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DANIEL M. GREENE

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¹ Page 526, for "8 Pac. Rep., 651," in line 32, read "8 Pac. Rep., 621."

² Page 486, for "173 Fed., 135," in line 3, read "273 Fed., 135."

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¹ Page 320, for "2 Gall., 264," in line 19, read "2 Gall., 364."

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¹Page 153, for "September 25, 1920," in line 7, read "February 25, 1920."

²Page 125, for "(41 stat., 1902)," in line 8, read "(41 stat., 1202)."

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¹ Page 279, for "February 8, 1922," in line 8, read "February 7, 1922."

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ARTICLE FROM DECISIONS
RELATING TO
THE PUBLIC LANDS.

**PREFERENCE RIGHTS ACCORDED TO DISCHARGED SOLDIERS,
SAILORS, AND MARINES—ACT OF JANUARY 21, 1922—CIRCULAR
NO. 678 (47 L. D., 346), SUPERSEDED.**

INSTRUCTIONS.

[Circular No. 822.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 1, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

House Joint Resolution No. 30, approved January 21, 1922, Public Resolution No. 36, amended joint resolution of February 14, 1920 (41 Stat. 434), to read as follows:

That hereafter, for the period of ten years following the passage of this Act, on the opening of public or Indian lands to entry, or the restoration to entry of public lands theretofore withdrawn from entry, such opening or restoration shall, in the order therefor, provide for a period of not less than ninety days before the general opening of such lands to disposal in which officers, soldiers, sailors or marines who have served in the Army or Navy of the United States in the war with Germany and been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve shall have a preferred right of entry under the homestead or desert land laws, if qualified thereunder, 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: *Provided*, That the rights and benefits conferred by this Act shall not extend to any person who, having been drafted for service under the provisions of the Selective Service Act, shall have refused to render such service or to wear the uniform of such service of the United States.

DURATION OF WAR.

Sec. 1. The war began April 6, 1917, and for the purposes of House Joint Resolution No. 30 (Public Resolution No. 36), terminated with the adoption of Public Resolution No. 64 (41 Stat. 1359), approved March 3, 1921.

EFFECT OF AMENDMENT ON ORDERS OF RESTORATION PRIOR TO JANUARY 21, 1922.

Sec. 2. Lands that had become subject to general disposition prior to January 21, 1922, will not be affected by the amendment, but where lands have been restored heretofore and the period of 63 days' preference right provided by Circular 678 (47 L. D., 346), had not expired January 21, the preference right for the officers, soldiers, sailors, and marines will be held to extend for the period of 91 days from the beginning of the period.

DURATION OF PREFERENCE-RIGHT PERIOD.

SEC. 3. Public or Indian lands opened to entry or restored from withdrawals or reservations after February 14, 1920, and prior to February 15, 1930, are subject to the provisions of the public resolution. The time provided therein for filing homestead and desert land applications by those entitled to exercise the privileges conferred thereby will begin and terminate as provided hereinafter, unless otherwise directed in the order opening or restoring the lands. Where such period begins prior to February 15, 1930, it will continue for the time prescribed, even though such period extends after February 15, 1930.

PERSONS ENTITLED TO THE BENEFITS OF THE PUBLIC RESOLUTION.

SEC. 4. (a) The words "officers, soldiers, sailors, and marines," as employed in the public resolution, are generic terms and embrace privates, seamen, sailors, nurses, and all other persons, male or female, who by enlistment or otherwise were regularly enrolled in the Army, Navy, or Marine Corps of the United States during the war with Germany, and who could not voluntarily terminate such service, but does not include civilian employees nor officers, nurses, or members of other organizations not so enrolled in the Army or Navy. Persons entitled to the foregoing privileges will be referred to hereinafter generally as soldiers.

(b) A person now in the active service of the United States Army, Navy, or Marine Corps is not entitled to the privileges of the public resolution unless he can show an honorable discharge or separation from a previous service in the Army, Navy, or Marine Corps subsequent to April 6, 1917, and prior to March 3, 1921. Whenever such person can show an honorable discharge or separation from such service he may avail himself of the benefits of the public resolution. Persons who were honorably discharged or separated from service in the United States Army, Navy, or Marine Corps after April 6, 1917, and prior to March 3, 1921, and who by reenlistment or otherwise are now engaged in such service, may exercise the privileges conferred by the public resolution, but must, if they make entry, comply in all particulars with the applicable law and regulations.

