under the stock raising act a tract containing as much as 400 acres; if he has entered 160 acres of land not designated under the enlarged homestead act, he may file petition for its designation thereunder and his right to make original stock-raising entry will be contingent on designation as indicated.

(c) A person who has perfected, or has pending, an entry or entries initiated since August 30, 1890, under the desert land, timber and stone, or preemption laws for 320 acres in the aggregate is disqualified from making any kind of entry under this act. If he made entries under said laws for not more than 160 acres they do not affect

his right under this act. If he has entered under the desert land, timber and stone, or preemption laws more than 160 acres but approximately 40 acres less than 320 acres, he is entitled to make an original or an additional entry under this act; but the tract entered hereunder (which in no case must exceed approximately 640 acres), together with the land entered under the other laws mentioned, and his prior uncanceled homestead entry or entries, if any, must not aggregate more than 800 acres. In other words, a person who was qualified to make an original or an additional homestead entry under other laws for as much as approximately 40 acres can enter hereunder such an amount of land as will, with the area theretofore entered under the homestead laws, not exceed 640 acres, but the total of all entries under the agricultural public land laws (i. e., timber and stone, desert land, preemption, and homestead) must not exceed 800 acres.

COMPACTNESS OF ENTRY.

5. With respect to compactness, no entry, nor any claim comprising an original entry and an additional entry under this act, shall entirely surround an unappropriated tract of public land, nor shall it have an extreme length of more than 2 miles if there be available land of the character described in the act the inclusion of which in the claim would reduce such length. An original entry may not include two separate tracts, even though they corner on each other.

ADDITIONAL ENTRIES WITHIN 20 MILES.

6. Any person otherwise qualified who has a pending or perfected homestead entry for less than 640 acres of land, which shall be designated as stock-raising land, may, under the first proviso to section 3 of the act, as amended, make an additional entry for a tract of designated land within a radius of 20 miles from the tract originally entered, and making up therewith an area of not more than 640 acres.

Any person otherwise qualified who, when making an original entry under the stock raising homestead act, is unable to secure the maximum area permitted by reason of adjoining lands or lands within a radius of 20 miles from the lands originally entered being reserved or covered by prior filings or entries, may, if the reservation be vacated, or if the intervening filings and entries be canceled as a result of relinquishment, contest, or otherwise, be permitted to enlarge his original entry, through amendment or by the filing of additional entry of designated lands within a radius of 20 miles from the tract originally entered, making up, with his first entry, an area of not more than 640 acres.

Such entries may include two incontiguous tracts if one of the tracts is contiguous to the original entry. But such applicant can not be allowed to secure a tract incontiguous to his first entry unless he enters all available land contiguous thereto. If he applies for land which is incontiguous to the original entry, he must furnish an affidavit that there is no unappropriated, unreserved land contiguous thereto, of the character described in the act, other than that for which he applies; however, this affidavit will not be necessary if your records show that there is no other vacant contiguous land. The

same limitation as to compactness of form will be enforced as with respect to original entries. It is immaterial whether a person applying for additional entry under this provision of the law resides upon or owns the land first entered. A person making entry under this section must show original homestead qualifications.

An additional entry (under any section of the act) can be made only as additional to a pending or perfected entry, not to an unallowed application; however, exception is made where suspension of the original filing has been due only to the necessity of passing upon the right of applicant to make a second entry, and the application therefor was otherwise allowable at the time the additional application was filed. In all other cases you will reject applications for additional entries where the applications for original entry are not allowable at the time of filing.

When the land involved is designated and subject to entry under the stock raising act, and it is, therefore, possible to embrace the entire area desired under that act, one who thereafter elects to make an entry under other homestead laws and an additional stock-raising entry will not be granted a reduction in the requirements of cultivation in connection with the original entry, but will be held to strict compliance with the requirements of the law under which the original entry was made.

Even though a person has two pending or perfected homestead entries, he may nevertheless make an additional entry under the proviso to section 3, provided all the other lands involved lie within 20 miles of the tract first entered. Where proof has been submitted on the original entry, the person may make an additional entry for land contiguous thereto, or within 20 miles, under section 5 of the act, provided he still owns and resides upon the original tract. See paragraph 9 as to method of perfecting title to an entry under said section.

A person whose right has been restored by a second entry act is in the position of never having made a homestead entry.

Where proof has been submitted on the original entry and there is no available vacant land contiguous thereto, claimant may have the pending additional entry changed to stand under the stock raising act and to include vacant land contiguous thereto. Though there be land contiguous to the original, and even though the two tracts first entered be more than 20 miles apart, he may have the additional entry changed to stand as an original under the stock raising act and to include adjoining land.

PROOFS ON ABOVE ENTRIES.

7. The entries hereinbefore explained may be perfected by proofs submitted within five years after their dates on a showing of compliance with the provisions of the three year law (act of June 6, 1912-37 Stat., 123), except that expenditures for improvements must be shown in lieu of the cultivation required by that act. The entryman must show that he has actually used the land for raising stock and forage crops for not less than three years, and that he has made permanent improvements upon the land, having an aggregate value of not less than \$1.25 per acre, and tending to increase the value of the land for stock-raising purposes; and at least one-half

of the improvements must be placed upon the tract within three years after the date of the entry.

As to residence, this must be continued for three years, subject to the privilege of a five months' absence in each year, divisible into two periods, if desired, but credit on the residence period on account of military service during time of war will be allowed as on other homestead entries; where an entry has been made, additional to a pending entry, or to a perfected entry for a tract, still owned by the claimant, the residence may be had on either of the tracts involved for three years after the additional is allowed, or becomes allowable. In other cases such residence must be on the land additionally entered. It must appear at the time of proof that there is then a habitable house on the land; but it will not be counted in estimating the value of the permanent improvements required to be placed on the tract, as above stated. If the entry comprises two noncontiguous tracts, the residence may be on either.

ADDITIONAL ENTRIES BEFORE PROOF.

8. (a) Under section 4 of the act any person having a homestead entry for land which shall have been designated under this act, upon which he has not submitted final proof, may make entry of contiguous designated lands, which, with the area of his original entry, shall not exceed 640 acres; if there is not sufficient vacant unreserved land of the proper character adjoining his pending claim, unapplied for by any other person, he may make up the deficiency by entering one or more other tracts lying within a radius of 20 miles from said claim, but he will not be permitted to take two or more tracts, while omitting from his application land adjoining one of them, which land is of the proper character and is not otherwise applied for. If there is no available land contiguous to the original claim, then the additional entry may be made so as to cover only an incontiguous tract or tracts.

The applicant is at liberty to file an affidavit corroborated by two witnesses to the effect that land, which should otherwise be included in his application, but which is omitted therefrom, is *not* of the character contemplated by the act, and stating the facts upon which that allegation is based.

(b) On submission of proof on the additional entry, claimant must show residence on one of the tracts to the extent ordinarily required, but will be entitled to credit for residence on the original tract before 62 after the date of the additional entry; he must also show improvements on the additional tract or tracts to the value of \$1.25 for each acre thereof. Proof on the additional entry may be submitted within five years after its allowance, when the requisite residence can be shown, but not before submission of proof on the original. Proof on the original entry must be submitted under the provisions of the law pursuant to which it was made and within its life, as limited thereby; but, subject to that condition, one proof may be submitted on the two entries jointly.

The marriage of a woman does not disqualify her from making an additional entry under this section; and husband and wife may make entries thereunder, additional to their respective pending entries, if an election as to residence on one of the original tracts, as provided by the act of April 6, 1914 (38 Stat., 312), has been accepted.

ADDITIONAL ENTRIES AFTER PROOF.

9. (a) Under section 5 of the act, any person who has submitted final proof on an entry under the homestead laws for land designated under this act, who owns and resides upon said land, may enter lands so designated contiguous thereto, which, with the area of his original entry, shall not exceed 640 acres; the entry may be made to cover land incontiguous to the original claim, in whole or in part, under the same rules as govern entries under section 4, as set forth in paragraph 8 of this circular.

If the applicant does not own his original entry or owns same and does not reside thereon, he is not qualified to make additional entry under this section.

One who has made an additional entry under either section 4 or section 5 of the act is qualified to make an additional entry for such a quantity of designated land within 20 miles of the original entry as, when added to the area formerly acquired, will not exceed approximately 640 acres.

A married woman may make entry under section 5 of the act.

(b) In order to acquire title to the land it is necessary only that claimant show the expenditure on the additional tracts of \$1.25 per acre for improvements of the kind described in paragraph 7. At least half of such expenditures must be made within three years after allowance of the entry. Proof may be submitted at any time within five years after the entry is allowed.

Where satisfactory proof has been submitted on the original entry, the additional entry may be perfected under this section of the act regardless of the question whether it was three-year, five-year, or commutation proof.

(c) An additional entry made under the first proviso to section 3 of the act by one who owns but does not reside on his original entry may be amended to stand and be completed under section 5 of the act, on proper application and showing of facts, in the event bona fide residence is resumed on the original entry before the intervention of an adverse claim.

ENTRIES IN LIEU OF RELINQUISHED LANDS.

10. (a) Under section 6 of the act, a person, otherwise qualified to make homestead entry, who has a perfected or an unperfected homestead entry for less than 640 acres of land which shall have been designated under this act, on which he resides and which he has not sold, and who is unable to make a full additional entry under the provisions of section 3 thereof, for the reason that there is not sufficient available land within the 20-mile limit to afford him the area to which he is otherwise entitled (as above indicated), may make an entry for the full area of 640 acres within the same land district, provided he shall relinquish the original entry, if not perfected, or reconvey the land to the United States, if final certificate has issued therefor.

(b) If proof has not been submitted on the original entry he must, with his relinquishment, furnish his affidavit, corroborated, so far as possible, by two witnesses, showing that at the time of filing application under this act he resided upon the land covered by said entry; that he has not sold, transferred, or conveyed the land or any

interest therein, or made a contract or agreement so to do; and that there is not, within 20 miles of the land embraced in his original entry, a tract of land of the character described in this act, of area sufficient to make up, with such original entry, the area he is entitled to enter.

(c) If final certificate has issued on the first entry, it must be shown by a certificate from the proper recording officer of the county in which the land is situated, or by satisfactory abstract of title, that the applicant has not transferred any interest in the land sought to be reconveyed and that there are no liens, unpaid taxes, or other incumbrances charged against it. Moreover, reconveyance of the land must be made by deed executed by the entryman, and also by his wife if he be married, in accordance with the laws governing the execution of deeds for the conveyance of real estate in the State in which the land is situated. The deed of reconveyance should accompany the application, but should not be recorded until directed by this office. On acceptance of an application of this character the deed will be returned for recording and refiled in your office before the entry is allowed.

(d) Where proof has been submitted, but final certificate has not issued, the relinquishment must be accompanied by an abstract of title or certificate of recording officer, as above specified.

(e) Where the former entry for land already designated under this act has not been perfected and is relinquished, you will allow the application for entry under this act, if no other objection appears. Where final certificate has issued on the former entry you will promptly forward the application and accompanying papers for consideration by this office.

(f) Where the original entry was pending and is relinquished, the land will become subject to appropriation (if not embraced in a withdrawal) when the new entry is allowed. Where the original entry was patented and is reconveyed, an order for restoration of the land will be made upon receipt of a report that the substitute entry has been placed of record.

(g) An application under this provision of the law may be accompanied by petition for designation under the act of the land sought and of the tract covered by the former entry, as hereinafter explained.

(h) Proof on an entry allowed under this section is governed by the same rules as though it were an original entry under this act.

(i) The fact that an applicant owns more than 160 acres of land, acquired otherwise than through homestead entry, does not exclude him from the privileges granted by this section.

PETITIONS FOR DESIGNATION.

11. (a) The proviso to section 2 of the act confers a preference right of entry upon a person pursuant to whose petition land has been designated. Any person qualified to make an original or an additional entry under this act may file an application to enter a compact body of unappropriated, unreserved, surveyed public land of the character described, which has not already been designated under this act, accompanied by petition, in duplicate, for the designation of such land and of the tract included in any former entry.

(b) He must, when he files said application, pay the regular fee and commissions; and if the tract is ceded Indian land he must at that time pay that part of its price ordinarily required when entry is made. The entire amount paid will be carried in the "Unearned money" account, and will be repaid by the receiver if the application be not allowed.

(c) All petitions for the designation of lands presented on behalf of individual applicants should be filed in the local land office. Individual petitions for designation will not be considered unless they are filed in connection with applications to make entry under the act.

12. (a) The petition must be in the form of an affidavit, executed in duplicate, and corroborated by at least two witnesses who are familiar with the character of the land. For convenience in filing it is desired that petitions be prepared on sheets not over 8½ by 11 inches in size with margins of 1 inch on the top and the left-hand side. The petition must contain the name and the post-office address of the applicant, a description by legal subdivisions of all the lands involved properly listed by entries with the serial number of each former entry. If the application contemplates the making of an original entry under this act, or if the application relates to a contiguous original and additional entry, only one petition need be filed. If, however, the lands which it is desired to have designated are comprised in two noncontiguous tracts, an additional copy of petition should be filed for each such tract.

(b) The petition should set forth in detail the character of each legal subdivision included in an application to make entry under this act and in any former homestead entries made under other acts. The information called for may be shown by means of a map or diagram whenever the facts can be advantageously presented thereby. Photographs of the land, where available, are useful in indicating its character and topography, and when presented should be located with reference to the land lines and to the direction in which they were taken. The location of corners of the public survey by which the applicant has determined the situation or legal description of the land should be indicated on the map or stated in the petition. It is believed that the requirements of these regulations as to furnishing a description of the land can properly be met only by a careful examination of the lands by the applicant, preferably assisted by a competent surveyor. Petitions which are deficient will be returned to the applicant for correction or he may be required to furnish supplemental affidavits concerning matters not discussed or which have not been described in sufficient detail. Care should be exercised in the preparation of petitions, as inaccuracies and omissions will tend to retard action, while false or misleading statements may lead to the rejection of the application.

(c) In the preparation of petitions attention should be given to the following considerations:

Surface water supply.—The relation of the lands to surface streams or springs rising on or flowing across or along them should be indicated, and the location of such water supplies should be accurately described with relation to the lines of the public surveys. If there is no surface water on the land, the location of such near-by sources of water supply upon which the applicant relies or which he proposes to use for stock-watering purposes should be described.

Underground water supply.—The location of any well or wells which may be present on the land should be described and information furnished in each instance concerning the depth of well, present depth of water, and yield. If there are no wells on the land, information should be furnished concerning any wells in the vicinity which may afford an indication of the probable depth of water on the lands applied for.

Irrigability.—If any part or parts of the land is irrigated, the location and source of water supply of such areas should be stated and the area irrigated in each legal subdivision indicated. If any portion of the land is under constructed or proposed irrigation ditches or canals, is crossed thereby, or is adjacent thereto, the relation of the lands to such water conduits and the possibility of their irrigation therefrom should be explained. If the lands are situated near or are crossed by streams which might afford a water supply for their irrigation, full particulars should be given as to the quantity of water available for this purpose and as to whether or not it can be applied to the lands. If artesian wells exist on or near the land or underground water is found under any part of the land at depths of less than 50 feet, the practicability of irrigating the land from underground sources should be fully discussed.

If the applicant has filed a notice of water appropriation or has acquired a right to use water for domestic, stock-watering, or irrigation purposes on the lands under the State law, a copy of such notice of water appropriation or water right should be furnished. Any attempts to irrigate and reclaim the land under the provisions of the desert-land act should be described and the reasons for lack of success stated.

Timber and vegetation.—The character of the surface of the land in both the original and the additional entry as it is at the time of application under this act and of the tree and plant growth thereon should be described and the approximate area in each legal subdivision which is of such character that it is included in each of the following general classes should be shown: Lands containing merchantable timber; lands containing timber which is not merchantable; lands covered with mesquite or similar growth; lands covered with sagebrush; open grass lands; lands covered with greasewood and allied plants; rocky wastes; alkali flats; sand dunes; lands in agricultural crops or under cultivation. If none of the above terms are applicable to any portion of the land, details of its character should be furnished. Where timber occurs an estimate of the amount of such timber on each legal subdivision should be made.

Agricultural value.—The acreage in each legal subdivision which is capable of producing agricultural or forage crops by cultivation should be stated by the applicant, as well as the number of acres which have actually been cultivated. If the applicant or his predecessors in interest have made agricultural use of the land in the original entry, the area planted, the kind of crops raised, the yield, and the value should be stated for the last five seasons, or such part thereof as may have been under cultivation.

Grazing value.—The applicant should indicate the grazing character of all the lands involved by describing them as winter, summer, spring, fall, or permanent range. If the land or any part thereof has been used for grazing, the nature and extent of such use should

be stated. The applicant should also furnish an estimate of the number of head of cattle or other live stock which, in his opinion, can be maintained on the land throughout the year.

(d) The applications for entry, if otherwise allowable and accompanied by petitions for designation which are in all respects regular, will be suspended by you and retained in your office. You will forward the two copies of the petition to this office and to the Geological Survey, respectively. Where defects appear in the petitions—especially (as to additional entries) failure to refer in the petition to the tract originally entered—you will call for supplemental evidence, as in other cases; if this is not furnished, you will forward all the papers to this office for consideration, making proper recommendations in connection therewith. If there are defects in an application, aside from the accompanying petition, you will take action in the same manner as with other defective applications for entry.

(e) No other entry of the land will be allowed before the application has been finally disposed of. However, later applications therefor should be received and suspended. If withdrawal of an application under this act be filed you will promptly notify this office thereof, inviting special attention to the pendency of the petition for designation, and will close the case on your records. Prior to final action on the application the applicant's homestead right will be in abeyance, and he will not be entitled to exercise same elsewhere, nor will he be permitted to have two applications under this act pending at the same time.

When designation of all the land involved has become effective you will allow the entry, unless the records show that there is possibility of a claim of preferential right for some part of the land under section 8 of the act, in which case the application will remain suspended until the expiration of the preferential right.

Where the land has been designated by the Secretary without deception or fraud on the part of the entryman and the entry has been allowed as a result thereof, it will not be subject to contest on a charge that such designation was improperly or erroneously made.

(f) If the Geological Survey advises this office that it is unable to classify the land, or some part thereof, as subject to designation, this office will, through the proper local land office, furnish the applicant with a copy of the Survey's report and will allow him 30 days within which to file response. At the applicant's option, he may either appeal from the finding to the Secretary of the Interior, alleging errors of law, or he may present further showing as to the facts, accompanied by such evidence as is desired, tending to disprove the adverse conclusion reached by the Survey.

Such appeal or showing, if filed, will be forwarded by you to this office, whence it will be transmitted to the Geological Survey for further consideration. That bureau will consider the evidence submitted, and if it warrants such action will recommend designation of the land, or, if its conclusion be still adverse, will transmit the record to the Secretary with report. The case will thereafter be considered as having the status of an appeal pending before the Secretary's office.

In cases where the applicant fails to furnish a showing or to appeal from the order of this office requiring him to furnish it within the 30 days prescribed or where the Secretary refuses designation

final action will be taken and the case closed by this office on the basis of the designations which may have been theretofore made.

(g) It is expressly provided by the act that the filing of an application for entry of land thereunder, though accompanied by petition for its designation, confers upon the applicant no right to occupy the land sought. No settlement or improvements should therefore be made until after designation of the land.

PREFERENTIAL RIGHTS FOR ADJOINING LAND.

13. (a) Under section 8 of the act any person who, as the holder of a homestead entry or as patentee thereunder, is entitled to make additional entry under this act has a preferential right to enter lands lying contiguous to his original tract and designated as subject to the act, said right extending for a period of 90 days after the designation takes effect; it covers such contiguous land as the person is qualified to enter under section 4 or section 5 of the act. This right is superior to the right of entry accorded a person who had filed application for entry of the land under this act accompanied by petition for its designation. However, before a designation has been made the land is subject to settlement and entry under any other laws applicable thereto unless there is pending such application and petition.

(b) After the designation of land takes effect no application therefor will be allowed under this act or under any other law until 90 days shall have elapsed if the records show that it may conflict with a preferential right to be claimed on account of an entry for adjoining land. Otherwise an application under this act may be allowed immediately on the taking effect of the designation.

Where there is conflict between an application for a tract by a holder of adjoining land, claiming a preferential right, and an application by one asserting no such right, you will allow the former and reject the latter subject to the usual right of appeal.

Where there is conflict between the applications of two or more persons claiming such preferential right of entry, you will, after the expiration of the 90-day period, notify the various applicants that they will be allowed 30 days from receipt of notice within which to agree among themselves upon the division of the tracts in conflict, by subdivisions, and that such subdivision will be made by this office in the absence of an agreement. Unless an amicable adjustment is made you will, pursuant to this notice, forward all the papers to this office for consideration, making on your schedules the necessary notations as to the method of transmittal. This office will thereupon make an equitable division of the different subdivisions among the applicants, so as to equalize as nearly as possible the areas which the different applicants will have acquired by adding the tracts thus allotted to those originally held or owned by them. An appeal will be allowed from the action of this office.

(c) Where there is but one subdivision adjoining the lands of two or more entrymen or patentees entitled to exercise preferential right of entry and seeking to assert same, said subdivision will be awarded to that person who first files application therefor with an assertion of such right.

(d) A preferential claim can not be recognized unless, on the date the designation of the land in question becomes effective, the land originally entered by the claimant has been designated under the act or there is pending a petition by such claimant for the designation of the land originally entered by him.

(e) A settlement right under any other applicable law, if initiated prior to designation or application and petition, will, if asserted in time, defeat a claim of preference right hereunder.

(f) The preference right of entry accorded to contestants by the act of May 14, 1880 (21 Stat., 140), is in no way affected by any of the provisions of this act.

(g) The fact that a person presents, with his application for entry under this act, the relinquishment of a former entry covering the tract sought confers upon him no preference right for entry of the land, and such application is subject to the preferential right given by section 8 of the stock-raising homestead law.

(h) An applicant for additional entry can not assert a preferential right as against a claimant whose application was filed before the date of the original entry of the former.

DISPOSAL OF COAL AND OTHER MINERAL DEPOSITS.

14. (a) Section 9 of the act provides that all entries made and patents issued under its provisions shall contain a reservation to the United States of all coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same; also that the coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

Said section 9 also provides that any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented under the act, for the purpose of prospecting for the coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on the land by reason of such prospecting.

It is further provided in said section 9 that any person *who has acquired from the United States the coal or other mineral deposits in any such land* or the right to mine and remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; or, second, upon payment of the damages to crops or other tangible improvements to the owner thereof under agreement; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure payment of such damages to the crops or tangible improvements of the entryman or owner as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against

the principal and sureties thereon. This bond, the form whereof will be found printed in the appendix hereto, must be executed by the person who has acquired from the United States the coal or other mineral deposits reserved, as directed in said section 9, as principal, with two competent individual sureties, or a bonding company which has complied with the requirements of the act of August 13, 1894 (28 Stat., 279), as amended by the act of March 23, 1910 (36 Stat., 241), and must be in the sum of not less than \$1,000. Qualified corporate sureties are preferred and may be accepted as sole surety. Except in the case of a bond given by a qualified corporate surety there must be filed therewith affidavits of justification by the sureties and a certificate by a judge or clerk of a court of record, a United States district attorney, a United States commissioner, or a United States postmaster as to the identity, signatures, and financial competency of the sureties. Said bond, with accompanying papers, must be filed with the register and receiver of the local land office of the district wherein the land is situate, and there must also be filed with such bond evidence of service of a copy of the bond upon the homestead entryman or owner of the land.

If at the expiration of 30 days after receipt of the aforesaid copy of the bond by the entryman or owner of the land no objections are made by such entryman or owner of the land and filed with the register and receiver against the approval of the bond by them, they may, if all else be regular, approve said bond. If, however, after receipt by the homestead entryman or owner of the lands of copy of the bond, such homestead entryman or owner of the land timely objects to the approval of the bond by said local officers, they will immediately give consideration to said bond, accompanying papers, and objections filed as aforesaid to the approval of the bond, and if, in consequence of such consideration by them, they shall find and conclude that the proffered bond ought not to be by them approved, they will render decision accordingly and give due notice thereof to the person proffering the bond, at the same time advising such person of his right of appeal to the Commissioner of the General Land Office from their action in disapproving the bond so filed and proffered. If, however, said local officers, after full and complete examination and consideration of all the papers filed, are of the opinion that the proffered bond is a good and sufficient one and that the objections interposed as provided herein against the approval thereof by them do not set forth sufficient reasons to justify them in refusing to approve said proffered bond, they will, in writing, duly notify the homestead entryman or owner of the land of their decision in this regard and allow such homestead entryman or owner of the land 30 days in which to appeal to the Commissioner of the General Land Office. If appeal from the adverse decision of the register and receiver be not timely filed by the person proffering the bond, the local officers will indorse upon the bond "disapproved" and other appropriate notations, and close the case. If, on the other hand, the homestead entryman or owner of the lands fails to timely appeal from the decision of the register and receiver adverse to the contentions of said homestead entryman or owners of the lands, said register and receiver may, if all else be regular, approve the bond.

The coal and other mineral deposits in the lands entered or patented under the act will become subject to existing laws, as to pur-

chase or lease, at any time after allowance of the homestead entry, unless the lands or the coal or other mineral deposits are, at the time of said allowance, withdrawn or reserved from disposition.

(b) Every application to make homestead entry under this act must contain a statement to the effect that the entry is made subject to a reservation to the United States of all the coal or other minerals in the land, together with the right to prospect for, mine, and remove the same; that no part of the land is claimed, occupied, or being worked under the mining laws; and that the land is unoccupied and unappropriated by any person claiming the same under the public-land laws other than the applicant. (See forms 4-016 and 4-016a, Appendix.) The face of final certificates issued on every homestead entry made under the provisions of this act must bear the following:

Patent to contain reservation of coal and other minerals, and conditions and limitations as provided by act of December 29, 1916 (39 Stat., 862).

There will be incorporated in patents issued on homestead entries under this act the following:

Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove all the coal and other minerals from the same upon compliance with the conditions, and subject to the provisions and limitations, of the act of December 29, 1916 (39 Stat., 862).

Mineral applications and coal-declaratory statements and applications under the coal and mining laws for the reserved deposits disposable under the act must bear on the face of the same, before being signed by the declarant or applicant and presented to you, the following notation:

Patents shall contain appropriate notations declaring same subject to the provisions of the act of December 29, 1916 (39 Stat., 862), with reference to disposition, occupancy, and use of the land as permitted to an entryman under said act.

Like notation will be made by the register and receiver on final certificates issued by them for the reserved mineral deposits disposable under and subject to the provisions of this act.

DRIVEWAYS FOR STOCK.

15. The reservation of driveways for stock, provided for in section 10 of the act, will be considered on application of parties interested, on recommendation of other departments of the Government, or on the reports of agents of this department. Lands withdrawn for driveways for stock or in connection with water holes can not thereafter be entered, and all applications to make entry under this act for land so withdrawn, whether filed before or after the withdrawal, will be rejected.

MISCELLANEOUS PROVISIONS.

16. No credit will be given for any expenditure for improvements made prior to the designation of the land under this act, or for residence prior to designation in connection with entries under section 3 and original entries under the act.

17. Proofs on entries under this act must be submitted within five years after the dates of their allowance, and no such entry is subject to commutation.

18. Every person applying for entry under this act who has heretofore made entry or entries under the homestead laws must furnish a description thereof or such data as will enable this office to identify it or them.

19. A person who has made entry under section 6 of one of the enlarged homestead acts may make an additional entry under the provisos to section 3 or under section 4 or 5 of this act, provided all be designated as stock-raising land; but he must reside on the land entered under this act or on that originally entered, if contiguous thereto, to the extent required by the three-year homestead act.

Very respectfully,

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

FORM OF APPLICATION FOR ORIGINAL ENTRY.

4-016.

[Form approved by the Secretary of the Interior, Feb. 18, 1921.]

DEPARTMENT OF THE INTERIOR.

STOCK-RAISING HOMESTEAD ENTRY—ORIGINAL.

United States Land Office _____ Serial No. _____
Receipt No. _____

APPLICATION AND AFFIDAVIT.

I, _____ (Give full Christian name.), of _____ (Male or female.), do hereby
_____ (Give post-office address.)

apply to enter, under the act of December 29, 1916 (39 Stat., 862), subject to the reservation to the United States of all coal and other minerals in the land, together with the right to prospect for, mine, and remove the same, _____ section _____ township _____, range _____, meridian, containing _____ acres.

I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I _____ citizen of

(Applicant must state whether native born, naturalized, or has filed declaration of intention 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.)

the United States; and am _____; that this

(State whether the head of a family, married or unmarried, or over 21 years of age, and if not over 21, applicant must set forth the facts which constitute him the head of a family.)

application is honestly and in good faith made for the purpose of actual settlement, use, and improvement by the applicant, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement and improvements necessary to acquire title to the land applied for; that I am not acting as agent for any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, 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 to obtain a home 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 have not heretofore made any entry under the timber and stone, desert land, or preemption laws, except as follows: _____

I have not heretofore made a homestead entry except as follows: _____

I further state that the land is not occupied and improved by any Indian; that it does not contain merchantable timber and no timber except _____; is not susceptible of irrigation from any known source of water supply, except the following areas:

(Here give subdivisions and areas of the land, if any, susceptible of irrigation.)

and does not contain any water hole or other body of water needed or used by the public for watering purposes; that no part of said land is claimed, occupied, or being worked under the mining laws; that said land is unoccupied and unappropriated by any person claiming the same under the public-land laws other than myself; that the land is chiefly valuable for grazing and raising forage crops.

(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 _____); that I verily believe

(Give full name and post-office address.)

affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me at my office in _____

(Town.)

(County and State.)

within the _____ land district, this _____ day of _____, 192__.

(Official designation of officer.)

We _____, of _____, and _____, of _____, do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by _____); and that said affidavit was duly subscribed (Give full name and post-office address.)

and sworn to before me at _____ this _____ day of _____, 192__.

(Official designation of officer.)

UNITED STATES LAND OFFICE AT _____

_____, 192__.

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of December 29, 1916; that there is no prior valid adverse right to the same, and has this day been allowed.

_____,
Register.

UNITED STATES CRIMINAL CODE.

SEC. 125. 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. (Act Mar. 4, 1909, 35 Stat., 1111.)

FORM OF APPLICATION FOR ADDITIONAL ENTRY.

4-016a.

[Form approved by the Secretary of the Interior Dec. 13, 1921.]

DEPARTMENT OF THE INTERIOR.

STOCK-RAISING HOMESTEAD ENTRY—ADDITIONAL.

United States Land Office _____

Serial No. _____

Receipt No. _____

APPLICATION AND AFFIDAVIT.

I, _____, of _____, do hereby apply
 (Give full Christian name.) (Post-office address.)
 to enter under section _____ of the act of De-
 cember 29, 1916 (39 Stat., 862), subject to the reservation of the United States
 of all coal and other minerals in the land, together with the right to prospect
 for, mine, and remove the same, _____
 section _____, township _____, range _____, meridian,
 containing _____ acres, as additional to my homestead entry No. _____
 made _____ at _____ land office
 for _____ section _____, township _____, range _____,
 _____ meridian, which I do _____ now own and reside upon.
 (If the statement is not true, insert "not.") (If under section 3, show qualifications
 of an original entryman)

I do solemnly swear that this application is made for my exclusive benefit as
 an addition to my original homestead entry, and not directly or indirectly for
 the use or benefit of any other person or persons whomsoever; that this appli-
 cation is honestly and in good faith made for the purpose of actual settlement,
 use, and improvement; that I will faithfully and honestly endeavor to comply
 with all the requirements of the law; that I have not heretofore made an entry
 under the timber and stone, desert land, or preemption laws, except as follows:
 _____; that I have not heretofore made an entry under the homestead
 laws (other than that above described), except _____.

I further state that the land applied for is not occupied and improved by any
 Indian; that no part of said land is claimed, occupied, or being worked under
 the mining laws; that said land is unoccupied and unappropriated by any person
 claiming the same under the public-land laws other than myself; that the land
 now applied for and that embraced in my original entry above described does
 not contain merchantable timber and no timber except _____; is not sus-
 ceptible of irrigation from any known source of water supply, except the follow-
 ing areas: _____

(Here give the subdivisions and areas of the land, if any, susceptible of irrigation.)
 and does not contain any water hole or other body of water needed or used by
 the public for watering purposes; that the land is chiefly valuable for grazing
 and raising forage crops.

(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
 _____); that I verily believe

(Give full name and post-office address.)

affiant to be a qualified applicant and the identical person hereinbefore de-
 scribed; 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 _____, 192_____

 (Official designation of officer.)
 We, _____, of _____,
 and _____, of _____,
 do solemnly swear that we are well acquainted with the above-named affiant
 and the lands described, and personally know that the statements made by him
 relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in
 my presence before affiants affixed signatures thereto; that affiants are to
 me personally known (or have been satisfactorily identified before me by
 _____); and that said affi-
 (Give full name and post-office address.)
 davit was duly subscribed and sworn to before me at
 this _____ day of _____, 192_____

 (Official designation of officer.)

UNITED STATES LAND OFFICE AT _____, 192_____

I hereby certify that the foregoing application is for surveyed land of the
 class which the applicant is legally entitled to enter under the act of December
 29, 1916; that there is no prior valid adverse right to the same, and has this
 day been allowed.

 Register.

UNITED STATES CRIMINAL CODE.

SEC. 125. 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 con-
 trary 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 im-
 prisoned not more than five years. (Act, Mar. 4, 1909; 35 Stat., 1111.)

FORM OF BOND FOR MINERAL CLAIMANTS.

4-684.

[Form approved by the Secretary of the Interior Jan. 18, 1917.]

Know all men by these presents: That I, _____, (Give full name of principal and sureties, and address of each.) _____ County _____, and _____ County _____, of _____ County _____, as the case may be), a citizen (or citizens) of the United States, or having declared my (or our) intention to become a citizen (or citizens) of the United States, as principal (or principals), and _____ of _____ County _____, and _____ of _____ County _____, as sureties, are held and firmly bound unto the United States of America, for the use and benefit of the hereinafter-mentioned entryman or owner of the hereinafter-described land, whereof homestead entry has been made subject to the act of December 29, 1916 (39 Stat., 862), in the sum of _____ dollars (\$_____), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors, and assigns, and each and every one of us and them, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this _____ day of _____, 19____.

The condition of this obligation is such that, whereas the above-bounden _____ has acquired from the United States the _____ deposits (together with the right to mine and remove the same) situate, lying, and being within the _____ of sec. _____, township _____, range _____, land district, _____, and whereas homestead entry, serial No _____ has been made at _____ land office, of the surface of said above-described land, under the provisions of said act of December 29, 1916, by _____.

Now, therefore, if the above-bounden parties or either of them, or the heirs of either of them, their executors or administrators, upon demand, shall make good and sufficient recompense, satisfaction, and payment unto the said entryman or owner, his heirs, executors, or administrators, or assigns, for all damages to the entryman's or owner's crops or tangible improvements upon said homesteaded land as the said entryman or owner shall suffer or sustain or a court of competent jurisdiction may determine and fix in an action brought on this bond or undertaking, by reason of the above-bounden principal's mining and removing of the _____ deposits from said described land, or occupancy or use of said surface as permitted to said above-bounden principal under the provisions of said act of December 29, 1916, then this obligation shall be null and void; otherwise and in default of a full and complete compliance with either or any of said obligations, the same shall remain in full force and effect.

Signed and sealed in the presence of and witnessed by the undersigned:

Residence _____

Residence _____

(Witnesses should give full names and addresses of each.)

Principal.
(The principal should sign first.)

Surety.
Residence _____

Surety.
(The principal and sureties should each sign full names and attach seals.)

AN ACT TO PROVIDE FOR STOCK-RAISING HOMESTEADS, AND FOR OTHER PURPOSES.

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 it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated unreserved

public land in reasonably compact form: *Provided, however,* That the land so entered shall theretofore have been designated by the Secretary of the Interior as "stock-raising lands."

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate as stock-raising lands subject to entry under this act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family: *Provided,* That where any person qualified to make original or additional entry under the provisions of this act shall make application to enter any unappropriated public land which has not been designated as subject to entry (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the said land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal; but no right to occupy such lands shall be acquired by reason of said application until said lands have been designated as stock-raising lands.

SEC. 3. That any qualified homestead entryman may make entry under the homestead laws of lands so designated by the Secretary of the Interior, according to legal subdivisions, in areas not exceeding six hundred and forty acres, and in compact form so far as may be subject to the provisions of this act, and secure title thereto by compliance with the terms of the homestead laws: *Provided,* That a former homestead entry of land of the character described in section two hereof shall not be a bar to the entry of a tract within a radius of twenty miles from such former entry under the provisions of this act, which, together with the former entry, shall not exceed six hundred and forty acres, subject to the requirements of law as to residence and improvements, except that no residence shall be required on such additional entry if the entryman owns and is residing on his entry: *Provided further,* That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land: *Provided further,* That instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes, of the value of not less than \$1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof.

SEC. 4. That any homestead entryman of lands of the character herein described who has not submitted final proof upon his existing entry shall have the right to enter, subject to the provisions of this act, such amount of lands designated for entry under the provisions of this act, within a radius of twenty miles from said existing entry, as shall not, together with the amount embraced in his original entry, exceed six hundred and forty acres, and residence upon the original entry shall be credited on both entries, but improvements must be made on the additional entry equal to \$1.25 for each acre thereof: *Provided,* That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land.

SEC. 5. That persons who have submitted final proof upon, or received patent for, lands of the character herein described under the homestead laws, and who own and reside upon the land so acquired, may, subject to the provisions of this act, make additional entry for and obtain patent to lands designated for entry under the provisions of this act, within a radius of twenty miles from the lands theretofore acquired under the homestead laws, which, together with the area theretofore acquired under the homestead laws, shall not exceed six hundred and forty acres, on proof of the expenditure required by this act on account of permanent improvements upon the additional entry: *Provided,* That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land.

SEC. 6. That any person who is the head of a family or who has arrived at the age of twenty-one years and is a citizen of the United States, who has entered or acquired under the homestead laws, prior to the passage of this act, lands of the character described in this act, the area of which is less than six hundred and forty acres, and who is unable to exercise the right of additional entry herein conferred because no lands subject to entry under this act adjoin the tract so entered or acquired or lie within the twenty-mile limit provided for in this act, may, upon submitting proof that he resides upon and has not sold the land so entered or acquired and against which land there are no encumbrances, relinquish or reconvey to the United States the land so occupied, entered, or acquired, and in lieu thereof, within the same land-office district, may enter and acquire title to six hundred and forty acres of the land subject to entry under this act, but must show compliance with all the provisions of this act respecting the new entry and with all the provisions of existing homestead laws except as modified herein.

SEC. 7. That the commutation provisions of the homestead laws shall not apply to any entries made under this act.

SEC. 8. That any homestead entrymen or patentees who shall be entitled to additional entry under this act shall have, for ninety days after the designation of lands subject to entry under the provisions of this act and contiguous to those entered or owned and occupied by him, the preferential right to make additional entry as provided in this act: *Provided*, That where such lands contiguous to the lands of two or more entrymen or patentees entitled to additional entries under this section are not sufficient in area to enable such entrymen to secure by additional entry the maximum amounts to which they are entitled, the Secretary of the Interior is authorized to make an equitable division of the lands among the several entrymen or patentees applying to exercise preferential rights, such divisions to be in tracts of not less than forty acres, or other legal subdivision, and so made as to equalize as nearly as possible the area which such entrymen and patentees will acquire by adding the tracts embraced in additional entries to the lands originally held or owned by them: *Provided further*, That where but one such tract of vacant land may adjoin the lands of two or more entrymen or patentees entitled to exercise preferential right hereunder, the tract in question may be entered by the person who first submits to the local land office his application to exercise said preferential right.

SEC. 9. That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and 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 or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided*, That all patents issued for the coal or other mineral deposits

herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this act with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this act.

SEC. 10. That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this act but may be reserved under the provisions of the act of June 25, 1910, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the Secretary may, in his discretion, also withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder and needed for use in the movement of stock to summer and winter ranges or to shipping points, and may prescribe such rules and regulations as may be necessary for the proper administration and use of such lands: *Provided further*, That such driveways shall not be of greater number or width than shall be clearly necessary for the purpose proposed, and in no event shall be more than one mile in width for a driveway less than twenty miles in length, not more than two miles in width for driveways over twenty and not more than thirty-five miles in length, and not over five miles in width for driveways over thirty-five miles in length: *Provided further*, That all stock so transported over such driveways shall be moved an average of not less than three miles per day for sheep and goats and an average of not less than six miles per day for cattle and horses.

SEC. 11. That the Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this act for the purpose of carrying the same into effect.

The above is the act of December 29, 1916 (39 Stat., 862), as amended by the act of October 25, 1918 (40 Stat., 1016), and the act of September 29, 1919 (41 Stat., 287).

LEWIS G. NORTON (ON REHEARING).¹

Decided December 19, 1921.

RESTORATIONS—WITHDRAWAL—HOMESTEAD—SETTLEMENT—ENTRY—SECRETARY OF THE INTERIOR.

An Executive order vacating a withdrawal and restoring lands to the public domain, does not, in the absence of express terms specifying how and when the lands shall be disposed of as authorized by the act of September 30, 1913, have the effect of restoring the lands to settlement and entry, but the time and method of their disposition under appropriate laws remain a matter of determination by the Secretary of the Interior.

RESTORATIONS—SETTLEMENT—PREFERENCE RIGHT—SECRETARY OF THE INTERIOR.

Settlement upon public land, not at the time subject to disposition and entry, prior to its orderly and formal restoration, can not be invoked as a basis for a preference right under the act of May 14, 1880, and such settlement will not prevent the Secretary of the Interior from making disposition of the land under appropriate law in a manner which will exclude the settler from participation therein.

RESTORATIONS—PREFERENCE RIGHT—MILITARY SERVICE.

The preference right privilege accorded to discharged soldiers, sailors, and marines by Public Resolution No. 29, act of February 14, 1920, attaches to lands restored to entry subsequently to the enactment of that act.

¹ Petition for exercise of supervisory authority denied April 26, 1922.

FINNEY, *First Assistant Secretary*:

Lewis G. Norton has filed motion for rehearing in the matter of his claim in and to a tract of land in Dade County, Florida, described in his homestead application, filed in the local office at Gainesville, March 14, 1921, as "the *balance* of Lot 6, Sec. 2, T. 53 S., R. 42 E., T. M., Florida, N. of the 500 ft. strip of land along the south line reserved by the President for the United States Coast Guard, which said *balance* was restored to the public domain, and lies *north* of the reserve in said Lot 6, Sec. 2, T. 53 S., R. 42 E., T. M., containing approximately 37.10 acres" wherein the Department by decision dated May 23, 1921, rejected said application for the reason that the land had not been opened to entry, filing, or other disposition under the public land laws. Counsel for Norton has been heard orally in the matter and elaborate and exhaustive written briefs have been filed.

The President's proclamation of March 11, 1921, reads as follows:

Whereas, the President of the United States, by Executive Order bearing date the twenty-eighth day of July, A. D. one thousand eight hundred and seventy-five, made a permanent reservation of a tract of land, approximately ten (10) acres in extent, along the entire east side of Lot 6, Section 2, Township 53 South, Range 42 East, Tallahassee Meridian, Florida, for Life Saving purposes, and

Whereas, the Secretary of the Interior, on the twenty-fifth day of April, A. D. one thousand eight hundred and ninety one, made a temporary reservation of the balance of said Lot 6, Section 2, Township 52 South, Range 42 East, Tallahassee Meridian, pending the procurement of proper description of the tract of land desired for use in connection with the Biscayne Bay House of Refuge, of the Life Saving Service, and

Whereas, the Secretary of the Treasury, by letter dated the seventh day of March, A. D. one thousand nine hundred and twenty one, has requested that part of the permanent reservation be continued, part of the temporary reservation be made permanent, and the balance of the land, within the said reservations, be restored to the public domain;

Now therefore, I, Warren G. Harding, President of the United States, do hereby permanently reserve from all forms of disposition, for the Coast Guard, all of that tract of land, containing twenty five (25) acres, more or less, within Lot 6, Section 2, Township 53 South, Range 42 East, Tallahassee Meridian, Florida, situate, lying and being between the south line of said Lot 6 and a line five hundred (500) feet directly north thereof and running parallel with the said south line of said Lot 6, and extending from the Atlantic Ocean on the east to Indian Creek, or Biscayne Bay, on the west. I do hereby release from withdrawal and restore to the public domain, subject to the public land laws of the United States, and to the jurisdiction of the Interior Department, the balance of land embraced within said Lot 6, Section 2, Township 53 South, Range 42 East, Tallahassee Meridian, Florida, outside of the permanent withdrawal herein created, and within the withdrawals of the twenty eighth day of July, A. D. one thousand eight hundred and seventy five and the twenty fifth day of April, A. D. one thousand eight hundred and ninety one, which are, in part, hereby vacated.

The record shows that by letter of April 1, 1921, the Commissioner of the General Land Office transmitted a copy of the aforesaid proc-

lamation to the local officers at Gainesville, advising them that steps would be taken to survey and mark upon the ground the land reserved and the portion restored to the public domain, and they should accept no entry or filing for the restored part until further instructed by his office.

No segregation survey of the land has been made or plat constructed. In the meantime, however, under date of June 10, 1921, the President issued an order as follows:

It is hereby ordered that all that portion of Lot Six (6), Section Two (2), Township Fifty-three (53) South, Range Forty-two (42) East, Tallahassee Meridian, Florida, released from reservation and withdrawal and restored to the public domain, and to the jurisdiction of the Interior Department by proclamation of the President of the United States, dated March 11, 1921, No. 1589, be and the same hereby is reserved for townsite purposes under Section 2380, United States Revised Statutes, to be hereafter disposed of under Section 2381, United States Revised Statutes.

A copy of this order was transmitted to the local officers with the Commissioner's letter of July 6, 1921, and they were advised that steps would thereafter be taken for the survey of said land into blocks, streets, and alleys, and for its disposal for town-site purposes and that in the meantime no rights could be acquired to said land or any portion thereof by settlement, application, or otherwise.

Norton states in an affidavit that he settled upon the south half of Lot 6 in April, 1920, building a house thereon and establishing residence therein with his family. It is conceded now that this occupation was nothing short of trespass inasmuch as the lands were then in state of reservation for the Coast Guard service, but he claims that after the north half of the lot was restored to the public domain by the President's order of March 11, 1921, he abandoned the south half and removed to the north half, and that his settlement rights immediately attached; that they must be recognized and cannot be divested by subsequent reservation or withdrawal of the lands from sale and disposition.

It must be borne in mind that Norton's homestead application never was allowed, and under no admissible view of the facts could it have been allowed because the lands had never been surveyed or platted, and thrown open to entry, and it remained for the Land Department, in its administrative capacity under the law, to do this.