(c) An alien soldier who served in the United States Army, Navy, or Marine Corps, during the war with Germany, and was honorably discharged, is given the status of a declarant by the act of May 9, 1918 (40 Stat., 542), and if otherwise qualified, may exercise the privileges conferred by the public resolution, and may make an original homestead entry or desert-land declaration, but must, before proving his title under either act, complete his citizenship.

(d) A minor soldier, if otherwise within the provisions of the public resolution, may, under the act approved August 31, 1918 (40 Stat., 955), make either a homestead or desert-land entry, and during his minority, or until he reaches the age of 21 years, may verify his homestead or desert-land application before any officer, at any place, authorized to administer oaths under the laws of the State within which the land applied for is situated. Among officers so recognized may be mentioned notaries public, and clerks of courts of record in this country, and consular and diplomatic officers in foreign countries. In connection, however, with public-land entries made by minor soldiers, attention is directed to the restrictive provisions attaching to such entries by public resolution approved September

13, 1918 (40 Stat., 960); and departmental instructions thereunder of October 9, 1918, Circular 622 (46 L. D., 451).

QUALIFICATION OF SOLDIERS.

SEC. 5. The public resolution provides that the privileges thereunder may be exercised only by those qualified to make a homestead entry or desert-land declaration. A soldier who at date of application is the owner of more than 160 acres of land in any State or Territory of the United States, can not make an original homestead entry. The ownership of land is no bar to making a desert-land declaration, but the soldier at the time of filing such declaration must be a resident of the State in which the land is situated. If the soldier at the time his application is filed is not the owner of more than 160 acres of land in any State or Territory, has not made homestead entry or desert-land declaration, nor taken by assignment a desert-land entry, nor acquired agricultural lands from the Government, he may make either an original homestead entry or desert-land declaration, or both, within the limitations fixed by law, if the land applied for is subject to the entry sought. If he has made a homestead or desert-land entry, or has acquired from the Government title to agricultural lands, he should, before filing his application, consult Suggestions to Homesteaders, Circular No. 541, and Statutes and Regulations Governing Entries Under the Desert-Land Laws, Circular No. 474, both of which may be obtained by request from the Commissioner of the General Land Office.

SHOWING REQUIRED TO ENTITLE THE SOLDIER TO THE PREFERENCE PROVIDED.

SEC. 6. 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, and prior to March 3, 1921; 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 having and using a seal, but he will not be required to file the original order of discharge or transfer. If he has lost his discharge, or is otherwise unable to secure a copy thereof, he must in a verified statement explain fully why such copy was not furnished. A minor soldier must show, in addition to the above, that he was under 21 years of age at the date of the execution of his application.

SOLDIER'S DECLARATORY STATEMENT NOT EFFECTIVE—ENTRY MUST BE MADE.

SEC. 7. Rights extended by the public resolution can not be supported by soldier's declaratory statement under the homestead law, but must be exercised through an application to make homestead entry.

EXECUTION AND PRESENTATION OF APPLICATIONS.

SEC. 8. To avail himself of the privileges conferred by the public resolution, the soldier, unless he be a minor, must, if not within, go to the land district in which the land is situated, and he should personally examine the land applied for. He must execute his application, whether it be under the homestead or desert-land laws, before either the register or receiver of the local land office, or before a United States commissioner, or a judge or clerk of a court of record in the county in which the land is located, or before one of such officers in the land district and nearest or most accessible to the land. When so executed, the application may be presented to the land office in person, by mail, or otherwise. A minor soldier may execute his application in the manner provided in paragraph (d), section 4, hereof.

SOLDIER MUST MAKE ENTRY UNDER THE LAW APPLICABLE.

SEC. 9. Where under the law or order of restoration issued pursuant to the provisions of the act of September 30, 1913 (38 Stat., 113), the lands are restored to entry only under the provisions of either the homestead law or the desert-land law, applications by soldiers must be restricted to the applicable law, but where under the law or order of restoration entries may be made under either or both of such laws for lands properly subject thereto, a soldier may file an application under the homestead law and one under the desert-land law, if he does not by such application include more land than he may lawfully acquire under the agricultural laws, provided he is qualified to make the entry sought, and the lands embraced in such applications are lawfully subject thereto, but he will not be permitted to file under both acts for the same tract.

PAYMENTS.

SEC. 10. The soldier must make the payments required of other persons under the law, pursuant to which his application is filed or entry is made.

COMPLIANCE WITH LAW AFTER ENTRY.

SEC. 11. The soldier must comply with the provisions of the desert-land law in the same manner and make the expenditures on the land and the payments required of other entrymen under that law. Where entry is made under the homestead law, the soldier may, under the provisions of the act approved February 25, 1919 (40 Stat., 1161), extending the provisions of section 2305, Revised Statutes, to service in the United States Army, Navy, or Marine Corps, in connection with the operations on the Mexican border, or in the war with Germany, receive credit for such service, not exceeding two years, in proving his claim. He must establish residence within the time and during at least the first year of his entry reside on the land and otherwise comply with the law in the manner required of other persons. He may at any time after the first year of his entry submit his proof, when he can show that the period of his compliance with the law after establishing residence and his military service equal 36 months. In applying credit for military service under the general or enlarged provisions of the homestead law, the following rule will be observed:

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 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.

LANDS AFFECTED BY THE PUBLIC RESOLUTION.

SEC. 12. The public resolution affects only lands that may be entered under the homestead or desert land acts, and does not extend the provisions of either of said laws to areas not otherwise subject thereto. It applies in all cases where such lands become subject to entry, (a) by the filing of township plats of survey or resurvey, or (b) where Indian lands are opened to entry, or (c) where public lands are restored from withdrawals or reservation; or (d) where lands are embraced in relinquishments which do not become effective upon being filed in the proper local land office, but upon which action by the Commissioner or Secretary is necessary before the lands affected are restored to disposition, or (e) where titles are recovered through actions in the courts. It does not apply to lands that were open to entry on the date of its approval, nor to lands embraced in entries canceled by contests, or by reason of expiration of the statutory period, nor to lands embraced in entries or selections where under the law such lands become subject to entry upon the filing of proper relinquishments thereof in the local land office. Where, however, entries made under the provisions of the public resolution are relinquished before the expiration of the preference right period accorded to soldiers, the lands affected thereby may be entered only by soldiers during such preference-right period.

CLASSES OF HOMESTEAD AND DESERT-LAND ENTRIES ALLOWABLE.

SEC. 13. The public resolution applies to all classes of homestead entries, whether under the 160, 320, or 640 acre provisions, and

homestead and desert-land entries, whether the entire estate is sought or whether the minerals are reserved to the United States. A soldier's homestead application under the enlarged, the stock-raising, or other special provisions of the law, will be governed by the regulations applicable thereto, and if by drawing; in case of simultaneous applications, or by time of filing such application is accorded priority, it will be disposed of accordingly.

UNSURVEYED LANDS.

SEC. 14. The public resolution will not prevent settlement on unsurveyed lands otherwise subject thereto prior to the filing of the township plat of survey, and where settlements are so made by qualified persons and maintained in the manner required by law, the rights secured thereby will not be subordinated, upon the restoration of the lands, to preferences asserted under the public resolution, but, from the date of the filing of the township plat of survey and until the preference period provided for soldiers has expired, settlements on the lands affected will confer no rights whatsoever.

RIGHTS THAT MAY DEFEAT THE SOLDIER'S APPLICATION.

SEC. 15. The rights conferred by the public resolution are subject to existing valid settlement rights and preference rights under existing laws, or equitable claims that are subject to allowance and confirmation. Without attempting to enumerate all the valid claims and existing preference rights that might defeat a soldier's application, the following may be mentioned:

(a) Settlement made by a qualified person at a time when the land was lawfully subject thereto, and maintained in the manner required by law to date of such application. The soldier may avoid conflict with such settlers' claims by carefully examining the land before filing his application.

(b) The preference rights granted under the provisions of the act of August 18, 1894 (28 Stat., 394), to the States of Washington, Idaho, Montana, North Dakota, South Dakota, Wyoming, and to Utah upon its admission into the Union, and subsequently extended to the States of New Mexico and Arizona by sections 11 and 29 of the enabling act of June 20, 1910 (36 Stat., 565, 575). Where the States mentioned applied for the survey of public lands within their respective limits, and complied with the requirements of said act, the preference rights accorded by said act, if exercised within the 60 days provided, will defeat a soldier's application. The period within which the State must apply in order to protect its preference will begin with the date of the order of restoration of lands withdrawn or in reservation, and surveyed during the time of withdrawal or reservation, and from the date of the filing of the township plat of survey, where the lands were not so withdrawn or reserved.