Manifestly, therefore, no rights were acquired by virtue of this application. It is a fundamental principle in the administration of the public land laws, as old as the system itself, that an application to enter land which is not subject to entry at the time the application is made confers no rights upon the applicant. *Lansdale v. Daniels* (100 U. S., 113); *Goodale v. Olney* (13 L. D., 498); *Hall et al. v. Stone* (16 L. D., 199); *Smith v. Malone* (18 L. D., 482).

But the movant contends in substance and effect that he has vested rights in the land by virtue of his settlement pursuant to the provisions of the acts of Congress approved May 20, 1862 (12 Stat., 392) and May 14, 1880 (21 Stat., 140), and that the President of the United States has no lawful warrant to reserve for town site purposes land in which a homesteader has such rights.

There is no force in this contention. In the case of a settler the Government has assumed no obligation with respect to the ultimate disposition of the land; no promise is extended to him that when the land is finally brought into market it will be disposed of under the laws recognizing prior settlement as the basis of a right to acquire title thereto. As observed by Justice Field in the Yosemite Valley case (15 Wall., 77, p. 93):

The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all cases, whenever necessary for their decision, between the acquisition by the settler of a *legal right to the land* occupied by him as against the owner, the United States; and the acquisition by him of a *legal right as against other parties to be preferred in its purchase*, when the United States have determined to sell. It seems to us little less than absurd to say that a settler or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires the right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition.

So again in the case of *Campbell v. Wade* (132 U. S., 34, p. 37), the court speaking through Justice Field said:

The adjudications are numerous where the withdrawal from sale by the government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the preemption laws of the United States, large portions of the public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific amount by occupation and improvement, and their entry at the appropriate land office and payment of the prescribed price. But it has always been held that occupation and improvement of the tracts desired, with a view to preemption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States, which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties. This subject was fully considered in *Frisbie v. Whitney*, 9 Wall., 187, where this doctrine was announced. It was subsequently affirmed in the *Yosemite Valley Case*, 15 Wall., 77, 87.

See also *Shepley v. Cowan* (91 U. S., 330); *Buxton v. Traver* (130 U. S., 232); *Shiver v. United States* (159 U. S., 491); *Gonzales v. French* (164 U. S., 338, p. 345); *Russian-American Packing Company v. United States* (199 U. S., 570); *United States v. Buchanan* (232 U. S., 72); *Andrew J. Billan* (36 L. D., 334, p. 337); *Leslie A. Reinovsky* (41 L. D., 627).

These cases firmly establish the doctrine that a settler can not by mere occupation of the public lands, even though his settlement be lawful and in good faith, acquire a vested right in the property or any right whatever as against the owner, the United States, and in view of this fundamental principle it is clear that Norton can not under the circumstances disclosed be heard to say that he has acquired a positive legal right to enter the lands in question as a homestead.

There is another ground of objection quite independent of the foregoing which in itself is fatal to Norton's claim. This goes to the validity of his settlement. While the President's order of March 11, 1921, vacated the withdrawal and restored the lands to the public domain, this did not have the effect to restore the lands to settlement or entry without the cooperation of the Land Department or deprive it of its administrative functions as to the disposition of said lands under the law. There was no language in the order specifying how or when the lands should be opened to settlement and entry. In fact the order specifically restored the lands subject to jurisdiction of the Interior Department and as heretofore pointed out it remained for the Land Department in its administrative capacity to survey and mark the land upon the ground, and show by means of a plat the strip reserved for the use of the Coast Guard, and the portion restored to the public domain; further, to formulate such rules and regulations for the opening as are needful in the interest of equal opportunity and for the protection of certain preferential rights conferred by statute. The view can not be entertained that the President intended to deprive the Land Department of its functions in this respect or to restore the lands to the category of public lands subject to settlement and entry save in an orderly manner and as directed by law.

In this connection it should be observed that there are certain statutory provisions bearing upon the opening of lands released from withdrawal or excluded from reservations or national forests. The first of these is found in the act of September 30, 1913 (38 Stat., 113), authorizing the President, in his discretion, when restoring lands to the public domain to specify how they shall be opened and when settlement and entry shall be allowed. It is unnecessary to dwell upon this because the President did not concern himself with it, evidently being content to leave such details to be worked out by the Interior Department.

The next provision bearing upon this matter is found in Public Resolution No. 29, approved February 14, 1920 (41 Stat., 434), which gives to discharged soldiers, sailors and marines, for two years following the adoption of the resolution, a preference right of entry for

60 days where lands are thereafter restored from withdrawals or reservations. Section 2 thereof provides: "That the Secretary of the Interior is hereby authorized to make any and all regulations necessary to carry into full force and effect the provisions hereof." The regulations thereunder will be found printed in Vol. 47 of the Land Decisions at page 346.

The tract here involved is subject to the provisions of this public resolution, and manifestly said tract could become subject to settlement and entry by the public generally only after the termination of the preference right period accorded those possessing the requisite status as discharged soldiers, sailors or marines, and under such rules and regulations as might be proper and needful.

The Department finds no reason after careful consideration of all that has been urged to modify its views in this matter, and is firmly of the opinion that Norton's claim is without merit. And it is unnecessary to enter into any discussion of the purpose to be subserved as contemplated by the withdrawal of June 10, 1921. It is enough to say that it was the authorized act of the Executive and as such prevents, while it is in force, any appropriation of the land under the public land laws. *Wolsey v. Chapman* (101 U. S., 755); *Wood v. Beach* (156 U. S., 548); *Spencer v. McDougal* (159 U. S., 62); *United States v. Midwest Oil Company* (236 U. S., 459).

The motion is denied.

STATE OF MONTANA.

December 27, 1921.

SCHOOL LAND—INDEMNITY—CROW INDIAN LANDS—ACT OF JUNE 4, 1920.

Section 16 of the act of June 4, 1920, which granted to the State of Montana for common school purposes, two designated sections of nonmineral and nontimbered lands in each township in the Crow Indian Reservation, for which the State had not previously received indemnity, clearly intended that where the lands in place, or portions thereof, have been allotted or are mineral or timbered, the State shall be entitled to select other unoccupied, nonmineral and nontimbered lands in said reservation to the extent of such deficiencies, not to exceed, however, two sections in any one township.

SCHOOL LAND—INDEMNITY—CROW INDIAN LANDS—ACTS OF FEBRUARY 22, 1889, AND FEBRUARY 28, 1891.

Where the State of Montana is unable to obtain in any township within the Crow Indian Reservation, the quantity of land, in place or as indemnity, granted to it for common school purposes by section 16 of the act of June 4, 1920, it is entitled under the provisions of the acts of February 22, 1889, and February 28, 1891, to select other lands subject to selection, outside of said reservation, in quantity equal to such loss.

COURT DECISIONS CITED AND APPLIED.

Cases of Mining Company v. Consolidated Mining Company (102 U. S., 167), and United States v. Sweet (245 U. S. 563), cited and applied.

BOOTH, *Solicitor*:

Some question having arisen regarding the school-land grant made to the State of Montana by section 16 of the act of June 4, 1920 (41 Stat., 751), particularly as to mineral and timber lands and the right of the State to indemnity therefor, you have requested my opinion in the premises.

The pertinent provisions of the section referred to read:

That there is hereby granted to the State of Montana for common-school purposes sections sixteen and thirty-six, within the territory described herein, or such parts of said sections as may be nonmineral or nontimbered, and for which the said State has not heretofore received indemnity lands under existing laws; and in case either of said sections or parts thereof is lost to the State by reason of allotment 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, nontimbered lands within said reservation, not exceeding two sections in any one township.

While the statute in which the above is to be found is comprehensive in terms and doubtless contains within itself sufficient elements on which a ruling may be founded, yet a consideration of other legislation germane to the subject matter will prove helpful. Montana, and certain other designated States, came into the Union pursuant to the act of February 22, 1889 (25 Stat., 676), section 10 of which provides:

That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in *Indian*, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been *extinguished* and such lands be *restored* to, and become a part of, the *public domain*. (Italics supplied.)

In express terms this statute neither includes mineral or timber lands in nor excludes such lands from the grant to the State, but as to lands known to be mineral at least it is well settled that the right of the State does not attach. *Mining Company v. Consolidated Min-*

ing Company (102 U. S., 167), *United States v. Sweet* (245 U. S., 563).

Lands embraced within Indian or other reservations for national purposes, however, were expressly excepted from the grant to the States, and on admission to the Union, Montana found within her borders several such reservations, including that for the Crow Tribe established by treaty dated May 7, 1868. (15 Stat., 649), but as subsequently reduced by the act of April 11, 1882 (22 Stat., 42). Remedial legislation applicable to all public land States alike is to be found in the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, the manifest import of which, briefly, is that where the school lands in place are lost to the State by reason of inclusion within Indian or other reservations, or where such lands have otherwise been disposed of by the United States, then the State suffering such loss may select indemnity lands elsewhere within her borders in quantity equal to the loss. This is optional with the State, however, as it may, if it so elects, await extinguishment of the reservation and restoration of the lands to the public domain and then take its lands in place.

Legislation practically contemporaneous with the statute last referred to made a further reduction in the Crow Indian Reservation—act of March 3, 1891 (26 Stat., 989, 1039). Although silent as to a school-land grant to the State, yet on extinguishment of the Indian reservation to the extent covered by this act, the right of the State arose to take its lands in place or to indemnity elsewhere, in case of loss, under the acts of February 22, 1889, and February 28, 1891, *supra*. This reservation was again reduced (to its present dimensions) by agreement with the Crow Indians ratified by the act of April 27, 1904 (33 Stat., 352), in which sections 16 and 36 not otherwise disposed of, in each township, are granted to the State for school purposes, and in case of loss to the State, with the right of indemnity elsewhere within the area "ceded," in quantity equal to the loss.

These observations but tend to fortify the conclusion that the intent of this and similar legislation is that the State is to receive two sections of land in place, in each township, in support of its common schools, and where such sections or any part thereof are lost to the State then the right of indemnity arises. But we need not dwell long on the question of general or latent intent, for, as previously indicated, in so far as the instant case is concerned the language used in the act of June 4, 1920, is sufficiently broad and plain to remove any doubt about its intent. No lands within this existing Indian reservation are "to be restored to the public domain," as commonly understood by that expression, under and by virtue of this act. With certain exceptions, including the grant to

the State of Montana for school purposes, the remaining unallotted lands within this reservation are to be prorated among members of the Crow Tribe living on a certain date. It is clear from section 16 of the act that two designated sections in each township are granted to the State for school purposes, except where such lands are mineral or timber and except where the State has already received indemnity lands elsewhere. Again quoting from the act:

And in case either of said sections or parts thereof is *lost* to the State by reason of allotment or otherwise, the governor of the State with the approval of the Secretary of the Interior, is hereby authorized to select other *unoccupied, unreserved, nonmineral, nontimbered lands within said reservation* not exceeding two sections in any one township. (Italics supplied.)

“Or otherwise” is a comprehensive term including as it necessarily must “in other ways” or “in any other manner.” Hence, the expression “lost to the State by reason of allotment or otherwise” must of necessity include lands lost to the State for any reason. When we come to examine the definition of the word “lost” we find that it also is in broad compass meaning not alone the loss of something once possessed but including also a failure to obtain that which one otherwise would rightfully be entitled to. The statute itself indicates clearly the sense in which this word is therein used. Lands allotted to the Indians are “lost” to the State although such lands have never been in its possession. We are not warranted in putting one construction on this word as applied to land allotted to the Indians and an entirely different construction as to the lands otherwise “lost” to the State. Where lands are mineral or timber in character or have been reserved for administrative or other reasons these lands are just as effectually lost to the State as are the lands allotted to the Indians, hence the right of the State to indemnity lands elsewhere clearly arises under the statute.

I find no difficulty therefore in concluding that the State of Montana is entitled to two sections of land in place, in each township within the diminished Crow Indian Reservation, but if for any reason, by allotment or otherwise, those sections or parts thereof are lost to the State, then the right of indemnity elsewhere “within the reservation” in quantity equal to the loss arises under the act of June 4, 1920. Further, that in making its lieu selections the State is confined to unoccupied, unreserved, nonmineral, nontimbered lands within said reservation, not exceeding two sections in any one township, and that herein lies the only limitation placed on the State in making its indemnity selections within the reservation. If unable to find in any one township within the reservation sufficient lieu lands of the character indicated to satisfy its indemnity rights then and not until then is the State forced to the public domain in order to satisfy its

grant. Authority for the latter procedure, if the need therefor arises, can be found in the acts of February 22, 1889, and February 28, 1891, *supra*; all of this, of course, with the understanding that the State has not heretofore exercised its indemnity rights as to these lands and previously obtained lieu selections elsewhere.

Approved: December 28, 1921.

E. C. FINNEY,
Acting Secretary.

MAXHIMER v. GENERAUX AND WILLIAMS.

Decided January 6, 1922.

SECOND HOMESTEAD—CONTEST—RESIDENCE—NOTICE.

For the purpose of contest, the rule that the six months within which residence must be established begins to run from the date of entry is not applicable to a second homestead entry made under the act of September 5, 1914, but, as against such entry, the time does not begin to run until the entryman is properly notified of the allowance of the entry.

DEPARTMENTAL DECISIONS CITED, APPLIED, AND DISTINGUISHED.

Case of Farnell *et al.* v. Brown (21 L. D., 394), cited and applied; case of Gauss v. Phelps (44 L. D., 180), cited and distinguished.

FINNEY, *First Assistant Secretary:*

June 5, 1917, Abram A. Generaux filed application Phoenix 035317 to make second homestead entry, under the act of September 5, 1914 (38 Stat., 712), for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 8, T. 6 S., R. 6 E., G. & S. R. M., Arizona. In this application and in the supporting affidavit he gave his postoffice address as 246 South Hill Street, Los Angeles, California. On February 7, 1918, the local officers received a letter from him wherein he again gave the same address, where he continued to reside.

The local land office made original entry on the serial register of the address of the applicant as Casa Grande, Arizona, and later, on February 7, 1918 (in lead pencil), noted the address of the applicant, 246 S. Hill St., Los Angeles.

In accordance with the instructions of September 26, 1914 (43 L. D., 408), the local officers suspended the application and forwarded it to the General Land Office for determination as to whether claimant was entitled to make second entry. On July 6, 1918, the local officers allowed the entry in accordance with the previous instructions of the Commissioner. The local officers mailed notice of allowance of the entry to claimant, addressed to Casa Grande, Arizona, which notice of the allowance of the entry was returned unclaimed on August 1, 1918.

May 6, 1921, Leonard L. Maxhimer filed a contest against said entry charging that the entryman had not resided upon or improved the land, notice of which contest was served on Generaux at his Los Angeles address on May 9, 1921, as evidenced by signed registry return receipt. In answer the claimant set up that his failure to timely establish residence was due to the fact that his address was erroneously noted in the local office as Casa Grande, Arizona, and that he did not receive notice of the allowance of his entry until May 23, 1921. A certified copy of the portion of the serial register relating to this entry shows the following notation:

"5-20-21. Receipt and allowance notice returned unclaimed from Casa Grande, record address, in August 1, 1918, remailed to 246 S. Hill St., Los Angeles, California."

June 11, 1921, the local officers recommended the cancellation of the entry on the ground that the contestee had admitted that he had not complied with the law. July 11, 1921, the General Land Office reversed that action and rejected the contest for the reason that the nonmilitary averment was insufficient, from which action contestant has appealed.

July 16, 1921, one Chet W. Williams filed the relinquishment of Generaux and at the same time filed his own application 051687 for the lands in controversy, which application was suspended to await the final action on the contest of Maxhimer.

The elimination of the contestee from the case renders the determination of the sufficiency of the contest necessary only for the purpose of ascertaining the respective rights of Maxhimer and Williams.

Section 2 of the instructions of April 1, 1913 (42 L. D., 71), provides:

"Where it appears of record that the defendant has been served with notice * * * 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."

This rule should not apply in a case where the contest is so fatally defective as to have called for its rejection by the local officers when it was presented.

In the case under consideration the record shows that notice of the allowance of the entry was not mailed to entryman's correct address (the one given in all the papers theretofore filed) until after notice of the contest had been served on him and evidence of such service filed in the local office.

While it is true, generally speaking, that the six months within which residence must be established begins to run from the date of entry, and not from the time notice of allowance is received, as was

held in *Gauss v. Phelps* (44 L. D., 180), such a rule should not be applied in this case. The decision in the *Gauss* case was based very largely on the fact that the entryman for over two years made no inquiry or effort to ascertain whether his application had been allowed, but in that decision it was said:

"It is unnecessary, in this case, to discuss the effect, upon a contest for abandonment, of proof that the entryman, without fault or laches on his part, had not received notice that his entry had been allowed."

Furthermore, Phelps admitted that he received notice of the allowance of his application more than three months prior to the filing of the contest.

In cases, such as the one now under consideration, where local officers are not permitted to allow entries on their own motion, and the allowance of the entry must await a decision by the General Land Office, the claimant is entitled to be notified of that decision when it is rendered. If the Commissioner should decide that such an application must be rejected, the applicant would undoubtedly be entitled to notice of that action, in order that he might protect his interest by appeal; and there is no good reason why a similar notice should not be given in cases where favorable action is taken. If an entry had been allowed under this application, and that entry had been subsequently suspended, the entryman would not have been required to maintain residence on the land so long as the suspension lasted and the entry could not have been successfully contested until after the entryman had failed to reside on the land for more than six months after he had been *properly notified* of the revocation of the suspension. *Farnell et al. v. Brown* (21 L. D., 394). The same rule should be applied in this and similar cases, where applications are formally "suspended" to await action by the General Land Office.

The local office records showed that the entryman could not have been culpably absent from the land, because he had not received notice of the allowance of his application. Furthermore, the failure of the local officers to note his correct post-office address was in no way due to any fault of his. The contest should have been dismissed by the local officers because of the facts herein stated, and for this reason the dismissal of the contest of Maxhimer by the Commissioner was correct. In view of these considerations it is not necessary to discuss the sufficiency or the insufficiency of the nonmilitary averment.

It follows, therefore, that the contestant gained no preference right of entry. The dismissal of the contest is affirmed and when this decision becomes final the case will be returned to the Commissioner for action on Williams's application in accordance herewith.

FREEMAN v. LAXSON ET AL.

Decided January 7, 1922.

DESERT LAND—ASSIGNMENT—FINAL PROOF—PAYMENT—SURVEY.

Where final proof is submitted, but final payment and adjustment to the plat of survey is not made, equitable title does not vest in the entryman and the assignment of such entry is governed by the regulations relating to assignments.

DESERT LAND—ASSIGNMENT—PAYMENT—SURVEY—CONTEST.

A contest against a desert entry based on the charges that the assignee was disqualified to take by assignment and that the entryman had defaulted, must be sustained where the assignment had been made prior to final payment and adjustment to the plat of survey, and no answer to the contest allegations was made after due service of notice.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of Simeon S. Hobson (29 L. D., 453), Bone v. Rockwood (38 L. D., 253), and Watson v. Barney *et al.* (48 L. D., 308), cited and applied.

FINNEY, *First Assistant Secretary*:

July 30, 1901, Dora Laxson made desert land entry No. 6831 (now 02204), Helena, Montana, for unsurveyed land described as the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 25, T. 13 S., R. 12 W., M. M., containing 160 acres.

Final proof was submitted October 30, 1902, which was accepted as satisfactory but final certificate was withheld because the land was still at that time unsurveyed. The plat of survey has been recently filed.

May 9, 1921, James R. Freeman filed contest affidavit against said entry alleging failure to adjust the entry to the plat of survey and make the necessary final payment of \$1 per acre; also that on October 30, 1902, the entrywoman, by a duly executed and recorded instrument in writing, sold and conveyed her interest in said entry to T. B. Craver; that said Craver was not qualified to take an assignment of the entry for the reason that he had at that time exhausted his 320 acre right under the agricultural land laws; that said Craver is now deceased and that his surviving heirs, whose names were given, are likewise disqualified for the same reason; that the said entry was not in the first instance made for the use and benefit of the said Dora Laxson, but was made for the use and benefit of the said T. B. Craver, and that the said conveyance was made in consummation of that agreement; that following the execution of the said conveyance, the said Laxson abandoned the said land and has ever since continued such abandonment.

Under date of July 18, 1921, the register of the local land office transmitted the record to the General Land Office with report of due service of notice of the contest and failure to make answer, and it was recommended that the entry be canceled.

By his decision of July 27, 1921, the Commissioner of the General Land Office rejected the contest affidavit, assigning as grounds for that action that the allegation of fraud in the making of the entry should not be inquired into on account of the remoteness of that transaction and the death of one of the parties; and that even if the assignee were found to have been disqualified to hold by assignment, and also his heirs were likewise disqualified, nevertheless such condition would not result in cancellation of the entry; that in such case the patent could be issued in the name of the original entrywoman, inasmuch as the assignment had not been recognized by the Land Department.

An appeal by the contestant from the action of the Commissioner has brought the case before the Department for consideration. In the case of *Bone v. Rockwood* (38 L. D., 253), the Department held that the charge of disqualification of the assignee to take a desert land entry by assignment is sufficient basis for a contest, and that where the assignment is recognized by the Land Department the entryman thereby parts with his title to the land, even though it be shown on contest that the assignee is not qualified to hold by assignment.

The regulations governing the assignment of desert land entries contemplate that such assignments will be submitted to the General Land Office for adjudication as to the qualifications of the assignee and for recognition of the assignment.

When this plan is pursued and it is found that the assignment can not be recognized on account of the disqualification of the assignee, the assignment is disallowed and the title is considered as retained in the assignor. But where parties fail to submit the assignment to the General Land Office, they act at their own risk and if the fact of assignment is brought to the attention of the Land Department by contest alleging disqualification of the assignee, such charge constitutes sufficient ground for a contest and for cancellation of the entry if proven or in case of failure to make answer. See *Watson v. Barney et al.* (48 L. D. 308). In the case of *Simeon S. Hobson* (29 L. D., 453), it was held (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.

In the present case ordinary final proof had been submitted prior to the conveyance but the final payment of \$1 per acre had not been made and the entry had not been adjusted to the plat of survey.

The equitable title had not been earned by the entrywoman at the time of the conveyance; therefore the rules governing assignments apply.

Inasmuch as the charges in this case were sufficient and default was made after due notice, no reason is seen why the recommendation of the local officers should not be approved and the entry canceled.

It is accordingly directed that the entry be canceled, and in view of the default of the contestees, the case is hereby declared closed.

The decision appealed from is reversed.

SOUTH BUTTE MINING COMPANY v. THOMAS ET AL.

Decided January 10, 1922.

MINING CLAIM—MINERAL LANDS—PATENT—ADVERSE CLAIM—COURTS—LAND DEPARTMENT.

Where it has been determined by a court of competent jurisdiction in a controverted case that a lode was not a vein or lode known to exist at the date of a placer application upon which a patent had issued, the Land Department will not undertake a reinvestigation of the issue, but will adopt that conclusion and refuse to entertain an application to make mineral entry under an alleged lode location.

COURT DECISIONS CITED AND APPLIED.

Cases of *Thomas v. South Butte Mining Company* (211 Fed., 105; 230 Fed., 968), and *South Butte Mining Company v. Thomas et al.* (260 Fed., 814; 253 U. S., 486), cited and applied.

FINNEY, *First Assistant Secretary:*

This case comes before the Department upon an informal appeal taken by Thomas D. Thomas from the decision of the Commissioner of the General Land Office, dated July 26, 1921, in which Thomas *et al.* were called upon to show cause why their mineral entry 016649, made January 7, 1919, for the Resurrection Lode Mining Claim, Survey No. 9853, Helena, Montana, land district, situated within the limits of a prior patented placer claim, should not be canceled because of a final decree in a suit to quiet title favorable to the South Butte Mining Company, successor in interest to the placer patentee.

The Resurrection Lode location is within the city of Butte and is crossed by a number of tracks of the Great Northern Railroad Company and in the immediate vicinity of that company's depot. The claim is 50 feet in width by 1,368 feet in length and covers conflicts with the patented Pay Streak and Refer Lodes. The remainder of the area of the Resurrection Claim is within the Noyes Placer, for which application was filed on December 17, 1878, and thereafter mineral entry No. 511 was allowed and thereupon patent No. 4124 was issued on July 28, 1880. The record shows that the Resurrection

Claim was located on December 1, 1909, by Thomas D. Thomas, surveyed in 1915 and 1916, and applied for on February 7, 1917. August 21, 1918, the South Butte Mining Company as owner of the patented placer filed a so-called adverse claim, No. 019547, pursuant to which a suit was instituted September 17, 1918. However, final certificate of entry for the Resurrection Lode was issued on January 7, 1919. March 11, 1919, the company filed its protest setting up as final and conclusive against the claimants its favorable decree quieting title dated September 18, 1912, rendered by the United States District Court for Montana in a suit against Thomas. Pursuant to such protest notices were issued and served and answers on behalf of the lode claimants were filed. November 19, 1920, counsel for the company filed in the local office a certified copy of a judgment of the Federal court holding the lode applicants in contempt and moved that their patent application be dismissed. November 20, 1920, the local officers held the Resurrection application for rejection. Thomas appealed. July 11, 1921, not being then fully advised in the premises, the Commissioner ordered action suspended to await the outcome of proceedings in the court. July 18, 1921, a full statement of the case was filed in the General Land Office in connection with which the finality of the proceedings in court was disclosed. Thereupon the Commissioner rendered his decision of July 26, 1921, here challenged.

The Resurrection Lode Claim was early involved in litigation. The South Butte Mining Company sued Thomas to quiet title and obtained a favorable decree in the United States District Court for Montana. The main issue in the suit was whether the Resurrection Lode was a vein or lode known to exist at the time of the placer application, therefore not covered by the placer patent within the purview of section 2333, Revised Statutes. The case was taken to the Circuit Court of Appeals for the Ninth Circuit by Thomas, and that court on February 2, 1914, affirmed the decree below. *South Butte Mining Company v. Thomas* (211 Fed., 105). Later Thomas petitioned for leave to file a bill of review for the purpose of setting aside the decree. His application was denied by said court of appeals on March 20, 1916. *Thomas v. South Butte Mining Company* (230 Fed., 968). After the application for patent had been filed the South Butte Mining Company instituted contempt proceedings against the Resurrection applicants. The district court rendered an opinion and dismissed those proceedings. The company appealed and the judgment of dismissal was reversed by the Circuit Court of Appeals on October 6, 1919. *South Butte Mining Company v. Thomas et al.* (260 Fed., 814). Thereupon Thomas filed a petition for certiorari, which was denied by the United States Supreme Court on May 3,

1920 (253 U. S., 486). The mandate of the Court of Appeals went down and on October 30, 1920, the United States District Court adjudged the applicants to be in contempt, ordered that each pay a fine of one dollar and costs and be imprisoned in the county jail until they filed in the local land office a withdrawal of their application for patent. A stay of ten days was allowed. One of the applicants, Hattie M. Bucher, filed her withdrawal. The other three applicants being outside of the State of Montana, the company filed in the local land office a copy of the judgment for contempt and moved the dismissal of the patent application as above stated.

The correspondence and papers upon which the Commissioner has transmitted the record as on appeal are most informal and unsatisfactory. There is no evidence of service of these papers upon the South Butte Mining Company, and the Department might for that reason decline to consider the case. In view of all the circumstances, however, the record has been reviewed and the matter will be disposed of as if a perfected appeal were present.

The contention presented by Thomas, as this Department understands it, is in substance that the question whether a vein or lode was known to exist within the boundaries of the patented placer claim at the date of the placer application is one to be determined primarily and exclusively by the Land Department and not by the courts.

It may be observed from the decisions of the Department that the land practice with regard to this question has not been entirely uniform. For a considerable period it was held that the Land Department upon issuance of a placer patent retained no further jurisdiction and had no right to entertain an application for an asserted known lode within the placer until the courts had passed upon the question. See the cases of Pike's Peak Lode (10 L. D., 200; 14 L. D., 47); Rebel Lode (12 L. D., 683); and South Star Lode (17 L. D., 280). That ruling was changed by the decision in the case of the South Star Lode on review (20 L. D., 204), where it was said:

And it is now held that when it has been ascertained by inquiry instituted by the Department or determined by a court of competent jurisdiction that a lode claim existed within the boundaries of the land covered by a placer patent, and that such lode claim was known to exist at the date of the application for such patent, and was not applied for, the land embraced in said lode is reserved from the operation of the conveyance by the terms thereof, and patent may issue for such lode if the law has been in other respects fully complied with.

See also Butte and Boston Mining Company (21 L. D., 125); Cripple Creek Gold Mining Company *v.* Mount Rosa Mining, Milling

and Land Company (26 L. D., 622), and Golden Center of Grass Valley Mining Company (47 L. D., 25). Where the question of a known lode is in issue in the courts and is adjudicated, the Department has accepted such adjudication and acted in accordance therewith. In the case of the Alice Mining Company (27 L. D., 661), the issue as to a known lode was involved in a so-called adverse suit and determined in favor of the placer patentee. It was there said:

The contention of the appellant, the placer patentee, is, curiously enough, that these lodes were known to exist at the date of its application for the placer patent, and therefore did not pass under the patent, and that the land department still has jurisdiction of the land embraced in survey No. 6324, and should issue patent upon its said entry of May 16, 1896.

* * * When it is duly ascertained that a lode alleged to have been known to exist within the placer boundaries at the date of the application for patent to the placer claim, was not known so to exist, it must be held that the title of the United States to such lode passed under the patent and that the jurisdiction of the land department was thereby terminated.

Here the court has ascertained and adjudged, in a controverted case, that the Resurrection Lode was not a vein or lode known to exist at the date of the placer application. A branch of that litigation was taken before the United States Supreme Court by Thomas, as above stated. The Department does not perceive any necessity for undertaking a reinvestigation of the issue determined but will accept and adopt the conclusion reached by the court. It follows that the entry for the Resurrection Lode must be canceled and the application for patent rejected. It is so ordered.

For the reason that appellant is not represented by counsel and is not himself a lawyer, the record submitted has received very careful scrutiny. The Department has been induced to follow the same principle as that which guided the Court of Appeals in its considerations. That court concluded its decision of May 20, 1916 (230 Fed., 968, 970), with the following language:

On account of the fact that the petitioner was without counsel and was himself evidently unskilled in the law, this court took particular care, on the appeal of the cause to this court, to protect his rights so far as it was authorized to do so on the case made upon the pleadings and proceedings in the court below; and for the same reason this court now examines with scrupulous care the appellant's petition and the proposed bill of review, to determine whether leave should be granted to file the latter. The question is in no respect involved in doubt, and we can find no ground whatever upon which to predicate such relief, assuming, which we do not decide, that this court has jurisdiction of the petition. In such a case it is the duty of the appellate court to deny the petition.

The action taken below is found to be correct and the decision called in question is affirmed.

REGULATIONS OF APRIL 15, 1918, GOVERNING INDIAN ALLOTMENTS UNDER SECTION 4, ACT OF FEBRUARY 8, 1887, AMENDED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 24, 1922.

THE HONORABLE

THE SECRETARY OF THE INTERIOR:

The Department, on September 1, 1921, held that the heirs of a deceased applicant under the fourth section of the general allotment act (24 Stat., 388) should be allowed to show that "the applicant personally settled on the land applied for during his or her lifetime, and while the land was open to settlement," and that "upon failure to submit such proof within the time allowed, the application will be finally rejected."

The question arises as to the proper disposition of a case in which the deceased applicant had made actual settlement sufficient to show good faith, before death, but had not completed the two years' use or occupancy required by the regulations of April 15, 1918 (46 L. D., 344).

On the analogy of the practice prevailing in homestead cases, the heirs of the deceased Indian applicant would be obliged to complete the two years of said use or occupancy required of fourth-section applicants under the regulations. While the Department, however, has held (46 L. D., 283), that the terms allotment and homestead "mean substantially the same thing so far as the laws in which they are found affect the public lands and so far as the interests of the Indian claimant are concerned," it has not held that the same requirements exacted of a homestead entryman are necessarily laid upon an Indian applicant for allotment.

For instance, while in the case above referred to it is held that a fourth-section allotment application is sufficiently like a homestead entry to justify its allowance under the body of the act of June 22, 1910 (36 Stat., 583), for land withdrawn or classified as coal, no requirement has been made that allotments shall, like homestead entries, be subject to the specific requirements exacted of homestead entrymen under said act.

The requirements of residence and the amount of cultivation each year and the erection of a habitable house, are specific in the said act and differ greatly from the use and occupancy found sufficient in case of an Indian allotment claim.

The conditions are more nearly analogous to the death of a claimant under the preemption law, wherein, under section 2269, Revised Statutes, the heirs are entitled to offer proof on the death of the

preemption settler at any time within the period allowed such settler and are not required to continue residence (3 L. D., 345).

In the case of the preemptor, section 2269, Revised Statutes, requires settlement in person and the erection of a habitable house but no specific time of occupancy is required. In the case of the Indian application, settlement only is required, but the Department has ordained that two years' use and occupancy are necessary to show good faith, whereas only six months is required of a preemptor.

As settlement sufficient to show good faith is all that is required by the allotment act, if death occurs while good faith is being demonstrated, it is believed that the heirs of the Indian applicant should not be required to continue use and occupancy after the death of the applicant, but on satisfactory establishment of settlement in good faith, trust patent should be issued.

It is recommended that the following provision be added to the regulations at the end of the section headed "Settlement" on page 6 thereof (46 L. D., 348):

"When it is sufficiently shown that an applicant was at the time of death, occupying in good faith the land settled upon, patent will be issued to his or her heirs without further use or occupancy on the part of such heirs being shown."

WILLIAM SPRY,
Commissioner.

Approved: February 3, 1922.

E. C. FINNEY,

First Assistant Secretary.

C. D. MURANE.

Decided January 28, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—ADVERSE CLAIM.

An assertion of prescriptive title can not be invoked under section 2332, Revised Statutes, to defeat the outstanding interest of record of a cotenant, by a claimant under an oil placer location with the view to obtaining an oil and gas prospecting permit under section 19 of the act of February 25, 1920, where a discovery of oil or gas has not been made.

OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—ADVERSE CLAIM—PREFERENCE RIGHT.

Performance of annual assessment work by a locator of an oil placer claim in accordance with the provision relating thereto contained in section 2324, Revised Statutes, can not be invoked, in the absence of a discovery of oil or gas, to oust the interest of a colocator who has failed to contribute, by an applicant for an oil and gas prospecting permit based upon an assertion of preference right under section 19 of the act of February 25, 1920.

OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—OCCUPANCY—STATUTES.

Section 19 of the act of February 25, 1920, presupposes that the occupant or claimant of an oil placer claim upon which a right to a prospecting permit is predicated has no interest in the land that can be otherwise recognized and completed under the terms of the mining laws.

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—WAIVER.

The right to an oil and gas prospecting permit conferred by section 19 of the act of February 25, 1920, is in the nature of a preference right or privilege which may be exercised, or waived, at the option of the occupant or claimant, and is, of necessity, waived if not asserted within the time and in the manner prescribed by the law and applicable regulations.

OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—ADVERSE CLAIM—PREFERENCE RIGHT—WAIVER—RELINQUISHMENT—STATUTES.

The oil leasing act of February 25, 1920, contains no necessary or even reasonable implication that a claim for relief under sections 18, 19, and 22, thereof is to be defeated by the refusal or failure of a coclaimant to join in an application for a permit, or that one of several coclaimants can by waiver, relinquishment, or failure to assert his right within the prescribed time, do more than destroy his personal privilege, or preference right to share the benefit granted by said sections; and provision to cover such contingency is contained in section 24 $\frac{1}{2}$ of the regulations issued pursuant to said act.

COURT DECISIONS CITED AND APPLIED.

Cases of Union Oil Company of California *v.* Smith (249 U. S., 337), and *Cole et al. v. Ralph* (252 U. S., 286), cited and applied.

FINNEY, *First Assistant Secretary*:

August 23, 1920, C. D. Murane filed applications 026478, 026479, 026480, and 026599, under section 19 of the act of February 25, 1920 (41 Stat., 437), for permits to prospect for oil and gas upon respectively the NW. $\frac{1}{4}$, Sec. 9, included in the T. R. No. 4 placer mining claim; the NE. $\frac{1}{4}$, Sec. 9, included in the T. R. No. 3 claim; the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, included in the T. R. No. 1 claim, and the SE. $\frac{1}{4}$, Sec. 4, all in T. 39 N., R. 79 W., 6th P. M., Douglas land district, Wyoming.

The lands in question were withdrawn from disposition under the mining laws by the order of September 27, 1909, and with the exception of the NW. $\frac{1}{4}$ of Sec. 9, which was restored June 25, 1910, were included in Petroleum Reserve No. 8, created by Executive order of July 2, 1910.

The applicant alleges in each of said applications that the said claims were located January 5, 1889, by eight persons; that thereafter by a chain of mesne conveyances, and by actual, exclusive, and adverse possession thereof, maintained since January 29, 1899, by the applicant and his predecessor in interest, Benjamin Hertzman, all the right, title and interests in and to each of the claims, and the land covered thereby became vested in, and is now held and pos-

sessed by the applicant; that prior to February 25, 1920, the applicant and his predecessors in interest expended upon or for the benefit of each of the claims an amount in excess of \$250. In support of each of the applications there is filed the affidavit of Hertzman, who therein avers that he purchased each of said claims and through mesne conveyance from the locators thereof obtained title thereto July 29, 1899; that ever since said date, until his conveyance to C. W. Murane on December 4, 1919, he remained in open, notorious, exclusive, and adverse possession thereof; that each year from 1899 to 1919 inclusive he either personally or through his agents performed all the necessary assessment work required by law on said claim; said work consisting of the digging and drilling of assessment holes, the construction and maintenance of reservoirs and the construction of roads; that said work was for the joint benefit of the mining claims of the affiant on the N. $\frac{1}{2}$. Sec. 9, NW. $\frac{1}{4}$, Sec. 10, SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, of the above mentioned township and range.

No discovery of oil or gas upon any of the claims in question is shown or alleged.

On or about April 6, 1921, the applicant filed a showing consisting of an affidavit executed by himself wherein he avers that the said four claims were located January 5, 1889, by John Merritt, David Sams, George DeWolfe, Boyd Bradley, Melvin Kenney, John Phillips, Patsey Hannigan, and Edward H. French; that by a quitclaim deed dated January 17, 1889, the said Merritt, Sams, Hannigan and Phillips conveyed to their colicators Kenney, Bradley, and French, all of their right, title, and interest in and to said four claims; that thereafter, as affiant is informed and believes, Kenney and Bradley by good and sufficient deed conveyed to French all their right, title, and interest in and to all the locations, but that the deed was never recorded and has been lost; that by quitclaim deed dated January 29, 1899, French, after he had acquired all the interests of Kenney and Bradley to the claims, conveyed all of his right, title, and interest therein to Hertzman; that Hertzman immediately entered into possession of the locations in the belief that he had acquired the entire title thereto, and that acting under such belief he maintained actual, continuous, visible, notorious, and hostile possession of said locations from the date last mentioned until December 4, 1919, when by quitclaim deed he conveyed all of his right, title, and interest therein to the affiant; that the said period of twenty years during which the said possession of the claims by Hertzman was maintained is longer than the time prescribed by the statutes of limitations for mining claims in the State of Wyoming; that by quitclaim deed dated December 18, 1919, George DeWolfe, one of the locators of the said claims, renounced all of his right, title, and interest in

and to all of the locations; that no claim or title has ever been asserted under the placer mining laws of the United States or under the act of February 25, 1920, to said locations by any person, association, or corporation adverse to the said Hertzman or his successor in interest, the affiant.

In view of the said showing the applicant asked that his title to the entire interest in the claims be regarded as established under the provisions of section 2332 of the Revised Statutes, contending that such section recognized the doctrine of adverse possession as furnishing sufficient basis for a patent, and that there is nothing in section 19 of the leasing act which requires an applicant for relief thereunder to show better title than is required under the mining laws.

Upon considering the application the Commissioner of the General Land Office by decision of September 22, 1921, found from the records of said applications that the claimant had failed to show a record title to more than an undivided 7/24 interest in any of the claims named and that section 2332 had no application to asserted mining claims upon which, like those here in question, there had been no discovery of mineral, stating that section 2324 of the Revised Statutes provides the only method by which a cotenant can be compelled to pay his proportion of the expenses of the annual labor, or have his rights and interests in the claim forfeited, and that that method is exclusive. He accordingly directed that the applicant be notified that he would be allowed thirty days within which (1) to file a supplementary application in which the holders of the outstanding record interests in the claims are joined; or (2) to supplement the present application by procuring and filing quitclaim deeds in his favor from the holders of the outstanding interests; or (3) to show cause, if any, why the names of the holders of the outstanding interests should not be inserted in the permit; and that in default or in the absence of an appeal the cases would be submitted to the Department with the recommendation that the permits thereunder be issued in the names of all of the fee title holders as shown by the abstract of title on file in the cases.

From this action the applicant appeals on the stated grounds (1) that section 19 of the leasing act grants relief to *bona fide* occupants or claimants under a claim initiated while the land was not withdrawn; (2) that the regulations under section 19 require the claimant to make a relinquishment of his title to the United States; (3) that the kind of title which the claimant shows, whether by recorded deeds or by adverse possession, is immaterial; (4) that title by adverse possession, which under section 2332 of the Revised Statutes, all things being proper, would have supported an application for a

patent, is equally valid to support an application for permit under section 19 of the leasing act; and (5) that since the applicant has been found by the Commissioner to have complied with all the requirements as to work, etc., and since no adverse claim has been asserted, his title by adverse possession, which is shown by competent evidence, makes him a *bona fide* occupant or claimant within the meaning of said section 19 and, therefore, entitles him to a permit.

By said section 2332 of the Revised Statutes, it is provided that—

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; * * *

Construing the provisions of this section, the Supreme Court of the United States in *Cole et al. v. Ralph* (252 U. S., 286, 305-306), said—

That the section is a remedial provision and designed to make proof of holding and working for the prescribed period the legal equivalent of proof of acts of location, recording and transfer, and thereby to relieve against possible loss or destruction of the usual means of establishing such acts, is attested by repeated rulings in the land department and the courts. But those rulings give no warrant for thinking that it disturbs or qualifies important provisions of the mineral land laws, such as deal with * * * the discovery upon which a claim must be founded. * * * Indeed, the rulings have been to the contrary.

* * * * *
The views entertained by the courts in the mining regions are shown in *Harris v. Equator Mining Co.*, 8 Fed. Rep. 863, 866, where the court ruled that holding and working a claim for a long period were the equivalent of necessary acts of location, but added that "this, of course, was subject to proof of a lode in the Ocean Wave ground, of which there was evidence." * * *

As respects discovery, the section itself indicates that no change was intended. Its words, "have held and worked their claims," presuppose a discovery; for to "work" a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered. Certainly it was not intended that a right to a patent could be founded upon nothing more than holding and prospecting, for that would subject non-mineral land to acquisition as a mining claim. Here, as the verdicts show, there was no discovery, so the working relied upon could not have been of the character contemplated by Congress.

The defendant places some reliance upon the decisions of this court in *Belle v. Meagher*, 104 U. S. 279, and *Reavis v. Fianza*, 215 U. S. 16, but neither contains any statement or suggestion that the section dispenses with a mineral discovery or cures its absence. The opinion in the first shows affirmatively that there was a discovery and that in the other shows that the controversy, although of recent origin, related to "gold mines" which had been worked for many years.

Whether in any event the asserted adverse possession by Hertzman of the claims here in question as against the outstanding interests of record of his coclaimants Bradley, Kenney, and DeWolfe could operate as a transfer to Hertzman of such interests is not necessary to be here decided. Suffice it to say that the Department is clearly of opinion that in view of the construction by the Supreme Court of section 2332 in the decision cited, the mere continuous, open, notorious, and adverse possession of an asserted mining location for a period equal to the time prescribed by the statutes of limitations of the State in which such land is situated, will not in the absence of a discovery operate under said section to confer title to such claim upon the person so in possession as would entitle him to a permit under the said section, and there is nothing in the leasing act which by either terms or implication in anywise modifies the provisions of said section 2332 so as to make it applicable to cases arising under said section 19 with respect to claims lacking discovery and which have not been "worked" within the meaning of the term as defined by the Supreme Court in the decision cited. The Commissioner, therefore, properly held that said section 2332 could not be invoked by the applicant to establish title in himself to the undivided 17/24 interest outstanding of record in Bradley, Kenney, and DeWolfe.

The Department, however, does not concur in the suggestion contained in the decision of the Commissioner to the effect that the provisions of section 2324 might have been invoked by Hertzman as a means of acquiring the interests of the noncontributing coclaimants with respect to the claims in question. As hereinbefore stated, there had been no discovery of oil within the limits of any of said claims. In the case of *Union Oil Company of California v. Smith* (249 U. S., 337) the Supreme Court at page 349 *et seq.* said—

And it is not to be doubted that the terms "assessments" and "annual assessment labor" refer to the annual labor required by section 2324, that being commonly called by miners the "annual assessment" or the "assessment work," and so described in many judicial opinions and in at least two acts of Congress, passed respectively November 3, 1893, c. 12, 28 Stat. 6, and July 2, 1898, c. 563, 30 Stat. 651. See *El Paso Brick Co. v. McKnight*, 233 U. S. 250, 255, 256, 258.

And it is important to observe that in these acts of Congress, as in the practice of miners, "assessment work" had nothing to do with locating or holding a claim before discovery. On the contrary it was the condition subsequent prescribed by Congress to be performed in order to preserve the exclusive right to the possession of a valid mineral land location upon which discovery had been made. *McLemore v. Express Oil Co.*, 158 California, 559, 563. Hence the declaration in the Act of 1903 that where oil lands are located as placer mining claims "the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person," indi-

cates simply the legislative purpose that the necessary assessment work if done upon one of the group should have the same effect as if properly distributed among the several claims; that is to say, the effect of preserving the exclusive right of possession and enjoyment conferred by section 2322 with respect to unpatented claims based upon a previous discovery of oil.

It must be held, therefore, that section 2324 would have no application to claims upon which there had been no discovery of mineral.

Nor does the Department concur in the Commissioner's holding that the defect pointed out by him can be cured by the amendment of the application by the insertion of the names of the holders of the outstanding interests, or by the insertion of the names of said persons in the permits to be issued under the applications for the reason that none of the persons whose names it is proposed to add to the application or to insert in the permit, if issued, has shown his qualifications to take a permit or otherwise complied with the regulations.