(c) The preference right granted the States of North Dakota, South Dakota, Montana, Idaho, and Washington, by the act of March 3, 1893 (27 Stat., 592), will not defeat soldiers' applications during the preference right period extended by the public resolution. Under the act of March 3, 1893, the rights therein granted attach only when the lands shall have become subject to appropriation under all of the applicable public-land laws, while the preferences

granted soldiers by the public resolution are effective for a period of at least 90 days *before* such lands shall become subject to appropriation by others. Therefore, the provisions of the aforesaid act of March 3, 1893, will not prevent the allowance of applications by soldiers during the period hereinafter fixed for filing such preference right applications, but upon the restoration of the land to entry generally, the rights of the several States to lands not then appropriated will attach, and for the period of 60 days thereafter will be superior to the claims of all other applicants, including soldiers.

(d) The act of June 11, 1906 (34 Stat., 233). Lands restored under the provisions of the said act of June 11, 1906, are, under the terms of such act, subject to preference rights as follows:

(1) For a period of 60 days by settlers prior to January 1, 1906, who shall not have abandoned such settlement prior to application;

(2) For a like period by persons, if qualified to make homestead entry, upon whose applications the lands were examined and listed.

The foregoing preferences are granted in the order named, and the 60-day period begins on the date the list and order of restoration reach the local land office.

(e) Preference rights extended certain Carey Act entrymen under the act approved February 14, 1920 (41 Stat., 407). The rights granted settlers under the provisions of the act of February 14, 1920 (41 Stat., 407), are not absolute, but are conditioned upon the recognition of such rights by the Secretary of the Interior in the order restoring such lands to the public domain. Where the order restoring Carey Act lands does not recognize the preference rights of settlers, nor provide for the exercise thereof, soldiers' applications will be governed by paragraph (a), section 16 hereof.

ORDER APPLICABLE TO LANDS OPENED OR RESTORED SUBJECT TO THE PROVISIONS OF THE PUBLIC RESOLUTION.

SEC. 16. It is ordered and directed that hereafter, and until February 15, 1930, when any surveyed lands within the provisions of the public resolution are opened or restored to disposition under the authority of the Department, such lands, unless otherwise provided in the order of restoration, shall become subject to appropriation under the laws applicable thereto in the following manner, and not otherwise:

(a) Lands not affected by the preference rights conferred by the acts of August 18, 1894 (28 Stat., 394), or June 11, 1906 (34 Stat., 233), or February 14, 1920 (41 Stat., 407), will be subject to entry by soldiers under the homestead and desert-land laws, where both of said laws are applicable, or under the homestead law only, as the case may be, for a period of 91 days, beginning with the date of the filing of the township plat, in case of survey or resurvey, and with the sixty-third day from and after the order of restoration, in all other cases, and thereafter to disposition under all of the public land laws applicable thereto. For the period of 20 days prior to the restoration or opening of such lands to soldiers' entry, and for a like period prior to the date such lands become subject to entry generally, soldiers in the first instance, and any qualified applicants in the second, may execute and file their applications, and all such applications presented within such 20-day periods, together with those offered at 9 o'clock a. m., standard time, on the dates such lands become subject

to appropriation under such applications shall be treated as filed simultaneously.

(b) Where the lands are subject to the preference rights conferred by the acts of August 18, 1894 (28 Stat., 394), or June 11, 1906 (34 Stat., 233), and where in the order restoring Carey Act lands preference rights of settlers are recognized under the provisions of the act approved February 14, 1920 (41 Stat., 407), the lands not appropriated under such dominant preference rights will become subject to entry by soldiers under the provisions of both the homestead and desert-land laws, or the homestead laws only, at 9 o'clock a. m., standard time, on the first office day after the termination of such preference-right periods, and to entry under all the applicable public-land laws at 9 o'clock a. m., standard time, on the ninety-first day from and after such first office day. Soldiers' applications may be filed at any time during such preference-right periods, and will be held subject to such superior preference rights. If the controlling preference right be exercised within the time prescribed, applications of soldiers in conflict therewith will be rejected. If such preference rights be not so exercised, the applications by soldiers filed during such preference-right periods, together with those filed at 9 o'clock a. m., standard time, on the first office day following the termination of such periods, will be treated as filed simultaneously.

DISPOSITION OF APPLICATIONS.

SEC. 17. (a) Applications treated as filed simultaneously will be rejected where they conflict with superior claims; otherwise they will be disposed of in the manner required by Circular 324, approved May 22, 1914 (43 L. D., 254).