Section 19 of the act of February 25, 1920, *supra*, presupposes that the occupant or claimant therein referred to has *no interest in the land* that can otherwise be recognized and completed under the terms of the mining law; lawful claims are recognized by and may be completed under the exception to section 37 of said act. The right conferred by said section 19 is, therefore, in the nature of a preference right or privilege which may be exercised or waived, at the option of the occupant or claimant, and is, of necessity, waived if not asserted within the time and in the manner prescribed by the law and the applicable regulations. When so waived, the land becomes subject to disposition to the public generally or to any other claimant recognized by the law as entitled to priority.

In the preparation of regulations (47 L. D., 437, 456) under the act of February 25, 1920, *supra*, the Department considered the probability that cases would arise in which it would be impracticable, if not impossible, for all proper parties to a claim for relief under sections 18, 19, and 22 of the act, to join in the application, and section 24½, which reads as follows, was incorporated in said regulations to cover such a contingency:

All proper parties to a claim for relief under section 18, 19, or 22 of the act should join in the application, but, if for any sufficient reason that is impracticable, any person claiming a fractional or undivided interest in such claim may make application for a lease or permit, stating the nature and extent of his interest, and the reasons for nonjoinder of his co-owner or co-owners. In cases where two or more applications are made for the same claim or part of a claim, leases or permits will be granted to one or more of the claimants, as the law and facts shall warrant and as shall be deemed just.

The Department is of the opinion that the regulation quoted is in entire harmony with the letter as well as the spirit of those sections of

the act to which it refers. It would be repugnant to sound principles of construction to hold that there is a necessary or even reasonable implication in the law that a party clearly entitled to the benefit of the same and duly asserting his claim is precluded by the refusal or failure of a coclaimant to join in the application; or to hold that one of several coclaimants could, by waiver, relinquishment, or failure to assert his right within the time prescribed, do more than destroy his personal privilege, or preference right to share the benefit of sections 18, 19, and 22.

Of course it would be competent for parties having a claim *prima facie* within the exception to section 37 to have waived the same and invoked the relief provisions of said act of February 25, 1920, and in such case a reconveyance of the outstanding title is imperative; but that fact has no application to the situation here presented, where no right under the mining law exists and the exercise of the privilege conferred by section 19 is barred by lapse of time.

The decision appealed from is, therefore, modified to accord with the views herein expressed and the case is remanded for consideration under said section 24½.

CAMPBELL v. DE HAVEN.

Decided February 3, 1922.

CONTEST — HOMESTEAD — ABANDONMENT — MILITARY SERVICE — AFFIDAVIT — JUDGMENT—REINSTATEMENT.

To meet the requirements of the act of July 28, 1917, it is necessary to allege in a contest affidavit charging abandonment that the absence "was not due" to military or naval service; and an application to contest based upon the charge that the absence "is not due" to such service is defective and will not justify the cancellation of an entry on a default judgment where no evidence was offered to prove that the abandonment "was not due" to military or naval service; and an entry so canceled on such a judgment should be reinstated.

FINNEY, *First Assistant Secretary*:

After service of notice of contest had been given by publication and a default judgment had been rendered by the register and receiver, the General Land Office on January 17, 1921, canceled the homestead entry, Miles City 033225, made by William S. De Haven, December 6, 1916, which as later amended embraces lots 2 and 3, SE. ¼ NW. ¼, NE. ¼ SW. ¼, and NW. ¼ SE. ¼, Sec. 30, T. 18 N., R. 36 E., M. M., under the contest filed by Charles Lee Campbell on August 16, 1920, charging—

That said entryman has wholly abandoned said land; that he has never established residence upon the same; that said defaults have existed for more

than one year last past and continue to date; and that said alleged absence is not due to his employment in any department of the United States Army, Navy, or Marine Corps, or any bureau in connection therewith.

By its decision of September 3, 1921, the General Land Office considered the application of Stella S. Smith, the entryman's mother, for the reopening of the case and the reinstatement of the entry, which contained a number of allegations made by her as to her son having served in the Army during the World War, and as to his later absence from home and supposed death, which need not be here set out at length for the reason that the Commissioner in that decision very properly reinstated that entry on the ground that the application to contest was fatally defective because it did not meet the requirements of the act of July 28, 1917 (40 Stat., 248), which mandatorily declares that—

Hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, entryman, or person unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases hereinafter initiated that the alleged absence from the land was not due to his employment in such military or naval service.

This application to contest alleged that the abandonment "*is not*" due to that service, instead of alleging, as it should have done, that it "*was not*" due to that service. For that reason it did not meet the demand of that statute or justify the cancellation of the entry. See Instructions of August 2, 1921 (48 L. D., 166).

Furthermore, this entry was improperly canceled on a default judgment. No evidence was offered to prove that the abandonment was not due to military or naval service, notwithstanding the fact that the act mentioned in express terms declares no entry shall be canceled on that ground until after it has been "proved at the hearing" that the default was not due to such service.

The contestant has failed to set up any sufficient reason why the Commissioner's decision should be reversed, and being entirely correct in his holding that the entry must be reinstated, it is hereby sustained to that extent; but in view of the instructions mentioned above, that decision is set aside in so far as it holds that the contest must be dismissed, and the case is hereby remanded for further proceedings looking to the amendment of the application to contest and the issuance of a new notice thereunder, if and when that amendment is made. But that amendment will be made under and subject to the conditions mentioned in that circular, and the entryman's mother should be notified of any and all actions hereafter taken in this case, and be permitted to appear therein in his absence.

WARNER v. BASHAW'S HEIRS.*Decided February 3, 1922.*

CONTEST—AFFIDAVIT—ABANDONMENT—HOMESTEAD—MILITARY SERVICE—ACT OF JULY 28, 1917.

Failure to allege in a contest affidavit that the abandonment of a homestead entry was not due to military or naval service is not sufficient ground for the dismissal of a contest when it conclusively appears that the physical condition of the entryman was such as to incapacitate him from such service, thereby excluding him from the class for whose benefit the act of July 28, 1917, imposed the requirement.

CONTEST—CONTESTANT—HOMESTEAD—PRACTICE—JUDGMENT.

Process should not issue on an application to contest a homestead entry after the death of the entryman where the contestant, having knowledge of that fact, fails to set forth the name and residence of each party adversely interested, together with the age of each heir, as required by Rule 2, Rules of Practice, and, if process inadvertently issue, a default judgment directing cancellation of the entry will not be sustained in the absence of submission of proof of the charges.

DEPARTMENTAL DECISIONS CITED AND FOLLOWED:

Cases of *Goudy v. Heirs of Morgan* (44 L. D., 376), *Moody v. Myers* (45 L. D., 446), *Thomas v. Richey* (48 L. D., 181), *Evans v. Woodward* (48 L. D., 232), cited and followed.

FINNEY, *First Assistant Secretary*:

On February 9, 1920, Joseph Bashaw made homestead entry, Cass Lake 011759, for the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 9, T. 141 N., R. 30 W., 5th P. M., Minnesota, and on November 1, 1920, he filed an application for an extension of time until February 9, 1921, within which to establish residence on the land.

On August 11, 1920, Henry K. Warner filed his application to contest the entry on the ground that the entryman had failed to establish residence prior to that date, and by its decision of February 17, 1921, the General Land Office dismissed the contest and granted the application for an extension.

On March 28, 1921, Warner filed another application to contest the entry on the ground that residence had not been established up to that time.

Notice of contest was then given by publication addressed to the heirs and legal representatives of the entryman, and, no answer or other pleading having been filed, the register and receiver rendered a default judgment and recommended the cancellation of the entry which was reversed on September 12, 1921, by the General Land Office in its decision of that date in which the contest was dismissed on the ground that the contestant had wholly failed to charge that the entryman's default was not due to his military or naval service.

This Department can not concur in the Commissioner's conclusion that this case must be dismissed on that ground, because in his ap-

plication for an extension of time the entryman stated that he was a veteran of the Civil War and had been prevented from establishing residence by the fact that he had since making the entry been physically unable to do so, and it was on that ground that the order for the extension was based by the General Land Office. The voluntary disclosure of these facts by the entryman cured the defect in the application to contest. See *Thomas v. Richey* (48 L. D., 181); *Evans v. Woodard* (48 L. D., 232).

However, the judgment rendered by the local office can not be sustained for other and controlling reasons. In the first place it appears to be more than probable that the entryman died before the second application to contest was filed, and no mention is made in that application of his death. Furthermore it is clear that the contestant knew of the entryman's death before he attempted service by publication because in his application for that service he disclosed his death and mentioned "as an heir Sherman Bashaw," but he did not in that application, or in any other manner, give the "name and residence of each party adversely interested, including the age of each heir" of the entryman, as he should have done in order to meet the requirements of Rule 2, Rules of Practice (44 L. D., 395).¹ Nor did he state what effort he had made, if any, to ascertain the names, ages, and whereabouts of such heirs, or say whether the entryman left a widow, or devisees. For these reasons an order for the publication of notice of contest should not have been made. *Moody v. Myers* (45 L. D., 446).

Again, the default judgment was improperly rendered for the reason that in such cases it is incumbent on the contestant to submit proof to sustain his charges. *Goudy v. Heirs of Morgan* (44 L. D., 376).

For these reasons the decision of the Commissioner is hereby modified, and when this decision becomes final the contest will be dismissed.

FOULK v. NEILSON.

Decided February 10, 1922.

CONTEST—MILITARY SERVICE—NAVAL SERVICE—AFFIDAVITS—ACT OF JULY 23, 1917—STATUTES.

The nonmilitary and nonnaval service averment required by the act of July 23, 1917, must be expressed in the words of the statute or be sufficiently broad to include both military and naval service, and contest affidavits which contain expressions as "said default was not due to military service of any kind or service in any organization connected with the military department of the United States," and "absence was not due to military service of any nature" are defective.

¹ See Rules of Practice, reprint July 13, 1921 (48 L. D., 246).

CONTEST—MILITARY SERVICE—AFFIDAVIT—JURISDICTION—ACT OF JULY 28, 1917—STATUTES.

The nonmilitary and nonnaval service averment requirement of the act of July 28, 1917, is directory and mandatory, but it is not jurisdictional where, a contest having been entertained upon a defective affidavit, it is conclusively shown that the contestee was not of the class for whose benefit the legislation was enacted, notwithstanding that a departmental regulation makes it compulsory that such requirement shall be complied with in all contests thereafter initiated.

CONTEST—MILITARY SERVICE—AFFIDAVIT—ACT OF JULY 28, 1917.

While the provisions of the act of July 28, 1917, were intended to afford protection only to those of the class specified in the statute, yet a departmental regulation requiring the nonmilitary and nonnaval service averment in every contest affidavit thereafter filed is not only a proper one but is also necessary in determining whether a contestee was or was not in the military or naval service.

CONTEST—CONTESTANT—MILITARY SERVICE—PRACTICE—AFFIDAVIT.

The act of July 28, 1917, which was intended to protect those coming within the class specified in the statute, relates to the matter of pleading, the burden being placed on the contestant at the outset, but if the contestee fails to object to the allowance of a contest upon a defective affidavit, and it is afterwards conclusively shown that the latter is not entitled to the protection of the act, advantage can not then be taken by employment of a technicality under a departmental regulation to set aside a judgment holding the entry for cancellation for good and sufficient reasons.

CONTEST—REINSTATEMENT—EVIDENCE.

An answer incorporated by a contestee as a part of his motion for reinstatement of a contest is to be treated as evidence in the consideration of the case upon appeal on denial of the motion.

DEPARTMENTAL DECISIONS CITED AND FOLLOWED.

The cases of *Thomas v. Richey* (48 L. D., 181) and *Evans v. Woodard* (48 L. D., 232) cited and followed.

FINNEY, *First Assistant Secretary*:

This is a case which involves a contest initiated February 4, 1921, by Arthur W. Foulk against the second homestead entry 026807 made February 12, 1920, by Andrew Neilson, for lots 1, 2, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 6, T. 22 N., R. 69 W., 6th P. M., Cheyenne, Wyoming, land district. The contestant has appealed from a decision rendered June 17, 1921, by the Commissioner of the General Land Office, directing the dismissal of the contest on the ground that the charge contained in the application and corroborating affidavit was not sufficient to meet the requirements of the act of July 28, 1917 (40 Stat., 248).

The local officers allowed the contest and issued notice for personal service, which was duly had. On March 15, 1921, the contestee, by his attorney, filed a motion to dismiss, setting forth several reasons upon which he based the insufficiency of the charge, among which was

the failure of the contestant to allege that the contestee's absence was not due to *naval* as well as *military* service. On the same day the local officers denied the motion, subject to right of appeal within thirty days, and submitted the case to the Commissioner of the General Land Office with a recommendation that the entry be canceled for failure of the contestee to answer. On March 29, 1921, the latter ordered the entry canceled, and on March 31, 1921, the cancellation was noted of record and the case closed. On April 1, 1921, the local officers notified the contestant of his preference right privilege, whereupon he filed an application to enter the lands in question which was allowed April 22, 1921.

On April 11, 1921, the contestee entered an appeal, setting forth eight assignments of error, among which was one urging the insufficiency of the nonmilitary averment portion of the affidavit. On April 27, 1921, the Commissioner held that the contest charges and the corroborating affidavit were sufficient; that there was no showing warranting consideration upon equitable grounds; and that the motion and appeal should be dismissed.

On May 4, 1921, the contestee filed in the local office an application for permission to submit answer and with it he filed his answer. The local officers transmitted the papers to the Commissioner of the General Land Office with a statement that they had denied the application for the reason that the case had been closed and the contestant had been allowed to enter the land.

On May 11, 1921, the contestee filed in the local office a motion to have the contest reinstated, and appended to it a copy of the answer, referred to as Exhibit "A," with the request that it be considered in connection with the motion.

The contestee, in his motion to reinstate the contest, referred to the fact that at the time the local officers denied his application to file answer, they advised him that he should either move for a reopening of the case or appeal to the Secretary of the Interior. He called attention to the fact that the Commissioner had caused the case to be closed before the time granted to him to enter an appeal had expired; that he had not been given an opportunity to file an answer; that he had expected that he would be permitted to file one and have a hearing on the merits; that injustice would be done him unless he be permitted to answer; that if such permission be granted he will defend the charges on a date set for a hearing. He requested that the contest be reopened; that his answer be given consideration and that a hearing be set before the register and receiver.

In his decision of June 17, 1921, here appealed from, the Commissioner, after reviewing the various stages of the proceedings, held that he had the authority to reconsider and correct any action there-

tofore taken; that in view of the holding of the Department in the unreported case of *Mundt and Moore v. LeMaster* (D-49267-Guthrie 06665), decided March 5, 1921, the conclusion reached in his previous decision of April 27, 1921, was erroneous. He, therefore, directed that the case be reopened, the contest be dismissed on the ground that the charges were not sufficient to sustain the proceeding, and that the contestee's entry be reinstated. He quoted from that portion of said departmental decision which had reference to the requirement of the nonmilitary service averment. Following is the quoted portion of the decision:

The requirement that in all contests hereafter initiated it shall be alleged in the preliminary affidavit that the defaults alleged are not due to entryman's employment in the military or naval service is mandatory and jurisdictional. The statute itself uses both terms "military or naval service" and all affidavits of contest filed in which abandonment is alleged must conform to the requirements of the act. The two terms are not synonymous. They are entirely separate and distinct and an averment in a contest affidavit that the defaults of the entrman are not due to *military service* might be proven and yet not make a case calling for the cancellation of the entry because the benefits of the law are conferred equally upon those employed in the *naval* service.

In his appeal the contestant urges that there is no sufficient ground warranting the dismissal of the contest; that the contestee has never made any claim to having been in the military or naval service during the period covered in his entry; that the reason given for the absence from the land was that the entryman was engaged in farm work upon his farm three and one-half miles distant, on which he continued to reside; that said statements are fully corroborated by witnesses and record evidence.

The contestee has filed a motion to dismiss the appeal alleging that it does not meet the requirements of the Rules of Practice; that the evidence upon which the appellant relies is *ex parte* and inadmissible; and that the contest affidavit is defective, which defect is jurisdictional.

The decision appealed from considered only one point, the sufficiency of the charge upon which the contest was based. The first two contentions made by the appellee need not be considered herein, but in order to make a proper disposition of the case in the present state of the record the Department finds it necessary to construe the law with reference to three separate issues: (a) whether or not the charge in the contest affidavit is sufficient to meet the requirements of the act of July 28, 1917; (b) whether or not the requirement of a sufficient affidavit is jurisdictional; and (c) if such requirement is not jurisdictional, whether or not the answer filed by the contestee after he had moved to dismiss the contest on account of the insufficiency of the charge, constituted a waiver of his right to have the issue decided on his demurrer.

The pertinent portion of the act of July 28, 1917, *supra*, reads as follows:

Hereafter no contest shall be instituted on the ground of abandonment, nor allegation of abandonment sustained against such settler, entryman, or person unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases hereafter initiated that the alleged absence from the land was not due to his employment in such military or naval service.

The charge contained in the contestant's application was set forth in the following language:

That said Andrew Neilson has abandoned the land for more than six months last past and has failed to improve and cultivate the land according to law. That absence is not due to military service of any nature.

The corroborating affidavit was similarly worded.

The contestee's answer was incorporated by him as a part of his motion for reinstatement of the contest. He not only invited attention to it, but requested that it be considered. It was before the Commissioner at the time that he rendered his decision. He is chargeable with a knowledge of its contents. It is now a part of the record and the Department concludes that it should be treated as evidence bearing on the issue.

The contestee stated in his answer that besides endeavoring to improve his second entry, he was taking care of 40 acres of hay land on a farm three and one-half miles from the homestead, which kept him away from his entry much of the time, but that he had never abandoned it. While he did not affirmatively make any assertion to indicate whether or not he was in the military or naval service at any time during the period covered by his entry, yet his accounting for his absence shows that his whereabouts during that time negatives the conclusion that he was in such service.

In consonance with the holdings of the Department in the unreported cases of *Mundt and Moore v. LeMaster, supra*, and *Wakefield v. King* (A-1818, Santa Fe 039618), decided March 5, 1921, and November 10, 1921, respectively, a contest affidavit is defective if it does not contain an averment that the entryman was not engaged in the *naval* service as well as in the *military* service, and such expressions as "said default was not due to military service of any kind or service in any organization connected with the military department of the United States," and "absence was not due to military service of any nature," do not fulfill the requirement of the act. Those decisions are still adhered to in so far as that point is in question. The averment should be expressed in the words of the statute or be sufficiently broad to include both military and naval service. Advantage of the defect may be taken by the contestee by demurrer.

The Commissioner, in holding the contest for dismissal, relied upon the statement contained in the case of *Mundt and Moore v. Le-Master*, *supra*, that the requirement of the nonmilitary and nonnaval service averment by the act of July 28, 1917, is "mandatory and jurisdictional." The paragraph in which that expression was used was quoted in the later decision of *Wakefield v. King*, *supra*.

It becomes necessary, therefore, to consider what the intention of Congress was when it enacted the statute here in question. In arriving at a correct conclusion as to that point the portions *in pari materia* of section 1 of the act must be construed together. The act granted relief to any settler upon the public lands of the United States or any homestead entryman who, after such settlement or entry, "enlists or is actually engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged." The language used later on in said section that "hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any *such* settler, entryman or person," except where the contest affidavit contains the nonmilitary service and nonnaval service averment, clearly shows that Congress intended that such averment should be made before a contest proceeding could be initiated against an entry made by one coming within the class specified in the act. It was clearly not intended, however, that the protection conferred by it was to be accorded to one who was not of the class for whose benefit the legislation was enacted.

The Department, as a matter of administration and in order to safeguard the interests of those for whose protection the statute was enacted, issued a regulation requiring that the nonmilitary service averment should be incorporated in all contest affidavits filed thereafter. The regulation, in the opinion of the Department is not only a proper one, but is absolutely necessary, otherwise there would be no way of knowing in advance whether any contestee was or was not in the military or naval service. But it is broader than the act itself. *Evans v. Woodard* (48 L. D., 232). Congress did not impose upon the Land Department the duty to regulate that the requirement should be inserted in every contest affidavit.

If an entryman whose entry is made the subject of contest is of the class for whose benefit Congress legislated, the statute makes the requirement to aver that the absence was not due to military or naval service both directory and mandatory. It relates to the matter of pleading. The contestee is relieved of raising the point by plea and the burden is placed on the contestant at the outset. The omission

of the averment from the affidavit makes it so fatally defective that process should not be issued thereon, and, should process be inadvertently issued, a motion to dismiss or demurrer thereto *must* be sustained. The denial of that right to the contestee is ground for reversible error.

By regulation, however, the Department has made compulsory in all contests thereafter initiated the filing of the affidavit described in the act of July 28, 1917. In respect to the initiation of contests, therefore, all contestants are required to make the same preliminary showing irrespective of whether or not the contestee comes within the class which the statute protects. If a proper affidavit is not submitted process should not be issued. If process be issued, the contestee, although not of the class protected by the act, may object to the proceeding and his objection should be sustained.

Cases have frequently arisen, however, where contests have been allowed to proceed to hearing without the proper affidavits having been filed by the contestants, either on account of the erroneous action of the local officers in refusing to sustain objections raised by contestees or by reason of the failure of contestees to take advantage of the defective pleadings. It has been subsequently shown in those cases that the entrymen were not of the class for whose benefit Congress legislated. The question of the jurisdiction of the Land Department to try such contests is often raised on appeal to this Department as has been done in the instant case. This appeal, therefore, goes to the power of the Department to hear and determine a contest initiated upon a defective affidavit where it has been conclusively shown that the contestee is not of the class for whose protection the affidavit was required.

The Department has previously held in the cases of *Thomas v. Richey* (48 L. D., 181), and *Evans v. Woodard*, *supra*, that where a contest proceeds to a hearing and it is clearly shown that the contestee is not of the class protected by the law, the regulation has no controlling effect. In that event the requirement is clearly not jurisdictional. The contestee does not come within the protection of the statute. Yet even in that event he *may*, under the departmental regulation, take advantage of the defective affidavit by motion to dismiss or demurrer, and such objection *should* be sustained. However, he can not later employ a technicality, placed within his grasp by a regulation, to set aside a judgment holding his entry for cancellation for good and sufficient reasons. While the nonmilitary and nonnaval averment has, by departmental regulation, been made mandatory in every contested case thereafter arising, yet to hold that it is jurisdictional in this class of cases would amount to an interpretation of the act of July 28, 1917, *supra*, different from that which Congress intended. The case of *Mundt and Moore v. LeMaster*, *supra*, in

which the term "mandatory and jurisdictional" was used will not be adhered to whenever it is found to be in conflict with the later cases of *Thomas v. Richey* and *Evans v. Woodard*, or with the principle enunciated herein. The case of *Wakefield v. King*, *supra*, which was decided subsequently to the decision in *Evans v. Woodard*, did not consider the question of the jurisdictional effect of the statute and consequently, by incorporating the paragraph quoted from the *Le-Master* case, the Department had no intention of vacating or modifying the principle enunciated in the *Richey* and *Woodard* cases. That principle is still adhered to.

In the case at bar the contestee pursued the proper course at the outset. However, instead of adhering to that course, he later chose to file an answer. By his answer he showed that he was not entitled to the protection of the act of July 28, 1917. His answer places him within the same category as the contestees in the *Richey* and *Woodard* cases. The failure on the part of the contestant to insert in his affidavit the averment required by the departmental regulation is not, therefore, a fatal defect. This is an entirely different case from that in which the contestee is of the class for whose benefit Congress legislated.

In view of the foregoing presentment of the law and facts, the action of the Commissioner in holding the contest for dismissal was erroneous, the decision of June 17, 1921, is reversed, and the case is remanded that it be reopened and proceed to hearing on the answer filed by the contestee.

AROUNI v. VANCE.

Decided February 10, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—SECOND HOMESTEAD—ENTRY—RELINQUISHMENT—PREFERENCE RIGHT.

An application for a second homestead entry under the act of September 5, 1914, filed by one having the requisite qualifications, assumes, during the pendency of action as to the question of its allowance, the status of an entry within the operation of the oil leasing act of February 25, 1920, irrespective of whether or not he executed a formal relinquishment, and confers upon the applicant a right to prospect the land superior to that of a prior applicant for a permit without a preference right.

FINNEY, *First Assistant Secretary*:

After having made homestead entry Glasgow 048793 and attempted for a while to comply with the requirements of the law thereunder, Kaffia Arouni found that adverse conditions would prevent her from acquiring title to the land embraced in that entry and, consequently, she concluded to abandon it, and on October 10, 1919,

filed her application Havre 044262, to make a second entry under the act of September 5, 1914 (38 Stat., 712), for the N. $\frac{1}{2}$, Sec. 28, T. 37 N., R. 15 E., M. M., Montana, under the enlarged homestead law. No entry has yet been allowed under that application, which was suspended at the time it was presented and forwarded to the General Land Office for its approval under the usual course of procedure in such cases.

On January 8, 1921, and long after Arouni's perfected homestead application was presented, Harry A. Vance filed his application Havre 045994, for an oil and gas prospecting permit covering the E. $\frac{1}{2}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 21, and the entire tract embraced in Arouni's homestead application, and 16 days later Arouni filed her similar application 046035, for the tract covered by her homestead application and also the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21, same township.

By its decision of November 19, 1921, the General Land Office held that the fact that Vance had filed his application before Arouni presented her application for a prospecting permit gave him the superior right to a permit for the reason that Arouni could not claim a preferred right inasmuch as no entry had been allowed under her homestead application.

In her appeal from that action Arouni urged in effect that she should be awarded a preferred right for the reason that her perfected homestead application had, without any fault on her part, been pending without action for more than two years and should therefore be treated as an entry for the purposes of this case.

On May 11, 1921, and before Arouni's appeal had been reached for consideration in this Department, the General Land Office, in letters addressed to her and to the register and receiver, called attention to the fact that its records failed to show that she had filed a relinquishment of her Glasgow entry and directed the register and receiver to at once notify her that if she failed to file such a relinquishment within 30 days her application to make a second homestead entry would be rejected.

In response to that requirement Arouni claimed that she filed her relinquishment of the Glasgow entry about the time she presented her application to make the second entry, and a controversy has arisen as to the correctness of that statement. She did, however, file a relinquishment in compliance with that requirement.

In the opinion of the Department the decision in this case does not turn on the question as to when the Glasgow entry was relinquished, or as to whether it was relinquished at all or not. The act on which this application for a second entry was based gives the right to make such an entry to any person, otherwise qualified "who through no

fault of his own, may have lost, forfeited, or abandoned" his former entry.

It will be observed that the right of second entry is given by the act to one who has "abandoned" his former entry. The act does not specify that that "abandonment" must be evidenced by a relinquishment or in any other particular manner.

In the case of *William H. Archer* (41 L. D., 336) it was said that—

The fact of abandonment of a former entry gives benefit of statute, whether the former entry is formally canceled on the record or not. *Walton v. Monahan* (29 L. D., 108); *Liberty v. Moyer* (38 L. D., 381); *Turney v. Manthey* (32 L. D., 561); *Lean v. Kendig* (36 L. D., 221).

See also *Ramage v. Beckworth* (41 L. D., 373, 375).

In her application to make the second entry Arouni swore that as to her former entry "I am relinquishing the same at once, have abandoned it." And in the affidavit filed by her in support of that application, which was corroborated by the oaths of two other persons, she swore as to the land covered by her Glasgow entry as follows:

I have lived on the land for two years except in the winter months. None broken—could not break it. * * * I have abandoned the claim since last summer. Have just executed a relinquishment on this land and delivered it to the Glasgow office. * * *

This land turned out to be all gumbo and alkali and it has been impossible to break it, or have it broken. I have tried a number of times to get it broken, and no one will even make an attempt at it, and consequently it is impossible to make a living on this land and I can not complete the entry.

Even if a formal relinquishment of the entry was not filed in the beginning these declarations could readily have been taken as being in effect a renunciation of all further claim under that entry, a very positive evidence of abandonment, and for that reason they could very well have formed the basis of an order by the General Land Office canceling that entry.

Nor can the fact that an entry has not been formally allowed under the application be said to defeat her preferred right to a prospecting permit because it has been long and very well settled that the allowance of an entry relates back to the date of the filing of the application on which it is based and gives all rights that would have attached if the entry had been timely allowed. *Ramage v. Maloney* (1 L. D., 461); *Wydler v. Keeler* (13 L. D., 288); *Mills v. Daly* (17 L. D., 345); *Smith v. Malone* (18 L. D., 482, 486).

And this doctrine has been so far extended in certain instances as to give an applicant the benefit of statutes relating only to entries allowed prior to their enactment in cases where applications pending at the time of the passage of the statutes were not allowed until after

the statutes become laws. See Charles C. Conrad (39 L. D., 342), and other kindred cases. Louis Zuckman (40 L. D., 25).

And that rule was also lately applied in the case of Rippy v. Snowden (47 L. D., 321), in which the facts were practically identical with those in this case. There Rippy had applied to make an enlarged homestead entry under the second entry act of September 5, 1914 (38 Stat., 712). Before that entry was allowed Rippy filed his application to make a stock-raising entry as additional to the land embraced in his pending application, and later Snowden filed his similar application and contended that he had the superior right because an entry had not been allowed under Rippy's enlarged homestead application.

In deciding that case this Department held that inasmuch as Rippy's rights under his enlarged homestead entry related back to the date of the presentation of his application therefor his pending application was a sufficient basis for the application to make the additional entry, and gave him rights larger than those of Snowden. It was said in that decision that—

To hold otherwise would be to render his (Rippy's) status and his rights dependent upon the delay incident to the transmission to and consideration by the General Land Office of his application for second entry.

The holding in that case is entirely decisive of the controlling question presented in the present case, and the decision here appealed from is, accordingly, hereby reversed.

HELLER v. HART.

Decided February 15, 1922.

APPLICATION—WATER EXPLORATION PERMIT—ACT OF OCTOBER 22, 1919.

Lands within a proven artesian well area in which wells are being successfully used for irrigation at a reasonable cost are not of the character that the act of October 22, 1919, contemplated should be designated as subject to exploration and an application for a water exploration permit embracing lands within such area must be denied, notwithstanding that it has not been clearly shown that all of the lands described in the application can be thus irrigated.

FINNEY, First Assistant Secretary:

On March 7, 1921, Charles Francis Hart filed his application, Carson City 013193, for a permit to explore for water on a tract of land described therein as follows: N. $\frac{1}{2}$ N. $\frac{1}{2}$, S $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 31, T. 32 N., R. 20 E., Lots 2, 3, 4, 5, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 6, N. $\frac{1}{2}$, NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 7, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 18, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$,

Sec. 5, S. $\frac{1}{2}$, SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, N. $\frac{1}{2}$ N. $\frac{1}{2}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 8, NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 9, N. $\frac{1}{2}$, Sec. 16, T. 31 N., R. 20 E., SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 13, T. 31 N., R. 19 E., Mount Diablo Meridian, Nevada.

On March 21, 1921, Arthur V. Heller filed his similar application 013194 embracing the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 5; all of Sec. 8, S. $\frac{1}{2}$ S. $\frac{1}{2}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 9, N. $\frac{1}{2}$ Sec. 17, N. $\frac{1}{2}$, Sec. 16, N. $\frac{1}{2}$, Sec. 15, W. $\frac{1}{2}$, SE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, T. 31 N., R. 20 E., Mount Diablo Meridian, Nevada.

Later, Heller filed a protest against the allowance of Hart's application asking that it be denied because the lands embraced in it are not in a reasonably compact form, and for the further reason that there are artesian wells now located on lot 2 of section 6, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, and the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$; Sec. 18, T. 31 N., R. 20 E.

By its decision of September 20, 1921, the General Land Office sustained Heller's protest and held Hart's application for rejection because there was a great and unjustifiable lack of compactness in the tracts mentioned therein, and at the same time Heller's application was suspended to await such final action as might be taken on Hart's application.

In his appeal from that action Hart attempts to set up facts which in his opinion justify the lack of compactness, and bring his application within the rule as to compactness prescribed in the regulations issued under the act mentioned; but in the opinion of this Department it is not necessary to here enter into a consideration of that question at all, because it is apparent that neither of these applications can be allowed for the reason that the lands involved are not of the character prescribed by the statute as being subject to the granting of such permits.

These applications are both based on the act of October 22, 1919 (41 Stat., 293), section 1 of which gives the Secretary of the Interior the power to grant to a qualified person—

a permit, which shall give the exclusive right, for a period not exceeding two years, to drill or otherwise explore for water beneath the surface of not exceeding two thousand five hundred and sixty acres of unreserved, unappropriated, nonmineral, nontimbered public lands of the United States in the State of Nevada not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply: * * * *And provided further,* That said land shall theretofore have been designated by the Secretary of the Interior as subject to disposal under the provisions of this act.

From this it will be seen that before such permits as these applicants are seeking can be granted it must not only appear that the lands applied for are "not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply," but they must also have been designated by the Secretary of the Interior "as subject to disposal under the provisions of this act."

Now it clearly appears that these lands should not and will not be designated in that manner, because there is with the record a communication from the Director of the Geological Survey dated December 12, 1921, in which he refers to the lands embraced in Heller's application and says:

Information obtained through recent field examination by a classifier of the Geological Survey indicates that the land involved in this application is located in a proven artesian well area where flows from 10 to 300 gallons per minute are found at depths of 160 to 300 feet. Several wells in the immediate vicinity that are being successfully used for irrigation of the land involved in this case can be obtained at a reasonable cost. The land therefore is known to be irrigable and is not of a character properly subject to designation under the ground-water reclamation act.

While it is true that the lands mentioned in the Director's letter do not include all the land applied for by Hart, it must be held that his recommendation also fatally affects Hart's application as to all the land he applies for. This conclusion is amply supported by the fact that Hart states in his application for the permit that "there are artesian wells in the vicinity of the land," and in his appeal he admits that there are at least two such wells on tracts applied for by him or on tracts adjoining them. Not only this, but the Director refers to the lands applied for by Heller, a part of which are in Hart's application, as being "in a proven artesian well area," and that area must, under all the circumstances stated be assumed to include all the lands embraced in both these applications.

For these reasons the decision appealed from is hereby modified, and the case is remanded with directions that these applicants be informed that their applications will be finally rejected if they fail within thirty days from notice of this decision to show cause to the contrary.

PLATT v. PARDUN.

Decided February 18, 1922.

MILITARY SERVICE—CONTEST—ABANDONMENT—HOMESTEAD—ACT OF JULY 28, 1917—STATUTES.

The protection afforded by the act of July 28, 1917, to those in the military or naval service of the United States, whose entries became subject of attack by contest on the ground of abandonment, covers only the period of such service, and after discharge the homestead laws must be complied with by them, unless excepted by special statutory provision, to the same extent as by those not within the class protected by that act.

MILITARY SERVICE—CONTEST—AFFIDAVIT—HOMESTEAD—ABANDONMENT—RELINQUISHMENT—PREFERENCE RIGHT.

A contest affidavit charging abandonment of a homestead entry after the discharge of the entryman from the military or naval service of the United States is not defective for failure to plead literally in the terms of

the act of July 28, 1917, and such affidavit, if otherwise sufficient, will, upon relinquishment of the entry, support a claim of presumptive preference right as against a subsequent contestant.

FINNEY, *First Assistant Secretary*:

Roy I. Platt has appealed from a decision rendered by the Commissioner of the General Land Office September 13, 1921, dismissing his contest against homestead entry 031052, made by Wilber C. Pardun November 1, 1918, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Sec. 14, N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$, Sec. 23, T. 29 S., R. 53 W., 6th P. M., Pueblo, Colorado, land district, on the ground that the charge contained in the contest affidavit was defective.

The record discloses that on March 9, 1921, Roy I. Platt filed an application to contest the entry of Pardun, setting forth his charge in the following language:

That claimant has wholly abandoned said entry for more than eleven months last past; that claimant has failed to establish or maintain residence thereon; except claimant did at one time establish residence thereon; but for more than eleven months past claimant has not maintained residence or cultivated same since his discharge from the United States Army; that said absence is not due to any army or military service of any character as an officer, private soldier, sailor, marine, national guardsman, or any other organization for offense or defense in any war authorized by Congress in which the United States may be engaged.

Due notice of the contest was served upon the entryman. He failed to answer, however, whereupon the local officers transmitted the record to the Commissioner of the General Land Office with a recommendation that the entry be canceled.

On June 1, 1921, LeRoy L. Pilgrim filed a contest application against the entry of Pardun, which the local officers suspended to await the result of the action upon the contest initiated by Platt.

In the decision appealed from, the Commissioner held that the affidavit of contest is vitally defective in that it stated that the absence of the entryman from the land *is not due* to service in the military or naval forces of the United States, instead of following the words of the act of July 28, 1917 (40 Stat., 248), namely *was not due* to such service. Reference was made to the departmental regulations governing this point.

On August 24, 1921, the local officers advised the Commissioner of the General Land Office that a relinquishment of Pardun's entry had been filed on August 22, 1921, and that they had dismissed the contest initiated by LeRoy L. Pilgrim.

On November 12, 1921, the Commissioner of the General Land Office further considered the case and advised the local officers that the relinquishment had not been received in his office; that the contestant, Platt, could not acquire a preference right on the presump-

tion that the relinquishment was the result of the contest, if the affidavit was so defective that a contest could not be predicated thereupon. Paragraph 3 of the instructions of April 1, 1913 (42 L. D., 71), was cited as in point. He ordered that no further action be taken by them until the Department shall have rendered its decision upon the appeal of Platt.

The contestant discusses in his appeal the meaning which he intended to convey by the use of *is* instead of *was* and contends that the Department should not give to its use a narrow technical construction. It does not appear necessary, however, to set forth here the arguments made on behalf of the contestant.

Paragraph 2 of the instructions of April 1, 1913 (42 L. D., 71), reads as follows:

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.

Paragraph 3 of the regulations of April 1, 1913, *supra*, provides that—

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. * * *

It is specifically stated in paragraph 3 that the affidavit must be a good and sufficient one. Paragraph 2 is silent as to that point. However, the regulations contemplate that a good and sufficient affidavit of contest shall be an essential requirement governing presumptive preference rights in all cases where relinquishments have been procured, irrespective of whether or not notice of the contest shall have been served upon the contestee. It is incumbent upon the Department to determine whether or not the charge contained in Platt's affidavit was sufficient upon which to predicate a contest. That is the only issue to be decided in this case.

The contestant stated in his affidavit that the entryman had been in the military service and that he had been discharged therefrom; that the contestee failed to return to the land after said discharge and that the abandonment of it had continued for more than eleven months. The entryman subsequently relinquished, and the relinquishment was apparently filed in the local office by the contestant.

In the instant case the contestant alleges that the entryman was in the military service and that he was discharged therefrom. No

attempt was made to charge abandonment of the entry during the period that the entryman served in the Army. The absence referred to is the present, continuing abandonment that has occurred since the soldier's discharge. The entryman did not interpose any objection to the charge, but on the contrary executed his relinquishment. However, if he had not done so, the Department concludes that in this case the charge was sufficiently stated to enable it to sustain the contest, notwithstanding that the term *is not due* was used. It is obvious that Congress by requiring that the contest affidavit contain the averment that the absence *was not due* to military or naval service, intended to protect entrymen who were in such service and during the period of their service. It did not, however, intend that the protection should continue after their discharge. They must then comply with the law to the same extent as other entrymen except where special provisions have been made for their benefit. Where, as in this case, the charge is made that the abandonment had occurred after the discharge from the Army and was continuous for more than eleven months up to the time of the initiation of the contest, the use of the statement that the absence *is not due* to military or naval service, when construed with other portions of the charge, does not make the affidavit defective. The charge correctly sets forth what the contestant desired to prove and which, if proven, is a sufficient ground for cancellation of the entry.

In view of the facts as presented the Department concludes that the charge in Platt's affidavit was a good and sufficient one and that the contestant is entitled to the exercise of the presumptive preference right described in the instructions of April 1, 1913, *supra*.

Accordingly the decision of the Commissioner is reversed and the case remanded for further action consistent herewith.

CARLAND v. CONNOLLY.

Decided February 21, 1922.

CONTEST—HOMESTEAD—CANCELLATION—STOCK-RAISING HOMESTEAD.

The cancellation of a homestead entry upon contest is not a sufficient ground upon which to base a subsequent contest against a stock-raising homestead entry made as additional to the former, even though the latter entry was allowed during the pendency of the first contest.

CONTEST—CONTESTANT—PRACTICE—RULE 8, RULES OF PRACTICE—NOTICE.

A contest abates *ipso facto* if proof of service is not filed within thirty days from date of service, as required by Rule 8, Rules of Practice, in case no answer is submitted, and a second contest by the same contestant will not be sustained upon substantially the same charges, notwithstanding that the entryman was not served with notice of the first contest, unless satisfactory explanation is made why the first contest was not prosecuted.

DEPARTMENTAL DECISIONS CITED AND FOLLOWED.

Cases of *Schmidt v. McCurdy* (44 L. D., 568), *Wickham v. Heir of Uber* (46 L. D., 53), *Mallman v. Halff* (46 L. D., 164), cited and followed.

FINNEY, *First Assistant Secretary*:

Anthony J. Connolly made homestead entry, The Dalles 012298, for SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 27, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 34, T. 4 S., R. 14 E., W. M., Oregon, on December 3, 1913. Thereafter and on December 8, 1914, the said entryman made additional entry, The Dalles 014205, under the enlarged homestead act, for E. $\frac{1}{2}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 33, same township and range.

The said entryman filed application, The Dalles 016897, under the stock-raising homestead act, on July 26, 1917, for SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 33, T. 4 S., R. 14 E., W. M., with a petition for designation of all of said lands, and the said entry was allowed July 22, 1920.

Robert O. Carland filed application to contest said stock-raising homestead entry, The Dalles 016897, on March 26, 1921, and alleged—

That said Anthony J. Connolly has not established and maintained residence thereon for more than six months last past and that he has placed no improvements whatever upon the land and has wholly failed to comply with the law; that his original entries Nos. 011840 (012298) and 014205 * * * were canceled as the result of contest alleging in substance of failure to establish and maintain residence, and final proof submitted thereon was declared false and untrue as to residence; that this entry No. 016897 should have been canceled automatically with his original entry; that said failure of entryman to comply with the law was not due to his services in any branches or in the Army or Navy of the United States during the late war with Germany or in any war in which the United States is now or has been engaged.

The contest was allowed and notice for personal service was issued on March 26, 1921. An affidavit was filed on April 28, 1921, from which it appears that notice of contest was served upon the entryman personally on April 26, 1921.

The contestee by his attorney filed a special appearance on May 25, 1921, with a motion that the contest be abated on the ground that notice of contest was not served within thirty days subsequently to the date of its issuance, and on the same day the local officers dismissed the case for want of jurisdiction and allowed the contestant thirty days within which to appeal.

By decision of September 20, 1921, the Commissioner held that, the case being one of simple abatement, there was no right of appeal, but that, on proper showing, a new application might be filed by the contestant unless the said decision should become final and result in the cancellation of the entry.

The Commissioner further found that the contestant, Carland, on December 11, 1918, had filed application to contest said entry 012298, made December 3, 1913, and said additional entry 014205; made De-

ember 8, 1914, on the ground that the entryman had never resided upon the land but had visited it only occasionally and that such failure to reside on the land was not due to military or naval service; that said entries were held for cancellation by decision dated May 7, 1920, and that said decision was affirmed by the Department on November 29, 1920; that, by decision of February 25, 1921, the Department denied a petition for a rehearing and, by decision of March 14, 1921, the said entries were canceled and the case closed.

The Commissioner further held that the additional entry should not have been allowed during the pendency of the contest against the original entry, as the right to make an additional entry depends upon the subsistence of an original; that the additional entry, having been allowed erroneously, should have been held for cancellation when the original and first additional entries had been canceled. Accordingly, the Commissioner directed that said additional stock-raising homestead entry 016897 be held for cancellation.

The contestee appealed from that portion of the said decision of the Commissioner dealing with the status of the entry on the ground, generally, that the original entry, even though subject to cancellation, might be the basis for the additional entry and that a second contest on the same grounds should not be allowed the contestant.

In the case of *Mallman v. Halff* (46 L. D., 164), it is held (syllabus):

An original entry of record, although subject to cancellation upon proper proceedings, may nevertheless be basis for an additional entry under section 3 of the enlarged homestead act, and the additional entry may be perfected, even should the original be canceled.

It appears that in the above entitled case as in the case at bar a contest had been initiated against the original entry and was pending at the date the application was filed to make the additional entries under the enlarged and stock-raising homestead acts, respectively, and no reason appears why the rule applied in *Mallman v. Halff*, *supra*, should not also be applied in this case.

In the case of *Schmidt v. McCurdy* (44 L. D., 568), cited by the Commissioner, it is held that upon failure to file proof of service of notice of contest within thirty days from the date of service, the contest abates *ipso facto*, in case no answer is filed, without the necessity of action by the adverse party or the local officers.

In the case of *Wickham v. Heir of Uber* (46 L. D., 53), cited by the Commissioner, the notice of contest was never served upon the contestee, and it was held that a second contest upon the same grounds could not be maintained unless some satisfactory explanation were made why the first contest had not been prosecuted.

It is believed that the rule announced in *Wickham v. Heir of Uber, supra*, was correctly applied by the Commissioner to the facts in this case, and the record is remanded for action accordingly.

RICHARD G. PEEPLES.

Decided February 21, 1922.

DESERT LAND—EVIDENCE.

Desert entries will not be allowed in areas where there is no persuasive geologic, topographic, or other evidence tending to furnish a reasonable assurance of an existing, sufficient, and economically available water supply, and an exception to this rule will not be made on the ground that the lands are situated in an undeveloped field.

FINNEY, First Assistant Secretary:

This case is up for consideration on Richard G. Peeples's appeal from the General Land Office decision of October 20, 1921, which rejected his application, Phoenix 047804, to make a desert-land entry for the NW. $\frac{1}{4}$, Sec. 12, T. 5 S., R. 9 E., G. & S. R. M., Arizona, on the ground that the entryman's proposal to secure water for irrigation by sinking and pumping from a well about 70 feet deep on the land does not sufficiently appear to be feasibly possible.

This decision is based on the report of a special agent's field examination in which he says that the land is situated on a mesa on which there has been no attempt at irrigation; that there are three wells in that vicinity; one about one and one-half miles distant, 75 feet deep, that furnishes but a small supply of water for domestic uses; and the other two, located within two and a half or three miles from this land and on the same plane, had been sunk to a depth of 220 and 225 feet before water in pumping quantities was reached.

The applicant does not dispute these statements but bases his appeal on the ground, mainly, that this is an undeveloped field and that, therefore, the Government should permit him to make an effort to prove the possibility of irrigation in that locality.

This contention would not, in the opinion of this Department, justify the allowance of this application, under the conditions disclosed. While it is the policy of the Government to encourage the reclamation of arid lands this Department can not be unmindful of the fact that it is also its duty to prevent as far as is reasonably possible improvident entries which are more than likely to result in failures after large expenditures of time and money have been unwisely made. It is not intended by the enforcement of the present stringent regulations to shut out all efforts by pioneers in untried

fields, but entries in such fields can not be sanctioned unless there are at least persuasive geologic or topographic or other evident conditions that furnish reasonable assurances of an existing, sufficient, and economically available supply of water; and in this case there is not only a lack of such a showing but former efforts in that locality strongly indicate, if they do not positively demonstrate, that there is almost if not a complete absence of sufficient water that could be profitably used.

The unrestrained allowance of applications of this kind prior to the adoption of the present restrictive regulations resulted in so many entries that should never have been made as to call for an act of Congress to give relief to entrymen who had found it impossible to secure water. That act, however, does not afford relief under entries made at this time, and that fact furnishes a strong reason why the existing regulations should be strictly enforced.

The decision appealed from is, therefore, affirmed.

SPINDLE TOP OIL ASSOCIATION v. DOWNING ET AL.

Decided February 25, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—NOTICE—PREFERENCE RIGHT.

The act of February 25, 1920, does not require the posting of notice on the land preliminary to the filing of an application for an oil and gas prospecting permit, and one who posts notice and applies for a permit under section 13 of the act after the filing of an application by another under that section does not acquire a preference right to a permit.

OIL AND GAS LANDS—PROSPECTING PERMIT—COMPACTNESS—ELECTION.

Where an applicant for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, in good faith presents an application which does not conform to the requirements of the statute as to compactness, and the Land Department requires an election as to the land to be retained, the privilege to elect, if exercised within the specified time, is not defeated by an intervening application filed by another under that act.

DEPARTMENTAL DECISION CITED.

Case of Fred Mathews (48 L. D., 239) cited.

FINNEY, *First Assistant Secretary:*

June 23, 1920, George W. Downing *et al.* filed prospecting permit application 04755, under section 13 of the act of February 25, 1920 (41 Stat., 437), for Secs. 18 and 26, T. 7 S., R. 10 E., S. B. M., El Centro land district, California, claiming preference right by virtue of posting notice on the land on May 24, 1920. June 25, 1921, the Commissioner of the General Land Office held that the land selected was not in compact form, there being other more compact unappropriated public lands at the time of filing, and allowed applicants to elect which tract they would retain. They elected to retain section

26, and on September 22, 1921, the application was finally rejected as to section 18.

On February 18, 1921, the Spindle Top Oil Association filed prospecting permit application 05155 under section 13 of the act of February 25, 1920, for Secs. 14, 22, 24, and 26, T. 7 S., R. 10 E., S. B. M., claiming preference right by posting of location notice on February 10, 1921. On September 22, 1921, the Commissioner held the application for rejection as to section 26, on account of conflict with the prior application of Downing *et al.* From this decision appeal has been taken.

The appeal sets out that appellants made examinations of the land at various times and found no evidence thereon that any claim had been initiated until the 25th day of September, when notice of Downing's claim was found some half mile from the section in question; that assuming, from the fact that no notice of any conflicts had been given them for over eight months after their application was filed in the local office, no conflict existed, on the 24th of September they began active work on the property, the work on section 26 being the erection of a building; that they have also entered into various agreements and contracts based on the conditions recited. In addition, it is contended that Downing's claim to noncontiguous tracts could not be held a valid claim to either, and that his claim to section 26 was not perfected until he made his election, five months after the filing of appellant's application.

The application of Downing *et al.* was actually filed in the land office long prior to the posting of notice on the land by the appellant and it is not necessary to invoke the claim of preference right by virtue of posting. The law does not require the posting of notice on the land prior to the filing of a permit application, but accords to one who actually erects a monument on the land and posts notice of his intention to apply for a permit therefor a thirty-day preference right period within which to file his application. The appellants could have ascertained the existence of the prior application by inquiry at the local land office at any time. Their assumption that there was no adverse claim because they were not notified of a conflict for some months after they filed their application was entirely unwarranted. Nor does the fact that they have done some work on the land and have incurred obligations in connection therewith give them any right, for they had no legal right to enter upon the land and begin work thereon prior to the allowance of a permit.

The remaining contention is with respect to noncompactness. The Department has held that the requirement of the statute as to compactness is directory and not mandatory (Fred Mathews, 48 L. D., 239). The rule as laid down in the regulations is that incontiguous tracts within a limited radius may be included in a permit when

conditions are such that because of prior disposals a reasonable area of contiguous land can not be procured. This is a flexible rule and each case presented must be considered in the light of the particular conditions existing therein. Where an applicant in good faith presents an application which the Commissioner determines does not conform to the requirements of compactness, it has been the practice to allow him to make an election as to tracts he will retain, and such right is not defeated by a subsequent section 13 application. The defect is considered to be a curable defect, and in this case it was cured within the time allowed by the Commissioner.

The action appealed from is affirmed, the case closed, and the record returned to the General Land Office.

WILLIAM WARNKE.

Decided February 25, 1922.

RECLAMATION HOMESTEAD—WITHDRAWAL—RELINQUISHMENT—ACTS OF JUNE 25, 1910, AND AUGUST 13, 1914.

The proviso to section 10 of the Act of August 13, 1914, which amended section 5 of the act of June 25, 1910, does not contemplate that lands entered prior to June 25, 1910, and relinquished subsequently to the creation of a second form reclamation withdrawal, shall be subject to entry before the establishment of farm units and announcement of the availability of water, except by one who had acquired an equity in the relinquished entry.

DEPARTMENTAL DECISIONS CITED AND FOLLOWED.

Cases of Ethel L. Catron (42 L. D., 7), Fredrek Steebner (43 L. D., 263), and Fred Anderson (45 L. D., 504), cited and followed.

FINNEY, *First Assistant Secretary*:

March 28, 1919, William Warnke filed homestead application for the NE. $\frac{1}{4}$, Sec. 29, T. 1 N., R. 1 E., G. & S. R. M., Phoenix, Arizona, land district, which was rejected by the local officers for the stated reason that the land involved was not subject to entry because it was under second form withdrawal under the reclamation act and had not acquired status for entry under the provisions of the act of June 25, 1910 (36 Stat., 835), as no farm units had been established and no public notice had been issued announcing the availability of water for irrigation of said tract.

October 12, 1921, the Commissioner of the General Land Office reversed the action of the register and receiver and returned the application for allowance under section 10 of the act of August 13, 1914 (38 Stat., 686), amendatory of section 5 of the said act of June 25, 1910.

By telegram of December 30, 1921, the register and receiver suggested to the Commissioner that his decision of October 12, 1921, appeared to conflict with departmental decision in the case of Fred Anderson (45 L. D., 504). In response, they were advised to withhold action on the application pending further instructions.

February 10, 1922, the Commissioner transmitted the record for departmental consideration. It appears that this land was withdrawn under the second form July 2, 1902, and is still so withdrawn; that no public notice has ever issued announcing that water is available for its irrigation, and no farm unit has been established including this land or any part thereof; that the land was entered by Sidney Henry July 24, 1907, which entry was relinquished by him January 22, 1908; that no subsequent entry affecting this land was made and it was vacant when Warnke filed the present application on March 28, 1919.

Section 5 of the act of June 25, 1910, *supra*, provides:

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.

That section was amended by the act of February 18, 1911 (36 Stat., 917), to read as follows:

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).

Said law was further amended by section 10 of the act of August 13, 1914 (38 Stat., 686), as follows:

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 per entry, and water is ready to be delivered for the land in such unit or some part thereof and such fact has been announced by the Secretary of the Interior: *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 reclamation law.

It will be observed that the act of June 25, 1910, absolutely cut off the right to make entry of lands withdrawn under the reclamation act where farm units had not been established, or where public an-

nouncement had not been made of date when water would be available. This resulted in hardships upon entrymen who had existing entries because they could not complete their titles on account of lack of water for reclamation, and could not dispose of their improvements to other prospective entrymen because, even if they relinquished their entries, no further entry could be allowed while the land remained in that condition. It was to relieve that class of cases that the amendatory legislation was enacted. This is shown in the report of the Department on the bill when the amendatory act of 1911 was pending in Congress. It was stated in said report in part that—

These settlers, many of them with from one to three years' residence to their credit, are not permitted under existing law to assign their entries. This results in hardships in many cases and it is believed that there should be some method by which such settlers who are unable to further maintain residence upon their claims because of the hardship incident thereto, or of the fact that their money has been expended, should be enabled to relinquish their claims, securing from other qualified settlers, who may desire to enter the same, compensation for the improvements placed upon the land.

Said bill, No. 9405, will afford relief to this class of entrymen by providing that the lands so relinquished shall continue to be subject to entry under the homestead law, subject to the terms and conditions imposed by the reclamation act. It is a measure which will afford relief to settlers, will operate in a limited number of cases only, and, in the opinion of the department, should be enacted into law.

The debate on the bill is to the same effect as shown by the following excerpts:

Mr. MANN. I can see no more reason for letting a man enter a piece of ground, unless he has bought the relinquishment, where it has already been entered before than where it has not been entered before. There is no distinction.

Mr. MONDELL. The gentleman is right in his view that an entryman can, under this act, sell his relinquishment. In some cases the entrymen have cultivated their lands or improved them quite extensively. They ought to be given the opportunity to get something for their improvements.

Mr. Mondell also called attention to the fact that the bill was suggested by the Reclamation Service because of the hardships met with in the field where homesteaders had spent a number of years on the land and found it impossible to remain and were unable to secure return for the improvements made. He further said:

This is simply to cover those cases where the men have gone on the land before the water was put on, to give them an opportunity to sell their improvements, and let some one else comply with the law.

This view of the law was applied by the Department in the case of Ethel M. Catron (42 L. D., 7), wherein it was said in effect that the act of February 18, 1911, was intended for the relief of those who were prevented by the act of June 25, 1910, from realizing the

value of their improvements by assigning their entries or by relinquishing them, so that the vendee of their improvements might make entry, and that "the act of 1911 must be construed according to its purpose and intent, rather than its letter." This doctrine was reiterated in the case of Fredrek Steebner (43 L. D., 263, 265-266), wherein it was said that the act of February 18, 1911—

was manifestly intended to apply to all such entrymen who have been or should be, by reason of the provisions of said act of June 25, 1910, prohibiting entries for such lands until public notice of water charges, etc., should be issued; prevented from realizing the value of the improvements placed by them on their entries by selling such improvements to others desiring to make entry for the lands upon relinquishment of their vendor's entry therefor, as might have been done prior to June 25, 1910, but which the act of that date prevented, as above stated.

In the case of Fred Anderson, *supra*, the Steebner case was cited with approval, and substantially the same language was employed in stating the purpose of the act of February 18, 1911. As to the point here involved, there is no material distinction to be drawn between the act of February 18, 1911, and the later amendatory act of August 13, 1914, *supra*.

In the present case there is no suggestion of any relation between the former relinquished entry and the present application. Indeed, the mere lapse of time between them, more than 11 years, practically precludes any such suggestion. The Henry entry was relinquished nearly two and one-half years before the law of June 25, 1910, was enacted. The land was subject to entry during all that time. Even after the date of the act of February 18, 1911, more than eight years elapsed before Warnke applied to enter. If he had in any manner acquired an equity in the former entry of Henry, doubtless it would have been made known long before the date when he filed the present application. The Department is clearly of opinion that the law was not designed to cover such a case as here presented. Therefore the decision of the Commissioner is vacated and the application is rejected.

UNITED STATES v. STATE OF NEW MEXICO.

Decided February 27, 1922.

RULE 72, RULES OF PRACTICE—COMMISSIONER OF THE GENERAL LAND OFFICE— APPEAL—JURISDICTION.

The principle previously enunciated by the Department that Rule 72, Rules of Practice, does not prevent the Commissioner of the General Land Office, before an appeal is taken, either on his own motion or where his attention is called to an error or omission, from reconsidering and correcting his decision in *ex parte* cases, is not to be construed as confined to cases of that class.

SCHOOL LAND—NEW MEXICO.

The grant to the State of New Mexico of certain designated sections of the public lands for school purposes embodied in the enabling act of June 20, 1910, became effective only upon and by force of the proclamation of admission of the State into the Union on January 6, 1912.

DEPARTMENTAL DECISIONS CITED AND CONSTRUED.

Cases of Nathan H. Pinkerton (40 L. D., 268), Stewart Campbell (42 L. D., 55), United States *v.* State of New Mexico (48 L. D., 11), cited and construed.

FINNEY, *First Assistant Secretary*:

This is an appeal by the State of New Mexico from an order and decision of the Commissioner of the General Land Office, rendered September 2, 1921, correcting and modifying his decision of August 11, 1921, in view of the discovery of a mistake of law applicable to certain of the controversies adjudicated in said earlier decision, the correction of which mistake altered said decision as to said controversies.

The appeal challenges the power of the Commissioner to correct, in cases such as this, his decision, prior to an appeal therefrom, and expressly excludes from its scope any appeal from the Commissioner's decision on its merits, "although the right to do so is not waived by the State."

The Commissioner's said first decision was on appeal from the register's and receiver's decision of October 23, 1920, following a hearing in adverse proceedings instituted by the United States against sundry school sections in New Mexico, upon charges that the lands were of known coal character prior to the date the rights of said State attached under its school-land grant. The grant of Sections 2 and 32 was made by the enabling act of Congress approved June 20, 1910 (36 Stat., 557, 561), providing for the admission of New Mexico as a State, but took effect only upon and by force of the proclamation of the admission of said State into the Union, which occurred January 6, 1912, as was held by departmental decision of February 15, 1921, in United States *v.* State of New Mexico (48 L. D., 11). That decision was overlooked in reaching said Commissioner's decision of August 11, 1921, and consequently certain evidence, in the record of said hearing, tending to show that Sec. 2, T. 18 N., R. 7 W., Sec. 32, T. 20 N., R. 8 W., and NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 32, T. 15 N., R. 9 W., in the Santa Fe land district, were of known coal character during the period intervening between said date of approval of said enabling act, June 20, 1910, and the date of said proclamation of admission, January 6, 1912, was held irrele-

vant, the State's rights being held to have attached June 20, 1910, instead of January 6, 1912.

This error and its vital influence upon said decision of August 11, 1921, having come to notice, the Commissioner of his own motion entered his decision of September 2, modifying that of August 11 by holding that said described lands were of known coal character when the rights of said State under its school-land grant attached, from which, as above stated, said State has appealed simply on the question of the Commissioner's power so to change his earlier unappealed decision.

It is argued that such a power is discountenanced by Rule 72 of the Rules of Practice as reprinted with amendments March 19, 1918¹, which provides that—

No motion for rehearing of any decision rendered by the Commissioner of the General Land Office will be allowed.

But this rule is merely intended to do away with consumption of time by a litigant in seeking from the Commissioner, change of a decision of his which can as well and more speedily be effected through its review on appeal to the department. It does not stand in the way of the Commissioner's correction, on his own motion, of his decision where an error in it has come to his notice prior to his appeal therefrom. This power of correction, on one's own motion, of one's own errors, before consideration of them by a tribunal of review has superseded the jurisdiction, inheres in every tribunal or adjudicating official, and it aids in arriving at a correct result of a controversy; for if rightly exercised it clears of possible error the record to be reviewed, while, if wrongly exercised the error will be set right, like other errors, upon consideration of the case on appeal.

The case of Nathan H. Pinkerton (40 L. D., 268), and Stewart Campbell (42 L. D., 55), which the appeal of said State cites as limiting the Commissioner's power of correction of his own decisions to those in *ex parte* cases, were *ex parte* indeed, but the principle laid down is not limited to such cases, and is clearly applicable to the situation here presented.

Although this appeal was by its terms confined to consideration of the Commissioner's jurisdiction to render his modifying decision of September 2, 1921, yet it brings the whole case before the Department, and that decision has also been reviewed upon its merits. The Department is satisfied that said decision is on its merits correct, upon both the facts and the law, and it is therefore affirmed.

¹ See Rules of Practice, reprint of July 13, 1921 (48 L. D., 246).

APPLICATIONS FOR LANDS AFFECTED BY WITHDRAWALS FOR TRANSMISSION LINES—FEDERAL WATER POWER ACT OF JUNE 10, 1920.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 28, 1922.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

Your letter of November 21, 1921, adverts to instructions of November 23, 1915 (44 L. D., 412), relative to the acceptance of applications to enter lands, part of which have been withdrawn for transmission lines, and requests advise as to the effect which should be given said instructions, keeping in mind sections 23 and 24 of the Federal Water Power Act approved June 10, 1920 (41 Stat., 1063), in connection with—

(a) Applications presented prior to the passage of said act for subdivisions affected by withdrawals for transmission lines, which applications have not yet been allowed, and

(b) Applications presented subsequent to the passage of said act for subdivisions affected by withdrawals for transmission lines.

General instructions under section 24 of the Federal Water Power Act were issued under date of November 20, 1920 (47 L. D., 595), and in view thereof the Department considers the instructions of November 23, 1915, obsolete.

Section 3 of the more recent instructions provides:

Where any application is presented which conflicts with a transmission-line withdrawal of a strip of land *crossing* the land applied for, you will, if otherwise regular, allow the entry, but will note upon the face of the entry papers, and upon your records, the following:

Entry made subject to conditions and reservations of section 24, Federal Water Power Act, approved June 10, 1920, in so far as transmission-line withdrawal No. —, created by Executive withdrawal of — (or water-power application heretofore filed under the act of June 10, 1920), may affect same.

Advice is also requested respecting the action to be taken upon isolated tract applications which were presented prior to the passage of the Federal Water Power Act for lands of like situation, but under which sales have not yet been ordered.

In these cases sale should be authorized in regular course, if otherwise proper, and if the lands are sold the entry papers should be endorsed in accordance with the regulation hereinbefore quoted.

E. C. FINNEY,
First Assistant Secretary.

ROBY v. KROKSTROM.*Decided December 12, 1921.***ADDITIONAL HOMESTEAD—ACT OF APRIL 28, 1904—COMMUTATION—PATENT—RESIDENCE—CULTIVATION.**

One who makes an additional entry under section 2 of the act of April 28, 1904, based upon a commuted original entry, is not entitled to a patent upon the strength of the latter entry, unless he had resided upon and cultivated the original entry for the full period prescribed by law precedent to patent, had it not been commuted; and where such requirement has not been met, he must continue to comply with the residence and cultivation requirement of the law for such period as added to that of the original entry will make the full period of residence and cultivation required by the law under which the patented entry was made.

ADDITIONAL HOMESTEAD—ACT OF APRIL 28, 1904—COMMUTATION—PATENT—RESIDENCE—CULTIVATION.

The residence provisions of the three-year homestead law can not be invoked by one who made an additional entry under the act of April 28, 1904, based upon a commuted original homestead entry made under the preexisting homestead law, but upon which residence had been maintained for more than three years prior to the submission of commutation proof, unless all of the requirements of the three-year homestead law precedent to the issuance of patent had been fulfilled.

ADDITIONAL HOMESTEAD—ACT OF APRIL 28, 1904—ALIENATION.

An entryman who, under the act of July 28, 1904, makes an entry as additional to a patented original entry, does not forfeit his right to perfect the former by the subsequent alienation of the latter, if he was at the time qualified to make the additional entry.

CONTEST—AFFIDAVIT—HOMESTEAD—ABANDONMENT—HEARING.

An allegation in a contest affidavit that an entryman had "wholly abandoned his original and his additional entry," is too general in its terms to warrant the ordering of a hearing, in that it does not show when the abandonment began or how long it continued.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Lyman v. Swick* (45 L. D., 325), cited and applied.

FINNEY, First Assistant Secretary:

On May 22, 1914, a patent issued to Johan Emil Krokstrom for lots 5 and 6, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 27, and lot 11, Sec. 34, T. 141 N., R. 28 W., 5th P. M., Minnesota, under his homestead entry, Cass Lake 03794, made May 15, 1909, and on commutation final proof made April 9, 1913, showing residence from June 1, 1909, to the date of the proof, or for a period of three years, ten months and eight days; and on April 26, 1916, he made entry for the adjoining lot 12 in said Sec. 34, under section 2 of the act of April 28, 1904 (33 Stat., 527) as additional to the land embraced in his original entry.

On January 15, 1920, E. H. Roby filed a contest against this additional entry charging "that said entryman shortly after making said additional entry sold and conveyed title to his original entry and removed therefrom and wholly abandoned said original entry and said additional entry."

By its decision of August 16, 1921, the General Land Office dismissed this contest on the ground that "no residence or cultivation is required on the additional entry where final proof upon the original entry has been made." That conclusion was based on the erroneous finding in that decision that "five-year final proof was submitted" under the original entry, and in his appeal from that action the contestant urges that erroneous finding as a reason why the Commissioner's action should be reversed.

The act of April 28, 1904, *supra*, authorizes persons who have made acceptable final proof under homestead entries embracing less than 160 acres to make entries such as the one here involved and declares that "patent shall issue (under such entries) without further proof."

Section 1 of that act authorized the allowance of second entries under other circumstances, and required proof of residence and cultivation thereunder, and section 3 says that commutation "shall not be allowed of an entry made under this act."

In construing the effect of this inhibition as to commutation on section 2 of the act this Department in its regulations issued September 11, 1908 (37 L. D., 160) said that "if the original homestead entry is commuted, no title will be passed to the entryman for the additional entry until he submits proof in the manner required by the homestead laws, showing that he has resided upon and cultivated the land included in the original entry for a period of five years or that he has resided upon and cultivated the land in the additional entry for such period as added to that of his residence and cultivation of the land in the original entry will make the full period of five years."

From the facts already stated it will be seen that this entryman lacked one year, one month and twenty-two days of having resided on the land for the required five years, and that, therefore, he cannot, under the regulation quoted, obtain title to the land covered by his additional entry until he furnishes proof that he has resided on and cultivated the land covered by it for the time that he lacked of completing his five years of residence under his original entry. A question, however, arises in this connection, as to whether this entryman can now urge that the provisions of the three-year homestead law, enacted prior to the final proof under his original entry, relieve him

of the necessity of residing on the land covered by his additional entry, in view of the fact that he resided more than three years under his original entry before he made proof. It is not believed that this entryman is in a situation to claim any of the benefits of the three year homestead law, because his final proof very clearly shows that he had not met all the requirements of that law and did not, therefore, attempt to make proof under it because of his lack of cultivation required by it. His final proof showed that he at no time cultivated more than 8.50 acres, or far less than the required one-eighth of the entire 148.91 acres covered by his original entry.

However, and notwithstanding these facts, it must be held that the contest charges are not sufficient to call for a hearing in this case. The charge that the entryman sold the patented land soon after his additional entry was made, avers an immaterial fact. While the entryman was required by the law under which the additional entry was made to show in support of his application that he was then the owner of and occupying the patented land, there is nothing in that statute which required him to continue to own and occupy it up to the time he made final proof under his additional entry, or for any other length of time after the additional entry is allowed. This Department in construing a similar statute in the case of Lyman D. Swick (45 L. D., 325) held that continuous ownership of the land originally entered and owned at the date of the application to enter was not essential to the acquisition of title under an additional entry if the entryman had again acquired the title. A kindred doctrine has been followed by this Department in numerous cases where it has been held that one who is qualified to make an entry at the time his entry is made does not forfeit his right to a patent by later placing himself in a position that would prevent him from making an entry.

The further allegation that this entryman had, since making the additional entry, removed from the land covered by the original entry "and wholly abandoned said original entry and said additional entry" does not state when the abandonment began or how long it had continued, and it is too general to warrant a hearing.

From these facts and considerations, it must be concluded that this contest should be dismissed, and in so far as the effect of the Commissioner's decision is concerned, it is hereby affirmed.

MARTHA HEAD ET AL.*Decided January 31, 1922.***ALLOTMENT—COAL LANDS—WITHDRAWAL—RESERVATION—SURFACE RIGHTS—ACT OF FEBRUARY 8, 1887.**

Only agricultural and grazing lands are subject to allotment under section 4 of the act of February 8, 1887, and where the lands embraced within an allotment application under that act are chiefly valuable for their coal contents, the allottee must file an election as prescribed by the act of March 3, 1909, and take with a reservation of the coal to the United States, as required by the act of June 22, 1910.

ALLOTMENT—INDIAN LANDS—PUBLIC LANDS—ACT OF MARCH 3, 1909.

The act of March 3, 1909, which makes provision for allotments in severalty is confined to such allotments on Indian tribal or reservation lands, and has no application to allotments on public lands made pursuant to section 4 of the act of February 8, 1887.

ALLOTMENT—CITIZENSHIP—ACTS OF FEBRUARY 8, 1887, AND MAY 8, 1906—STATUTES.

Children of an allottee, born after the parent had made an allotment under section 4 of the act of February 8, 1887, having received the status of United States citizenship by section 6 of that act, were not entitled to allotments thereunder, and the act of May 8, 1906, which amended section 6 of the former act by postponing the citizenship status until the expiration of the trust period, has no retroactive effect upon the children of allottees whose allotments were made prior to the enactment of the amendment.

ALLOTMENT—VESTED RIGHT—PUBLIC LANDS.

Section 4 of the act of February 8, 1887, does not confer upon an Indian a vested right to an allotment of public lands thereunder, and such right can not be acquired prior to the fulfillment of all of the conditions set forth in the act.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *United States v. Celestine* (215 U. S., 278), *United States v. Pelican* (232 U. S., 442), *Oliver C. Keller* (44 L. D., 522), *Billilik Izhi v. Phelps* (46 L. D., 283), cited and applied.

FINNEY, *First Assistant Secretary*:

Appeal is filed by Martha Head, a Catawba Indian, in her own behalf and by Pinkey H. Head on behalf of his minor children, Nellie A., Helen Katherine, George Willard, Heber, Mary Evelyn, and Lucy Head, all Catawba Indians, from decision of the Commissioner of the General Land Office dated June 13, 1921, involving allotments made by or in behalf of said parties on the public domain under the fourth section of the act of February 8, 1887 (24 Stat., 388), as amended for lands in sections 5, 8, 9, 22, and 27, T. 30 N., R. 15 W., N. M. P. M., New Mexico.

In all cases except that of Mary Evelyn Head, the appeal is from an order laid upon allottees requiring them to file election to receive

patents for the lands embraced in their allotments, reserving the coal in said lands to the United States under the act of March 3, 1909 (35 Stat., 844). In the case of Mary Evelyn Head, the allotment application filed in her behalf was held for rejection for the reason that she was born subsequent to the time her father, Pinkey H. Head, filed allotment application for himself under the fourth section of the act of 1887, reference being made to decision rendered in the case of Oliver C. Keller (44 L. D., 520, 522).

The township in question was withdrawn July 26, 1906, from filing or entry under the public land laws. This withdrawal was subsequently modified to apply to coal entries only; and was included in coal land withdrawal by Executive order of July 2, 1910.

It is urged in the appeal among other things that the lands in question are primarily valuable for their coal deposits; that the act of March 3, 1909 (35 Stat., 781, 783), recognizes the right of Indian allottees to the coal deposits in the lands covered by their allotments; that the coal land withdrawals in respect to the lands in question were made subsequently to the allotment applications and that as to Mary Evelyn Head, the rule laid down in the Keller case as to subsequently born children of allottees is wrong.

It has been held that the fourth section of the act of February 8, 1887, is in its essential elements a settlement law and that "to make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based upon settlement." Indian lands—Allotments (8 L. D., 647, 650). That is, only agricultural and grazing lands are subject to allotment under that section. The Indian is required to state the character of the land applied for under said section and at the same time to file a nonmineral affidavit. In other words, lands to which the mineral laws of the United States apply are not subject to allotment under the fourth section of the act of February 8, 1887. Consequently if the lands in question are chiefly valuable for their coal deposits, as alleged on appeal, they are clearly not subject to allotment under that section except upon election being made in accordance with the act of March 3, 1909 (35 Stat., 844), which provides—

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. * * * *Provided further*, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him.

The instructions issued under the above act specifically state that "it applies alike to locations, selections, and entries made prior to its passage and those made subsequently thereto." In view of the allegation and claim that the lands in question are primarily valuable for coal, it is unnecessary to have further evidence as to their coal character.

The act of June 22, 1910 (36 Stat., 583), authorizes agricultural entries and surface patents for lands withdrawn or classified as coal lands. It was held in the case of *Bililik Izhi v. Phelps* (46 L. D., 283), that the provisions of that act are applicable to allotments made under the fourth section of the act of February 8, 1887.

As to the act of March 3, 1909 (35 Stat., 781, 783), cited in the appeal, the same refers to allotments in severalty on Indian tribal or reservation lands and has no application to fourth section allotments on public lands.

The fourth section of the act of February 8, 1887, provides as follows:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations.

The construction placed upon this section in the regulations issued soon after the passage of the act of 1887 (Circular of September 17, 1887, unpublished) was as follows:

The fourth clause above cited, "To each other single person under eighteen years now living," etc., will be construed to embrace children who may be born prior to the date of the parent's application for an allotment.

The same rule was followed in the regulations issued under the fourth section April 15, 1918 (46 L. D., 344, 348), which read:

An Indian settler on public lands under the fourth section is also entitled upon application to have allotments made thereunder to his minor children, step-children, or other children to whom he stands *in loco parentis*, provided the natural children are in being at the date of the parent's application, or the other relationships referred to existed at such date.

Section 6 of the act of February 8, 1887, provides:

* * * 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* * * * is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges, and immunities of such citizens. (Italics supplied.)

It was held in the case of *Oliver C. Keller, supra*:

Therefore, at the time the parent applied for an allotment for himself under said section, he is also entitled to select allotments on behalf of his minor

children then in being. He is not entitled to select allotments on behalf of children that may be born thereafter, and this for the further reason that the act of 1887 in section 6 thereof declares every Indian to whom an allotment has been made under the provisions of said act to be a citizen of the United States. Hence, children born after the parent has been allotted have the status of citizens and not Indians, and are therefore not entitled to allotments under the fourth section.

Two propositions were involved in this holding, viz—an Indian parent is not entitled to select an allotment on behalf of a child born after he applies for an allotment for himself under the fourth section of the act of 1887 because the law as construed in the regulations was against such a selection. This is sufficient reason of itself. But the additional reason is stated that as the law declares the parent to be a citizen upon allotment being made to him, a child thereafter born to him has the status of a citizen and not that of an Indian. Exception is taken in the appeal to the second proposition on the ground that under the act of May 8, 1906 (34 Stat., 182), an Indian allottee does not become a citizen until the issuance to him of a patent in fee simple.

The act of May 8, 1906, *supra*, which was an amendment of section 6 of the act of February 8, 1887, provides:

* * * And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple *under the provisions of this act* * * * is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, etc. (Italics supplied.)

The allotment application of Pinkey H. Head for himself was made March 9, 1906, prior to the act of May 8, 1906. His child, Mary Evelyn Head, was born December 26, 1909, and allotment application was not filed on her behalf by the father until May 24, 1910, long after he received trust patent on his own allotment. The provisions of the act of May 8, 1906, clearly show that it was not intended to affect allotments applied for prior to its passage. Such allotments are governed by the provisions of the act of 1887, which declare that upon the making of allotments under that act the allottees shall become citizens. The purpose of the act of May 8, 1906, was as stated in the case of *United States v. Pelican* (232 U. S., 442, 450), "distinctly to postpone to the expiration of the trust period the subjection of allottees under that act to State laws." It was also held in the case of *United States v. Celestine* (215 U. S., 278, 291) that—

The act of May 8, 1906, c. 2348, 34 Stat. 182, extending to the expiration of the trust period the time when the allottees of the act of 1887 shall be subject to state laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty.

It is also urged in this appeal that the Indian has a vested right to an allotment under the fourth section of the act of February 8, 1887, and that the allotment right under such section becomes vested in an Indian child at the time of its birth, the parent on whom said act confers authority to make allotment selection for the minor child, acting only in the capacity of guardian or trustee for the benefit of the child. An Indian no more has a vested right to an allotment on the public domain than has a homesteader under the general homestead laws prior to the performance of certain required conditions. An Indian may have a vested right to an allotment in reservation lands because the lands being owned by the tribe in common, the individual member if otherwise qualified, has an inherent interest in such lands. But in respect to public lands, the situation is different as in the absence of such legislation as contained in the Indian homestead acts of March 3, 1875 (18 Stat., 402, 420), and July 4, 1884 (23 Stat., 76, 96), and the fourth section of the act of February 8, 1887, an Indian would not be entitled to apply for public lands. Besides only those Indians not residing upon a reservation or for whose tribe no reservation has been provided by treaty, act of Congress, or Executive order are entitled to allotments on the public domain under the fourth section of the act of 1887.

The requirement as to coal land election and the finding as to after born children both being in accordance with law, the decision of the Commissioner of the General Land Office in these cases is hereby affirmed.

OLE HOGELAND.

Decided February 13, 1922.

ENLARGED HOMESTEAD—SETTLEMENT—ADVERSE CLAIM—WITHDRAWAL.

The rule that a settler upon unsurveyed land subsequently designated under the enlarged homestead act is entitled to enlarge his claim to the full extent of 320 acres, is not applicable where an adverse claim intervenes prior to designation of the land; and an intervening withdrawal is such an adverse claim as will prevent the extension of the settlement claim to include more than 160 acres.

DEPARTMENTAL DECISIONS CITED AND DISTINGUISHED.

Cases of Northern Pacific Ry. Co. v. Morton (43 L. D., 60), and Fannie Lipscomb (44 L. D., 414), cited and distinguished.

FINNEY, *First Assistant Secretary*:

On May 10, 1917, Ole Hogeland filed application 013704 under the enlarged homestead act for lots 1, 2, and 4, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 18, T. 9 S., R. 9 E., M. P. M.,

containing 319.31 acres, in the Bozeman, Montana, land district, with which he filed a petition for the designation of said lands. Accompanying his application is his affidavit wherein he states "affiant further deposes and says that he settled on the land February 1, 1916, with the intention of claiming the same under the homestead laws, and that he has fenced (160 acres), built a house, and made other improvements, and has made his home thereon since settling on the land." The lands were designated subject to entry under the enlarged homestead act on August 5, 1919, and Hogeland's application was passed to entry on September 15, 1919.

By its decision of October 30, 1920, the General Land Office held that this entry had been erroneously allowed except as to 160 acres, for the reason that the land was temporarily withdrawn by Executive order of April 16, 1917, in aid of legislation to secure the use of the land as a game preserve, and rewithdrawn by Executive order of February 28, 1919. From this decision claimant has appealed.

The Executive order of April 16, 1917, excepted from the force and effect of the withdrawal "all lands covered by valid adverse claims initiated prior to the date hereof and maintained pursuant to law." It was further provided that if legislation were not enacted before the adjournment of the Sixty-fifth Congress, "and no other direction is given regarding the disposition of these lands, they will, on March 5, 1919, become subject to disposal under any law then applicable thereto without further notice." For the purpose of preventing the initiation of further claims to the lands and prior to March 5, 1919, namely, on February 28, 1919, the lands were again withdrawn in aid of legislation by Executive order No. 3053. Said withdrawal is still in effect. It is apparent, therefore, that the lands have not been subject to settlement or entry since April 16, 1917.

The entryman contends that on February 1, 1916, he settled on the lands embraced in his entry "and with the intention of taking all of it." It is true that the right acquired by settlement upon public lands is coextensive with the right of entry conferred by the homestead laws and that a settler upon unsurveyed land subsequently designated under the enlarged homestead act is entitled to make entry of the land embraced in his settlement claim to the full permitted area of 320 acres. See *Northern Pacific Ry. Co. v. Morton* (43 L. D., 60), and the case of *Fannie Lipscomb* (44 L. D., 414). But this right to extend the settlement claim can not become effective until the lands have been designated (*Instructions of April 16, 1912, 40 L. D., 578, 579*), and of course if an adverse claim intervenes prior to the designation, the settlement claim can not be extended. In the *Morton* case above cited, it is shown that Morton marked the 320 acres he claimed prior to the date of the filing of the selection by the railway company, and in the *Lipscomb* case, Lips-

comb's claim to the 80 acres in excess of the 160 acres originally settled upon was rejected for the reason that the school lands applied for by her were surveyed in the field in 1908, prior to the passage of the enlarged homestead act and prior to the date (May 1, 1909) she extended her settlement claim.

The withdrawal of April 16, 1917, which was extended by the withdrawal of February 28, 1919, and which is still in force, effectively precluded Hogeland from extending his settlement claim to 320 acres at the time the lands were designated. The Commissioner's decision requiring the entryman to reduce his entry to 160 acres of contiguous tracts, to indicate the 160 acres he settled on as his home and on which his improvements are situated, and to relinquish the remainder, is correct, and is accordingly hereby affirmed.

NORTHERN PACIFIC RAILWAY COMPANY.

Decided January 31, 1922.

RAILROAD GRANT—INDEMNITY—MINERAL LANDS—OIL AND GAS LANDS—SURFACE RIGHTS.

In expressly excluding mineral lands from the grant to the Northern Pacific Railroad Company by the proviso to section 3 of the act of July 2, 1864, Congress contemplated that mineral lands, in the absence of special provisions to the contrary, should be considered as entireties or as a single estate; and the act of July 17, 1914, did not expressly or by implication modify or enlarge the provisions of the grant so as to permit of the selection of the surface of oil lands as indemnity.

FINNEY, *First Assistant Secretary:*

The Northern Pacific Railway Company has appealed from the decision of the Commissioner of the General Land Office, dated August 28, 1920, and adhered to on September 14, 1921, holding for cancellation its mineral indemnity list No. 511, serial 039592, filed July 7, 1917, subject to the provisions of the act of July 17, 1914 (38 Stat., 509), for certain odd sections in T. 8 N., R. 59 E., M. M., Miles City, Montana, land district, for the reason that the lands having been included in prior place list No. 403, serial 011016 and in a petroleum withdrawal were not subject to selection pursuant to the surface act mentioned. In the last decision mentioned it was held that the provisions of the act of July 17, 1914, do not apply either to the grant in place or to the grant of mineral indemnity so as to permit a division thereof into an agricultural surface parcel and a mineral reserve parcel.

The lands are within the place limits of the Northern Pacific grant. Upon the filing of the township plat the company, on November 22, 1910, filed its place list No. 403, serial 011016, for all

the odd numbered sections in the township and at different dates thereafter portions of the land were patented. The tracts remaining unpatented were included in Petroleum Reserve No. 43 by Executive order of January 11, 1916. On July 7, 1917, the indemnity list here involved was filed, in which approved mineral bases were assigned for the selected tracts.

The contention of counsel is that it was error to hold that the place list constituted a bar to the filing of the indemnity selection list, the clear purpose of the company being to accept the situation arising from the withdrawal and thereafter to seek limited title to the tracts by way of indemnity. The decision of the Commissioner was technically correct. The acceptance and filing of the indemnity list in the face of the still pending place list was irregular, the company not having formally waived or relinquished its right under the place list. But this feature of the case may at this time be passed over and the far larger and more important question as to the availability in any event of these tracts under said act of July 17, 1914, considered.

Section 1 of said act reads in part as follows:

That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits * * * *Provided*, That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.

It is contended on behalf of the company that the provisions of the act are very plain and that any nonmineral claim, or claim limited to nonmineral lands, can be located under the act on an oil reserve upon the conditions indicated. The possible technical objection that these tracts are not agricultural lands, to which class of lands the indemnity right under the grant is limited, is avoided, so it is asserted, by said act of 1914, the very purpose and object of which is to permit a separation and disposition of the surface as an agricultural estate distinct and apart from the mineral deposit thereunder.

This contention calls for a consideration of the terms of the company's grant. By section 3 of the act of July 2, 1864 (13 Stat., 365, 368), the place grant to the Northern Pacific Railway Company was confined to the odd numbered sections, *not mineral*, with the proviso—

That all mineral lands be and the same are hereby, excluded from the operations of this Act, and in lieu thereof a like quantity of unoccupied and

unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided.

This section directed that the word "mineral" when used in the act should not be held to include iron or coal. Under the terms of the concluding section of the act Congress may at any time, having due regard for the rights of the company, add to, alter, amend, or repeal the act.

Under the joint resolution of January 30, 1865 (13 Stat., 567), it is provided that no transcontinental railroad grant heretofore made should "be construed so as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." In the additional indemnity belt established in the resolution of May 31, 1870 (16 Stat., 378), mineral lands were excepted the same as in the granting act. Section 2318, Revised Statutes, prescribes that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." These provisions all deal with mineral lands as entireties or a single estate; there is no suggestion that the mineral deposits may be reserved and subtracted from the whole estate leaving a remainder of "agricultural" lands available under the grant.

The case of *Barden v. Northern Pacific Railroad Company* (154 U. S., 288) established the doctrine that mineral lands, ascertained to be such at any time prior to patent, do not accrue to the company under its land grant. This applied to indemnity as well as to place lands. *United States v. Southern Pacific Company et al.* (251 U. S., 1). The Northern Pacific classification act of February 26, 1895 (28 Stat., 683), was a congressional interpretation of the grant and directed that all lands in certain land districts within both the place and the indemnity limits be examined and classified, and that all claims or filings theretofore or thereafter made on behalf of the company for lands classified as mineral should be rejected, canceled, and disallowed. Any patent, certificate, or evidence of title issued in violation of the provisions of the act was to be void. Congress has since 1914 continued to appropriate for the completion of such classification. See 38 Stat., 571, 1148; 39 Stat., 817; and 40 Stat., 18.

The Department having first held that the coal surface act of March 3, 1909 (35 Stat., 844), modified the original grant so as to require the company to take a limited title for indemnity on withdrawn coal lands, on rehearing receded from that view and held in *Northern Pacific Railway Company* (45 L. D., 155, 156), as follows:

The act of March 3, 1909, was general in character and can not be construed as indicating the purpose of Congress to modify or alter a grant made by former special acts. The act of March 3, 1909, has no operation upon

Northern Pacific indemnity selections, since the railroad company has a right to make such selection, whether the land is coal in character or not.

The previous decision of the Department is, accordingly, vacated and recalled, the Commissioner's decision reversed, and the selection will be approved in the absence of other objection, as directed in the administrative order of even date herewith (45 L. D., 152).

October 26, 1916, in the case of the Central Pacific Railway Company (unreported), involving Carson City list 05539, after citing the above holding, the Department said:

In harmony with the reasoning contained in the case of the Northern Pacific Railway Company, *supra*, the general act of July 17, 1914, *supra*, can not be construed as indicating the purpose of Congress to modify or alter the grant made by the former special acts of July 1, 1862, and July 2, 1864.

November 13, 1917, in the unreported case of the Seaboard Air Line Railway Company, successor to the Florida Central and Peninsular Railroad Company, with reference to the availability and applicability of the act of July 17, 1914, to the railroad grant therein involved it was said:

Land within the primary limits of a grant to aid in the construction of a railroad, as is that here in question, is within neither the terms nor the intent of the above quoted provisions of the act. Hence the said rule, which is expressly limited to cases falling within the purposes of the act, has no application to a tract within such limits, in so far as the grantee or its successor in interest is concerned.

The Department has held that the act of July 17, 1914, does not apply to claims or selections arising under the swamp land grant. See State of Florida (47 L. D., 92, 93). The administrative order of April 23, 1921 (48 L. D., 98), concludes as follows:

This order will not affect the disposition of the question of the mineral character of land claimed under the railroad land grants, either within the place or the indemnity limits, or under the swamp land grants. The well established practice and procedure now prevailing as to such lands will continue to be followed.

In instructions of August 4, 1921 (48 L. D., 172, 173), the Department said:

Field investigations and hearings with respect to minerals will proceed as heretofore in connection with railroad and wagon-road place and indemnity lands and with lands claimed by States as swamp and overflowed in character.

In the late case of *Payne v. Central Pacific Railway Company* (255 U. S., 228, 235-6), the Supreme Court said:

And speaking specially of the right to indemnity lands under such a grant, it was said in *United States v. Southern Pacific R. R. Co.*, 223 U. S. 565, 570: "What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the

so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the Government created upon valuable consideration and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim."

The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits. * * * But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act.

The railway company by its contention here presented necessarily concedes that these tracts do not inure to it under the place grant, but it is urged that they can be selected under the indemnity provisions of the grant as aided and supplemented by the act of July 17, 1914. Under this view the act of 1914 brings about an amendment and modification of the limitations and conditions of the indemnity grant and extends such grant to land theretofore inhibited, thereby very materially enlarging the scope of the company's indemnity. If this be sound, the result will be that the surface estate in many tracts which contain the specified minerals, and for that reason are inhibited as place lands, will pass by limited patent as indemnity lands. The indemnity right will thus be broadened and widely differentiated from the place grant, the prohibition as to mineral lands contained in the original grant being in so far avoided.

As has been stated, Congress excluded all mineral lands from the grant. It provided that the grant should not be construed to embrace mineral lands which were reserved exclusively to the United States unless otherwise specially provided. Mineral lands are reserved from sale except as otherwise expressly directed by law.

In view of these clear and emphatic provisions the question arises as to whether Congress by the act of July 17, 1914, evinced an intent and purpose to modify the company's grant and enlarge the scope of the provisions relating to indemnity. The railroad grant was by a special act, of particular lands within a defined belt, and to a specified single grantee. The act of 1914 is couched in general terms and provides for agricultural entries on certain mineral areas where limited title is sought under the nonmineral land laws of the United States. Railroad grants or grantees are not in terms mentioned. Such grants and claims are comprehended, if at all, within the language "the nonmineral land laws of the United States" and "ap-

propriation" or "selection," which latter are limited by the phrase "if otherwise available."

The company concedes that the surface act warrants no modification or enlargement of its place land grant, but does contend that it aids and extends the scope of the grant of indemnity lands. The Department is far from being persuaded that this is so. In the case of *Burke v. Southern Pacific Railway Company* (234 U. S., 669, 680), the court with reference to the railroad grant there being considered, said: "Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant should not be treated as a gift." The Department is unable to read in the act of July 17, 1914, that Congress has "specially provided" or has "expressly directed by law" the disposition of the surface of these mineral lands to the company in part satisfaction of its claim to indemnity. That Congress could enlarge and extend the grant is not to be denied. But that it has done so by the act of July 17, 1914, does not appear. It is hardly a matter of doubt or uncertainty, but rather a situation where Congress has not specifically provided and directed by law with reference to railroad land grant. The Department, however, is not unaware that in the case of *United States ex rel. Southern Pacific Railroad Company v. Lane* (46 Appeals, D. C., 74), the court held that the expression "under any of the land laws of the United States" used in the proviso relating to ditches and canals in the act of August 30, 1890 (26 Stat., 371, 391), comprehended the company's indemnity rights thereafter exercised, following the holding of the Department in 42 L. D., 396, and also that in section 20 of the leasing act of February 25, 1920 (41 Stat., 437), the phrase "not including lands claimed under any railroad grant" suggests the inference that a surface title to oil and gas land can accrue under a railway grant. Furthermore, the act of February 28, 1919 (40 Stat., 1204), provides that the company in making adjustment selections based on certain Indian lands shall take a restricted title on coal tracts. Nevertheless, these things do not justify the Department in undertaking to read into said act of July 17, 1914, by implication and inference a power and right in the company to select the surface of oil land as indemnity when such power and right is not specially and expressly conferred or granted by the terms of that act.