(b) Soldiers' applications and those of other qualified persons filed after 9 o'clock a. m., standard time, on the dates the lands become subject to such applications, will be disposed of in the order filed.

RESTORATION OF LANDS TO GENERAL DISPOSITION.

SEC. 18. (a) While the special privileges extended by the public resolution may be exercised by soldiers of the war with Germany only, when the lands shall have been restored to disposition generally, under the applicable public land laws, soldiers of any war may proceed on terms of equality with other qualified persons. Those who served for ninety days or more in the United States Army, Navy, or Marine Corps during the Civil War, Spanish-American War, or Philippine Insurrection, and were honorably discharged, may initiate claims under the homestead law by filing declaratory statements, either in person or by agent. Those who served in the United States Army, Navy, or Marine Corps for 90 days or more in connection with the operations on the Mexican border or during the war with Germany, and were honorably discharged, may file declaratory statements in person, but *not* by agent. The soldiers who make entry after restoration of the land to general disposition may apply such military service in lieu of residence in proving claims under the homestead laws, to the extent indicated in section 11 hereof.

(b) Where the lands are affected by the provisions of the act of March 3, 1893 (27 Stat., 592), the applications of soldiers and other

persons will be held subject to the rights of the State for a period of 60 days from and including the date of such general restoration.

Approved May 1, 1922.

E. C. FINNEY,

First Assistant Secretary.

WILLIAM SPRY,

Commissioner.

HOMESTEAD ENTRIES WITHIN NATIONAL FORESTS.

REGULATIONS.

[Circular No. 263.]¹

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 2, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Your attention is called to the act of June 11, 1906 (34 Stat. 233), a copy of which is hereto attached as Appendix A. This act authorizes homestead entries for lands within national forests, and you are instructed thereunder as follows:

1. Both surveyed and unsurveyed lands within national forests which are chiefly valuable for agriculture and not needed for public use may, from time to time, be examined, classified, and listed under the supervision of the Secretary of Agriculture, and lists thereof will be filed by him with the Secretary of the Interior, who will then declare the listed lands subject to settlement and entry.

2. By an act approved August 10, 1912 (37 Stat. 269), the Secretary of Agriculture was directed to select, classify, and segregate all lands within the boundaries of national forests that may be opened to entry under the homestead laws applicable thereto. Any person interested in securing a classification or review of a classification previously made by the Secretary of Agriculture, should present his request to the supervisor of the national forest in which the land is located, and should state the reasons which he may have for believing the land has not been properly classified.

3. When any lands have been declared subject to settlement and entry under this act, a list of such lands, together with a copy of the notice of restoration thereof to entry and authority for publication of such notice, will be transmitted to the register and receiver for the district within which the lands are located. Upon receipt thereof the register will designate a newspaper published within the county in which the land is situated and transmit to the publishers thereof the letter of authority and copy of notice of restoration, said notice to be published in the designated newspaper once each week for four successive weeks. You will also post in your office a copy of said notice, the same to remain posted for a period of 60 days immediately preceding the date when the lands are to be subject to entry. If no paper is published within the county, publication should be made in a newspaper published nearest the land.

4. The cost of publishing the notice mentioned in the preceding paragraph will not be paid by the receiver, but the publisher's vouchers therefor, in duplicate, should be forwarded to the Depart-

¹ Revision of regulations of Aug. 19, 1913 (42 L. D., 331).

ment of the Interior, Washington, D. C., by the publisher, accompanied by a duly executed proof of publication. The register will require the publisher to promptly furnish him with a copy of the issue of the paper in which such notice first appears, will compare the published notice with that furnished by this office, and in case of discrepancy or error cause the publisher to correct the printed notice and thereafter publish the corrected notice for the full period of four weeks.

5. In addition to the publication and posting above provided for, you will, on the day the list is filed in your office, mail a copy of the notice by registered letter to any person known by you to be claiming a preferred right of entry on any of the lands described therein, and also at the same time mail a copy of the notice by registered letter to each of the persons named after each tract in the restoration notice and advise each of them of his preferred right to make entry during the 60-day period prior to the date of restoration. Upon receiving evidence of service of such notice or notices you will forward same to this office.

6. Any person qualified to make a homestead entry who, prior to January 1, 1906, occupied and in good faith claimed any lands listed under this act for agricultural purposes, and who has not abandoned the same, and the person upon whose application such land was listed, or a qualified ex-service man of the war with Germany, has, each in the order named, the preferred right to enter the lands so settled upon or listed at any time within sixty days prior to restoration of the land, or in the case of an ex-service man of the world war at any time within ninety days prior to date of restoration. Should an application be filed by such settler during the sixty-day period you will, upon his showing by affidavit the fact of such settlement and continued occupancy, allow the entry. If an application is filed during the said period by the party upon whose request the lands were listed, or by an ex-service man of the World War, during the ninety-day period, you will retain said application on file in your office until the date of restoration or until an entry has been made by a claimant having the superior preference right. If no application by a bona fide settler prior to January 1, 1906, is filed within the preference right period, you will allow the application of the party upon whose request the lands were listed. If entry by a person claiming a settler's preference right is allowed other applications should be rejected without waiting the expiration of the preferred period. Of the applicants for listing, only the one upon whose request a tract is listed secures any preference right. Other applicants for the listing of the same tract acquire no right by virtue of such applications.

While the preference right period of ex-service men of the war with Germany begins to run ninety days prior to the date of the restoration of the land to entry, filings may be presented during the twenty days preceding such preference right period; that is, from the one hundred and tenth day to the ninetieth day prior to date of restoration, and such filings will be treated as simultaneously filed at 9 a. m., on the ninetieth day prior to date of restoration in the manner provided by Circular 324, approved May 22, 1914 (43 L. D. 254). The filings of the successful ex-service applicant may there-

after be allowed only in the event prior claimants do not exercise their preference right before the date of restoration.

All applications by others than the classes above referred to, which are filed prior to the date of opening, should be rejected notwithstanding the fact that an attempted transfer of the preference right of entry may have been made, but applications may be filed by the general public within twenty days prior to the date of restoration, and all such applications will be treated as simultaneously filed at 9 a. m. on the date of restoration, in accordance with said Circular 324.

The approved form of notice of restoration reads as follows:

RESTORATION TO ENTRY OF LANDS IN NATIONAL FOREST.

Notice is hereby given that the lands described below, embracing _____ acres, within the _____ National Forest, _____, will be subject to settlement and entry under the provisions of the homestead laws of the United States and the act of June 11, 1906 (34 Stat. 233), at the United States land office at _____, on _____, by any qualified person, except that for a period of 90 days prior to said date the land will be subject to a preference right of ex-service men of the war with Germany. Such ex-service men, in order to avail themselves of their preference rights, must file their applications on or after (one hundred and tenth day prior to restoration) but prior to (date of restoration). All such applications filed on or after (one hundred and tenth day prior to restoration) but prior to (ninetieth day prior to restoration) will be treated as simultaneously filed at 9 a. m. on (ninetieth day prior to restoration). All such applications filed on or after (ninetieth day prior to restoration) but prior to (date of restoration) will be treated in the order in which filed.

Applications may be filed by the general public within 20 days prior to (date of restoration) and will be treated as simultaneously filed at 9 a. m. on (date of restoration).

(Description of lands restored.)

(Date.)

This form should be modified to cover notice to bona fide settlers prior to January 1, 1906, and to applicants for listing under the act of June 11, 1906, where it appears that the rights of such parties are involved.

7. The fact that a settler prior to January 1, 1906, has already exercised or lost his homestead right will not prevent him from making entry of the lands settled upon if he is otherwise qualified to make entry, but he can not obtain patent until he has complied with all of the requirements of the homestead law as to residence and cultivation and paid \$2.50 per acre for the land entered by him.

8. When an entry embraces unsurveyed lands or irregular fractional parts of a subdivision of a surveyed section, a metes-and-bounds survey of such lands and fractional parts must be made at some time before the entryman applies to make final proof. Survey will not be required where the tract can be described by legal subdivisions or as a quarter or a half of a surveyed quarter-quarter section or rectangular-lotted tract, or as a quarter or half of a surveyed quarter-quarter-section or rectangular-lotted tract.

9. Under the act of August 10, 1912 (37 Stat. 287), and subsequent acts making appropriations for the Department of Agriculture, authority is given for the making of metes-and-bounds surveys by the forest officers under the direction of the surveyor general. (See Circular No. 235 of April 30, 1913.)

10. Application for survey should be made by the entryman to the district forester of the district in which the land lies, and upon

execution of same and filing of the approved plat in the local land office a copy of same will be sent to the entryman for posting upon the land during the period of publication, and upon receipt of his plat the entryman may apply to submit proof.