The contentions of the Northern Pacific Railway Company are not sustained. Indemnity list No. 511, serial 039592, Miles City, as to lands in the petroleum reserve was properly held for cancellation. The decision of the Commissioner is affirmed.

NORTHERN PACIFIC RAILWAY COMPANY.

Motion for rehearing of departmental decision of January 31, 1922 (48 L. D., 573), denied by First Assistant Secretary Finney, February 27, 1922.

ANSON T. LINDLEY.

Decided March 4, 1922.

STOCK-RAISING HOMESTEAD—ALIENATION—RESIDENCE.

A stock-raising homestead entry made as additional to an original homestead entry that was previously perfected and sold, while in all respects an original entry as to the requirements of residence, yet being governed by the first proviso to section 3 of the stock-raising homestead act, it can not be enlarged by the addition of incontiguous tracts.

STOCK-RAISING HOMESTEAD—EVIDENCE.

The stock-raising homestead act does not require one who makes an entry thereunder as additional to an original entry, to show that he was not the owner of more than 160 acres of land in the United States, acquired under other than the homestead law.

STOCK-RAISING HOMESTEAD—AMENDMENT—EVIDENCE.

One who having made an entry under the stock-raising homestead act as additional to an original entry, applies to have the former entry changed to an original entry under that act for the purpose of including incontiguous tracts, must show that he is not the owner of more than 160 acres of land in the United States, acquired under other than the homestead law.

FINNEY, *First Assistant Secretary*:

At The Dalles, Oregon, land office on August 21, 1919, Anson T. Lindley applied to make entry under the stock-raising homestead act for NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 7, T. 5 S., R. 15 E., W. M., as additional to his homestead entry for SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, said township. In his application he stated that there was no vacant public land adjoining his original entry, which he had sold since submitting final proof thereon. The application was allowed November 13, 1920.

On January 24, 1921, Lindley applied to amend his stock-raising entry so as to embrace therein lot 4, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 1, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 2, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 11, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 12, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, T. 5 S., R. 14 E., W. M., NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 7, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, T. 5 S., R. 15 E., W. M.

The Commissioner of the General Land Office, by decision dated October 4, 1921, denied the application to amend for the reason that it seeks to add to the entry six incontiguous tracts. Said decision further required entryman to show whether he was the owner of more than 160 acres of land in the United States acquired under

other than the homestead law, or suffer the cancellation of his entry. Entryman has appealed, contending that his application to amend is allowable under section 4 of the stock-raising homestead act. He has not made the showing required by the decision appealed from.

Having perfected the original entry and sold the land, the entry in question is governed by the first proviso to section 3 of the stock-raising homestead act—that is, it is subject to the requirements of law as to residence and improvements. It is in all respects an original entry under the act, so far as the requirements of law are concerned. But it can not be enlarged by the addition of incontiguous tracts, as said proviso limits entries thereunder to “a tract within a radius of twenty miles from such former entry.”

The Commissioner erred in requiring entryman to show that he was not the owner of more than 160 acres of land in the United States acquired under other than the homestead law if he desired the entry as made to stand. Such a showing is necessary in connection with *original* entries, but is not required in making additional entries under any section of the act.

Prior to the perfecting of the present entry, entryman can not acquire under the stock-raising homestead act any incontiguous tract, unless he requests that the entry be changed in character to an original entry, which can only be done upon a showing that he is not the owner of more than 160 acres in the United States acquired under other than the homestead law. If the entry should be changed to an original entry after showing the qualifications referred to, entryman would then be qualified to make an additional entry for one or more designated tracts lying within a radius of 20 miles from the land embraced in the changed entry.

The decision appealed from is modified to agree with the foregoing.

AMERMAN v. MACKENZIE.

Decided March 8, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—ENTRY—WORDS AND PHRASES—STATUTES.

An oil and gas prospecting permit is not an “entry” within the meaning of that term as it is used in the statutes relating to the public lands.

OIL AND GAS LANDS—PROSPECTING PERMIT—CONTESTANT—HOMESTEAD—PREFERENCE RIGHT.

The preference right accorded by the act of May 14, 1880, as amended by the act of July 26, 1892, to a contestant who procures the cancellation of a homestead entry as the result of his contest, is not applicable with respect to an oil and gas prospecting permit under section 13 of the act of February 25, 1920.

DEPARTMENTAL DECISION CITED.

Case of Braucht *et al. v. Northern Pacific Railway Company et al.* (43 L. D., 536), cited.

FINNEY, *First Assistant Secretary*:

Thomas G. Amerman has appealed from the decision of the Commissioner of the General Land Office of July 28, 1921, holding for rejection his prospecting permit application 052367, filed May 25, 1921, under section 13 of the act of February 25, 1920 (41 Stat., 437), for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 15, E. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 22, T. 35 N., R. 3 W., Great Falls land district, Montana, because of conflict with similar application 052154 filed March 18, 1921, by Roscoe D. Mackenzie.

It appears from the record that the land described was included in enlarged homestead entry 043847, filed June 19, 1917, by Walter McKay. On February 4, 1921, Amerman contested McKay's entry, and procured the cancellation thereof May 10, 1921. On May 25, 1921, he paid the cancellation fee, and filed prospecting permit application 052367 at 1:47 p. m., and enlarged homestead application 052368 at 1:50 p. m., the latter being suspended on account of the prior permit applications. In his application to contest Amerman stated that he desired and intended to acquire title to the land under the homestead law.

The Commissioner held that Amerman was not entitled to a preference right as the act of May 14, 1880 (21 Stat., 140, 141), is not applicable to applications under the leasing act.

The act of May 14, 1880, as amended by the act of July 26, 1892 (27 Stat., 270) provides that where a person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead, or timber culture entry, he shall be allowed thirty days from notice of cancellation to *enter* said lands. The Department has construed the act liberally, and has held that it contemplates that a contestant may exercise such right by any form of appropriation which he may use in acquiring *title* to the land. Braucht *et al. v. Northern Pacific Railway Company et al.* (43 L. D., 536). But the act of 1880 can not be held to have contemplated the entry of mineral lands in the exercise of the preference right granted thereby, for it was inapplicable to conditions under the mining laws. The act of February 25, 1920, supersedes the provisions of the mining laws in so far as the minerals named therein are concerned and it makes specific provision for various classes of preference rights. Furthermore, a permit under the leasing act is not an *entry*, or an appropriation of the land with a view to the acquisition of *title* thereto. Considering all of these circumstances, the conclusion is reached that an application under the leasing act is not entitled to preference by virtue of the provisions of the act of May 14, 1880, as amended.

In this case Mackenzie filed the first section 13 application, and there being no one entitled to a preference right under the provisions of the act, he is entitled to the allowance of his application. Amerman's intention, as shown by his sworn statement in his contest affidavit, was to enter the land as a homestead, and the allowance of such entry, under the application heretofore filed, will secure him the reward which he sought by his contest, and in conformity with the act of May 14, 1880. His application must be made subject to the provisions of the act of July 17, 1914 (38 Stat., 509), and subject to the rights of the permit applicant under section 29 of the leasing act.

The action of the Commissioner is affirmed, the case closed, and the record returned to the General Land Office.

PROTECTION OF TRANSFEREES AND MORTGAGEES UNDER THE HOMESTEAD LAWS.¹

March 11, 1922.

MORTGAGEE—TRANSFEREE—ALIENATION—HOMESTEAD—PATENT—EQUITY—SECTION 2296, REVISED STATUTES.

A homestead entryman is not precluded from mortgaging his entry prior to the perfection of his equitable title, and the provision contained in section 2296, Revised Statutes, to the effect that no homestead shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of patent, does not invalidate a mortgage voluntarily given on an unperfected entry.

MORTGAGEE—TRANSFEREE—ALIENATION—HOMESTEAD—FINAL PROOF—OFFICERS—EVIDENCE—EQUITY—SECTION 2291, REVISED STATUTES.

While section 2291, Revised Statutes, contemplates that a homestead entryman shall, upon the submission of final proof, appear personally before the proof-taking officer, yet an exception to that requirement will be made where the testimony of the entryman can not be obtained, and in such cases equitable consideration will be given to evidence submitted by a mortgagee showing that all of the conditions precedent to patent have been performed by the entryman.

MORTGAGEE—MORTGAGE—HOMESTEAD—NOTICE—RELINQUISHMENT—RULE 98, RULES OF PRACTICE.

A mortgagee who has filed notice of his mortgage interest in an unperfected homestead entry as provided by Rule 98, Rules of Practice, must be given notice of any relinquishment filed, and no relinquishment will be accepted by the Land Department unless he joins therein or until he has had reasonable opportunity to make a showing.

SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY—EQUITY—PUBLIC LANDS.

In the administration of the public lands, the Secretary of the Interior may, unless limited by special statutory provision, take cognizance of equities acquired in good faith by claimants, without an act of Congress expressly conferring that authority.

¹ See Circular No. 819, approved March 31, 1922 (48 L. D. 613).

FINNEY, *First Assistant Secretary*:

The Department has considered your [Commissioner of the General Land Office] request of January 7, 1922, for instructions as to the extent to which the officers of the Land Department may legally go in the protection of transferees or incumbrancers against the action of the entryman under the homestead law who has incumbered the land covered by his entry for the benefit of creditors.

The decisions of the Department and the courts have dealt with certain phases of this subject, but as stated in your communication other important aspects of the matter have not been thoroughly examined into, and for this reason it seems desirable to establish some definite administrative regulations in the premises.

It is difficult to establish a fixed rule that shall govern in every case that may arise. The controlling provisions of the law relating to homesteads found in sections 2290, 2291, and 2296, Revised Statutes, will first be examined. In his application for a homestead entry the applicant must make affidavit that his—

Application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person,

and at time of final proof, or before issuance of final certificate or patent, he must make affidavit "that no part of such land has been alienated, except as provided in section 2288." That section refers to the transfer for church, cemetery, or school purposes, or for the right of way of railroads. Section 2296 provides that—

No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

Under these provisions it has uniformly been held by the Department and the courts that a contract to convey the whole or any part of the land prior to the perfection of his equitable right by one seeking a homestead is void and will not and can not be enforced, and if known to the Department will defeat the entry. *Hawker v. Fowlks* (2 L. D., 53); *La Bolt v. Robinson* (3 L. D., 488); *Tagg v. Jensen* (16 L. D., 113); *Walker v. Clayton* (24 L. D., 79); *Meal v. Donahue* (*Ibid.*, 155); *Swaze v. Suprenant* (*Ibid.*, 337); *Myers v. Croft* (13 Wall., 291); *Anderson v. Carkins* (135 U. S., 483).

This is not true with respect to a mortgage or deed of trust executed under like circumstances, upon land the title to which is in process of acquisition. All the decisions of the Department since the incumbency of Secretary Teller have been to the effect that such mortgage or deed of trust is not an alienation within the scope of the homestead statute or forbidden by the spirit of the law. *Larson v. Weisbecker* (1 L. D., 409); *Mudgett v. Dubuque and Sioux City*

Railroad Company (8 L. D., 243); *Kezar v. Horde* (27 L. D., 148). It is true that the case of *Larson v. Weisbecker*, *supra*, decided by Secretary Teller, arose under the preemption law and involved the construction of section 2262, Revised Statutes, but the spirit and intent of the preemption and homestead laws in this respect are the same, and section 2290, Revised Statutes, as amended by section 5 of the act of March 3, 1891 (26 Stat., 1095), was made substantially to conform to the language of section 2262.

The courts have not always been harmonious in their views upon this subject, many of the earlier decisions holding that a mortgage given while title to the land was still in the United States was void. But the great weight of opinion is to the contrary, and it must now be accepted as definitely settled by the highest authority that a mortgage or deed of trust given by one seeking or holding an entry under the homestead laws of the United States, prior to the perfection of his equitable title is valid. *Fuller and Company v. Hunt et al.* (48 Iowa, 163); *Kirkaldie v. Larrabee* (31 Calif., 456); *Weber v. Laidler et al.* (Wash.), (66 Pacific 400); *Worthington v. Tipton et al.* (New Mexico), (172 Pacific, 1048); *Adam et al. v. McClintock et al.* (North Dakota), (131 N. W., 394); *Guaranty Savings Bank v. Bladow* (176 U. S., 448); *Hafemann v. Gross* (199 U. S., 342).

And the rule that a *bona fide* entryman, seeking to appropriate public land to his own use may mortgage his inchoate title for any purpose not inconsistent with good faith, is expressly recognized by rule 98 of Practice (44 L. D., 395, 411),¹ which provides:

Transferees and incumbrancers of land the title to which is claimed or is in process of acquisition under any public-land law shall, upon filing notice of the transfer or incumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original entryman or claimant. Every such notice of a transfer or incumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the General Land Office, where like notation thereof will be made. Thereafter such transferee or incumbrancer, as well as the entryman, must be made a party defendant to any proceeding against the entry.

So also in the circular "Suggestions to Homesteaders" (44 L. D., 91, 108),² wherein it is stated:

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.

Here is an interpretation of the policy of the law which the courts have held is in accord with the fair and natural meaning of its lan-

¹ See Rules of Practice, reprint July 13, 1921 (48 L. D., 246).

² See Circular No. 541, approved January 16, 1922 (48 L. D., 389, 406).

guage, recognizing the legal right of the homesteader to mortgage his equitable interest in the land, his inceptive, his conditional title. The entryman has a contract with the Government whereby he is to receive a patent upon compliance with certain conditions precedent. But in the very nature of things this is a precarious and unstable security, and manifestly if the homesteader should for any reason not beyond his control abandon his occupation, neglect his obligations, fail in his compliance with the law, and fall short of earning title to the land, he has violated his agreement, not only with the Government, but with his debtor, and wrongfully shorn the encumbrancer of his security.

The purpose and scope of the law is very convincingly expounded by the Supreme Court of Iowa in the case of *Fuller and Company v. Hunt*, *supra*, and the decision there so clearly and forcefully discusses the proposition that the Department feels justified in quoting from it at length, as follows:

The first question presented is, as to whether a person who has entered upon land under the homestead act can make a valid mortgage upon the same prior to the time when he is entitled to make final proof. It is claimed by the appellant that he cannot, because it is provided in the homestead act that the land shall not become liable to the satisfaction of any debts contracted prior to the issuance of the patent. The debt sought to be enforced was contracted prior to the issuance of the patent. It is abundantly evident that the land could not have been reached by general execution. If the land is liable at all, it is by virtue of the act by which the debtor undertook to create a special lien upon it, and we have to say that we think that the debtor's act had that effect. Mere exemptions from execution do not prevent the debtor from creating such lien. Exemptions are provided merely for the debtor's protection. Such is the general rule, and such, it appears to us, is the intention of the homestead act. The only reason suggested why the claimant under the homestead act should not be allowed to mortgage his homestead is, that it would be against public interest. But the fact that the act provides against alienation by the claimant, and does not provide against mortgaging unless alienation includes mortgaging (a point which will be hereafter considered) indicates that it was not deemed to be against the public interest that the claimant should mortgage his homestead. In *Nycum v. McAllister*, 33 Iowa, 374, it was substantially so held. It is true that in that case the five years had expired when the mortgage was executed, but a patent had not issued. The decision upholding the mortgage was based upon the idea that the provision of the statute that the land shall not be liable for debts contracted prior to the issuance of the patent did not prevent the debtor from creating by contract a special lien. Mr. Justice Beck, in delivering the opinion, said: "The provision is intended as a shield for the debtor's protection." The debts, then, from which the land is exempted by statute must be considered those which are enforceable against it only by general execution. We regard the case above cited as decisive of the question in this case. The fact that in that case the five years had expired does not render it inapplicable as an authority. The land was held liable for a debt contracted before the issuance of a patent. This necessitated a construction of the statute, which excluded from its provision debts charged upon the land by the debtor's own contract. The question of the expiration or non-expira-

tion of the five years affects merely the character of the mortgagor's interest. But it is not claimed by defendant's counsel that the invalidity of the mortgage results from a want of a mortgageable interest, but simply from a disability imposed by statute upon the mortgagor.

Another objection is urged by the defendant's counsel, upon the ground that the claimant in making final proof must show by affidavit that he has not alienated the land. The execution of the mortgage, it is said, is an alienation within the meaning of the statutes. But we think this is not so. The giving of a mortgage may result in alienation, but it is not such of itself, nor can it be said that the mortgage is given with such purpose. Land is often mortgaged with the view of obviating the necessity of alienation. The office of a mortgage is simply to create a lien. Under our statute the legal title remains in the mortgagor, though the case would probably not be different if it passed to the mortgagee. A conveyance made merely to create a lien lacks the essential element of alienation. This has been repeatedly held in the law of insurance. *Rollins v. Columbian Ins. Co.*, 5 Foster, 200; *Conover v. Mutual Ins. Co.*, 1 Com., 290; *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Pick., 418; *Hubbard & Spencer v. Hartford Fire Ins. Co.*, 33 Iowa, 333. So, also, it has been held that an inhibition upon selling is not an inhibition upon mortgaging. *Middleton Savings Bank v. Dubuque*, 15 Iowa, 394; *Krider v. Trustees of Western College*, 31 Iowa, 547. In *Nycum v. McAllister*, as we have seen, a mortgage executed by a claimant under the homestead act, before the issuance of a patent, was sustained. Yet by the act no patent could issue except upon proof by affidavit of the claimant that he had not alienated the land. And the fact that such affidavit is required renders void an attempted alienation. *Oaks v. Heaton*, 44 Iowa, 116. We cannot, then, regard a mortgage as an alienation.

The Department finds nothing in the case of *Ruddy v. Rossi* (248 U. S., 104), in opposition to the doctrine of the cases hereinabove cited. In the latter case, which was decided December 9, 1918, the court merely held that the exemption created by section 2296, Revised Statutes, was valid and within the constitutional power of Congress and that a judgment upon a debt contracted prior to the issuance of patent under the homestead law was unenforceable. This states the obvious purpose of the law. The prohibition is clear and direct and manifestly the homestead can not be reached by general execution or levied upon to enforce the payment of a debt contracted prior to patent, by the ordinary process of the courts. The land can and may become liable only by virtue of the voluntary act of the party in executing the mortgage and creating a lien. As said in the Iowa case above quoted: "Mere exemptions from execution do not prevent the debtor from creating such lien. Exemptions are provided merely for the debtor's protection. Such is the general rule, and such, it appears to us, is the intention of the homestead act." The Department very recently had occasion to consider this question in the case of *Lockwood v. Lounsbury et al.*, decided January 17, 1922 (48 L. D., 637), where it was held that the case of *Ruddy v. Rossi*, *supra*, decided nothing to cast any doubt on the previous rulings of the court to the effect that section 2296, Revised Statutes, does not invalidate a mortgage or incumbrance given by a

homesteader to secure money with which to improve his land, "or for any other purpose not in itself tending to impeach his *bona fides*."

Now with respect to the rights of transferees and mortgagees to show that title to the land has been earned by the entryman or to submit supplemental final proof for the protection of their interests. It goes without saying that a transferee prior to patent or an incumbrancer prior to the submission of final proof acquires no greater estate or right than existed in the homesteader; he has no better standing before the Department; he is charged with knowledge of the law and with knowledge that he purchases or loans his money upon an equitable interest merely, or a title *sub judice*, and that the issuance of patent is dependent upon the action of the Land Department and its future finding that the entryman has complied with all the prerequisites prescribed by law to the rightful acquisition of the public land he claims. In other words, he takes the risk of the entryman's failing to perfect his claim. *Hawley v. Diller* (178 U. S., 476).

But while this is true, the rule is now definitely established by the Supreme Court that where a final certificate has been issued and subsequently canceled, without notice to the entryman's transferee, or mortgagee, that the cancellation, though it be binding and conclusive upon the entryman, if upon notice to him, is not conclusive upon such transferee or mortgagee so as to bar him from showing the validity of the entry, either by a proper proceeding in the Land Department before the issuance of a patent, or before a judicial tribunal against one to whom a patent has been issued; but such cancellation, binding upon the entryman, destroys the effect of the canceled certificate as *prima facie* evidence of the right to a patent. He is, however, permitted to show the validity of the entry by other evidence. *Guaranty Savings Bank v. Bladow, supra*; *Thayer v. Spratt* (189 U. S., 346). In the case last cited the court said (page 351):

It has been held in this court, in *Guaranty Savings Bank v. Bladow*, 176 U. S., 448, and *Hawley v. Diller*, 178 U. S., 476, 488, that a cancellation of a certificate of entry was not conclusive as against a transferee who had no notice and no opportunity to be heard upon the question of the original validity of the entry, but that it left the transferee without the right to use the entry certificate as *prima facie* evidence of the validity of the entry or of his subsequent claim. The transferee is, however, left free to prove the validity of the entry by any means other than the certificate. Although the assignment or conveyance of the certificates did not transfer the legal title to the lands described therein, yet the transferee or grantee thereby became possessed of an equitable interest in the lands which could not be taken from him without some notice. The character of the certificates as a mere means of evidence could be and was destroyed, but the transferee was nevertheless not thereby deprived of his right to show the validity of the former entry.

And in that case a defendant holding under a certificate transferred before its cancellation, who had not been notified of the proceeding to cancel it, was held entitled to a decree declaring that the plaintiffs, holding under a patent issued upon a subsequent entry, held the legal title in trust for the defendant, the evidence offered by the transferee being held sufficient to show the validity of the original entry.

The right of a mortgagee without notice of the proceeding in the Land Department was considered in *Guaranty Savings Bank v. Bladow*, *supra*, and the court held that, although conclusive as to the entryman upon all questions of fact, if made after notice to him, the cancellation would not be conclusive upon a mortgagee, if made without notice to him, with no opportunity on his part to be heard.

That is, it would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the land department, and therein showing the validity of the entry, or from proceedings before a judicial tribunal, against the patentee, if a patent had already issued, and therein showing the validity of the entry; such proof in each case would, however, have to be made by evidence other than the certificate which had been canceled. Had the mortgagee taken either of these courses, it might have demanded in the one case, upon proving the validity of the entry, that a patent should be issued to the mortgagor or his grantees, leaving the land subject to the lien of the mortgage, or if a patent had been issued, the mortgagee might then have demanded relief against the patentee upon proof of the validity of the entry, in a proceeding in court to hold him as trustee.

The Department has in numerous instances recognized the rule that an incumbrancer or transferee is entitled to avail himself of every right that his debtor had to perfect title to property on which he has a security, to show the validity of the entry, that there has been full compliance with law, and that a patent has been rightfully earned by the claimant. In the case of *Charles Lehman* (8 L. D., 486), it was held (syllabus):

If the pre-emptor has in fact complied with the law up to the time of making proof, and can, at that time, truthfully make the requisite final affidavit, a sale thereafter, without such affidavit having been made, and prior to the issuance of final certificate, will not of necessity defeat the right to a patent.

Equitable consideration will be given to evidence that may be submitted by a transferee, where the testimony of the entryman can not be secured, showing that the entryman had complied with the law during the time covered by his final proof, and had not prior to the submission thereof, disqualified himself for the execution of the necessary proof of non-alienation.

In this case *Lehman*, the transferee of the entryman *De Witt*, had submitted supplemental proof in support of the entry, which the Commissioner of the General Land Office had rejected. In deciding the case on appeal, First Assistant Secretary *Chandler* said (page 489):

There is nothing appearing in this case which shows that *Lehman* has not equities which may be fully protected under the statute cited (Sec. 2450-2457,

Revised Statutes), and if he can satisfactorily establish the fact of such equities by showing the validity of De Witt's entry, it should not be canceled. He may be unable to procure the usual final pre-emption affidavit, and yet be able to satisfactorily show that De Witt settled upon said tract intending "in good faith to appropriate it to his own exclusive use," and not with the intention of selling the same on speculation; and that up to the time of making final proof he had not "directly or indirectly made any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself." These facts are peculiarly within the knowledge of the settler and his testimony in relation thereto is very desirable in all cases, but where it can not be obtained, as in cases of death or insanity, other testimony of necessity is resorted to; and, in my opinion other testimony may be resorted to where the settler through perverseness and a desire to injure the real party in interest refuses to testify. No greater necessity exists in cases of death or insanity for allowing the facts which are usually shown by the entryman's final affidavit to be shown by other evidence than exists in the case at bar if the allegations made by appellant be true. He should therefore, be allowed an opportunity to fully show the facts affecting the validity of said entry and that De Witt refuses to testify in the case solely through ill will and a desire to defraud and injure him, and not because he could not have conscientiously made the usual affidavit on making final proof.

In the case of Addison W. Hastie (8 L. D., 618), it was held (syllabus):

A relinquishment made by the entryman, after mortgaging the land covered by his final proof, will not defeat the right of the mortgagee to show that the entryman had in fact complied with the law, and was entitled to patent.

And in the case of Daniel R. McIntosh (8 L. D., 641, 643), the Department said:

This proof is not satisfactory. The improvements are very small although the value placed upon them is large. From the facts set forth in the proof it can not be determined that the entryman ever in good faith established his residence on this land. No statements are made as to the kind or amount of furniture he placed in the house. The indefinite character of the final proof taken in connection with the character of the land and the further fact that he sold the land three days after making his final proof are sufficient to create a suspicion as to Lane's good faith in this matter. Since, however, bad faith is not positively shown the transferee will, in the absence of an adverse claim, be allowed to submit supplemental proof in support of said entry. This proof must be submitted within ninety days after notice of this decision and should show with particularity all that Lane did on or in connection with said land up to the date of his final proof. This proof should show what improvements were made there, giving the value of each separate item.

Likewise, in the case of Alpheus R. Barringer (12 L. D., 623, syllabus):

On requirement of new final proof a mortgagee may be permitted to show due compliance with law on the part of the entryman, prior to the submission of the original proof, where such entryman fails or refuses to comply with said requirement.

A number of the decisions above referred to are cited in the case of *Chadek v. Turcotte et al.*, decided in the United States District Court for Montana, October 25, 1921 (275 Fed., 874). In that case the court said (page 875) :

The homestead statutes are in the nature of an offer to convey public lands of the United States to qualified persons who will reside upon, cultivate, and not alienate the lands for a term of years, and then submit their affidavits and evidence thereof, their final proof that they have performed the conditions precedent to patent. The lands are earned by performance of the conditions precedent, and the affidavits and evidence, or final proof, is but a method of information of the fact to the United States. * * * If the conditions precedent have been performed, that final proofs in some particulars may be defective, and require supplement, does not impair this vested right. It is not a matter of substance, but of form only.

It is true that this whole line of decisions is founded primarily on the proposition that if the entryman has fully complied with the law and received final certificate, the equitable title had vested in him so that he might sell, incumber, or deal with the land in every respect as if it were his own, and that parties dealing with him under these circumstances were entitled to the protection of the Department. But it is likewise true that the Department holds out to the public generally that an entryman under the homestead laws has a mortgageable interest in the property. This interest, this inceptive title, this expectancy, this promise of a patent is a valuable right. It is property in the highest sense, and the courts as well as the Department have ruled that it may be pledged as security for a loan without violating any law or contravening public policy. Inasmuch, therefore, as the right is expressly recognized, it would not be in accord with the principles of justice and fair dealing to strike down and destroy such right without affording the mortgagee an opportunity to appear and protect his interests by showing a proper compliance with law on the part of the entryman which would entitle him to patent. The rules and regulations of the Department, as above pointed out, provide for this special notice where knowledge of the incumbrance or transfer is in possession of the Department and the validity of the entry is brought in question and require that such transferee or incumbrancer shall be made a party defendant to any proceeding against the entry. But manifestly in cases where the entryman had not theretofore submitted proof of his compliance with the law, it would be a vain and utterly futile thing for an incumbrancer to appear and defend the validity of an entry under attack where the entryman has absconded or refuses to testify, unless, upon showing the validity of the entry, that the law had been fully complied with and title earned he could be permitted to make the proof required by law. The absurdity of the proposition is at once apparent.

It is true that the law with respect to the submission of final proof (section 2291, Revised Statutes), as amended by the act of June 6, 1912 (37 Stat., 123), contemplates that the entryman shall appear personally before the proof-taking officer and prove by his own testimony and that of two credible witnesses that he has a habitable house upon the land and that he has actually resided upon and cultivated the same for a period of three years succeeding the time of filing the affidavit provided for in section 2290, Revised Statutes; that he shall make affidavit that he has not alienated the land except as provided for in section 2288, Revised Statutes, and shall subscribe to an oath of allegiance, whereupon he becomes entitled to a patent. But this requirement of the testimony and affidavit of the entryman has never, for obvious reasons, been held applicable to cases where the right to make final proof has been recognized as existent in another whether widow, deserted wife, heir, personal representative, guardian, or mortgagee. Unquestionably, in cases where the testimony of the entryman can not be obtained, either because of the act of God or of his own contumacy or fraudulent design, other agencies of proof must be utilized, for equity will not permit a right to be without a remedy. The Department recognizes, and when occasion demands, applies equitable principles, and to do justice can afford remedies for rights which would otherwise be unprovided for. The extent and quality of this power has been as clearly recognized as its existence has been established. *Williams v. United States* (138 U. S., 514, 523).

So if the settler made the entry in good faith, has done nothing inconsistent with the terms of the law, has performed all the essential acts upon the land, and fully earned the right to a patent, he should not be permitted wrongfully and in open fraud of his creditors to calmly abandon and forfeit the right acquired by a perverse or malicious refusal to submit the proper proofs of his claim to the Land Department. This is the sequence of the decision of the Department in the case of *Charles Lehman, supra*, and a necessary application of the doctrine laid down by the Supreme Court in *Guaranty Savings Bank v. Bladow*, and *Thayer v. Spratt, supra*. Manifestly the homesteader can not be restrained from abandoning his occupation or enjoined to submit his proof. The officers of the Land Department have no power to do this. They can not compel specific performance, but no court of equity would deny the right of the purchaser proceeding in good faith or that of the incumbrancer actuated by good motives, to show the validity of the entry, that all essential requirements of the law have been met and equitable title earned. The Department deems it not inappropriate in this connection to repeat

what the Supreme Court said in *United States v. Detroit Lumber Company* (200 U. S., 321, 339) :

It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the Government and its vendees we must bear in mind the general principles of equity and determine rights upon those principles except as they are limited by special statutory provisions. And clearly upon those principles a party purchasing an equitable right is entitled to be protected in his purchase so far as it can be done without trespassing upon the rights of other parties.

Of much the same tenor were the observations of the court in the earlier case of *United States v. Macdaniel* (7 Peters 1, 13), from which the following is taken :

A practical knowledge of the action of any one of the great departments of the government, must convince every person, that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow, that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits.

It would be, of course, violative of the plain provisions of the law and contrary to its whole purpose and policy to permit an agent, transferee, or incumbrancer to perform any provision of the homestead law which is required to be the personal act of the entryman himself. The incumbrancer or transferee, in the case of a defaulting debtor, may, however, submit evidence probative of the fact that the entryman has personally met such requirement of the statute.

In a number of adjudicated cases to which attention is invited, where an entryman has incumbered the land for the benefit of creditors, to enable him to make improvements, or for other purposes not inconsistent with good faith, and relinquished his claim, another entryman applying for the land, the Department has ruled that the subsequent applicant should satisfy the mortgage debt upon penalty of disallowance of his application or cancellation of his entry. In most, if not all these cases, it was apparent that there was a plan or conspiracy to defraud the creditor; that the subsequent entryman had notice or knowledge of the outstanding mortgage; that the loan

had been used for betterments or improvements upon the land and that its value had been correspondingly increased. These cases do not proceed upon the theory that the Secretary of the Interior has the power to hold the land forever charged with the payment of the loan advanced by the mortgagee. The holding is based upon the proposition that good faith must characterize every attempt to acquire title to public lands of the United States, and that under no circumstances will the Department lend itself or permit itself knowingly to be made an instrument to further the fraudulent designs of an individual who is seeking to acquire title to public lands. Of course there is no intention or purpose in every case and under any and all circumstances to guarantee the incumbrancer's claim. Nor is there any purpose to aid and encourage the land speculator. The underlying thought was expressed by First Assistant Secretary Chandler in the case of Addison W. Hastie (8 L. D., 618, 621):

If the facts set up in said affidavit are true the government will not be a party to such an unconscionable wrong, nor permit the entryman by such a fraudulent practice to defeat the rights of the mortgagee who has confided in what he supposed to be the integrity of Nicholas in connection with this entry and loan. Let honesty and fair dealing characterize the acts of the entryman both towards the government and those with whom he deals in making his entry.

Upon mature reflection the Department is convinced that it would be helpful of good administration and conducive to justice and fair dealing to establish a rule that where notice of a mortgage interest is filed as provided in Rule 98 of Practice, such mortgagee must be given notice of any relinquishment filed and no relinquishment will be accepted unless he joins therein or until he has had reasonable opportunity to make such showing in the matter as he may be advised.

It is directed that a regulation of this nature be framed and submitted for departmental approval.¹

WITTE v. SEIBERT.

Decided March 13, 1922.

PRACTICE—SUPERVISORY AUTHORITY—CONTEST—JUDGMENT—HEARING.

Supervisory authority is not designed to enforce technicalities and refusal of the register and receiver to render a default judgment in a contest because the answer of contestee was filed and served after the expiration of thirty days from notice of contest, and the ordering of a hearing thereupon, are not sufficient grounds for invoking its exercise.

FINNEY, *First Assistant Secretary*:

Gilbert R. Witte has filed petition for exercise of the supervisory authority of the Department in the above entitled case, involving his

¹ See Circular No. 819, approved March 31, 1922 (48 L. D., 613).

contest against the homestead entries of John P. Seibert for the E $\frac{1}{2}$, Sec. 18, T. 13 N., R. 12 E., and lots 1 and 2, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$, Sec. 19, said township, Santa Fe, New Mexico, land district.

The point at issue is the action of the register and receiver in authorizing a hearing upon answer filed and served by the contestee after the expiration of thirty days from notice of contest, it being contended by Witte that he is entitled to judgment as upon default.

The Commissioner of the General Land Office by decision of January 30, 1922, declined to disturb the action of the local office, and the matter is now brought here upon further petition.

This does not present a case calling for the unusual remedy sought, as the question can be determined in regular order of procedure upon appeal if action adverse to the contestant be taken by the officers below in final decision upon the whole case after hearing. Supervisory power is not designed to enforce technicalities of procedure, but looks to the equities and substantial merits of the case. Without reciting the details contained in the present record, it is sufficient to say that an examination of the case so far as disclosed indicates that the merits can best be determined for final disposition after a hearing.

The petition is accordingly denied.

PROOF OF NONMILITARY AND NONNAVAL SERVICE IN CONTESTS AGAINST HOMESTEAD ENTRIES.

Instructions.

[Circular No. 815.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

The act of July 28, 1917 (40 Stat., 248), provides among other things that—

hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, entryman, or person unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing that the alleged absence from the land was not due to his employment in such military or naval service.

Under the foregoing it is not only necessary that the contest affidavit contain such allegation, but that it must be proved at a hearing.

Therefore, if the contestee fails to answer after due service of notice of the contest, you will fix a date for a hearing for the sole purpose of submission of evidence relating to the allegation of non-

military and nonnaval service; giving the parties notice thereof by registered mail not less than 20 days in advance of the date fixed. Notice to the contestee should be addressed to his last-known address and, if personal service of notice of the contest was not made, to the post office nearest the land.

If the contestee fails to appear at the hearing, the contestant may submit affidavits by not less than two persons who have personal knowledge as to whether the absence of contestee was due to military or naval service under an enlistment antedating March 3, 1921.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**ACT OF JANUARY 27, 1922, AMENDING SECTION 2372, REVISED
STATUTES, RELATING TO CHANGE OF ENTRIES.**

INSTRUCTIONS.

[Circular No. 817.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

An act approved January 27, 1922 (Public No. 131, 67th Congress), amended section 2372, Revised Statutes, by adding thereto the following:

In all cases where a final entry of public lands has been or may be hereafter canceled, and such entry is held by the Land Department or by a court of competent jurisdiction to have been confirmed under the proviso to section 7 of the Act of March 3, 1891 (Twenty-sixth Statutes, page 1099), if the land has been disposed of to or appropriated by a claimant under the homestead or desert-land laws, or patented to a claimant under other public-land laws, the Secretary of the Interior is authorized, in his discretion, and under rules to be prescribed by him, to change the entry and transfer the payment to any other tract of surveyed public land nonmineral in character, free from lawful claim, and otherwise subject to general disposition: *Provided*, That the entryman, his heirs, or assigns shall file a relinquishment of all right, title, and interest in and to the land originally entered: *Provided further*, That no right or claim under the provisions of this paragraph shall be assignable or transferable.

2. An application for the benefits of this act should describe a specific tract of nonmineral surveyed public land free from lawful claim and subject to general disposition, and should be accompanied

by the formal relinquishment by the entryman, his heirs, or assigns of all right, title, and interest in and to the land in the entry on which the right is based. Where application is made by heirs, satisfactory proof of heirship is required. This must be the best evidence that can be obtained, and must show that the parties applying are the heirs and the only heirs of the deceased entryman. Where applications are made by assignees, the applicants must show their interest in the land under the original entryman by furnishing properly authenticated abstracts of title, and they must show, by affidavits or otherwise, that they have not been indemnified by their grantors for the failure of title. The application should also state whether action has been instituted in the courts to have a subsequent entryman of the land in the former entry declared a trustee, and, if so, the status of the litigation.

3. Credit for payments made in connection with the relinquished entry will be allowed, but a tender of any additional sums due for the land applied for must accompany the application.

4. No rights under the act are assignable or transferable.

5. Applications should be suspended and transmitted to the General Land Office with the current monthly returns, and the applicants should be notified of such suspension. After consideration of the application, it will be submitted to the Secretary of the Interior with appropriate recommendations.

6. Applicants for the benefit of the act will be required to begin, within 30 days after notice of allowance, publication of a notice in a newspaper to be designated by the register as of general circulation in the vicinity of the land, which notice should be substantially as follows:

NOTICE OF CLAIM UNDER SECTION 2372, R. S., AS AMENDED BY THE ACT OF
JANUARY 27, 1922.

UNITED STATES LAND OFFICE,

_____, 19__

Notice is hereby given that _____ has filed in this office an application under section 2372, Revised Statutes, as amended by the act of January 27, 1922, for _____, Sec. __, T. __, R. __, and that the same has been allowed by the Secretary of the Interior.

All persons claiming the land adversely or desiring to show it to be mineral in character will be allowed until _____, 19__, to file in this office their objections to the issuance of patent under the aforesaid application.

Register.

If the notice is published in a daily paper, the publication must be inserted in 30 consecutive issues; if daily except Sunday, in 26; if weekly, in 5, and if semiweekly, in 9. During the period of publication, the notice as published must be posted in the local land office.

If no objections appear, the register will, immediately after the date named in the notice, issue final certificate, using Form 4-196 if the former entry was a homestead, or Form 4-200 if a desert-land entry, noting thereon references to the act of January 27, 1922, and to the letter allowing the application.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**REGULATIONS OF JULY 19, 1916, CIRCULAR NO. 491, RELATING TO
COAL MINING PERMITS UNDER SECTION 10, ACT OF OCTOBER
20, 1914, AMENDED.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 24, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES IN ALASKA:

Reference is had to Circular No. 491 (45 L. D., 227), "Relating to the acquisition of title to public lands in the Territory of Alaska" in the matter of coal mining permits under section 10 of the act of October 20, 1914 (38 Stat., 741).

The last paragraph on page 84 of Circular No. 491 (45 L. D., 227, 310-311), under "action by register", provides:

"The register will keep a proper record of all applications received and all actions taken thereon in a book provided for that purpose. If there appear no reasons why the application should not be allowed, the register will issue a permit on the form provided for that purpose. Should any objection appear either as to the qualifications of the applicant or applicants, or in the substance or sufficiency of the application, the register may reject the application or suspend it for correction or supplemental showing under the usual rules of procedure subject to appeal to the Commissioner of the General Land Office. Upon the issuance of a permit, the register will promptly forward to the Commissioner of the General Land Office, by special letter, the original application and a copy of the permit, and transmit copies thereof to the Chief of the Alaskan Field Division, and to the local representative of the United States Bureau of Mines, for their information."

As stated in the circular these regulations were intended merely as a temporary arrangement to meet immediate necessities, and since operations under the coal leasing provisions of the said act of October 20, 1914, are being extended, it now seems inadvisable to grant free mining permits in fields where mines are being operated under leases, since to do so would appear to be unfair to the lessee, who must,

while burdened with more onerous requirements and with payment of royalties, compete with one holding a free permit.

The instructions as to action by the register (Circular No. 491, page 84) are, therefore, modified as follows:

When there shall be filed in your office an application for free permit, or for renewal of an existing free permit under section 10 of the act of October 20, 1914, involving land within a field in which there are mines being operated under the leasing provisions of the said act, the register shall transmit such application to the Commissioner of the General Land Office without action, but with appropriate recommendation, calling special attention to the possibility of its competition with existing government leases. Should there be applications for free permit in fields where there are no leases, such permits may be issued by the register as heretofore.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

UNITED STATES v. BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY.

Decided March 24, 1922.

MINING CLAIM—DISCOVERY.

A discovery of a vein or lode of rock in place bearing valuable mineral is necessary to sustain a lode location, but an actual disclosure of commercial ore is not essential to effect an adequate discovery.

MINING CLAIM—RECORDS—EVIDENCE—DISCOVERY.

A recital of discovery in a recorded notice of location of a lode claim does not constitute evidence of discovery.

MINING CLAIM—EVIDENCE—DISCOVERY.

The principle with respect to a rule of property set forth in the Rough Rider case (42 L. D., 584) will not be applied where the claimant's title was acquired and application for patent was filed subsequently to the issuance of the departmental regulations of May 21, 1909, which require that the evidence must specifically show that the claim contains a valuable mineral deposit.

MINING CLAIM—EXPENDITURES—TUNNEL.

The sufficiency and availability of patent expenditures is satisfactorily established when the evidence shows that the claimant has been working adjoining mining ground owned by him by means of an extensive system connected with a main tunnel; that a number of the workings directed toward the claim are within a reasonable distance; and that the logical and practical way to develop the claim at depth is by the extension of those workings.

MINING CLAIM—DISCOVERY—NONCONTIGUITY.

The fact that the elimination from a mineral entry of claims upon which satisfactory discovery had not been shown will render the uncanceled claims incontiguous, is not alone sufficient to cause the cancellation of such in-

contiguous claims, where the claims as originally located and held formed a contiguous body of land, and will occupy that status after the elimination of the claims upon which discovery had not been made.

MINING CLAIM—DISCOVERY—CONTIGUITY.

The Land Department will not enforce the cancellation of claims embraced within a mineral entry upon which discovery was not made until after the filing of the application to make entry, where discovery had been made upon certain other claims, and the group, including those upon which discovery was afterwards made, is held in common ownership and forms a contiguous body upon the ground.

FINNEY, *First Assistant Secretary*:

The Bunker Hill and Sullivan Mining and Concentrating Company which on September 19, 1911, filed its mineral application 07922 and on February 6, 1913, made mineral entry for the Yreka group, consisting of 37 lode mining claims, mineral survey No. 2587, situate in T. 48 N., Rs. 2 and 3 E., B. M., Coeur d'Alene, Idaho, land district, has appealed from the decision of the Commissioner of the General Land Office dated July 21, 1921, in which the entry was held for cancellation because of nondiscovery and noncontiguity, as to all the claims except the Drew lode which was patented November 18, 1916, and the adjoining fractional Sliver location as to which the Government presented no evidence.

According to the record these claims were located in the year 1906 with the exception of one located in 1908, and two located in 1910. All were conveyed to the applicant company in 1910. That portion of the group in R. 3 E. is within the Coeur d'Alene National Forest. Pursuant to a report from the Field Service the Commissioner, on October 7, 1915, directed that adverse proceedings be instituted upon charges that there had been no discovery of mineral in rock in place and that as much as \$500 had not been expended upon or for the benefit of any of the 33 lode claims specifically named in each charge, four claims, the Drew, B, Yreka No. 12, and Yreka No. 14, not being included. An answer was filed and a hearing requested which was had in May, 1918.

The local officers in their opinion of January 29, 1919, held that the second charge as to insufficient expenditures had not been proven and should be dismissed and that the nondiscovery charge should be dismissed as to the Drew, Sliver, and 14 other named claims but that as to the balance of the claims the mineral entry should be canceled. The company appealed and counsel submitted an elaborate brief. The Commissioner reviewed the evidence at considerable length and found that the requisite discovery of mineral had not been made at all upon the Foster, Lilly, Missing Link, Penfield, Peak, Snow Line, A, D, E, Yreka No. 10, and Yreka Nos. 15 to

25 inclusive (21 claims); that discovery was shown upon the Edna, Emily Grace, K-40, Medium, C. F, and Nos. 1 and 2 (8 claims), but only after entry, and that at the date of application there were sufficient disclosures upon none of the locations except the Drew, Sliver, B, Yreka Nos. 11, 12, 13, 14, and 26 (8 claims). As but one of the claims, the Sliver, of the last mentioned eight was contiguous to the Drew location, upon which the application notice was posted, the Commissioner held the entry for cancellation to the extent of all the claims save said Drew and Sliver locations in accordance with the ruling of the Department of August 23, 1916, herein, as to contiguity and in harmony with the decision in the case of William Dawson (40 L. D., 17). Because of the foregoing disposition of the matter, the question of the sufficiency of the improvements was not considered in the Commissioner's opinion.

In the present appeal it is in substance asserted that the evidence is insufficient to justify the findings and conclusion as to nondiscovery and that it was error for the Commissioner to hold that it was incumbent upon the company to prove a valid discovery by other evidence than the location affidavits themselves, to reject certain claims because of noncontiguity and to decide that the principle of the Rough Rider case (42 L. D., 584), with respect to the rule of property doctrine was not controlling. The case is submitted here upon the brief filed on behalf of the applicant company before the General Land Office.

The claims in question cover an area of about 673 acres and are situated approximately two miles southerly from the town of Kellogg, and a somewhat lesser distance from Wardner, Idaho, in the Coeur d'Alene mining region. They include the mountain ridge and high peaks (Kellogg Peak, 6396 feet elevation, and West Kellogg Peak, 6206 feet elevation) of the vicinity. The surface is mountainous, rough, and broken, and the claims are reached only by means of mountain trails. The applicant company has operated its mining properties at Kellogg and Wardner since 1886 and, it is stated, has produced ore of a gross value of over \$80,000,000, and its net earnings have exceeded \$26,000,000. The company is a large producer of lead and silver. Its ores are taken from the formation known as the Wardner lode or fault zone. There are other large producing mines in the near vicinity whose output has been many millions. Within a radius of two miles from the Yreka group there are many claims producing and shipping ore. The land in question has no agricultural value and there is no timber or grazing of substantial value upon the surface.