11. The commutation provisions of the homestead laws do not apply to entries made under this act, but all entrymen must make final proof of residence and cultivation within the time, in the manner and under the notice prescribed by the general provisions of the homestead laws, except that all entrymen who are required by the preceding paragraphs to have their lands, or any portion of them, surveyed must, within five years from the date of their settlement, present to the register and receiver their application to make final proof of all of the lands embraced in their entries.

Entries made under the said act of June 11, 1906, are subject to the provisions of sections 2291 and 2297, United States Revised Statutes, as amended by the three-year homestead act of June 6, 1912 (37 Stat. 123), whether made before or after June 6, 1912.

12. In all cases where a survey of any portion of the lands embraced in an entry made under this act is required, the register will, in addition to publishing and posting the usual final-proof notices, keep a copy of the final-proof notice, with a copy of the field notes and the plat of such survey attached, posted in his office during the period of publication, and the entryman must keep a copy of the final-proof notice and a copy of the plat of his survey prominently posted on the lands platted during the entire period of publication of notice of intention to submit final proof, and at the same time his final proof is offered he must file an affidavit showing the date on which the copies of the notice and plat were posted on the land and that they remained so posted during such period, giving dates.

13. Section 1 of the said act of June 11, 1906, having been amended by the act of May 30, 1908 (35 Stat. 554), the only counties in southern California in which entries thereunder can not be made are San Luis Obispo and Santa Barbara, to which counties the act of June 11, 1906, does not apply. Entries made of lands in the Black Hills National Forest can be made only under the terms and upon the conditions prescribed in sections 3 and 4 of the act of June 11, 1906, as amended by the act of February 8, 1907 (34 Stat. 883), and the act of July 3, 1912 (37 Stat. 188).

14. This act does not authorize any settlements within forest reserves except upon lands which have been listed, and then only in the manner mentioned above, and all persons who attempt to make any unauthorized settlement within such reserves will be considered trespassers and treated accordingly.

15. The act of June 11, 1906, provides that nothing shall be done to impair in any way the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve and maintains his settlement claim as required by law.

Very respectfully,

WILLIAM SPRY,
Commissioner.

Approved: May 2, 1922.

E. C. FINNEY,

First Assistant Secretary.

APPENDIX A.

AN ACT To provide for the entry of agricultural lands within forest reserves.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture may in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of land within permanent or temporary forest reserves, except the following counties in the State of California, Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego; which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this Act.

Upon the filing of any such list or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length, at the expiration of sixty days from the filing of the list in the land office of the district within which the lands are located, during which period the said list or description shall be prominently posted in the land office and advertised for a period of not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated: *Provided*, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry: *Provided further*, That any entryman desiring to obtain patent to any lands described by metes and bounds entered by him under the provisions of this act shall, within five years of the date of making settlement, file, with the required proof of residence and cultivation, a plat and field notes of the lands entered, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of such lands, which shall be distinctly marked by monuments on the ground, and by posting a copy of such plat, together with a notice of the time and place of offering proof, in a conspicuous place on the land embraced in such plat during the period prescribed by law for the publication of his notice of intention to offer proof, and that a copy of such plat and field notes shall also be kept posted in the office of the register of the land office for the land district in which such lands are situated for a like period; and further, that any agricultural lands within forest reserves may, at the discretion of the Secretary, be surveyed by metes and bounds, and that no lands entered under the provisions of this Act shall be patented under the commutation provisions of the homestead laws, but settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries.

Sec. 2. That settlers upon lands chiefly valuable for agriculture within forest reserves on January first, nineteen hundred and six, who have already exercised or lost their homestead privilege, but are otherwise competent to enter lands under the homestead laws, are hereby granted an additional homestead right of entry for the purposes of this act only, and such settlers must otherwise comply with the provisions of the homestead law, and in addition thereto must pay two dollars and fifty cents per acre for lands entered under the provisions of this section, such payment to be made at the time of making final proof on such lands.

Sec. 3. That all entries under this act in the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States, and the laws and regulations permitting the location, appropriation, and use of the waters within the said forest reserves for mining, irrigation, and other purposes; and

no titles acquired to agricultural lands in said Black Hills Forest Reserve under this act shall vest in the patentee any riparian rights to any stream or streams of flowing water within said reserve; and that such limitation of title shall be expressed in the patents for the lands covered by such entries.