The principal witness for the Government was E. D. Gardner, a mineral examiner. He had investigated the claims on October 30, 31, and November 1, 1915, and again on May 14 and 15, 1918, just a week

before the hearing was had. He testified in detail with respect to what he observed and found disclosed at the time of his two examinations upon the several claims. His evidence is set forth with substantial accuracy in the Commissioner's opinion. In 1915 he found the discovery cuts and openings on very many of the claims to be in slide rock, soil, or wash, with no evidence that rock in place had been reached. The workings were then more or less caved. He did not investigate the Sliver location, a small fractional claim to the north of the Drew. His evidence shows an adequate discovery upon the Yreka Nos. 11, 13, and 26, according to his examination in 1915, in addition to the Sliver location and the four claims not protested. Upon a number of the northern claims of the group the company did considerable additional work in 1917. As a result of this new work, Gardner in 1918 observed disclosures of mineral sufficient to justify further development work upon eight other claims, namely, the Edna, Emily Grace, K-40, Medium, C, F, No. 1, and No. 2, locations.

It was stipulated that two other Government witnesses who had examined the claims would testify substantially the same as the witness, Gardner. Mining engineer, S. L. Shonts, a witness for the company, testified as follows:

I will state now that my observation as to the facts will conform practically with those stated by Mr. Gardner yesterday.

The witnesses for the company, mining engineers, and geologists, asserted that valuable ores existed and would be found at depth upon these claims. It was stated that the Wardner lode would, as it extended on its strike to the southeast, carry its dip which was about 45° to the southwest beneath these claims and that the ground could be explored and developed by projecting drifts and crosscuts into the ground from the company's main workings upon the lode to the north and northwest much better and more economically than by doing development work on the surface of the locations. Some of the company's drifts and crosscuts were at the time of the hearing within 1,600 to 2,000 feet from the north boundary of the group.

Mining Geologist Hershey, who had examined the region and made a geologic map of the various formations testified in part as follows:

So far as I know, none of the claims show any commercial ore, if that is what you mean by valuable mineral. * * * A number of the claims show limonite and other evidences such as we find at the outcrops of veins in the Coeur d'Alene district. * * * My opinion as to the mineral character of that claim is based largely upon the fact that I am confident that the large Wardner lode, on which the Bunker Hill and Sullivan Company has been mining, extends under that ground.

He stated that the group was traversed by a number of faults and that certain of the claims were crossed by the Milo, Mountain King,

and Jackass faults. He knew of no fault or break that would cut off the Wardner lode on its course toward the southeast.

This witness stated that the broad Wardner lode at a vertical depth of about 2,000 feet below level No. 15 of the company's mine would enter under a portion of the Yreka group. Level No. 15 was about 1,200 feet above sea level. If the altitude of the northern and lowest portion of the surface of the Yreka group was approximately 5,000 feet above sea level, the Wardner lode would pass beneath the north end of the Yreka group at a depth of about 5,800 feet below the surface. If the dip continued uniform and did not flatten and was not faulted, the lowest depth of the lode would be 14,000 feet below the surface of the Yreka group and probably a little greater. The witness stated that in the deepest workings of the company's mine they were mining lead ore at a depth of about 4,000 feet below the highest point on the outcrop of the lode.

The witnesses for the company testified that with but few exceptions the producing mines of the Wardner district had no showing of ore at the surface and that many claims in the region had been passed to patent with no better or different showing with respect to mineral than that found upon these claims.

The vital question in this case is as to discovery. The requirement with respect to discovery is statutory. See section 2320, Revised Statutes. In *Cole v. Ralph* (252 U. S., 286, 295, 296, 299), the Supreme Court of the United States very recently said:

* * * But to sustain a lode location the discovery must be of a vein or lode of rock in place bearing valuable mineral. * * *

Location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim.

* * * * *
The evidence bearing upon the presence or absence of lode discoveries was conflicting. That for the plaintiffs tended persuasively to show the absence of any such discovery before the placer claims were located, while that for the defendant tended the other way. Separately considered, some portions of the latter were persuasive, but it was not without noticeable infirmities, among them the following: The defendant testified that no ore was ever mined upon any of the lode claims, and that "there was no mineral exposed to the best of my (his) knowledge which would stand the cost of mining, transportation and reduction at a commercial profit." In the circumstances this tended to discredit the asserted discoveries, and of like tendency was his unexplained statement, referring to the claims grouped in this patent application, that "some of them have not a smell of ore, but they can be located and held on the principle of being contiguous to adjacent claims"—an obviously mistaken view of the law—and his further statement, referring to vein material particularly relied upon as a discovery, that he "would hate to try to mine it and ship it."

See also the decision of the Supreme Court in the case of *Chrisman v. Miller* (197 U. S., 313).

Upon the record submitted the Department is of the opinion that no error was committed in the concurring conclusions reached below to the effect that at the date of the hearing adequate discoveries of mineral were shown only with respect to 16 of the locations and that the remainder of the claims were lacking in discovery. That conclusion is reached only by considering with liberality the testimony adduced and the showing made in the record.

With regard to the charge that sufficient patent expenditures had not been made the Commissioner made no finding. The local officers held that such charge had not been proven and that it should be dismissed. The evidence shows that the company has been working its mining ground to the north and northwest by means of an extensive system of drifts, crosscuts, inclines and levels connected with its long Kellogg tunnel. A number of these workings are directed toward the Yreka group and are within a reasonable distance of northern boundary of the claims. The logical and practical way to develop the Yreka ground at depth is by the extension of the present workings into that area. The Department is satisfied with regard to the sufficiency and availability of the patent expenditures claimed on behalf of the company.

The contention that the affidavit required by the Idaho statute in connection with the recorded location notice is good and *prima facie* evidence of a discovery is not well founded. The State statute does not require any direct and specific averment as to discovery of mineral. In the Nevada case of *Cole v. Ralph* (252 U. S., 286, 303), upon this precise question the court said:

The further objection is made that no probative force was given to recitals of discovery in the recorded notices of location of the lode claims. The notices were admitted in evidence and no instruction was asked or given respecting the recitals. In one nothing is said about discovery, and what is said in the other two is meager. But, passing this, the objection is not tenable. The general rule is that such recitals are mere *ex parte*, self-serving declarations on the part of the locators, and not evidence of discovery. *Creede & Cripple Creek Mining Co. v. Uinta Tunnel Mining Co.*, 196 U. S. 337, 352; *Lindley on Mines*, 3d ed., section 392; *Mutchmor v. McCarty*, 149 California, 603, 607; *Streprey v. Stark*, 7 Colorado, 614, 619; *Magruder v. Oregon & California R. R. Co.*, 28 L. D. 174. This rule is recognized and applied in Nevada. *Fox v. Myers*, 29 Nevada, 169, 186; *Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co.*, 36 Nevada, 543, 560.

It is argued that other claims in the region have been passed to patent where the surface disclosures and claimed discoveries have been no better than those here found, and that the so-called rule of property invoked in the *Rough Rider* case (42 L. D., 584) is here applicable and that patent should issue. In this connection it may be noted that the mining circular of March 29, 1909 (37 L. D., 728, 766), in paragraph 41, provided that in the application for patent—

The vein or lode must be fully described, the description to include a statement as to the kind and character of mineral, the extent thereof, whether ore has been extracted and of what amount and value and such other facts as will support the applicant's allegation that the claim contains a valuable mineral deposit.

This requirement was made prior to the applicant company's purchase of these claims and considerably before its application for patent. In view of the mandate of the Federal statute, the requirement of the mining circular, the holding of the Supreme Court herein above cited, and the facts, this Department does not regard the present case as within the rule of property referred to in the Rough Rider decision.

In connection with the matter of discovery it must not be understood that an actual disclosure of commercial ore is essential to a sufficient and adequate discovery. The principle laid down in the case of *Castle v. Womble* (19 L. D., 455), which has been many times cited, is authoritative. See also the case of *Jefferson-Montana Copper Mines Co.* (41 L. D., 320), *Cataract Gold Mining Co.* (43 L. D., 248), *Chrisman v. Miller* (197 U. S., 313), and *Cole v. Ralph* (252 U. S. 286).

As to the eight claims upon which discovery after entry was proven at the hearing, the Department sees no good purpose in canceling the entry to that extent, as suggested by the Commissioner, and requiring the applicant company to institute new proceedings for the entry and patent of said locations. Due notice has been given by publication and posting, as required by the law and regulations, the purchase money thereupon has been paid, and it is evident that the locations are such as are now subject to application, entry, and patent under the general mining laws. The spirit and intent of the mining laws has been fulfilled and it would be overtechnical to require the applicant to go through the form of a new proceeding to accomplish a result which may be attained by allowing the entry to remain intact as to said locations. It is so ordered.

With reference to the fact that the elimination from the entry of claims upon which a satisfactory discovery has not been shown will render other claims noncontiguous, the Department is not disposed to cancel such noncontiguous claims, in view of the fact that the claims as located and held by applicant company form a contiguous body of land held and worked under the general mining laws, and will occupy that status after the cancellation of the entry to the extent of the claims on which discovery has not been made.

As stated above, with reference to the question of discovery after application, no good purpose would be served in a case like this by cancellation of the said locations and the subjecting of the company

to new proceedings. The law is met, in my judgment, by the fact above stated that the group of claims forms a contiguous body, held and worked in common ownership—contiguous in fact—upon the ground, and which presumably will be made contiguous upon the records by subsequent proceedings by the applicant, after discovery shall have been established upon the claims now held for cancellation because of nondiscovery.

Accordingly, the Commissioner's decision is affirmed as to those claims held for cancellation because up to the present time no discovery of mineral has been shown to have been made thereupon, and modified so as to hold the entry intact as to the other claims embraced therein, upon which satisfactory discovery has been made.

CHARLES EDMUND BEMIS.

Decided March 25, 1922.

DESERT LAND—CULTIVATION.

The mere planting of a crop does not fulfill the requirement of the desert-land law, and while it is not always necessary to show that the crop was remunerative, yet it is incumbent upon the entryman to show that some sort of a crop was raised by irrigation or that a *bona fide* effort was made with that end in view.

DESERT LAND—CULTIVATION—FINAL PROOF—COMMISSIONER OF THE GENERAL LAND OFFICE—ACT OF MARCH 3, 1891.

Good faith is a controlling element in determining the question of compliance with the requirement of the desert-land law as to cultivation, and in administering the law, the Commissioner of the General Land Office is not only authorized, but it is his imperative duty under section 7 of the act of March 3, 1891, to require such additional proofs to be made within the period prescribed by law as may be necessary to show the character and extent of the cultivation.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

Case of Nancy M. Hough (47 L. D., 621) cited and distinguished.

FINNEY, *First Assistant Secretary*:

Charles Edmund Bemis has appealed from a decision rendered by the Commissioner of the General Land Office October 6, 1921, requiring a supplemental showing in connection with the final proof submitted by the former July 15, 1921, upon his desert land entry 01456, made January 8, 1913, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 13, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, T. 11 S., R. 6 E., S. B. M., El Centro, California, land district.

The Commissioner found that twenty acres of the entry had been tilled, cleared, plowed, disked and leveled, but considered as insufficient the showing as to cultivation which he set forth from the following quoted portions of the proof:

Furrowed out part of it and ridged part of it, ditched, irrigating and planting; its object was to produce an agricultural crop; planted to milo maize; part of this is up but unable to harvest a crop yet. All of this land has been irrigated * * * planted forepart of June, 1921; this is up now in most places; but not ready for harvesting; this should be ready for harvesting in about three months.

The entryman was required, inasmuch as sufficient time after the submission of the proof had elapsed for maturation of the crop, to submit an affidavit, properly corroborated, preferably by the two proof witnesses, showing the result of the crop; whether it matured and was harvested; if so, the number of pounds, tons, or bushels realized.

The entryman failed to make the required showing, but entered an appeal, contending as a general assignment of error that the law does not require a showing that a remunerative crop was produced. The cases of Margaret A. Hodgkinson (Los Angeles 021177, D-49645, unpublished) and Nancy M. Hough (47 L. D., 621) were cited as sustaining that contention.

There is only one point at issue in this case, that is, whether or not the Commissioner has authority under the law to require such a supplemental showing to be made by an entryman as that imposed upon the appellant herein.

In the concluding paragraph of the decision appealed from the Commissioner stated that the purpose of the requirement was to determine whether or not satisfactory cultivation of the land had been made; also to test the practical sufficiency of the water supply and the efficiency of the method of reclamation.

The act of March 3, 1891 (26 Stat., 1095), amending the act of March 3, 1877 (19 Stat., 377), contains among others, the provision that before a patent shall be issued, proof must be made showing cultivation of one-eighth of the land within the entry.

The method and scope of cultivation required under the desert-land laws are treated in paragraphs 24 and 25 of the regulations of May 18, 1916 (45 L. D., 345, 360, 361), the pertinent portions of which are as follows:

24. While it is not required that all of the land shall have been actually irrigated at the time final proof is made, it is necessary that the one-eighth portion which is required to be cultivated shall also have been irrigated in a manner calculated to produce profitable results, considering the character of the land, the climate, and the kind of crops being grown. * * *

25. As a rule, actual tillage of one-eighth of the land must be shown. It is not sufficient to show only that there has been a marked increase in the growth of grass, or that grass sufficient to support stock has been produced on the land, as a result of irrigation. If, however, on account of some peculiar

climatic or soil conditions, no crops except grass can be successfully produced, or if actual tillage will destroy or injure the productive quality of the soil, the actual production of a crop of hay, of merchantable value, will be accepted as sufficient compliance with the requirements as to cultivation (32 L. D., 456). In such cases, however, the facts must be stated, and the extent and value of the crop of hay must be shown, and, as before stated, that same was produced as a result of actual irrigation.

In the opinion of the Department, the desert-land law contemplated that one-eighth of the land must be irrigated and that irrigation should be proven or verified by the production of a crop. While, as stated in the case of Nancy M. Hough, *supra*, it is not always necessary to show that the crop was remunerative, yet it is incumbent upon the entryman to show that some sort of a crop was raised by irrigation or that a *bona fide* effort was made with that end in view. The mere planting of a crop does not fulfill the requirement.

It is impossible to lay down a fixed rule as to what constitutes satisfactory cultivation. *Costello v. Jansen* (10 L. D., 10). However, the character and extent of cultivation upon a desert land entry goes far toward determining the good or bad faith of an entryman. Good faith is a controlling element and Congress specifically declared in section 7 of the act of March 3, 1891, *supra*, after enumerating the showings that must be made, "that additional proofs may be required at any time within the period prescribed by law."

At the time that the entryman submitted his proof he had nearly two full cropping seasons within which to comply with the requirements of the law before the expiration of the time for submission of proof. Notwithstanding that fact he, without disclosing any reason for doing so, made proof of his attempted cultivation before the crop had all germinated and begun to grow. Such action should not be passed unnoticed, especially since the law calls for convincing evidence of his good faith.

The facts upon which the decisions in the cases cited by the appellant were rendered are dissimilar to those in the instant case. In the reported case of Nancy M. Hough, the entrywoman had exhibited an honest endeavor to comply with the law. Ditches had been constructed which made possible the practical irrigation of the entire entry. One-eighth of the land had been irrigated and cultivated and the crops had matured before the proof was submitted. The sufficiency of the proof was placed in issue upon a charge that poor crops had been raised on account of insufficient application of water; that if more water had been applied better crops would have been raised. The Department held in that case that it was not incumbent upon the claimant under the circumstances to show that the crop was reasonably remunerative in order to establish good faith; that the proof

showed compliance with the law as to cultivation and should have been accepted.

From a comparison of the cases it is obvious that the case of Nancy M. Hough, relied upon by the appellant, is not in point. In the instant case only one crop had been planted and sufficient time had not elapsed for its maturity. Proof of irrigation by the production of a crop could not then have been verified. It remained to be seen what further effort was made by the claimant in order that his good faith could be determined. The requirement of supplemental proof imposed by the Commissioner was for the purpose of enabling him to ascertain to what extent the entryman had tried to comply with the law. While successful or remunerative cultivation is not absolutely necessary, yet the degree of good faith displayed by a claimant must necessarily be measured by the extent to which he tried to produce a productive and profitable crop. The requirement was, therefore, not only reasonable, but also imperative under the law and the departmental regulations. The question of whether or not the law had been complied with would have to be determined after the submission of the supplemental proof.

Accordingly the action of the Commissioner is affirmed.

RIGHT TO CUT TIMBER IN THE STATE OF ARIZONA GRANTED TO CITIZENS OF WASHINGTON AND KANE COUNTIES, UTAH.

INSTRUCTIONS.

[Circular No. 818.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 28, 1922.

CHIEFS OF FIELD DIVISIONS:

On February 27, 1922, there was approved an act of Congress (Public No. 157) which provides as follows:

That section 8 of an act entitled "An act to repeal the timber culture laws, and for other purposes," approved March 3, 1891, as amended by an act approved March 3, 1891, chapter 559, page 1093, volume 26, United States Statutes at Large, be, and the same is hereby amended by adding thereto the following:

"That it shall be lawful for the Secretary of the Interior to grant permits, under the provisions of section 8 of the act of March 3, 1891, to citizens of Washington County and of Kane County, Utah, to cut timber on the public lands of the counties of Mohave and Coconino, Arizona, for agricultural, mining, and other domestic purposes, and remove the timber so cut to said Washington County and Kane County, Utah."

The cutting of timber under the provisions of this act must be done in conformity with the rules and regulations issued March 25, 1913—Circulars Nos. 222 and 223 (42 L. D., 30 and 22).

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

TONY BLACKBIRD.

March 29, 1922.

INDIAN LANDS—PUBLIC LANDS—PATENT—HEIRS, DEVISEES, ASSIGNEES—WORDS AND PHRASES—STATUTES.

The term "public lands" as used in the act of May 20, 1836, later embodied substantially in section 2448, Revised Statutes, declaring that where a patent is issued, in pursuance of any law of the United States, in the name of a deceased person, the title to the land designated therein shall inure to the heirs, devisees, or assignees of the patentee, is to be construed to include "Indian lands."

INDIAN LANDS—ALLOTMENT—PATENT—SECRETARY OF THE INTERIOR—COURTS—JURISDICTION.

The Secretary of the Interior is without power to cause the cancellation of a patent in fee which has been placed of record in the General Land Office, though never delivered, and where such a patent has been inadvertently issued, under authority of the act of May 8, 1906, on the ground of competency, to a deceased allottee, even prior to the expiration of the trust period, the function of vacating the same rests exclusively in the courts.

BOOTH, Solicitor:

You have requested my opinion as to the validity of a patent in fee issued to an Indian where the allottee died prior to the issuance of such patent, and, inferentially, as to the power of the Secretary of the Interior to cancel such patent.

Briefly the facts in the case are: Tony Blackbird, a Sioux Indian of the Lower Brule Reservation, South Dakota, received an allotment of 326.44 acres for which the usual 25-year trust patent issued December 31, 1903, pursuant to the act of March 2, 1889 (25 Stat., 888, 891), and the general allotment act of February 8, 1887 (24 Stat., 388). The original trust period on this allotment would not have expired until December, 1928, but in March, 1913, the allottee applied for a patent in fee, on the ground of "competency"; authority for the issuance of such patent in cases of this kind being found in the act of May 8, 1906 (34 Stat., 182). Based on favorable recommendations

from the Indian Service a final or fee patent issued to this Indian on October 7, 1913, which patent was duly recorded on the records of the General Land Office. In the meantime, however, on May 30, 1913, the allottee died, which fact it appears was not brought to the attention of the Indian Office or of the Department prior to the actual issuance of patent. On ascertaining that fact, however, the fee patent was not "delivered" but was retained in the Indian Office. Interested persons obtained a certified copy of the patent, had the same recorded and conveyances to third parties now also appear of record from the widow and two children of the deceased allottee, these appearing to be the only heirs at law of the decedent. Mortgages or other incumbrances are now of record against the land involved.

Fundamentally a patent or other instrument of conveyance to a grantee not in being, as to a fictitious person, is void and conveys no title. (112 U. S., 24, 31; 199 U. S., 62, 63, 80; 217 Fed., 11.) This rule has been invoked at times as authority for canceling or otherwise setting aside instruments issued in the name of fictitious persons. To state the rule another way: There must be a grantee capable of taking title unless the common law rule has been altered by statute. *Corpus Juris*, vol. 18, p. 158. As to this the act of May 20, 1836 (5 Stat., 31), embodied substantially in the Revised Statutes as section 2448 provides:

"Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life."

While in both instances the statute literally reads "public lands" and at times a sharp distinction is to be drawn between "public lands" and "Indian lands" (227 U. S., 355, 367; 239 U. S., 62, 63; 252 U. S., 159), yet the Supreme Court itself has held that the statute above quoted is applicable to lands allotted to Indians. *Crews v. Burcham* (1 Black, 66 U. S., 352, 356); *United States v. Chase* (245 U. S., 90, 101). See also *Kenny v. Miles* (250 U. S., 60, footnote). The reason for so holding is apparent. Doubtless many certificates of allotment, trust patents, and other forms of paper evidence of title have been issued to Indian allottees who were dead at the time of the issuance of such instruments. To hold these instruments void would necessitate cancellation and the issuance of new instruments in many cases to the heirs of the decedent. Manifestly, a proceeding of this kind would be useless. How much better, therefore, to hold that the title so acquired inures to the benefit of the heirs of the patentee or grantee. This the courts have done.

As to the authority of the Secretary of the Interior to cancel patents in fee after issuance, even though never "delivered," we have

no statute which specifically clothes that officer with such authority. On the other hand, we find many decisions by the courts showing a lack of such authority. Extracts from a few of these appear below:

"Title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title."

United States *v.* Schurz (102 U. S., 378).

"After the issuance of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings."

Michigan Land and Lumber Company *v.* Rust (168 U. S., 589, 593).

"The power of supervision and correction vested in the Secretary of the Interior over Indian allotments is not unlimited and arbitrary; it can not be exercised to deprive any person of land the title to which has lawfully vested."

Ballinger *v.* Frost (216 U. S., 240).

The true situation, as I see it, is possibly best summed up in *Steel v. Smelting Company* (106 U. S., 447), wherein the court said, page 454:

"So with a patent for land from the United States * * *. It can not be vacated or limited in proceedings where it comes collaterally in question. It can not be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued and placed on the records of the department. This can be accomplished only by regular judicial proceedings, taken in the name of the Government for that special purpose."

These views are set forth at some length because Secretaries of this Department, of their own volition have had occasion at times to resort to the cancellation of patents in fee after issuance. See *United States v. Caster* (271 Fed., 615), and *United States ex rel. Prettybull v. Lane* (47 App. D. C., 134). Superficially, these two decisions are not in harmony. In the former it was held, in effect, that the Secretary of the Interior is without power to recall the title after issuance of a patent in fee simply by canceling the patent and correcting the records of his Department accordingly. In the latter case the court refused a writ of mandamus to compel the Secretary to deliver the patent where it appeared that such patent was procured through false and fraudulent representations. This but illustrates the doctrine that "he who comes into equity must come with clean hands." While mandamus will lie upon a proper showing to compel the performance of a purely ministerial act (92 U. S., 531, 541; 211 U. S., 249; 216 U. S., 240-1), yet such writ will be refused where the object to be sought promotes or aids a wrong (222 U. S., 204; 245 U. S., 308, 311). The latter principle is reflected in the *Prettybull* case but it still remains to be seen whether the cancellation of the patent in fee in that instance by the Secretary of the Interior reinvested the fee

to those lands in the United States or that the courts would not uphold a conveyance by the patentee of those lands.

The essential difference between a void patent and a voidable patent lies in the fact that the former is a complete nullity and conveys no title. Hence, on cancellation, no one can be heard to complain. With a voidable patent, however, the rule is otherwise and whether the fee in such cases is to be recalled is a judicial question and one for determination by the courts. Such is the situation, as I see it, with reference to the case at hand. Sufficient grounds may exist for voiding the patent in this instance as the record before me indicates that misrepresentations may have been made as to the "competency" of Tony Blackbird. Even if this is true, however, that would not justify an administrative officer in arbitrarily canceling the patent, and this is particularly true where the rights of third parties have intervened. The matter is solely one for the courts to determine.

I am not unmindful of the fact that the patent in fee in this case issued prior to the expiration of the trust period, in the name of the original allottee, under authority of the act of May 8, 1906, *supra*, on the alleged ground of "competency," and, it might be argued, that a dead Indian certainly is not a competent Indian. Thus it might be said that the foundation or authority for the issuance of this patent in the first instance was lacking, and while there may be some force to that argument, yet whether that fact renders the patent void or voidable is a question for judicial determination by the courts. In this connection, however, it may be pointed out that—

"* * * every patent for public or Indian lands carries with it an implied affirmation or finding of every fact made a prerequisite to its issue. * * *"
Dickson v. Luck Land Company (242 U. S., 371, 374).

See also *United States v. Wildcat* (244 U. S., 111).

Needless to add I am of the opinion that the Secretary of the Interior is without power to cancel a patent in fee once issued and placed of record in the General Land Office but that this is a function resting exclusively in the courts. To hold otherwise would shake the very foundations upon which the title to most of our public and Indian lands rest.

Approved:

F. M. GOODWIN,

Assistant Secretary.

RELINQUISHMENT OF INCUMBERED LANDS — NOTICE TO MORTGAGEE.¹

INSTRUCTIONS.

[Circular No. 819.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 31, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Your attention is directed to Rule 98 of Practice (44 L. D., 411),² which provides:

Transferees and incumbrancers of land, the title to which is claimed, or is in process of acquisition, under any public land law shall, upon filing notice of the transfer or incumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had, affecting such land which is required to be given the original entryman or claimant. Every such notice of a transfer or incumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the General Land Office, where a like notation thereof will be made. Thereafter, such transferee or incumbrancer, as well as the entryman, must be made a party defendant to any proceeding against the entry."

For the purpose of rendering this rule more effective in the protection of existing equities, you will see that in all cases where notice of a mortgage interest in land embraced within a subsisting entry, is filed, as provided in the above Rule of Practice, such mortgagee is given notice of any relinquishment of the entry that may be filed; and you will accept no relinquishment in such case unless the mortgagee joins therein, or is given opportunity to make such showing in the matter as he may desire, and 30 days from notice of the relinquishment may be allowed the mortgagee in which to express his assent to the relinquishment, or submit such statement or showing as he may desire. If the mortgagee fails to respond to the notice, or objects to the relinquishment of the entry, you will suspend action thereon and report the matter in full to this office, with your recommendation.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

¹ See opinion of March 11, 1922 (48 L. D., 582).

² See Rules of Practice, reprint July 13, 1921 (48 L. D., 246).

**STATE OF CALIFORNIA AND OVERLAND TRUST AND REALTY
COMPANY (ON PETITION).**

Decided September 13, 1921.

**SCHOOL LAND—INDEMNITY—AMENDMENT—SELECTION—FOREST LANDS—WITH-
DRAWAL.**

Defects in an indemnity school selection may be cured by an amendatory selection prior to the intervening of adverse rights, and where the defects are cured before the lands are included within a forest withdrawal, the selection is to be treated as within the purview of a proviso which excepts from the operation of the withdrawal "any lawful entry, filing, selection or settlement" made and maintained in compliance with law, notwithstanding that the filings had been suspended because of a controversy with the State concerning the validity of its indemnity base.

SCHOOL LAND—INDEMNITY—SELECTION—RECLAMATION—WITHDRAWAL.

A first form withdrawal under the reclamation act does not defeat the equitable title of the selector acquired under an indemnity school selection if the selection was legal and completed prior to the withdrawal.

COURT DECISIONS CITED AND APPLIED.

Cases of *Payne, Secretary of the Interior v. Central Pacific Railway Company* (255 U. S., 228), *Payne, Secretary of the Interior v. State of New Mexico* (255 U. S., 367), *State of Wyoming v. United States* (255 U. S., 489), cited and applied.

FINNEY, *First Assistant Secretary:*

This is a petition for the exercise of the supervisory authority of the Department and for reconsideration of State selections R. and R. Nos. 401 and 402, now Sacramento 0189.

It appears that the State of California, on April 13, 1899, filed selection No. 316 for lot 1, Sec. 18, T. 15 N., R. 17 E., M. D. M., and for lots 1 and 2, Sec. 22, T. 16 N., R. 17 E., M. D. M.

September 28, 1901, the State filed selection R. and R. No. 401 for lot 1, said Sec. 18, and R. and R. No. 402 for lots 1 and 2, said Sec. 22, in lieu of portions of certain school sections. These latter selections were marked "amendatory of Sel. 316" and were for the same land.

March 17, 1902, the Commissioner of the General Land Office held for cancellation selection 316 for the reason that the State had failed, after due notice, to comply with instructions of February 21, 1901 (30 L. D., 491), and that decision became final and the selections were canceled March 9, 1903.

The lands here involved were, on December 24, 1902, included in an area temporarily withdrawn with the view to inclusion in a national forest, and were so included by proclamation of October 3, 1905 (34 Stat., 3163), with the proviso, however, that all lands covered by any lawful filing were excepted from the force and effect of such reservation so long as the claimant continued to comply with the law under which the filing was made.

June 24, 1912, said sections were included in a first form withdrawal under the reclamation act for construction purposes in connection with the Truckee-Carson reclamation project.

By decision of March 14, 1914, the Commissioner of the General Land Office held the said selections 401 and 402 for cancellation for two reasons; first, because they were not considered lawful pending selections at the time of the withdrawal for forest purposes, due to the fact that they were filed while the prior selection 316 was still subsisting of record and barred the way to subsequent filings until finally canceled; and, second, because of the unconditional withdrawal for construction purposes under the reclamation act which, under the rule at that time applied in the Land Department, affected all lands so withdrawn, title to which had not passed out of the Government.

That action was affirmed by the Department December 30, 1914, and motion for rehearing was denied April 10, 1915.

This petition seeks a reopening of the case and challenges the correctness of the action taken as to each of the grounds upon which the adverse action was predicated. As to the latter ground, the intervening reclamation withdrawal, recent Supreme Court decisions are invoked to the effect that such withdrawal would not destroy the equitable title of the State under its selections, provided it had done all that the law required of it to perfect title prior to the withdrawal. This point is conceded.

The second contention is a reiteration of the argument presented at the time of the former adjudication, namely, that these latter selections were amendatory of the prior selection 316, and that even if not so considered they should be given effect as new selections prior to the date of the forest withdrawal and treated as lawful filings existing of record at that time. It is pointed out that they were treated as lawful filings for many years and that the interested parties were repeatedly advised during that period that they were completed filings but were suspended because of a controversy with the State concerning its indemnity selections in general, it having been held that the State had made selections in excess of its indemnity base.

Upon review of the record the Department is impressed with the suggestion contained in the petition that the basic reason for the rejection of these selections in the former adjudication was the reclamation withdrawal which was made in 1912, and that the other objection was not really vital or substantial. If the selections were legal and completed prior to the reclamation withdrawal, they were not affected thereby, under the recent rulings of the Supreme Court. See cases of *Payne, Secretary of the Interior v. Central Pacific Railway Company* (255 U. S., 228); *Payne, Secretary of the Interior v.*

State of New Mexico (255 U. S., 367); and State of Wyoming v. United States (255 U. S., 489); decided February 28, March 7, and March 28, 1921, respectively.

The Department has repeatedly allowed claimants to file amendatory applications to cure defects in prior claims still pending of record, where no adverse rights have intervened.

As now advised the Department is of the opinion that these later selections should be considered as amendatory of the old selections, as noted of record, as they were without doubt intended to complete and perfect the claim of the State to the same lands. The tracts selected are the same, and the base lands offered are partly the same as contained in the old selection. It is urged that the State sold the selected tracts in 1899, and was, therefore, under obligation to take all necessary precaution to perfect title in protection of its transferee. The amendatory selections were pending prior to, and were unaffected by, the forest withdrawal, if predicated on valid base (47 L. D., 398).

The former action is recalled and vacated, and the case is remanded for readjudication by the Commissioner in harmony with this decision, and if the selections are found to have been complete and proper for approval at the date of the reclamation withdrawal, they will be reinstated and allowed, in the absence of other sufficient objection not here considered.

FRANK ANDERSON.

Decided March 27, 1922.

SURVEY—MINING CLAIM.

The relation between a mineral survey and a conflicting public land survey is sufficiently shown by the tie of the mining claim to one of the corners of the public land survey and by the courses and distances given in the respective surveys.

DEPARTMENTAL REGULATION REVOKED.

Section 15 of the Manual of Instructions for Survey of the Mineral Lands of the United States, approved October 6, 1908, revoked.

FINNEY, First Assistant Secretary:

Frank Anderson, United States mineral surveyor, has appealed from the decision of the Commissioner of the General Land Office, dated November 1, 1921, affirming the action of the United States surveyor general for Arizona, which required Anderson to retrace the section line of the public land survey between Secs. 31 and 6, Tps. 22 and 23 S., R. 16 E., G. and S. R. M., Arizona, which was intersected in surveying Blue Rock No. 6 Lode of mineral survey No. 3689. The controversy arises under section 15 of the Manual of In-

structions for the Survey of Mineral Lands (1909), approved October 6, 1908, which reads as follows:

15. When a boundary line of a *mineral* claim intersects a section line, give courses and distances from the points of intersection to the corners of the public surveys at each end of the half mile of section lines so intersected.

The appellant states that in making the mineral survey he first located on the ground the southwest corner of Sec. 31, and by actual survey tied corner No. 1 of the mineral survey to it; that the computations to determine the point of intersection between line 4-5 of said lode and the south line of Sec. 31 are based upon said tie, made by actual measurement, and the calls for the course and distance of said section line as given in the official field notes of the public land survey for said section.

He further states that there has been no question as to the accuracy of the course and distance of the section line as officially returned in the public land survey, and that it is not incumbent on him in surveying a mineral claim to resurvey the section lines of the public land survey intersected. He contends that he has fulfilled the requirements of the survey manual in making an actual tie to the nearest section corner and in giving intersected distances with the section line from the corners according to the public land surveys.

Unless section 15 of the manual is to be given the construction placed upon it by the Commissioner, it should be eliminated altogether, because otherwise it would not serve to give any information in addition to that already shown by the returns of the public land survey. That construction harmonizes with sections 8 and 11 of the manual and accords with the fundamental principle that a return showing courses and distances presupposes an actual survey. This leads the Department inevitably to the alternative of enforcing the regulation as construed by the Commissioner or of its revocation *in toto*.

Upon due consideration, I am unable to see any sufficient reason which would justify its enforcement. The survey of the mining claim is governed by its own monuments just as the public land survey is controlled by the corners of the public land survey. The relation between the two is shown by the tie of the mining claim to one of the corners of the public land survey and the courses and distances given in the respective surveys. The importance of finding the relation of one survey to the other arises in constructing a segregation plat to show the area of land left for disposal under the agricultural land laws. Such areas are always calculated from the courses and distances given in the returns, and not from the actual monuments as they may exist on the ground. If the returned courses and distances be accurate, the calculated areas will be exact. It is

not incumbent on the mineral claimant to bear the expense of verification of the courses and distances given in the public land survey by making a resurvey thereof. If this were enforced he would in many cases be required to survey four one-half mile lines in order to give the required information. This is an undue burden and should not be imposed.

The decision appealed from is accordingly vacated and section 15 of the manual is hereby revoked.

RECLAMATION PROJECTS—RELIEF TO WATER USERS—EXTENSION ACT OF MARCH 31, 1922.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

RECLAMATION SERVICE,

Washington, D. C., April 3, 1922.

TO ALL FIELD OFFICERS:

The act of March 31, 1922 (Public No. 185), reads as follows:

An Act To authorize the Secretary of the Interior to extend the time for payment of charges due 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 where an individual water user or individual applicant for a water right under a Federal irrigation project constructed under the Act of June 17, 1902 (Thirty-second Statutes, page 388), or any Act amendatory thereof or supplementary thereto, is unable to pay any construction charge due and payable in the year 1922 or prior thereto, the Secretary of the Interior is hereby authorized, in his discretion, to extend the date of payment of any such charge for a period not to exceed one year from December 31, 1922: *Provided,* That the applicant for the extension shall first show to the satisfaction of the Secretary of the Interior by a detailed verified statement of his assets and liabilities, an actual inability to make payment at the time the application is made and an apparent ability to meet the deferred charge when the extension expires; also in cases where water for irrigation is available, that the applicant is a landowner or entryman whose land against which the charge has accrued is being actually cultivated: *Provided further,* That similar relief in whole or in part may be extended by the Secretary of the Interior to a legally organized group of water users of a project, upon presentation of a sufficient number of individual showings made in accordance with the foregoing proviso to satisfy the Secretary of the Interior that such extension is necessary: *And provided further,* That each charge so extended shall draw interest at the rate of 6 per centum per annum from its due date in lieu of any penalty that may now be provided by law, but in case such charge is not paid at the end of such extension period, any penalty that would have been applicable save for such extension, shall attach from the date the charge was originally due the same as if no extension had been granted.

SEC. 2. That the Secretary of the Interior is hereby authorized, in his discretion, after due investigation, to furnish irrigation water on Federal irrigation projects during the irrigation season of 1922 to landowners or entrymen

who are in arrears for more than one calendar year in the payment of any operation and maintenance or construction charges, notwithstanding the provisions of section 6 of the Act of August 13, 1914 (Thirty-eighth Statutes, page 686): *Provided*, That nothing in this section shall be construed to relieve any beneficiary hereunder from payments due or penalties thereon required by said Act: *Provided further*, That the relief provided by this section shall be extended only to a landowner or entryman whose land against which the charges have accrued is actually being cultivated.

2. *Scope of the act.*—This act applies to all Federal irrigation projects constructed or being constructed under the reclamation law, including the Mesa Division of the Yuma Project in Arizona, but it does not apply to projects being constructed by the Reclamation Service for the Bureau of Indian Affairs. It is a temporary measure necessitated by the present financial stringency and the low price of agricultural products, and permits two classes of relief, to wit: (a) Extension of time of payment of construction charges due in 1922 or prior thereto, for not to exceed one year from December 31, 1922, and (b) the furnishing of irrigation water during the season of 1922 notwithstanding a delinquency of more than one year in the payment of any operation and maintenance or construction charges.

3. *General policy.*—The continuance of the present Federal reclamation plan is dependent upon the collection of water charges under the liberal terms of the reclamation law. Good policy and good faith both require that so far as possible repayments to the Government be not unreasonably postponed. Those water users who have credits and assets making it possible for them to pay all or part of their obligations due the United States will be expected to do so. At the same time, this measure will be applied sympathetically for the benefit of those not now able to pay, but who are exerting themselves to reclaim their lands and to carry out their contracts with the United States, and who, with the relief authorized by the measure, may be expected to become successful farmers. The measure does not contemplate the indiscriminate granting of relief, but care will be used to treat fairly all deserving cases. The question of leniency will be considered from a practical business standpoint and for the best interests both of the Government and of the water users.

4. *Relief under section 1.*—Under this section the Secretary is authorized, in his discretion, and under certain conditions and limitations as set forth below, to extend the date, or dates, of payment of construction charges due in 1922 or prior years. No such charge can be extended beyond December 31, 1923, and all such charges extended will draw interest at the rate of 6 per centum per annum from the time they originally become due and payable. If unpaid at the end of the extension period, any and all penalties as provided by the reclamation law will attach from the original due date. Operation

and maintenance charges can not be extended, nor can penalties thereon be remitted or reduced.

5. *Relief under section 2.*—Section 6 of the act of August 13, 1914 (38 Stat., 686), provides that no water shall be delivered to the lands of any water-right applicant or entryman who shall be in arrears for more than one calendar year in the payment of any reclamation charges, and the effect of section 2 of the present act is to authorize the Secretary, in his discretion, to waive such inhibition for the year 1922. In other words, during the season of 1922, the Secretary is authorized, in his discretion, to furnish water to those in arrears for more than one calendar year as defined by departmental decision of May 24, 1916 (Reclamation Service Circular Letter 564). No extension of time in payment is provided for under this section, and the penalties for nonpayment, as recited in the reclamation law, continue to run until the sum or sums due are paid.

6. *Who are qualified to apply for relief.*—The liberal terms of the reclamation law are intended to provide homes for persons who live by farming, and only those whose lands, against which the charges have accrued, are actually being cultivated are eligible for relief. This, however, does not mean that every irrigable acre of each farm must be cultivated, but that in a general way the farm must be under cultivation. No relief will be granted to nonresidents and as to lands held in tenancy. An exception to the rule as to cultivation is made in the case of lands in Part I of the Mesa Division of the Yuma Project in Arizona, for which water is not yet available; the construction charges against these lands may be extended but not the purchase price for the lands. A further exception to the rules as to residence and cultivation may also be proper where serious illness or death in a family, or some other exigency, has compelled some relaxing of effort on the part of the owner. Each application which relies upon such a claim should be carefully and personally investigated by the project manager and full report made thereon. In some such cases it may be preferable for the owner to arrange to sell his land, in which case the Reclamation Service, upon request, will assist him to sell at a stipulated and reasonable price. The requirements of this paragraph apply to both classes of relief under the act.

7. *Who are entitled to relief.*—The Secretary is authorized to extend construction charges only upon a satisfactory showing by the applicant that he is actually unable to make payment at the time the application is made and that there is a reasonable likelihood of his being able to make payment when the extensions expire. Both elements must be present in order to satisfy the requirements of the act. In other words, relief may be given to an applicant who shows he is unable to now pay a past-due construction charge, *only* in the event

of his being able to establish a reasonable expectation of paying the charge at a later specified date. As a general rule extensions of construction charges should be arranged so that each separate charge will fall due on a different date, such dates not being restricted to December 1. This will make it easier for the water user to pay the charges when the extensions expire. However, efforts should be made in every reasonable way to reduce the number of construction charge installments extended in any individual case. The general principles stated in this paragraph will be applied in determining whether an applicant under section 2 of the act is entitled to irrigation water in 1922.

8. *Holders of excess lands.*—Every effort should be made to reduce excess holdings within projects.

9. *Sale of land through the Reclamation Service.*—In furtherance of the suggestions made in paragraphs 6 and 8 as to the sale of lands, each project manager is authorized to make available the services of the Reclamation Service, and the owner may list the land he is willing to sell, stating the price and terms at which he is willing to dispose of it. The price and terms named will be given consideration in determining what action should be taken upon his application for relief. When the price and terms at which the land is offered for sale are reasonable, a formal instrument authorizing the project manager to sell, may be executed by the landowner. A form for this purpose will be provided upon requisition by the project manager.

10. *Procedure by applicant.*—Every person who desires to obtain any of the benefits of this act must file an application with the project manager on the form (7-298a) provided for that purpose. This form has been prepared for the purpose of assisting the applicant to present essential facts upon which the Secretary may exercise the discretion demanded by the act. A full and frank answer to each question propounded should be made. The application may be supplemented by any additional showing, provided same is submitted in the form of an affidavit. This form may be used by land purchasers under Part I of the Mesa Division of the Yuma Project in Arizona, questions not applicable being modified or deleted. A supply of printed form of application will be provided upon requisition by the project manager.

11. *Procedure by United States.*—Upon receipt of an application for relief under either section 1 or section 2 of the act, the project manager shall promptly compile in the form of a statement all information practically available to him bearing on the assets and liabilities of the applicant, the extent to which he has cultivated his farm, and his personal and actual ability or inability to pay the charges due, and also his probable ability to pay same at a later date. The statement should also show where the applicant is residing and

what, if any, other business he may be conducting, and with what success. Each application, with the statement of the project manager, will be submitted to the board of directors of the local water users' association, or irrigation district, for its investigation, consideration, and recommendation. Following action by such board, the application will be forwarded immediately to the Director (with copy to the Chief Engineer) with recommendation of the project manager. In cases where the Director fully approves the request of the applicant, his decision shall be final; in all other cases the application shall be referred to the Secretary of the Interior for final decision.

12. *Relief to organized group of water users.*—Relief as to construction charges may be granted to a legally organized group of water users, such as an irrigation district or a water users' association. This provision is intended to apply only to those organizations which have contracts with the United States covering the group payment of water charges. The necessity for such relief must appear from individual showings made upon the regular application blank. However, a special application must first be made by the organized group of water users through the project manager, chief engineer, and director, and each such case will be handled by itself as differing circumstances warrant.

MORRIS BIEN,
Acting Director.

Approved:

ALBERT B. FALL,
Secretary.

OTRIN v. HAWKINS.

Decided April 5, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD—PREFERENCE RIGHT—ADVERSE CLAIM.

The right of a third party to file an application for an oil and gas prospecting permit for a tract covered by the unrestricted homestead entry of another is expressly recognized by section 12 (c) of the departmental regulations of March 11, 1920, but the granting of a permit is dependent upon a future amendment of the entry reserving the mineral contents to the United States, and the exercise by the entryman of a preference right, if any, to a permit pursuant to section 20 of the leasing act.

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD—RELINQUISHMENT—ADVERSE CLAIM.

Immediately upon the cancellation, by voluntary relinquishment or otherwise, of an unrestricted homestead entry during the pendency of an oil and gas permit application adversely to the entryman, the rights of the permit applicant, all else being regular, attach and become superior to those of a junior homestead applicant.

HOMESTEAD—OIL AND GAS LANDS—PROSPECTING PERMIT—SURFACE RIGHTS—
SECRETARY OF THE INTERIOR.

The discretionary authority of the Secretary of the Interior to allow surface homestead entries upon lands covered by an oil and gas prospecting permit is expressly recognized in section 29 of the act of February 25, 1920, such allowance being subject, however, to the rights of the permittee to use so much of the surface of the land as is necessary in extracting and removing the mineral deposits without compensation to the nonmineral entryman.

FINNEY, *First Assistant Secretary*:

February 4, 1921, Leo Otrin filed application 045377, under section 13 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas on the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 17, T. 13 N., R. 26 E., M. P. M., Lewistown land district, Montana, the land at that time being embraced in the unrestricted homestead entry 024150, made January 13, 1914, by Henry S. Andrews.

March 24, 1921, Royal H. Hawkins filed application 045533 to make unrestricted homestead entry of the above described land under the provisions of section 7 of the enlarged homestead law as an addition to his homestead entry 09660, covering the SW. $\frac{1}{4}$, Sec. 28, of the same township and range, said application being accompanied by the relinquishment of Andrews of all of his right, title, and interest under his entry.

By decision of June 11, 1921, the Commissioner of the General Land Office required Otrin to show cause, within 30 days from notice, why Hawkins's application to enter should not be allowed, provided he should consent to the amendment of the same so as to make the entry subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), and to whatever rights Otrin might have under his permit application.

From that action Hawkins appealed on the stated grounds that the Commissioner erred in not rejecting the application of Otrin for the reasons (1) that at the time it was filed the land was not subject to a permit because included in the unrestricted homestead entry of Andrews, and (2) in not allowing the homestead entry of appellant, as applied for subject only to the future classification of the land, as valuable for oil and gas deposits.

July 18, 1921, Otrin responded with a protest against the application of Hawkins, alleging in substance and effect that the tracts in question are probably valuable for the oil and gas deposits contained therein; that an allowance of an entry on that application, subject to the conditions named in the Commissioner's decision, would interfere with the prospecting of the land for oil and gas and with the successful development and extraction of such deposits if found upon the land; and that in the presence of development operations the land would be valueless for agricultural purposes.

The Department is unable to concede the correctness of the contention of Hawkins that the permit application of Otrin was erroneously received because at the date of its presentation the land was covered by the unrestricted homestead application of Andrews, for, by section 12(c) of the regulations of March 11, 1920, reprint as amended to October 29, 1920 (47 L. D., 437, 444, 445), issued under the leasing act, the right of a person to file a prospecting permit application for a tract covered by the unrestricted homestead entry of another is expressly recognized, subject, however, to a future amendment of the entry to be obtained in the manner provided for in said section, and to the exercise by the entryman of a preference right, if any, to a permit under the provisions of section 20 of the act. It is clear, therefore, that immediately upon the cancellation, by voluntary relinquishment or otherwise, of such an entry pending a permit application for the land adverse to the entryman, the rights of the permit applicant, all else being regular, would be superior and paramount to those of a junior homestead applicant for the same tract.

On the other hand neither a permit application, nor a permit granted thereon, would of necessity preclude the allowance of a homestead entry upon the land, for by section 29 of the leasing act it is expressly provided that the Secretary of the Interior, in making a lease (with a view to which a permit application is filed) under said act, may in his discretion reserve to the United States the right to sell or otherwise dispose of the surface of the lands embraced within such lease under existing laws, in so far as the surface is not necessary for use of the lessee in extracting and removing deposits thereon. And by departmental instructions of October 6, 1920 (47 L. D., 474), it is directed that application to make nonmineral entry of lands outside of areas which have been designated as within the geological structures of producing oil and gas fields shall be received by local officers, and if in any case nonmineral entry shall be allowed on instructions from the Commissioner, the same will be with a reservation of the oil or gas to the United States and subject to the rights of the permittee or lessee, as the case may be, to use so much of the surface of the land as is necessary in extracting and removing the mineral deposits without compensation to the nonmineral entryman for such use. But while the right of a nonmineral claimant to make entry of land covered by the prior prospecting permit application of another is thus clearly recognized both by the provisions of the leasing act and the regulations thereunder, such an entry could not affect the unrestricted and unhampered use of the land for prospecting and developing purposes under a permit or lease.

For the reasons stated the protest of the permit applicant is dismissed and the decision of the Commissioner affirmed.

HOEL v. ROSE,

Decided April 5, 1922.

SETTLERS—HOMESTEAD—WIDOW, HEIRS, DEVISEE—SECTION 2291, REVISED STATUTES—STATUTES.

A life convict who is declared civilly dead by State statute, is not dead within the purview of section 2291, Revised Statutes, which gives the right of entry to a settler's widow, or if she be dead, to his heirs, "if he be dead."

HOMESTEAD—SETTLERS—ENTRY.

Conviction of crime and sentence to life imprisonment therefor do not take away the statutory qualifications of a settler on public land to make a homestead entry.

COURT DECISIONS CITED AND APPLIED:

Cases of *Davis v. Lanning* (19 S. W., 846), *Avery v. Everett* (6 Am. St. Rep., 368), *Smith v. Becker et al.* (64 Pac., 70), cited and applied.

FINNEY, First Assistant Secretary:

The lands in T. 20 N., R. 41 E., M. M., then unsurveyed, were designated for entry under the enlarged homestead law in 1909, and later, on April 8, 1918, the plat of the survey thereof was filed in the local land office.

On September 4, 1917, and while he was confined in the Montana Penitentiary under a life sentence for murder, James E. Harry claiming as a settler filed in the local office a notice of his intention to be absent from the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 21, and other land in that township, "for as long a time as I (he) may be held in the Montana State Prison."

On March 6, 1919, he filed a similar notice, and on July 17, 1919, he filed his application, Miles City 041179, to enter the land under the enlarged homestead law. This application, which was supported by his claim of settlement on May 1, 1914, was rejected by the local office for the reason that it was not executed within the land district or county in which the land is located.

On October 11, 1919, and after the rejection of Harry's application, Mangus Hoel filed his petition for the designation of and his application 047019 to enter the said NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and also tracts not in conflict, under the stock-raising homestead law.

Later the General Land Office notified Harry's attorney and the local office that inasmuch as he was civilly dead under the laws of Montana his heirs would be permitted to make an entry under his settlement claim upon furnishing a proper showing as to the facts essential to the allowance of the entry by them.

On April 26, 1920, Lillian J. Rose, on behalf of herself and other heirs of Harry, filed an application to enter the land mentioned,

which entry was allowed by the local office on July 27, 1920. This application was supported by a showing as to all the essential facts except that it did not show that Harry's settlement had been maintained after his conviction in 1917, either by himself, by another person in his interest, or by any of the heirs in their own behalf.

On March 28, 1921, Hoel filed a protest against Rose's entry on the ground that settlement had not been maintained; and by its decision of October 29, 1921, the General Land Office sustained that contention and held the entry for cancellation, not only as to the tracts in conflict but also as to all other tracts embraced therein, on the ground that all the rights secured by Harry's settlement had lapsed before that entry was applied for, for the reason that the settlement had not been maintained.

In her appeal from that action Rose contends that the law did not require the heirs to either reside on or cultivate any part of the land at any time until after the entry was allowed; and she further strongly urges that if canceled at all it should be canceled only as to the tracts in conflict.

In the opinion of this Department it is not necessary to here consider the questions thus raised, because the entry must be canceled for the further and more fundamental reason that its allowance was not warranted by the law. Mrs. Rose, being a married woman, was not qualified to make the entry in her own right, and she could not have properly made it as Harry's heir because he was not dead within the meaning of section 2291, Revised Statutes, on which her application was based. That section has been held to give the right of entry to a settler's widow, or if she be dead to his heirs, "if he be dead;" but the fact that section 1240 of the Penal Code of Montana declares that "a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead" does not create a situation that brings his wife or heirs within the provisions of section 2291.

Harry's conviction and sentence did not operate to divest him of title to his property under either the common law or the statute; and, in fact, section 1244 of the Penal Code of Montana so declared, while section 1241 specifically provided that convicts such as he should not be deemed incapable of disposing of and conveying their property, and sections 1242 and 1243 declare that such convicts shall be competent to testify as witnesses in court, and that their persons shall be under the protection of the law.

It has long been well settled under the common law of both this country and England that one declared civilly dead does not so far cease to exist as to authorize the appointment of an administrator for his estate, or the distribution of his property among his heirs,

and further that his heirs take no interest in his property until after his natural death. See 9 Cyc. 873; *Davis v. Laning* (19 S. W., 846); and the exhaustive note to *Avery v. Everett* (6 Am. St. Rep., 368, 379).

In discussing this question the author of the note just mentioned after a copious citation of many authorities, both English and American, very aptly and correctly remarked (page 383, note):

We deduce, therefore, that in those states where there is a statutory provision that one imprisoned for life shall be deemed civilly dead, the legislature could not have intended that such convict should labor under greater disabilities than those entailed by the common-law decisions; and if the strict rule of the common law is not to be followed, it must be assumed—and especially so in view of our institutions and tenures here, and also in view of the fact that such convict may be pardoned—that one *civiliter mortuus* under the statutes ought not to be deemed naturally dead so far as retaining his title to property and protecting it is concerned, and that it ought not certainly to devolve upon his successors or heirs simply because of the disability of imprisonment. This construction of those statutes would, it seems to us, be founded in greater justice and more in consonance with the reason of the law, and more in keeping with the spirit of our institutions, than a conclusion to the *contra*.

The laws of Montana not only protect the property rights of life convicts, and continue their dominion over them, but they do not authorize the appointment of administrators or provide for the control of their estates, as do the laws of some other States, and even if they did it would be doubtful if the heirs of such persons could claim their property, because so strongly and well established is the doctrine that such property does not pass by inheritance that the Supreme Court of Kansas refused to recognize the claims of such heirs under the laws of that State which not only say that a life convict "shall be deemed civilly dead," but further declare that "his estate, property, and effects shall be administered and disposed of in all respects as if he were naturally dead." *Smith v. Becker et al.* (64 Pac. 70).

In construing that statute the court said in that case:

We think that by the use of the word "administered" in this provision relating to the estate of convicts it was the intention of the lawmakers to restrict the administrator to the control and disposition of personal property for the benefit of creditors, to the end that all debts of the convict may be speedily paid. The words "disposed of" are not, in our judgment, broad and comprehensive enough to reach to and embrace that act of the law which vests the ownership of property in an heir by inheritance.

The conclusion reached in this case that Congress did not have in mind entrymen who were civilly dead, or intend to transfer their rights to their heirs when it enacted section 2291, Revised Statutes, is in a measure strongly sustained by the decision in the leading and often cited case of *Avery v. Everett*, *supra*, which involved a

statute providing that life convicts should be "deemed civilly dead." It was held that such a death was not contemplated by a testator who directed that property he willed to his son should pass to others at the son's "death," and that the property remained in the son notwithstanding the fact that he was civilly dead.

Furthermore, it is a fact that while the Land Department might through the exercise of its supervisory power, refuse to allow Harry to make an entry on the ground that he would not be able to meet the requirements of the law as to residence, that fact does not take away from him his statutory qualifications to make the entry, and it can not be said that his heirs could at the same time have a right to enter the land in their own exclusive interests.

For these reasons, if not for those assigned by the Commissioner, this entry must be canceled in its entirety, and his action is therefore affirmed.

OIL PROSPECTING PERMITS IN POWER SITE RESERVES—SUB-DIVISION 10 OF PERMIT FORM, MODIFIED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., April 7, 1922.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

On August 30, 1921, you submitted application for oil and gas prospecting permit, Salt Lake City 028589, filed by Alvina L. Kamen, involving lands withdrawn for power site purposes, recommending that the permit be issued on the standard form, without reference to proposed amendment thereto suggested by the Federal Power Commission.

I now transmit herewith for your information a copy of the opinion of the Solicitor, dated September 30, 1921 (48 L. D., 459), and approved by the Secretary, holding that the sole authority to determine what, if any, provisions should be inserted in a prospecting permit or lease affecting power site lands, rests with the Secretary of the Interior.

In accordance with the suggestion of the Solicitor, on the last page of his opinion, in all permits involving power site lands you will add to subdivision 10 of the permit form the following:

"He further agrees that in the event of discovery of oil or gas within the permit area appropriate conditions for the protection of the power development and use may be incorporated in any lease or leases to be issued to him or his successors."

Kamen's permit is returned for action in accordance with the above.

E. C. FINNEY,

First Assistant Secretary.

**EFFECT OF LEASING LAW IN CERTAIN STATES RESPECTING
SHOWING TO BE MADE BY NONMINERAL CLAIMANTS.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 8, 1922.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

The proposed instructions, requiring a nonmineral showing with respect to potash, coal, phosphate, oil shale, gas, and sodium, in connection with the disposition of public lands in Alabama, Kansas, Michigan, Minnesota, Missouri, Oklahoma, and Wisconsin, submitted by your office for departmental approval, have had careful consideration.

While the Department entertains no doubt that Congress intended to make and did make, by the acts of October 2, 1917 (40 Stat., 297), and February 25, 1920 (41 Stat., 437), all of the minerals named, owned by the United States, subject to disposition as provided in said acts, it is not believed that the situation is such as to call for any change in the existing forms or practice, as to the States referred to. If, in any case arising in those States, there is a claim, classification or report that the lands are valuable for the minerals in question, the nonmineral claimant should be required to make such showing or waiver as the facts may warrant.

The instructions are returned herewith, without approval.

E. C. FINNEY,
First Assistant Secretary.

REPAYMENT BASED UPON RELINQUISHMENT—PRIOR DEPARTMENTAL DECISION MODIFIED.

INSTRUCTIONS.

[Circular No. 820.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 12, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

In departmental instructions of March 30, 1922 (unpublished), it is directed that a relinquishment filed in support of an application for repayment, pursuant to the provisions of the act of June 16, 1880 (21 Stat., 287), and the regulations thereunder (45 L. D., 520), should be treated as absolute and the entry canceled thereupon and the land involved opened to settlement and entry without further

action, in conformity with the rule as enunciated in instructions of January 31, 1912 (40 L. D., 397), regardless of whether or not the repayment claim should be subsequently allowed or denied, thereby overruling the decision in the case of Peter A. C. Hausman (37 L. D., 352), so far as it conflicts with said instructions.

It is to be noted that departmental instructions of March 30, 1922, apply only to cases wherein the entry shall have been relinquished in its entirety. Said instructions in nowise modify paragraph 15 of the repayment regulations of October 25, 1916 (45 L. D., 520, 522), which paragraph relates solely to applications for repayment of moneys paid in connection with commutation entries, final homestead entries, final desert-land entries, and other final certificates where it is the intention of the applicant for repayment to merely suffer cancellation of the final entry, leaving the basic entry intact subject to future compliance with the public land laws.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

ISAAC P. CLARK ET AL. AND OHIO OIL COMPANY.

Decided April 19, 1922.

OIL AND GAS LANDS—MINING CLAIM—OCCUPANCY—ADVERSE CLAIM.

Mere possession and occupancy of a mining claim, unaccompanied by diligent prosecution of work leading to the discovery of mineral ore, in the absence of discovery, insufficient grounds for a lawful exclusion from the land of others who seek to make mineral discovery and development thereon.

OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—ADVERSE CLAIM.

As between two conflicting claimants for an oil and gas prospecting permit under section 19 of the act of February 25, 1920, both relying upon asserted placer locations for the same land on which the character of the work performed by each was substantially the same, a superior right to a permit will be accorded to the junior claimant upon a showing of exercise of due diligence, where the senior claimant, having failed to exercise due diligence in the prosecution of work looking to a discovery of oil or gas, forcibly prevented the junior claimant from proceeding actively with the performance of discovery and development work with a view to perfecting the location.

COURT DECISIONS CITED AND APPLIED.

Cases of *Whiting et al. v. Straup et al.* (95 Pac., 849), *Union Oil Company of California v. Smith* (249 U. S., 337); *Cole et al. v. Ralph* (252 U. S., 286), cited and applied.

FINNEY, *First Assistant Secretary*:

On March 29, 1920, Isaac P. Clark, on behalf of himself and a number of associates, filed application 028226, under section 19 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon, together with another tract, the N. $\frac{1}{2}$ and SE. $\frac{1}{4}$, Sec. 26, T. 19 N., R. 78 W., 6th P. M., Cheyenne land district, Wyoming, based upon four asserted oil placer mining claims alleged to have been located in February and March, 1919, said locations being denominated the Lucky Strike Nos. 2, 3, 4, and 5, and embracing respectively the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ of said section.

The applicant, who was one of the locators of said claims, alleges that as lessee of the locators he entered in possession of the claims in June, 1919, for the purpose of making mineral discoveries thereon and was in possession of the claims under the above-named locations on October 1, 1919; that prior to February 25, 1920, he expended upon or for the benefit of each of the locations a sum in excess of \$250. Attached to the application is an itemized statement by Clark of expenditures aggregating \$8,849.52, alleged to have been made for the benefit of the four claims named and another one situated in the same section. In a supplemental statement, however, the following expenditures are alleged: For the Lucky Strike Nos. 2 and 3, for locating, stakes, and validating wells, \$200; one cellar 10 by 10 by 6 feet and two cellars 10 by 10 by 1 feet (incompleted because the men performing the work were driven off by force), \$150; rig timbers, \$236.20. Lucky Strike No. 4, locating, stakes, and validating well, \$100; one cellar 10 by 6 by 6 feet (incompleted), \$100; rig timbers, \$185. Lucky Strike No. 5, locating, stakes, and validating well, \$100; cellar 10 by 10 by 12 feet, \$150; tools and equipment, \$190.

The applicant alleges that there were three oil placer mining claims in conflict with those relied upon by him, namely, the Eureka No. 3, covering the NW. $\frac{1}{4}$ of the section, the Eureka No. 4, covering the NE. $\frac{1}{4}$, and the Eureka No. 5, covering the SE. $\frac{1}{4}$, but charges that said claims were fraudulent as against both himself and the Government of the United States; that said claims were located by persons who were merely dummies; that neither the locators nor their assigns, nor any of them, have complied with the law; that said claims have been abandoned; that the locators and their assigns "have been guilty of various fraudulent devices, and that particularly, among other things, they converted the timber of this claimant amounting to more than 12,500 feet, board measure, and otherwise hindered and prevented by force and arms this claimant from proceeding to actual discovery of oil in commercial paying quantities"; that neither the said locators of the Eureka claims nor their assigns, nor any of them, have *bona fide* expended \$250 for the benefit of any of said claims;

That upon the Northeast Quarter of said section there was erected a little cabin at a cost not to exceed \$90.00, and there was placed upon the ground in the year 1918 six lengths of ten inch casing and some lengths of timber; yet since that time they have done nothing, and that said material was placed there merely for the purpose of doing alleged annual labor for the purpose of fraudulently securing title to said land.

That upon the Northwest Quarter of said section, there was placed in the year 1918 two lengths of timber and five lengths of casing, all for the purpose of doing alleged annual labor, designed to secure by fraud a title to said lands without actual discovery or other right.

That upon the Southeast Quarter of said Section said claimants erected a cabin of a value not to exceed \$90.00, and placed thereon certain timber and lengths of casing for the purpose of doing alleged annual labor to secure title fraudulently.

That aside from the things herein stated, if any of said things have been for the benefit of said claims, nothing has been done by any other than this applicant.

August 25, 1920, the Ohio Oil Company filed application 029685, under the above-mentioned act and section thereof, for a permit to prospect for oil and gas upon the above-described tracts based upon the Eureka Nos. 3, 4, and 5 oil placer mining claims embracing the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of said section. The said application was filed by the Company as a lessee of the locators of the claims named but is joined in by the parties shown by the abstract to possess the record title thereto. The expenditures relied upon by this applicant in fulfillment of the requirements of the statute are as follows: On the Eureka No. 3, cellar 9 by 9 by 10 feet, \$100; two timbers 10 by 12 inches, 20 feet in length, \$40; 120 linear feet of 10-inch casing, \$360; total, \$500. Eureka No. 4, cellar 9 by 9 by 10 feet, \$100; 14 timbers 10 by 12 inches, 20 feet in length, \$280; 120 feet of 10-inch casing, \$360; cabin 10 by 12 by 7 feet, \$100; total, \$785. Eureka No. 5, cellar 9 by 9 by 10 feet, \$100; 4 timbers 10 by 12 inches, 20 feet in length, \$80; 200 linear feet of 10-inch casing, \$600; cabin, \$100; total, \$880. The company alleges that the said claims were located September 7, 1917, and that ever since that date they have been claimed and possessed continuously by the applicant and its predecessors in interest, and that it and all interested parties were claimants and occupants of the land on October 1, 1919; that the applicant and the interested parties have performed all acts under the preexisting laws necessary to valid locations except to make discoveries.

Upon considering the conflicting applications of Clark and the Ohio Oil Company the Commissioner of the General Land Office, by decision of August 22, 1921, after quoting from reports of special agents of that office upon said applications, found and held as follows:

It seems clear that the prior claims were never abandoned by the Ohio Oil Company or the original locators.

The prior locations on which the Ohio Oil Company and its lessors base their claim for permit may have been invalid for lack of discovery. So far as that is concerned the same may be said of the subsequent claims located by Clark and his associates, but whether the prior claims were invalid or not for lack of discovery the original locators and their lessees and assignees had it appears complied in all other respects, and the claims were being maintained in accordance with a long established custom having the sanction of the mining laws and until the prior claims were canceled in a proper proceeding the original locators and their lessees were legally entitled to maintain possession. Clark's application is rejected to the extent of the conflict with the application of the Ohio Oil Company to wit: as to the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of said Sec. 26, subject to the usual right of appeal.

Appeal by Clark from this action brings the case to the Department.

The Department is not persuaded that the facts disclosed by the records of the conflicting applications under consideration warrant the Commissioner's conclusion that the claims upon which the Ohio Oil Company's application is based were being maintained in accordance with a long-established custom having the sanction of the mining laws, or that the locators of said claims and their lessees were legally entitled to maintain possession thereof as against Clark and his coclaimants under the Lucky Strike claims. The company concedes in its application that all of the three Eureka claims lack discoveries. It is true that the company alleges, and Clark, in fact, admits that there were cabins upon each of two of the claims and that a small quantity of casing and timbers had been placed upon each of the three. Clark avers in his application that the cabin upon one of the claims and the casing and timbers upon two of them were placed there in 1918. The company alleges also, and this Clark does not deny, that upon each of the three claims a cellar had been excavated by the company. It does not appear from the company's application when the work last mentioned was performed, but a special agent reports that the cellars were undoubtedly upon the land in 1918. It nowhere appears from the records that any further steps were taken by either the locators of the Eureka claims or the Ohio Oil Company looking to the development of oil upon any portion of the land, while on the other hand a special agent reports that in June, 1921, when he examined the claims there was nothing upon any portion thereof in the shape of mining improvements save the cellars.

The Ohio Oil Company alleges that it and its lessors have claimed and possessed the land ever since the date of the Eureka locations, but what said alleged possession consisted of, aside from the cabins, material, and cellars on the land, is not shown. Mere possession and

occupancy of a mining claim, however, upon which there has been no discovery of mineral are insufficient grounds for the lawful exclusion from the land of others who seek to make mineral discoveries and development thereon. It is only when such occupancy and possession are accompanied by diligent prosecution of work leading to the discovery of mineral that the exclusion of others from the land is justified. As was said by the Supreme Court in *Union Oil Company of California v. Smith* (249 U. S., 337, 346, 348): "It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled—at least for a reasonable time—to be protected against forcible, fraudulent, and clandestine intrusions upon his possession," but "whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral," and the same court in *Cole et al. v. Ralph* (252 U. S., 286, 294) said:

• In advance of discovery an explorer in actual occupation and diligently searching for mineral is treated as a licensee or tenant at will, and no right can be initiated or acquired through a forcible, fraudulent or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably, and not fraudulently or clandestinely, and makes a mineral discovery and location, the location so made is valid and must be respected accordingly.

Referring to the same principle the Supreme Court of Wyoming, in *Whiting et al. v. Straup et al.* (95 Pac., 849), at page 855 said:

Tested by the above rules, it is clear that at the time the predecessors in interest of the defendant company, through their agents Bijur and Straup, entered upon the land, erected the drilling machinery thereon, and thereby made the discovery of gas, the plaintiffs were not maintaining, and for some time at least had not maintained, such a possession as, unaided by a valid location, would exclude other bona fide locators or prospectors. They were neither in the actual possession nor occupancy of the land, nor engaged in prospecting or exploring the same for mineral. Although they acquired whatever rights they had, under the conveyances aforesaid, in August, 1902, the only actual work done by them upon the premises was the digging the hole above mentioned in November of that year, which confessedly was not expected to uncover a deposit of oil or other mineral, but was intended chiefly, as it seems, to show their claim of possession, and also to serve as preliminary to the erection of a drilling machine. But, whatever the reason for the delay, more than a year elapsed after digging the hole before they took a machine upon the premises and commenced the actual work of exploration, and, in the meantime, the parties under whom the defendants claim had peaceably gone upon the land, and made their discovery and location; and when they went upon the land, it is conceded, and indeed alleged by the plaintiffs, that the latter and their employes were absent therefrom.

If, therefore, as Clark, in effect charges, the locators of the Eureka Nos. 3, 4, and 5 claims and their successors in interest, while failing to exercise due diligence in the prosecution of work upon said claim looking to the discovery of mineral, have removed from the land the materials placed thereon by Clark and his coclaimants of the Lucky Strike Nos. 2, 3, 4, and 5 claims, and otherwise forcibly prevented the last mentioned claimants from proceeding actively with the performance of discovery and development work upon the land, with a view to perfecting their locations, the superior right to a permit for the tracts in conflict would, as between the Eureka and the Lucky Strike claimants, appear to be in the latter, if, as he claims, he exercised due diligence, the character of the work relied upon by the two sets of conflicting claimants being substantially the same, and apparently sufficient, in the absence of the conflict, to support a section 19 permit application. The present records, however, do not afford a sufficient basis for a determination of the respective rights of the conflicting claimants, and a hearing will therefore be ordered for the purpose of affording them an opportunity to substantiate their claims. The decision appealed from is accordingly so modified.

LIMITATIONS RESPECTING THE LEASING OF OIL SHALE DEPOSITS.

April 21, 1922.

OIL AND GAS LANDS—OIL SHALE LEASE—SECTION 21, ACT OF FEBRUARY 25, 1920.

The limitation contained in section 21 of the act of February 25, 1920, relating to the leasing of deposits of oil shale belonging to the United States, prevents a lessee thereunder from taking and holding directly more than one lease, irrespective of whether the leased area is in one State or another.

OIL AND GAS LANDS—OIL SHALE LEASE—SECTION 27, ACT OF FEBRUARY 25, 1920.

The limitations contained in section 27 of the act of February 25, 1920, in respect to any kind of mineral leased under that act, are applicable to an oil shale lease, and consequently no person or corporation can take and hold, either directly or indirectly, any interest or interests in oil shale deposits in an area or areas exceeding in the aggregate the equivalent of 5,120 acres.

BOOTH, *Solicitor*:

There was submitted on April 14, 1922, for my opinion the question as to the number of oil shale leases and the interests thereunder that might be held by the lessee pursuant to the provisions of the leasing act of February 25, 1920 (41 Stat., 437). The question arises upon a letter dated April 13, 1922, and a memorandum from the Bureau of Mines.

By section 21 of the leasing act, *supra*, the Secretary is authorized to lease to any qualified person or corporation the deposits of oil shale and needed surface grounds. That section prescribes:

* * * that no lease hereunder shall exceed five thousand one hundred and twenty acres of land, to be described by the legal subdivisions of the public-land surveys, or if unsurveyed, to be surveyed by the United States, * * * *Provided further*, That not more than one lease shall be granted under this section to any one person, association, or corporation.

The section also contains a provision entitling a person who had valid oil shale claims on January 1, 1919, to a lease for such area as he should relinquish which "shall not exceed the maximum area authorized by this section to be leased."

Section 27 of the act in general restricts a lessee to one coal, one phosphate, or one sodium lease in any one State; to one oil or gas lease within a producing geologic structure; and to not more than three oil or gas leases in any one State. The section then continues as follows:

No corporation shall hold any interest as a stockholder of another corporation in more than such number of leases; and no person or corporation shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, which, together with the area embraced in any direct holding of a lease under this act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, for any kind of mineral leased hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under this act. Any interests held in violation of this act shall be forfeited to the United States.

The limitations of the above excerpt in respect to any kind of mineral leased under the act are general and are applicable to an oil shale lease. It will be observed that the maximum area subject to oil shale leasing is twice the maximum prescribed for the other deposits subject to lease under the act, in a single lease.

The regulations concerning oil shale leases (47 L. D., 424, *et seq.*), provide that the application for lease, among other things, shall contain the following:

3 (c). A statement that the applicant has no lease under the provisions of this section, nor any other application for lease thereunder pending, and that he does not hold interests in such leases or applications which, with the land applied for, will exceed 5,120 acres.

Section 4 (i) of the form of lease reads as follows:

Interest in leases.—To observe faithfully the provisions of section twenty-seven of the act, defining the interest or interests that may be taken, held, or exercised under leases authorized by the act.

In the memorandum submitted it is suggested that apparently the words "oil shale" have been omitted from the first clause contained

in section 27 of the leasing act. It is true that oil shale deposits are not there mentioned. Such deposits are properly omitted from the limitations there specified because of the specific restriction of one oil shale lease to one lessee found in the preceding section 21 of the act. The further observation in the memorandum to the effect that after application for lease there are no provisions to preclude an individual or an association from acquiring an interest in, or even control of a number of other oil shale leases at a later date, is not well founded.

Section 30 of the act provides that no lease shall be assigned or sublet except with the consent of the Secretary of the Interior. Section 4 (f) of the form of oil shale lease contains the lessee's covenant not to assign or sublet without the written consent of the lessor. Consent to an assignment or a subletting to a disqualified assignee would not be given. Furthermore the provisions found in the latter part of section 27 are directed against monopolistic contracts or understandings as to holdings of lands in excess of the amounts provided in the act.

It is my opinion that under the terms of section 21 of the leasing act a lessee can take and hold directly only one oil shale lease covering an area not exceeding 5,120 acres. This limitation is general and it is immaterial whether the leased area is in one State or another. No person or corporation can take and hold any interest or interests as a member of an association or as a stockholder of a corporation holding an oil shale lease, which interest, together with the area directly held by lease, or which, together with any other interest or interests indirectly held, exceeds in the aggregate the equivalent of 5,120 acres.

Approved:

E. C. FINNEY,

First Assistant Secretary.

LOCKWOOD v. LOUNSBURY ET AL.¹

Decided January 17, 1922.

MORTGAGE—HOMESTEAD—FINAL PROOF—PATENT—ALIENATION—SECTION 2296,
REVISED STATUTES.

A mortgage given upon a homestead entry prior to the submission of final proof for the purpose of securing money for improvements or for any other purpose not inconsistent with good faith, does not constitute an alienation of the land, or violate the purpose and intent of section 2296, Revised Statutes, which specifically declares that lands embraced within a homestead entry shall not be taken in satisfaction of any debt incurred prior to patent.

¹ See decision on motion for rehearing, page 642.

MORTGAGE—HOMESTEAD—CONTEST—NOTICE—RULES 2 AND 98, RULES OF PRACTICE.

A mortgagee who has filed notice of his mortgage interest in an unperfected homestead entry is entitled to protection, and by Rules 2 and 98, Rules of Practice, must be made a party defendant in any contest or other proceeding adversely affecting such entry.

COURT AND DEPARTMENTAL DECISIONS CITED, DISTINGUISHED AND APPLIED.

Case of Ruddy v. Rossi (248 U. S., 104), cited and distinguished; cases of Guaranty Savings Bank v. Bladow (176 U. S., 448), Thayer v. Spratt (189 U. S., 346), Hafemann v. Gross (199 U. S., 342), Daniel R. McIntosh (8 L. D., 641), Henry Gimbel *et al.* (38 L. D., 198), cited and applied.

Editor's Note.—For a more detailed discussion of the subject relating to the protection of transferees and mortgagees under the homestead law, see 48 L. D., 582.

FINNEY, *First Assistant Secretary*:

L. V. Lockwood has appealed from the decision of the General Land Office of July 22, 1921, holding as senior the contest brought by Willie Doxie Burke against the homestead entry (Glasgow 035707) made by John H. Lounsbury on February 8, 1916, embracing the N. $\frac{1}{2}$, Sec. 11, T. 36 N., R. 56 E., M. M., Glasgow, Montana, land district, and holding as junior the contest of said Lockwood against said homestead entry. The action of the Commissioner in directing that a mortgagee and a lien holder of record be made parties to the proceedings is also assigned as error.

It appears from the record that Marion Lounsbury, wife of the entryman, on December 26, 1919, filed application to make final proof on the entry, in connection with which she filed an affidavit that on September 6, 1918, the entryman deserted her, since which date his whereabouts has been unknown. Final proof was not submitted.

March 11, 1919, there was filed in the local office notice of a mortgage on the land, held by the Otto M. Christinson Land Company. The Boundary Lumber Company, on September 29, 1920, filed notice of a lien in its favor for supplying building material to the entryman.

February 20, 1920, the chief of field division filed protest against acceptance of final proof pending an investigation on behalf of the United States.

August 6, 1920, Willie Doxie Burke filed application to contest the entry, in which application it was charged:

That said entryman has wholly abandoned said land for more than one year last past, and has never established a bona fide residence on said land, and never did any cultivation on said land and no improvements except a small shack. Said abandonment has not been caused nor is not now due to his employment as set forth under the act of July 28, 1917, nor due to military service rendered in connection with operations in Mexico or along the borders thereof, or mobilization camps elsewhere, whether such service be in military or naval organizations of the United States or the national guards of the several States. Entryman was not a citizen of the United States and not eligi-

ble to become a citizen and deserted from the United States Army in September, 1918, at Vancouver Barracks and has never been heard from since said time and never returned to his homestead.

Counsel for Mrs. Lounsbury moved to dismiss the contest, upon the ground that she had not been named a party defendant. The allegations of the contest affidavit were also denied. The motion was sustained.

March 5, 1921, L. V. Lockwood filed the following affidavit of contest:

That said entryman has wholly abandoned said land since September, 1918. That Marion Lounsbury, the deserted wife of entryman has wholly abandoned said land for more than one year last past; that neither said entryman or the deserted wife of said entryman have cultivated said entry in compliance with the homestead law; that such abandonment or failure to cultivate is not due to military services rendered in connection with operations in Mexico, or along the borders thereof, or in mobilization camps elsewhere, in the military or naval organization of the United States or the National Guard or militia of any of the several States, or during the War with Germany and its allies. They have failed to cultivate any part of entry since date of entry.

Five days later, Burke filed an amended application to contest, as follows:

That entryman John H. Lounsbury never established a bona fide residence on the land nor did Marion Lounsbury his deserted wife establish a bona fide residence and reside upon the land. And that both entryman John H. Lounsbury and his deserted wife abandoned said land before third year of entry had elapsed, and at no time before or since date of entry did entryman or his deserted wife do or have done any cultivation on said land, the only improvements in compliance with homestead law was building a small shack on said land. That said entryman was not a citizen of the United States and eligible to become a citizen of the United States, that he deserted from the United States Army in September, 1918, at Van Couver Barracks and has never been heard from since said date and never returned to the land. That deserted wife Marion Lounsbury is not a United States citizen and resides in Canada and that she has not resided upon the land since being deserted or abandoned by John H. Lounsbury nor has she complied with the homestead laws. Nor has her attorneys of record, Hill & Christensen, complied with homestead laws in her interest nor had any improvements done. Nor has the mortgagee of record complied with homestead laws as re to perfecting entry in their interest. None of the above abandonments set forth and alleged have been caused nor are they due to the employment as set forth in the act of July 28, 1917.

The local officers rejected this amended application, stating:

You can not now be permitted to amend your affidavit so as to include a strictly new charge, in the face of an intervening contest, contest No. 9466, filed March 5, 1921, by L. V. Lockwood. The junior contest now becomes senior as to the new issues raised relative to abandonment by the deserted wife.

Burke appealed, and the General Land Office overruled the local officers, holding, in effect, that Burke's earlier contest was sufficient and should not have been rejected. Action was directed as follows:

Burke will be allowed to proceed with his contest. The papers are herewith returned and you are directed to order a hearing on the issues as made by the

charges and the answer of the mortgagees. Since no one had authority to appear for Mrs. Lounsbury the answer made in her behalf will be disregarded. The application of Lockwood to contest will be held as a junior contest.

From this decision, Lockwood has appealed to the Department.

From an examination of the contest affidavits filed (that of Lockwood as well as those of Burke), it appears that not one of the applicants to contest names as parties adversely interested the Christinon Land Company and the Boundary Lumber Company, both of which, as stated above, had filed timely notice as incumbrancers. In Rule 98 of Practice, it is provided:

Transferees and incumbrancers of land the title to which is claimed or is in process of acquisition under any public-land law shall, upon filing notice of the transfer or incumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original entryman or claimant. Every such notice of a transfer or incumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the General Land Office, where like notation thereof will be made. Thereafter such transferee or incumbrancer, as well as the entryman, must be made a party defendant to any proceeding against the entry.

And Rule 2 of Practice provides:

Any person desiring to institute contest must file in duplicate with the register and receiver, application in that behalf, together with statement under oath containing: (a) Name and residence of each party adversely interested, including the age of each heir of any deceased entryman.

It is contended by counsel for Lockwood, in their brief filed on appeal, that the above-mentioned companies are not proper parties in interest, and, therefore, not entitled to notice, and in support of this, section 2296, Revised Statutes, and *Ruddy v. Rossi* (248 U. S., 104) are cited. Section 2296 reads as follows:

No lands acquired under the provisions of this chapter (the homestead laws) shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.

In *Ruddy v. Rossi*, decided December 9, 1918, the Supreme Court, in construing this statute, held that lands embraced in a homestead entry could not be taken in satisfaction of a debt incurred prior to the issuance of patent, and this regardless of whether the debt was contracted before or after the issuance of final certificate.

Section 2296, Revised Statutes, has been quite generally held by the courts, as well as by the Land Department, not to invalidate a mortgage or other incumbrance of his land, given by a homesteader, to secure money with which to improve his land, "or for any other purpose not in itself tending to impeach his *bona fides*," even though the debt was contracted before the issuance of patent to the homestead. The court decisions so holding are collated in Volume 16 of

the Decennial edition of the American Digest, title, "Public Lands," section 36, subtitle, "Mortgages."

In the case of *Hafemann v. Gross* (199 U. S., 342, at p. 347), it is stated:

Obviously, the trend of the authorities is strongly in favor of the proposition that a mortgage or deed of trust by one seeking an entry under the preemption or homestead laws of the United States, made prior to the perfection of his equitable right, is valid. These authorities would fully sustain the decision of the Supreme Court of Minnesota in the present case.

Elsewhere in the decision (pp. 345, 346), the following appears:

With respect to a mortgage or deed of trust executed under like circumstances, the decisions of the Land Department have been all to the effect that such mortgage or deed of trust is not an alienation within the scope of the homestead statute or forbidden by the preemption law, especially where, in the case of a preemption, the mortgage is given to secure money borrowed to complete the purchase of the land. See, in reference to preemptors, *Larson v. Weisbecker*, 1 L. D. 422, Opinion of Secretary Teller; *In re William H. Ray*, 6 L. D. 340, Opinion of Acting Secretary Muldrow; *Haling v. Eddy*, 9 L. D. 337, Opinion of Secretary Noble; *Murdock v. Ferguson*, 13 L. D. 198, Opinion of Assistant Secretary Chandler. With reference to a homestead entryman, see *Mudgett v. Dubuque & Sioux City R. R. Co.*, 8 L. D. 243, Opinion of Secretary Vilas; *Dawson v. Higgins*, 22 L. D. 544, Opinion of Secretary Smith; *Kezar v. Horde*, 27 L. D. 148, Opinion of Secretary Bliss.

Accordingly, in "Suggestions to Homesteaders," issued by the Land Department (48 L. D., 389, 406), the following is included:

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.

The Land Department, following well recognized principles of equity, has long extended some measure of protection to transferees or incumbrancers as against the action of homestead entrymen who have incumbered or transferred their entries. Thus, in case of the entryman's relinquishment, the mortgagee who has given notice of his mortgage on the land is permitted to submit supplemental evidence to show that the entryman had in fact earned title to the land; and other rights of third parties in like situation have been recognized. *Daniel R. McIntosh* (8 L. D., 641); *Henry Gimbel et al.* (38 L. D., 198).

This practice has received the approval of the Supreme Court. In *Guaranty Savings Bank v. Bladow* (176 U. S., 448, 454), which involved cancellation of an entry without notice to the transferee, the court said:

But the cancellation, although conclusive as to the entryman, upon all questions of fact, if made after notice to him, would not be conclusive upon the

mortgagee, if made without notice to such mortgagee and with no opportunity on his part to be heard. That is, it would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the land department, and therein showing the validity of the entry, or from proceeding before a judicial tribunal, against the patentee, if a patent had already issued, and therein showing the validity of the entry; * * *.

See also *Thayer v. Spratt* (189 U. S., 346, at p. 351).

The action of the Commissioner in directing that the Christinson Land Company and the Boundary Lumber Company be made parties in any adverse proceedings taken in the case was undoubtedly correct, and is hereby approved.

It appearing that the contest affidavits of Burke and Lockwood are alike defective in that they fail to name the Christinson Land Company and Boundary Lumber Company as parties, said affidavits are both hereby rejected, with the right accorded to Burke, as senior contestant, to amend his contest application, in default of which the same right will be extended to Lockwood.

LOCKWOOD v. LOUNSBURY ET AL. (ON REHEARING).

Decided April 22, 1922.

CONTEST—AFFIDAVIT—AMENDMENT.

Where two contest applications are defective, a junior applicant is not entitled to a preference to amend his application over a senior applicant, solely on the ground that the former's application was less defective than that of the latter's.

FINNEY, *First Assistant Secretary*:

Motion for rehearing has been filed on behalf of L. V. Lockwood, in the case, wherein the Department by decision rendered on appeal January 17, 1922 (48 L. D., 637), held that the contest affidavits of Lockwood and Willie Doxie Burke filed against the homestead entry of Lounsbury (035707) allowed February 8, 1916, for the N. $\frac{1}{2}$, Sec. 11, T. 36 N., R. 36 E., M. M., Glasgow land district, Montana, were both defective for the reason that they failed to name the Christinson Land Company and Boundary Lumber Company, incumbancers of record, as parties thereto. In disposing of the case upon its merits, opportunity was afforded Burke, the first contestant in point of time, to amend his contest application, as senior contestant, and in the event of Burke's failure to so amend, the right of amendment was to be thereafter extended Lockwood, as junior contestant.

The Department, notwithstanding the contentions advanced in support of the motion to the contrary, is clearly of the opinion that the mortgagee and lien holder, as incumbancers, are entitled to pro-

tection of their interests under the governing laws, and necessary parties to the contest, as provided by Rules 2 and 98, Rules of Practice. The Department can not concur in the contention that Lounsbury, the subsequent contestant, is entitled to amend his contest affidavit in preference to Burke, for the reason that Lounsbury's affidavit of contest, originally filed, was in a measure more perfect than that of the senior contestant, Burke.

The affidavit of contest filed by Lounsbury was defective, and it is not a question of in what degree it was lacking as compared with the prior affidavit of contest filed by Burke.

No good and sufficient reason appearing that would warrant a modification or reversal of the prior action taken herein, the motion for rehearing is denied, and the case remanded for appropriate action upon the amended affidavit of contest now with the record and filed pursuant to the Department's ruling upon appeal.

INDIAN TRUST ALLOTMENTS.

April 27, 1922.

INDIAN LANDS—ALLOTMENT—PATENT—SECRETARY OF THE INTERIOR—JURISDICTION.

The jurisdiction of the Secretary of the Interior over Indian trust allotments ceases automatically on expiration of the trust period and thereafter he is without authority to exercise any control thereover other than to issue a patent in fee to the allottee, or to his heirs, as the case may be.

INDIAN LANDS—ALLOTMENT—ALLOTTEE—PATENT—HEIRS.

Fee patents predicated upon trust allotments of deceased Indian allottees should be issued to the heirs generally without naming them or attempting to set up their respective interests, regardless of whether or not the heirs have been determined by the Department or by the courts.

INDIAN LANDS—ALLOTMENT—JURISDICTION.

Under provisions contained in the acts of February 8, 1887, and June 21, 1906, authorizing the President, in his discretion, to extend the period of the trust on Indian allotments, such authority, if exercised at all, must be invoked prior to the expiration of the trust period.

INDIAN LANDS—ALLOTMENT—ALIENATION—PATENT—JURISDICTION—COURTS.

Questions relating to the validity of conveyances made by an Indian trust allottee or his heirs during the interval between the expiration of the trust period and the issuance of a fee patent are cognizable primarily by the courts.

BOOTH, *Solicitor*:

You have requested my opinion on several questions relating to the status of Indian "trust allotments" *after* the expiration of the trust period but *prior* to the issuance of final or fee patents therefor, and

as to the jurisdiction of the Secretary of the Interior over such allotments. The questions presented may be briefly stated thus:

1. Can the Secretary of the Interior sell the land and issue a patent in fee to the purchaser?
2. Can the land be partitioned and patents in fee be issued to adult heirs and new trust patents issued to minor heirs?
3. Can a patent in fee be issued to the heirs in common, including minor heirs?
4. Can the trust period be extended, with or without further action by Congress?
5. Of what validity is a deed executed by the allottee or his heirs prior to actual issuance of the fee patent?

It is essential to bear in mind that we are here dealing only with those Indian allotments on which the trust period has expired by operation of law, i. e., lapse of time, and for which the final or fee patent has not issued. The term "trust allotment" as applied to Indian lands allotted in severalty is so well understood that an extended discussion here is doubtless unnecessary. The original or "trust patents" for all such allotments provide for a definite period of trust, usually twenty-five years, at the expiration of which the United States agrees to convey the fee, by patent, to the allottee or to his heirs, discharged of the trust and free of all charge or incumbrance whatsoever. See section 5 of the general allotment act of February 8, 1887 (24 Stat., 388), on which most of our Indian trust allotments are founded, and from which, for convenient reference, I quote:

"* * * * which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of heirs according to the laws of the State or Territory where such land is located, and that at the *expiration* of said period the United States *will convey* the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion *extend* the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, *before* the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." (Italics supplied.)

Manifestly this legislation contemplates that when the trust has expired the allottee or his heirs then become entitled, as a matter of right, to a final or fee patent. True, the act contains a provision by which the trust may be extended, in the discretion of the President, and while this act, in itself, is silent as to whether the authority so conferred, if exercised at all, is to be invoked only during the trust period, yet in the act of June 21, 1906 (34 Stat., 325, 326), we find:

"That *prior* to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under *any law or treaty* the President may in his discretion continue such restrictions on alienation for such periods as he may deem best." (Italics supplied.)

Viewing this provision as a legislative interpretation of prior acts relating to the same subject matter (221 U. S., 286, 309; 41 Sup. Ct. Rep., 561), it follows that if the trust is to be extended, such action must be had prior to its expiration. Otherwise action of this kind would virtually amount to a reimposition of restrictions against alienation, or the creation of a new trust, rather than an extension of the former period. Congress, of course, can reimpose restrictions even after they have once expired (*Brader v. James*, 246 U. S., 88), but where vested rights have intervened, the rule even there may be otherwise. With these, however, we are not now concerned other than to observe that in the absence of express legislation by Congress, which I do not find, it is beyond the power of administrative officers to extend the period of the trust after that period has once expired. This answers the fourth question.

When we come to consider the jurisdiction of the Secretary of the Interior over Indian trust allotments, his powers and duties in connection therewith, and particularly such matters as a determination of the heirs of deceased allottees, a sale or partition of the allotment, issuance of patents in fee to the heirs or to purchasers, etc., these rest largely on the act of June 25, 1910 (36 Stat., 855), which, in terms, gives the said Secretary exclusive jurisdiction over the estates of deceased allottees. *Hallowell v. Commons* (239 U. S., 506); *Lane v. Mickadiet* (241 U. S., 201). When we examine that statute, however, even section 1 of which is quite lengthy, we find therein certain limitations, as the following, taken from that act will disclose (pertinent provisions only reproduced) :

"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, * * * the Secretary of the Interior, * * * shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee * * *; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold: *Provided*, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, * * * to be set aside and patents in fee to be issued to them therefor. * * * *Provided*, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure *during the trust period* for such heir or heirs as may be incompetent, as their respective interests shall appear." (Italics supplied).

Standing alone and read literally, the expression, "before the issuance of a fee simple patent," would imply jurisdiction in the Secretary of the Interior to do those things provided for in the act at any time prior to actual issuance of the final patent, but when construed in conjunction with the language immediately preceding, "before the expiration of the trust period," it becomes manifest that these two elements are essential and must be coexistent. The conjunction used is "and," not "or." In other words, and to state the proposition negatively, the trust period must not have expired and a fee simple patent must not have issued. Absence of either results in a loss of jurisdiction. It could not successfully be contended that jurisdiction remains in the Secretary after the issuance of a patent in fee where such patent issues prior to the expiration of the trust period, as to which see the act of May 8, 1906 (34 Stat., 182). On the issuance of a patent of this kind the trust is thereby terminated, and likewise, when that period expires by operation of law the trust also terminates. Either contingency terminates the jurisdiction of the Secretary of the Interior over the subject matter. This is measurably reflected by the proviso last reproduced above from the act of 1910, which directs that the proceeds derived from a sale of inherited Indian lands *shall be paid* to competent heirs and held in trust *during the trust period* for such heirs as may be incompetent.

If any doubt remains about the matter we need only return to the organic acts under which these allotments are made and observe therein the plain congressional direction that the lands so allotted are to be held in trust for a definite period, at the expiration of which the fee is to be conveyed by patent to the allottee or to his heirs. Of what avail is a fixed period of trust, if on expiration of that period the administrative officers extend such trust indefinitely simply by declining to issue final patent, continuing in the meantime to exercise supervision and control? In *Lane v. Mickadiet, supra*, the Supreme Court says, (page 207):

"It is undoubted that the fee simple title to the land embraced by the allotment had not passed from the United States and that, as expressly stated in the granting act, the land was held in trust by the United States for the benefit of the allottees to await the expiration of the trust period fixed by law when the duty on the part of the United States of conveying the fee to the land would arise."

Again, in several syllabi of *Hallowell v. Commons, supra*, holding that the Secretary has exclusive jurisdiction to determine the heirs of deceased Indian allottees, we find such expressions as "dying during the period in which an allotment * * * was held in trust"; "dying during the trust period"; "dying within the trust period"; all illustrative of the true intent.

I am of the opinion, therefore, that on expiration of the trust period provided by law the jurisdiction previously resting in the Secretary of the Interior over such Indian allotments ceases, and that there then remains nothing to be done but the purely ministerial duty of casting the legal title on the person or persons to whom such title belongs. Accordingly the first and second questions are answered in the negative and the third question in the affirmative. In fact, in regard to the latter, this appears the logical thing to do, i. e., issue final patent to the heirs generally without naming them or attempting to set up their respective interests in the estate. Otherwise, "newly discovered heirs" may arise after issuance of such patent, and it would then prove embarrassing to find that the outstanding fee patent issued by the Government had named the heirs and specifically set forth their respective interests in the estate. I regard the former as the safe rule to follow in practically all cases, regardless of whether the heirs have previously been determined by this Department, by the local courts, or remain undetermined. The trust having expired by operation of law and our jurisdiction over the land having terminated, issuance of the final patent to "Heirs of ——" would leave the matter open for any adjustment that subsequent developments might require.

As to the fifth question, this is a matter cognizable primarily by the courts, for, finding as we have that jurisdiction over these allotments terminates automatically on expiration of the trust period, whether the allottee or his heirs then have power to make a valid conveyance of the land so allotted prior to actual issuance of the final patent, is a matter for determination by the courts rather than by administrative officers of the Government. In this connection, however, it may be said that the fee to lands so allotted does not pass *eo instanti* on expiration of the trust, as the law does not so provide. Necessarily, therefore, actual passage of the fee must await issuance of the final patent. The right to such patent, however, has been fully earned, become vested, so to speak, on expiration of the trust period and whether the courts will or will not uphold conveyances executed in the interim between the expiration of the trust and the issuance of final patent is purely speculative. They (the courts) may uphold such transactions by applying the doctrine of relation, as to which see *Lomax v. Pickering* (173 U. S., 26); *Barnett v. Kunkel* (259 Fed., 394); and *Anchor Oil Company v. Grey* (41 Sup. Ct. Rep., 544): Not being a matter primarily for departmental determination, however, it is one regarding which I express no definite conclusion. We are concerned here only with the issuance of final patent, and having performed that duty we may well leave to the courts controversies involving the title between the patentees and

their grantees. Should it develop, prior to issuance of final patent, that the allotment was founded on fraud or mistake in the first instance, administrative officers may then be justified in withholding final patent, for, as observed by the Supreme Court in *Knight v. United States Land Association* (142 U. S., 161, 178), it would be useless for the Secretary of the Interior to issue final patent and immediately thereafter to request the Attorney General to institute proceedings to set the patent aside. In the absence of some controlling reason, however, on the expiration of the trust period nothing then remains to be done but to cast the fee on the allottee, or on his heirs, as the case may be.

My prior opinions of July 14 and August 8, 1921 (unreported), regarding this matter are hereby overruled.

Approved:

E. C. FINNEY,

First Assistant Secretary.

FISCUS v. MINER.

Decided April 29, 1922.

CONTEST—HOMESTEAD—OFFICERS—LAND DEPARTMENT.

Action of one of the local officers allowing a contest during the temporary absence of the other, in a case in which it nowhere appears that such action was not acquiesced in by such other officer upon his return, is to be construed to have been the joint action of both officers.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Potter v. United States* (107 U. S., 126), and *Broadbrooks v. Kyle* (28 L. D., 8), cited and applied.

FINNEY, *First Assistant Secretary*:

Arthur E. Fiscus has appealed from a decision of the Commissioner of the General Land Office dated January 4, 1922, wherein the Commissioner dismissed his application to contest the homestead entry of Harold E. Miner for 320 acres in Secs. 2, 10, and 11, T. 23 S., R. 72 W., 6th P. M., within the Pueblo, Colorado, land district.

The entry was made on May 10, 1916, and on August 31, 1921, Fiscus filed application to contest same which was rejected by the local officers for the reason that the corroborating affidavit did not contain the requisite nonmilitary averments. On September 23, 1921, applicant filed an amended application to contest, which was rejected by the local officers because the allegations in same and in the prior application were in conflict as to the military service of entryman. On motion to reconsider, said rejection was vacated and revoked, and notices for personal service were issued on October 14,

1921, which were signed by the receiver only, the register being absent from the office at the time. On November 16, 1921, contestant filed affidavit for service of notice by publication, which was rejected by the local officers because it was not filed within 30 days from October 14, 1921, the date of allowance of contest, as required by Rule 9, Rules of Practice. Fifteen days were allowed from receipt of rejection notice, which appears to have been received on November 22, 1921, within which to appeal from said rejection. On November 23, 1921, contestant filed a motion for the issuance of new notices of contest, contending that the former notices issued October 14, 1921, were illegal and invalid because not signed by both the register and receiver. Such motion was denied and contestant appealed. Upon appeal the action of the local officers was sustained by the Commissioner and the contest dismissed.

It appears from the record that on September 14, 1921, one Smith filed contest against this entry which was held suspended by the local officers pending final disposition of the contest of Fiscus.

The old Rules of Practice provided that the notice of contest must be signed by the register and receiver or one of them. See 31 L. D., 528, Rule 8. This provision was not embraced in the present Rules of Practice (48 L. D., 246), but it is provided therein that the register and receiver may allow any application to contest without reference thereof to the Commissioner, and that they shall act promptly upon all applications to contest. See Rules 4 and 5. Under the old Rules it has been held that a desert-land entry is not invalid because allowed by the receiver in the absence of the register where both offices are filled at such time and the register on his return approves the action of the receiver. *Broadbrooks v. Kyle* (28 L. D., 8); also that the register and receiver were not required to sit at the same time and concurrently pass upon the sufficiency of the proof of settlement and improvements by preemptors. *Potter v. United States* (107 U. S., 126).

In the instant case it appears that the contest was allowed by the receiver during the temporary absence of the register from the office. While the present Rules of Practice make no specific provision for action by one of such officers during the temporary absence of the other, no express inhibition of such action is contained in said Rules. In the proper administration of the public business it is believed that the allowance of a contest by one of the local officers during the temporary absence of the other, in a case in which it nowhere appears that such action was not acquiesced in by such other officer upon his return to the office, must be construed to have been made on behalf of the other officer and is clearly warranted under the same rule of construction as set forth in the cases cited.

Contestant evidently considered the notice of allowance of the contest, signed only by the receiver, sufficient, as 32 days thereafter, acting under such allowance, he filed affidavit for notice by publication. In this he failed to comply with Rule 9 of the Rules of Practice and the action of the Commissioner and the local officers for such reason was clearly correct.

The decision appealed from is affirmed.

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**MILITARY SERVICE—COMPENSATION AWARD—CREDIT FOR
PERIOD OF HOSPITALIZATION—ACT OF APRIL 6, 1922.**

INSTRUCTIONS.

[Circular No. 821.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 29, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

The act of April 6, 1922 (Public No. 187), provides:

That the provisions of section 2305, Revised Statutes of the United States, as amended by the act of February 25, 1919 (Fortieth Statutes, page 1161), so far as applicable to those discharged from the military or naval service because of wounds received or disability incurred therein, be, and the same are hereby, extended to those regularly discharged from such service and subsequently awarded compensation by the Government for wounds received or disability incurred in the line of duty.

Sec. 2. That the provisions of the act of September 29, 1919 (Forty-first Statutes, page 288), entitled "An Act to authorize absence by homestead settlers and entrymen, and for other purposes," be, and they are hereby, extended to those who, after discharge from the military or naval service of the United States, are furnished treatment by the Government for wounds received or disability incurred in line of duty.

Under the provisions of section 1, a person who served for not less than 90 days in the United States Army, Navy or Marine Corps, during the Mexican Border operations or the War with Germany, was honorably discharged, and who subsequently was awarded compensation by the Government for wounds received or disabilities incurred in line of duty, in accordance with the act of October 6, 1917 (40 Stat., 398, 405), as amended by the act of August 9, 1921 (42 Stat., 147, 153), is entitled to the same credit for such service in connection with a homestead entry made by him, under section 2305, United States Revised Statutes, as amended by the act of February 25, 1919 (40 Stat., 1161), as though he had actually been discharged

from the service by reason of disability incurred in line of duty. In such cases credit is given for the full period of enlistment, subject to the requirement that residence on the homestead for at least one year must be shown, as set forth and explained in Circular No. 302 (unpublished).

Section 2 of the act extends the benefits of the act of September 29, 1919 (41 Stat., 288), to those persons who, after discharge from the military or naval service of the United States during the War with Germany, are furnished treatment by the Government for wounds received or disability incurred in line of duty under the terms of the Vocational Rehabilitation Act of June 27, 1918 (40 Stat., 617), and its amendments, upon the ground that they come within article 3 of the act of October 6, 1917, *supra*. Its effect is to grant to settlers, applicants or entrymen under the homestead laws who, after such settlement, application or entry, are given hospital treatment by the Government under the conditions just stated, credit for constructive residence during the period of such treatment, subject to the requirement that residence on the homestead for at least one year must be shown.

The administration of this provision of the act will be governed by the regulations under the act of September 29, 1919, which will be found on page 7 of said Circular No. 302.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

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1. A mortgage given upon a homestead entry prior to the submission of final proof for the purpose of securing money for improvements or for any other purpose not inconsistent with good faith, does not constitute an alienation of the land, or violate the purpose and intent of section 2296, Revised Statutes, which specifically declares that lands embraced within a homestead entry shall not be taken in satisfaction of any debt incurred prior to patent..... 637

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1. A mortgagee who has filed notice of his mortgage interest in an unperfected homestead entry as provided by Rule 98, Rules of Practice, must be given notice of any relinquishment filed, and no relinquishment will be accepted by the Land Department unless he joins therein or until he has had reasonable opportunity to make a showing..... 582

2. While section 2291, Revised Statutes, contemplates that a homestead entryman shall, upon the submission of final proof, ap-

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pear personally before the proof-taking officer, yet an exception to that requirement will be made where the testimony of the entryman can not be obtained, and in such cases equitable consideration will be given to evidence submitted by a mortgagee showing that all of the conditions precedent to patent have been performed by the entryman..... 582

National Forests.

See *Application*, 2; *Indian Lands*, 13; *Reservation*, 6, 7; *School Lands*, 2.

Naval Service.

See *Military Service*.

Nebraska.

See *Indian Lands*, 11, 12.

New Mexico.

See *School Land*, 3, 4, 22.

Notice.

See *Contest*, 16, 27; *Contestant*, 2; *Mining Claim*, 1; *Oil and Gas Lands*, 19, 34, 43; *Practice*, 5, 6; *Relinquishment*, 1; *School Land*, 4; *Timber and Stone*, 2.

Occupancy.

See *Coal Lands*, 8, 12, 15, 16; *Homestead (Stock-raising)*, 60; *Indian Lands*, 13; *Mining Claim*, 10; *Oil and Gas Lands*, 53.

Officers.

See *Application*, 2; *Contest*, 30; *Practice*, 2.

1. Under the rules applicable to matters pending before the Commissioner of the General Land Office, registers and receivers have no authority to take action or to make any notation upon their records until specifically directed to do so by him, other than to file, note, and transmit such papers as may be filed in connection therewith, or to report at the proper time that no action has been taken, if that be the fact..... 215

Oil and Gas Lands.

GENERALLY.

See *Alaska*, 1; *Coal Lands*, 12; *Contest*, 6; *Homestead*, 2, 5, 7, 21; *Mineral Land*, 4, 5; *Mining Claim*, 10; *Railroad Grant*, 2; *Repayment*, 8; *School Land*, 15, 16, 17; *Swamp Land*, 4; *Timber and Stone*, 1, 2; *Withdrawal*, 4, 7.

1. Section 2 of the act of June 25, 1910, expressly excepting homestead entries from the effects of a subsequent withdrawal, intends that such entries may be perfected only on condition that the lands are nonmineral and subject to disposition under the agricultural land laws, and a petroleum withdrawal made prior to submission of final proof impresses the land with a *prima facie* mineral character which makes it incumbent upon the claimant either to prove that it is of the character subject to his claim, or to accept a restricted patent under the act of July 17, 1914..... 126

2. The rule of law that a withdrawal is ineffective as against one who prior thereto had done everything necessary to vest in him a

Oil and Gas Lands—Continued. Page.

GENERALLY—Continued.

complete equitable title, can not be invoked by a homesteader who made entry of lands before but did not submit final proof until after their inclusion within a petroleum reserve, and a patent issued upon such entry must contain a reservation to the United States of the oil and gas unless the entryman assumes the burden of proof and shows that the lands are in fact nonmineral in character. 155

3. The operation of the mill site law, section 2337, Revised Statutes, is in terms limited to nonmineral land and the Land Department has no authority to issue a limited patent thereunder for surface lands within a petroleum reserve. 243

4. The Land Department, to which is committed exclusively the determination of the character of the public lands, may, in the exercise of that jurisdiction, select its own instrumentalities and methods, and an executive withdrawal and inclusion within a petroleum reserve of public lands upon a recommendation of the Geological Survey is one mode of classification which presumptively fixes their mineral character, provisionally, however, and subject to revocation upon further investigation or upon sufficient showing by a nonmineral claimant. 281

LEASING ACT OF FEBRUARY 25, 1920.

GENERALLY.

5. Circular of June 15, 1921, adding paragraph 8 (a) to oil and gas regulations; reward for discovery. (Circular No. 761). 152

6. Regulations of December 8, 1921, governing payment of annual rental under oil and gas leases. (Circular No. 795). 340

7. Instructions of April 8, 1922; showing required of nonmineral claimants in certain States under leasing law. 629

8. Land that is not within a designated oil or gas structure is nevertheless to be treated as valuable for oil and gas when embraced within a prospecting permit, and a homestead entry made subordinate thereto must be subject to the provisions and reservations of the act of July 17, 1914. 108

9. A protest by an oil placer mining claimant against the allowance of a prospecting permit, containing no allegation which, if substantiated by evidence adduced at a hearing, shows that the protestant is entitled to complete his claim under the placer mining laws or to use the same as a basis for a permit or lease under any of the relief provisions of the act of February 25, 1920, is not sufficient to defeat a permit application filed under section 13 of that act. 147

10. The provisions of the surface act of July 17, 1914, and those contained in the leasing act of February 25, 1920, are not in conflict, but are a complement of each other, to the extent that by the former, mineral rights and all incidents essential thereto are excluded from homestead entries, while by the latter, the rights pertaining to

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GENERALLY—Continued.

the estate of the surface claimant are duly respected and protected. 150

11. The courts, not the Land Department, have direct jurisdiction to determine questions pertaining to actual physical possession of lands in cases arising from conflicts between claimants under the acts of July 17, 1914, and February 25, 1920, respectively. 150

12. The general leasing act of February 25, 1920, is applicable to oil or gas bearing lands of the United States, if there be any, in the bed of Red River, Oklahoma, adjacent to the Texas boundary, irrespective of the fact that the preexisting mining laws were not in operation in the former State, and an application to acquire such areas by Valentine scrip, unsupported by nonoccupancy and nonmineral affidavits, must be denied, inasmuch as such scrip is locatable only on unoccupied, nonmineral public land. 277

13. An oil and gas prospecting permit or a lease consequent thereon, granted pursuant to the act of February 25, 1920, does not constitute an "entry," "location," or "other disposal" of the land included therein, within the meaning of those terms as contemplated by section 24 of the water-power act of June 10, 1920. 459

14. The authority conferred upon the Federal Power Commission by subdivision (h) of section 4 of the act of June 10, 1920, to make such rules and regulations not inconsistent with the purposes of the act as may be necessary and proper for the purpose of carrying out its provisions, does not clothe that commission with jurisdiction to require the insertion of restrictions in oil and gas prospecting permits and leases consequent thereon, issued by the Secretary of the Interior pursuant to the act of February 25, 1920, for lands in power site withdrawals and reserves for power purposes. 459

PROSPECTING PERMITS.

See *Oil and Gas Lands*, 8, 9, 13, 14.

15. Instructions of May 11, 1921, amending paragraph 4 (h) of oil and gas regulations of March 13, 1920, relative to filing of bonds with applications for prospecting permits. (Circular No. 754). 112

16. Instructions of October 14, 1921; procedure as to noncompliance with terms of oil and gas permit. (Circular No. 785). 234

17. Instructions of April 7, 1922, relative to oil prospecting permits in power site reserves; Circular No. 672, amended. 623

18. Upon the granting of an oil prospecting permit, rights thereunder attach as of the date of the filing of the application. 108

19. The general Rules of Practice relating to service of notice are applicable to oil prospecting permit cases in which the question of preferred right is involved with respect to unperfected and patented entries containing reservation of the minerals to the United States, and the regulation which requires personal

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PROSPECTING PERMITS—Continued.
service is to be construed to include actual service by registered mail, when possible, or by publication when proper showing can be made that the person to be served can not be found..... 110

20. Lands beneath the waters of a navigable lake which is surrounded by tracts that have been patented by the Government or are embraced within existing claims or pending applications are not subject, apart from the abutting uplands, to the oil prospecting permit or lease provisions of the act of February 25, 1920..... 129

21. Ownership by the Government of lands abutting upon a meandered nonnavigable lake carries with it the same rights with respect to the adjacent submerged land that private ownership does, and where the title to such land is vested in the United States, an oil prospecting permit granted under the act of February 25, 1920, embracing the Government-owned shore lands includes the right to prospect the submerged lands..... 129

22. An oil and gas prospecting permit is not subject to a contest by a third party and an application therefor can not be entertained... 158

23. As between two conflicting applications for an oil and gas prospecting permit, no such preference right is acquired by the second applicant by reason of his previous location of the land and posting of notice thereupon as will defeat a proper application filed prior thereto..... 186

24. The filing of an appeal and showing of naturalization in the department, instead of the local office, in a case involving an application for an oil and gas prospecting permit, is irregular, but it is merely such an irregularity as may be waived by the department in the absence of an adverse claim to the land..... 215

25. While an oil and gas prospecting permit can not be issued under the act of February 25, 1920, to an alien, yet there is nothing in the law or the practice of the Land Department that forbids the issuance thereof to a citizen who is naturalized after the filing of the application but before the granting of the permit... 216

26. Section 20 of the act of February 25, 1920, did not modify or limit the right of assignment of a desert-land entry authorized by preexisting law or deprive an assignee of any rights or privileges conferred upon the original entryman, and the recognized assignee of one who made a desert-land entry of lands not withdrawn or classified as mineral at the time of entry is entitled to a preference right to prospect for oil and gas, notwithstanding that the assignment was made subsequent to January 1, 1918..... 237

27. An application for a second homestead entry under the act of September 5, 1914, filed by one having the requisite qualifications assumes, during the pendency of action as to the question of its allowance, the status of an entry within the operation of the oil-leasing

Oil and Gas Lands—Continued. Page.

PROSPECTING PERMITS—Continued.
act of February 25, 1920, irrespective of whether or not he executed a formal relinquishment, and confers upon the applicant a right to prospect the land superior to that of a prior applicant for a permit without a preference right..... 543

28. An oil and gas prospecting permit is not an "entry" within the meaning of that term as it is used in the statutes relating to the public lands..... 580

29. Immediately upon the cancellation by voluntary relinquishment or otherwise, of an unrestricted homestead entry during the pendency of an oil and gas permit application adversely to the entryman, the rights of the permit applicant, all else being regular, attach and become superior to those of a junior homestead applicant..... 622

30. The right of a third party to file an application for an oil and gas prospecting permit for a tract covered by the unrestricted homestead entry of another is expressly recognized by section 12 (c) of the departmental regulations of March 11, 1920, but the granting of a permit is dependent upon a future amendment of the entry reserving the mineral contents to the United States, and the exercise by the entryman of a preference right, if any, to a permit pursuant to section 20 of the leasing act..... 622

31. The discretionary authority of the Secretary of the Interior to allow surface homestead entries upon lands covered by an oil and gas prospecting permit is expressly recognized in section 29 of the act of February 25, 1920, such allowance being subject, however, to the rights of the permittee to use so much of the surface of the land as is necessary in extracting and removing the mineral deposits without compensation to the nonmineral entryman..... 623

ALASKA.

32. Instructions of March 28, 1921, relative to oil prospecting permits in Alaska; section 10 (a) oil and gas regulations modified..... 46
SECTION 13 PERMITS.

See Section 19 Permits, 47, 49.

33. Instructions of April 23, 1921, relative to applications for section 13 oil prospecting permits for lands subsequently included in designated producing structures..... 98

34. An applicant for a prospecting permit under section 13 of the act of February 25, 1920, is not required to serve notice on the owner of lands patented to a railroad company with reservation of the oil and gas under the act of July 17, 1914, inasmuch as claimants of railroad grant lands are excepted by section 20 of the former act from the preference right to permits therein..... 175

35. The act of February 25, 1920, contemplates that the right to an oil and gas prospecting permit may be initiated by filing an application therefor, and it is clear that it was not the intention of Congress by the insertion of

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SECTION 13 PERMITS—Continued.

the condition in section 13 thereof that "the applicant shall, prior to filing his application for permit, locate such lands," when construed *in pari materia* with other provisions of said section, to require a demarcation of the boundaries on the ground as a condition precedent to the validity of such application..... 185

36. Prospecting permits can not be granted within the geological structure of a producing oil or gas field, and the Land Department did not intend by its instructions of April 23, 1921, to recognize any right in an applicant who applied under section 13 of the act of February 25, 1920, to prospect lands which, because of delay in action upon the application, are subsequently designated as within such a field, although not designated, yet so known and existing at and prior to the filing of the application..... 213

37. Where a homestead entry, patented with reservation of the oil and gas by the United States, has been sold or transferred subsequently to January 1, 1918, the transferee does not acquire a preference right under section 20 of the act of February 25, 1920, to prospect for oil or gas upon the patented land, but having become the sole owner of the land, subject to the reservation contained in the patent, he may, in the absence of other sufficient objection, be granted a prospecting permit under section 13 of the leasing act..... 214

38. The provision in section 13 of the act of February 25, 1920, relating to the limitation of length of a tract of land that may be included in an oil and gas prospecting permit, is directory, not mandatory, and a permit may be granted under that section for the prospecting of a tract, the length of which exceeds two and one half times its width, where the conditions are such that, because of prior disposals, a reasonable area of land in compact form as prescribed by the act is not available..... 239

39. The denial of an application for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, is a proper exercise of the discretionary authority under that act, if the lands to be prospected were at the time of the filing of the application within a known geological structure, although not designated as such until subsequently thereto... 355

40. When the limits of a producing oil and gas field are determined by the Geological Survey, and the same designated by it as such, the designation relates back to the time that the production began, and the filing of an application for a prospecting permit for lands then known to be within a producing oil field, although not yet designated, does not confer upon the applicant any vested right or constitute a ground upon which the granting of a permit under section 13 of the act of February 25, 1920, can be enforced by him..... 355

41. An application for a prospecting permit under section 13 of the leasing act, once denied in connection with favorable action upon con-

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SECTION 13 PERMITS—Continued.

flicting applications under section 19 of that act, will not be reinstated to the prejudice of the competing applicants, if the defeated applicant did not first seek his remedy under the original application by appeal or otherwise... 356

42. Where an applicant for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, in good faith presents an application which does not conform to the requirements of the statute as to compactness, and the Land Department requires an election as to the land to be retained, the privilege to elect, if exercised within the specified time, is not defeated by an intervening application filed by another under that act..... 555

43. The act of February 25, 1920, does not require the posting of notice on the land preliminary to the filing of an application for an oil and gas prospecting permit, and one who posts notice and applies for a permit under section 13 of the act after the filing of an application by another under that section does not acquire a preference right to a permit..... 555

44. The preference right accorded by the act of May 14, 1880, as amended by the act of July 26, 1892, to a contestant who procures the cancellation of a homestead entry as the result of his contest, is not applicable with respect to an oil and gas prospecting permit under section 13 of the act of February 25, 1920..... 580

SECTION 19 PERMITS.

See Section 13 Permits, 41.

45. Instructions of April 23, 1921, modifying instructions as to acreage under section 19 permits which may be acquired by transfer or assignment..... 96

46. The purpose and intent of the provision of section 19 of the act of February 25, 1920, which specifies that "all permits or leases thereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear," is obviously to permit the Land Department to deal with the holder or holders of the record mining title, and *a priori* the mere lessee of such claimant, not being himself in a position to surrender to the United States the mining title, is not entitled to a lease in his own name under said section..... 210

47. An applicant for an oil and gas prospecting permit under section 19 of the act of February 25, 1920, who is unable to show sufficient fulfillment of the expenditure requirement of that section necessary to entitle him to a permit thereunder, can not be allowed to amend his application and take a permit under section 13 of the act in the presence of an adverse claim existing by reason of the pendency of an application previously filed by another under the latter section..... 218

48. Expenditures incident to the examining, surveying and staking of an oil or gas location, and the recording of notices thereof can not be accredited in making up the aggregate

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of \$250 required to be expended by section 19 of the act of February 25, 1920, in order to entitle the claimant to a preference right to a prospecting permit.....	218
49. An attempted oil placer location upon lands within an unrestricted homestead entry which remained intact at the time of the passage of the act of February 25, 1920, lacks the element of basic validity requisite as a condition precedent to the granting of an oil and gas prospecting permit under section 19 of that act and constitutes no bar to the allowance of a junior permit application in favor of the homesteader.....	337
50. An assertion of prescriptive title can not be invoked under section 2332, Revised Statutes, to defeat the outstanding interest of record of a cotenant, by a claimant under an oil placer location with the view to obtaining an oil and gas prospecting permit under section 19 of the act of February 25, 1920, where a discovery of oil or gas has not been made.....	526
51. Performance of annual assessment work by a locator of an oil placer claim in accordance with the provision relating thereto contained in section 2324, Revised Statutes, can not be invoked, in the absence of a discovery of oil or gas, to oust the interest of a co-locator who has failed to contribute, by an applicant for an oil and gas prospecting permit based upon an assertion of preference right under section 19 of the act of February 25, 1920.....	526
52. The right to an oil and gas prospecting permit conferred by section 19 of the act of February 25, 1920, is in the nature of a preference right or privilege which may be exercised, or waived, at the option of the occupant or claimant, and is, of necessity, waived if not asserted within the time and in the manner prescribed by the law and applicable regulations.....	527
53. Section 19 of the act of February 25, 1920, presupposes that the occupant or claimant of an oil placer claim upon which a right to a prospecting permit is predicated has no interest in the land that can be otherwise recognized and completed under the terms of the mining laws.....	527
54. As between two conflicting claimants for an oil and gas prospecting permit under section 19 of the act of February 25, 1920, both relying upon asserted placer locations for the same land on which the character of the work performed by each was substantially the same, a superior right to a permit will be recorded to the junior claimant upon a showing of exercise of due diligence, where the senior claimant, having failed to exercise due diligence in the prosecution of work looking to a discovery of oil or gas, forcibly prevented the junior claimant from proceeding actively with the performance of discovery and development work with a view to perfecting the location.....	630

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PREFERENCE RIGHT TO LEASES AND PERMITS.—SECTIONS 18, 19 AND 20.	
55. Instructions of July 30, 1921, relative to conditions under which Carey Act entrymen are entitled to preference rights under section 20, act of February 25, 1920.—When election under act of July 17, 1914, is required.....	164
56. Where a claimant, who is asserting rights under the placer mining laws to withdrawn oil and gas bearing lands, files concurrently an application for a preferential lease, together with a quit-claim deed, pursuant to the provisions of section 18 of the act of February 25, 1920, and a request for a patent it will be held that the claimant elected to accept the benefits conferred by the leasing act.....	303
57. Congress, when it incorporated in the act of February 25, 1920, the relief provision contained in section 18 thereof, authorizing the issuance of preferential leases to oil placer mining claimants for lands withdrawn September 27, 1909, upon fulfillment of the conditions specified therein, intended that such claimants should either pursue patents under the placer mining laws, or leases under that section, not both concurrently.....	303
58. The granting of an oil and gas lease under section 18 of the act of February 25, 1920, is a matter wholly independent of any contract that may have been entered into pursuant to the act of August 25, 1914, between the Government and the lease applicant or his predecessor in interest with respect to the land, but controversies giving rise to such contracts, as well as suits, must be settled and adjusted in harmony with the provisions of that section.....	313
59. Neither section 18 of the act of February 25, 1920, which provides that under certain stated conditions a claimant of oil and gas bearing lands may be granted a lease, nor any other provision of the leasing act authorizes either expressly or by implication the collection of payment of royalty on oil and gas produced by the lease applicant from any land other than that in the relinquished area....	313
60. Upon the division of a tract of oil and gas bearing land as the result of the settlement of a controversy involving the question of title, whereunder the claimant receives a patent for a portion of the land and is granted the right to acquire a lease for the remainder under section 18 of the act of February 25, 1920, upon fulfillment of the conditions set forth in that section, the Government is entitled to receive payment of only an amount equal to one-eighth of the value of the oil or gas produced from the relinquished area, notwithstanding the fact that a contract to a different effect had previously been entered into with respect to the distribution of proceeds impounded under an operating agreement.....	313
61. An entryman whose entry has been allowed under the enlarged homestead act, upon an application, accompanied by the required	

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PREFERENCE RIGHT TO LEASES AND PERMITS—SECTIONS 18, 19 AND 20—Contd. showing and payment, filed previously to the inclusion by Executive order of the land within a petroleum reserve, is entitled to the exercise of the preference right privilege to an oil and gas prospecting permit accorded by section 20 of the act of February 25, 1920, notwithstanding that the withdrawal was made prior to the allowance of the entry, and that the entry was allowed subject to the reservations of the act of July 27, 1914. 350

62. A homestead entryman, whose entry was made subsequently to the enactment of the act of February 25, 1920, does not acquire thereby a preference right to a prospecting permit under section 20 of that act. 356

63. The oil leasing act of February 25, 1920, contains no necessary or even reasonable implication that a claim for relief under sections 18, 19, and 22, thereof is to be defeated by the refusal or failure of a claimant to join in an application for a permit, or that one of several claimants can by waiver, relinquishment, or failure to assert his right within the prescribed time, do more than destroy his personal privilege, or preference right to share the benefit granted by said sections; and provision to cover such contingency is contained in section 24½ of the regulations issued pursuant to said act. 527

SECTION 24½.

See *Preference Right to Leases and Permits*,

63.

OIL SHALE, SECTIONS 21 AND 27.

64. The limitation contained in section 21 of the act of February 5, 1920, relating to the leasing of deposits of oil shale belonging to the United States, prevents a lessee thereunder from taking and holding directly more than one lease, irrespective of whether the leased area is in one State or another. 635

65. The limitations contained in section 27 of the act of February 25, 1920, in respect to any kind of mineral leased under that act, are applicable to an oil shale lease, and consequently no person or corporation can take and hold, either directly or indirectly, any interest or interests in oil shale deposits in an area or areas exceeding in the aggregate the equivalent of 5,120 acres. 635

Oklahoma.

° See *Oil and Gas Lands*, 12.

Omaha Lands.

See *Indian Lands*, 11, 12.

Oregon & California Railroad Lands.

1. Lands within the forfeited grant to the Oregon & California Railroad Co., that have been classified as "power site lands" under the authority conferred by section 2 of the act of June 9, 1916, and included within a power site reserve by Executive order issued pursuant to the act of June 25, 1910, as amended by

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the act of August 24, 1912, are open to exploration, discovery, and purchase under the United States mining laws only so far as those laws apply to metalliferous minerals, and are not, therefore, subject to location of a claim based upon discovery of deposits of fire clay or kaolin. 429

2. An attempted location of a mining claim for lands within the forfeited grant to the Oregon & California Railroad Co., prior to their classification, but which were later classified as "power site lands" under the authority conferred by section 2 of the act of June 9, 1916, is void *ab initio* and no rights are acquired thereby which prevent a subsequent withdrawal of the lands for water-power purposes. 431

Patent.

See *Allotment*, 2; *Florida*, 1; *Homestead*, 2, 7, 15, 16; *Indian Lands*, 11, 12, 24, 25, 33, 34; *Jurisdiction*, 1, 2; *Military Service*, 17; *Mortgage*, 1, 2; *Oil and Gas Lands*, 1, 2, 3, 56, 57; *Railroad Grant*, 1; *Reclamation*, 3; *Repayment*, 3; *School Land*, 15, 16; *Survey*, 2; *Swamp Land*, 4; *Timber and Stone*, 1; *Withdrawal*, 4.

Payment.

See *Accounts*, 1; *Desert Land*, 9, 10; *Entry*, 1; *Homestead (Additional)*, 12; *Indian Lands*, 3, 19, 21, 26; *Oil and Gas Lands*, 6, 59, 61; *Reclamation*, 2; *Reservation*, 1.

Per Diem.

See *Accounts*, 1.

Phosphate, Etc., Land.

See *Oil and Gas Lands*; *Potash Lands*.

Possession.

See *Coal Lands*, 9, 12, 20; *Mining Claim*, 10; *Oil and Gas Lands*, 11; *Right of Way*, 7.

Potash Land.

See *Mining claim*, 2.

1. Instructions of October 10, 1921, relative to bonds with potash leases: (Circular No. 781). 221

Power Sites.

See *Oil and Gas Lands*, 17; *Oregon & California Railroad Lands*, 1, 2.

Practice.

See *Contest*, 4, 9, 19, 23, 27; *Military Service*, 13; *Mortgage*, 1; *Oil and Gas Lands*, 19, 24, 41.

1. Revised rules of July 13, 1921. 246

2. Personal attendance of a contestant at the hearing is presumptively essential to the proper presentation of a contest, and a motion for continuance and change of place, while a matter within the discretion of the local officers, should be considered from the standpoint of the ability of the contestant to attend under the circumstances, where he makes showing that, owing to sickness or some other unavoidable happening, he will be unable to be present at the hearing. 415

Practice—Continued.

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3. Action on a motion for continuance of a hearing on the ground that the contestant will be unable to attend on account of sickness or some other unavoidable circumstance is not to be governed by the general provisions contained in the Rules of Practice relating to continuance on account of absent witnesses, which are inapplicable, but should be dependent upon the facts in each case. 415

4. The principle previously enunciated by the department that Rule 72, Rules of Practice, does not prevent the Commissioner of the General Land Office, before an appeal is taken, either on his own motion or where his attention is called to an error or omission, from reconsidering and correcting his decision in *ex parte* cases, is not to be construed as confined to cases of that class. 560

5. A mortgagee who has filed notice of his mortgage interest in an unperfected homestead entry as provided by Rule 98, Rules of Practice, must be given notice of any relinquishment filed, and no relinquishment will be accepted by the Land Department unless he joins therein or until he has had reasonable opportunity to make a showing. 582

6. A mortgagee who has filed notice of his mortgage interest in an unperfected homestead entry is entitled to protection, and by Rules 2 and 98, Rules of Practice, must be made a party defendant in any contest or other proceeding adversely affecting such entry. 638

Preference Right.

See *Application*, 3; *Coal Lands*, 7, 8, 9, 14, 15, 16; *Contest*, 14, 25, 29; *Contestant*, 1, 2; *Desert Land*, 3; *Homestead*, 22, 26, 36, 40, 45-48, 54, 55, 58, 59, 62, 63; *Indian Lands*, 13; *Military Service*, 4, 7, 11; *Oil and Gas Lands*, 19, 23, 26, 27, 29, 30, 34, 36, 37, 40, 43, 44, 48, 51, 52, 54, 55, 56, 57, 61, 62, 63; *School Land*, 5; *Settlement*, 2; *Water Power*, 3.

1. The preference right privilege accorded to discharged soldiers, sailors, and marines by Public resolution No. 29, act of February 14, 1920, attaches to lands restored to entry subsequently to the enactment of that act. 507

2. Settlement upon public land, not at the time subject to disposition and entry, prior to its orderly and formal restoration, can not be invoked as a basis for a preference right under the act of May 14, 1880, and such settlement will not prevent the Secretary of the Interior from making disposition of the land under appropriate law in a manner which will exclude the settler from participation therein. 507

Private Claim.

See *Survey*, 4, 5.

Prospecting Permits and Coal Mining Permits.

See *Coal Lands*; *Oil and Gas Lands*: *Alaska*, 1, 2, 5; *Coal Lands*, 1, 6, 7; *Contest*, 6.

Public Lands.

See *Indian Lands*, 17, 29, 30, 33; *Repayment*, 7; *Selection*, 2; *Supervisory Authority*, 1.

Purchaser.

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See *Indian Lands*, 19; *Reservation*, 8, 9.

Railroad Grant.

See *Mineral Lands*, 5; *Oil and Gas Lands*, 34.

1. Instructions of April 5, 1921, modifying instructions of March 8, 1900 (29 L. D., 589), as to issuance of patents for Central Pacific grant lands. 58

2. In expressly excluding mineral lands from the grant to the Northern Pacific Railroad Co. by the proviso to section 3 of the act of July 2, 1864, Congress contemplated that mineral lands, in the absence of special provisions to the contrary, should be considered as entreties or as a single estate; and the act of July 17, 1914, did not expressly or by implication modify or enlarge the provisions of the grant so as to permit of the selection of the surface of oil lands as indemnity. 573

Railroad Land.

See *Coal Lands*, 17, 18, 19; *Oil and Gas Lands*, 34; *Oregon & California Railroad Lands*, 1, 2; *Selection*, 2, 3, 4; *Withdrawal*, 2.

1. Instructions of August 4, 1921, under Administrative Order of April 23, 1921, with reference to State, railroad, and lieu selections. 172

Reclamation.

See *Homestead (Reclamation)*; *Indian Lands*, 21, 22, 23, 26; *School Land*, 24.

1. Instructions of October 18, 1921; Yuma auxiliary project; citizenship. 235

2. Instructions of April 23, 1922; reclamation projects; relief to water users under extension act of March 31, 1922. 618

3. Section 2 of the act of January 25, 1917, which imposes the qualification of citizenship upon "any purchaser or patentee" of lands within the Yuma auxiliary project, Arizona, did not contemplate the restriction of the right of original entry or purchase to native born or to those who had theretofore become citizens, but the conditions of the statute as to citizenship are sufficiently met if, at the time of the issuance of patent, the patentee is a citizen of the United States. 235

Records.

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17. Where the possible mineral deposits, oil or gas, in public lands embraced in an indemnity school selection, have been waived by the selector and a restricted certificate of title has been accepted under the provisions of the act of July 17, 1914, the State is estopped from further claim and the case is *res adjudicata*, notwithstanding that the mineral value of the land as of the date when the selection was completed was not established prior to the waiver and election to take a restricted patent..... 387

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19. Lands within a school section in the State of California, which were found to be of mineral character subsequently to the approval of the official survey, are not subject to mineral entry under the United States mining laws unless and until exchange thereof for other lands has been perfected pursuant to the act of February 28, 1891, and where a mineral entry for such lands has been canceled because invalid when made, a reinstatement thereof after an exchange of the lands has been approved will not be permitted to the prejudice of an intervening adverse claim, if the claimant submitted without protest to the cancellation of the entry and failed to renew his claim after title revested in the United States. 418

20. Section 16 of the act of June 4, 1920, which granted to the State of Montana for common school purposes, two designated sections of nonmineral and nontimbered lands in each township in the Crow Indian Reservation, for which the State had not previously received indemnity, clearly intended that where the lands in place, or portions thereof, have been allotted or are mineral or timbered, the State shall be entitled to select other unoccupied, nonmineral and nontimbered lands in said reservation to the extent of such deficiencies, not to exceed, however, two sections in any one township. 512

21. Where the State of Montana is unable to obtain in any township within the Crow Indian Reservation, the quantity of land, in place or as indemnity, granted to it for common school purposes by section 16 of the act of June 4, 1920, it is entitled under the provisions of the acts of February 22, 1889, and February 28, 1891, to select other lands subject to selection, outside of said reservation, in quantity equal to such loss. 512

22. The grant to the State of New Mexico of certain designated sections of the public lands for school purposes embodied in the enabling act of June 20, 1910, became effective only upon and by force of the proclamation of admission of the State into the Union on January 6, 1912. 561

23. Defects in an indemnity school selection may be cured by an amendatory selection prior to the intervening of adverse rights, and where the defects are cured before the lands are included within a forest withdrawal, the selection is to be treated as within the purview of a proviso which excepts from the operation of the withdrawal "any lawful entry, filing,

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See *Amendment*, 1; *Coal Lands*, 7, 8, 14; *Homestead (Reclamation)*, 26; *Indian Lands*, 16, 20, 24, 25, 26, 28, 34; *Jurisdiction*, 1; *Oil and Gas Lands*, 31, 39; *Preference Right*, 2; *Restorations*, 1; *Supervisory Authority*, 1; *Water Exploration Permit*, 1.

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1. Instructions of April 23, 1921, modifying administrative ruling of July 15, 1914, relative to selections of subsequently withdrawn lands. 97

2. Instructions of August 4, 1921, under Administrative Order of April 23, 1921, with reference to State, railroad, and lieu selections (Circular No. 768). 172

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4. A plea alleging that by a clerical inadvertence base tendered in support of a selection for the exchange of lands under the act of July 1, 1898, was, to the detriment of the transferee of the selector, erroneously used as base in support of another selection which had passed to patent, is not a sufficient ground for the allowance of the substitution of new base with the view to the reinstatement of the original selection where the selector has become estopped from demanding the reopening of the proceedings by reason of the doctrine of *res adjudicata*. 343

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1. Instructions of October 8, 1921, relative to prior settlements on lands in stock-drive-way withdrawals. (Circular No. 783). 202

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2. Only unoccupied and unimproved public lands are subject to settlement and entry under the homestead laws, and one who, without the consent of the owner of the adjoining surveyed lands, settles upon and occupies unsurveyed lands that were erroneously or fraudulently omitted from survey, and which, at date of said settlement, were in the possession of the latter, does not acquire any preference right of entry; the fact that the initiation of the claim was peaceful and without force is immaterial..... 1

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See *Amendment*, 1; *Coal Lands*, 7; *Oil and Gas Lands*, 31, 39; *Water Exploration Permit*, 1.

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3. Under a rule of administration adopted by the Land Department, based upon an agreement with the State of Minnesota, the character of ceded Chippewa Indian lands selected by the State under the swamp land grant of March 12, 1860, is to be determined by an examination in the field, and where the selected lands, as the result of such examination, have been classified as swamp, the right of an adverse claimant to contest the classification does not exist..... 359

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1. Neither the act of March 2, 1849, granting swamp and overflowed lands to Louisiana, nor the general swamp act of September 28, 1850, creates of its own force a present grant of complete title in the State, and prior to approval by the Secretary of the Interior under the former or the issuance of a patent under the latter, the authority of the Land Department to inquire into and determine all rights and equities claimed as against the Government does not cease..... 201

2. The State of Louisiana does not require a complete and perfected interest equivalent to full equitable title under either of the swamp acts of March 2, 1849, and September 28, 1850, to any tract until it has been finally identified as of the class and condition contemplated by the granting act..... 201

3. Mineral lands, not being expressly included within the terms of either of the swamp acts of March 2, 1849, and September 28, 1850, do not inure to the State of Louisiana, and prior to the Secretary's approval under the former or the issuance of a patent under the latter act, the character of claimed swamp land is open for investigation and adjudication..... 201

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Waiver.

See *School Land*, 8, 17, 52, 63.

Water Exploration Permit. Page.

1. The Secretary of the Interior may, through the exercise of his supervisory power, sanction the amendment of a permit to explore for water granted under the act of October 22, 1919, inasmuch as such a permit is an "entry" in the sense in which that term is used in the administration of the public land laws relating to the amendment of entries..... 380
2. Lands within a proved artesian well area in which wells are being successfully used for irrigation at a reasonable cost are not of the character that the act of October 22, 1919, contemplated should be designated as subject to exploration and an application for a water exploration permit embracing lands within such area must be denied, notwithstanding that it has not been clearly shown that all of the lands described in the application can be thus irrigated..... 546

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7. An oil and gas prospecting permit is not an "entry" within the meaning of that term as it is used in the statutes relating to the public lands. See *Oil and Gas Lands*, 28.

8. "Existing entry," see *Homestead (Stock-raising)*, 49.

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10. "Homestead entry," see *Homestead (Reclamation)*, 27.

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15. "Owned by the United States," see *Indian Lands*, 17.

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