SEC. 4. That no homestead settlements or entries shall be allowed in that portion of the Black Hills Forest Reserve in Lawrence and Pennington counties in South Dakota except to persons occupying lands therein prior to January first, nineteen hundred and six, and the provisions of this act shall apply to the said counties in said reserve only so far as is necessary to give and perfect title of such settlers or occupants to lands chiefly valuable for agriculture therein occupied or claimed by them prior to the said date, and all homestead entries under this act in said counties in said reserve shall be described by metes and bounds survey.

SEC. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been open to settlement as provided in this act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve.

Approved, June 11, 1906 (34 Stat. 233).

AN ACT Excepting certain lands in Pennington County, South Dakota, from the operation of the provisions of section four of an Act approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following-described townships in the Black Hills Forest Reserve, in Pennington County, South Dakota, to wit: Townships one north, one east; two north, one east; one north, two east; two north, two east; one south, one east; two south, one east; one south, two east; and two south, two east, Black Hills meridian, are hereby excepted from the operation of the provisions of section four of an Act entitled "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six. The lands within the said townships to remain subject to all other provisions of said Act.

Approved, February 8, 1907 (34 Stat. 883).

AN ACT Excepting certain lands in Lawrence and Pennington Counties, South Dakota, from the operation of the provisions of section four of an Act approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following-described townships in the Black Hills Forest Reserve, South Dakota, to wit: Township three north, one east, and so much of townships two north, one east, and two north, two east, as are within Lawrence County, and township one north, three east, in Pennington County, Black Hills meridian, are hereby excepted from the operation of the provisions of section four of an Act entitled "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six. The lands within the said townships to remain subject to all other provisions of said Act.

Approved, July 3, 1912 (37 Stat. 188).

AN ACT To amend an Act approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six, be amended by striking out of section one the following words: "Except the following counties in the State of California: Inyo, Tulare, Kern, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego."

Approved, May 30, 1908 (35 Stat. 554).

UNITED STATES MINING LAWS,

AND REGULATIONS THEREUNDER, RELATIVE TO THE RESERVATION, EXPLORATION, LOCATION, POSSESSION, PURCHASE, AND PATENTING OF THE MINERAL LANDS IN THE PUBLIC DOMAIN.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, Washington, D. C., April 11, 1922.

LAWS.

TITLE XXXII, CHAPTER 6, REVISED STATUTES.

Mineral Lands and Mining Resources.

SEC. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

Mineral lands reserved. 4 July, 1866, c. 166, s. 5, v. 14, p. 86.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Mineral lands open to purchase by citizens. 10 May, 1872, c. 152, s. 1, v. 17, p. 91.

SEC. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the

Length of mining claims upon veins or lodes. 10 May, 1872, c. 152, s. 2, v. 17, p. 91.

limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.

Proof of citizenship.

10 May, 1872,
c. 152, s. 7, v.
17, p. 94.

SEC. 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

Locators' rights of possession and enjoyment.

10 May, 1872,
c. 152, s. 3, v.
17, p. 91.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Owners of tunnels, rights of.

10 May, 1872,
c. 152, s. 4, v.
17, p. 92.

SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of

the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required expenditures.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has,

Regulations
made by min-
ers.

10 May, 1872,
c. 152, s. 5, v.
17, p. 92.

Patents for
mineral lands,
how obtained.

10 May, 1872,
c. 152, s. 6, v.
17, p. 92.

or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Adverse claim, proceedings on.

10 May, 1872, c. 152, s. 7, v. 17, p. 93.

SEC. 2326.¹ Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty

¹ See also act June 7, 1910 (36 Stat. L., 459), extending the time in which to file adverse claims and institute adverse suits with respect to mineral applications in Alaska.

days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

SEC. 2327. The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so, as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

Description
of mining vein
or lode claims.

10 May, 1872,
c. 152, s. 8, v.
17, p. 94.

Amended
Apr. 28, 1904
(33 Stat., 545).

Patents to
conform to
official monu-
ments.

Monuments
to govern de-
scriptions.

Pending applications; existing rights.

10 May, 1872, c. 152, s. 9, v. 17, p. 94.

SEC. 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

Conformity of placer claims to surveys, limit of.

9 July, 1870, c. 235, s. 12, v. 16, p. 217.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Subdivisions of ten-acre tracts; maximum of placer locations.

9 July, 1870, c. 235, s. 12, v. 16, p. 217.

SEC. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

Conformity of placer claims to surveys, limitation of claims.

10 May, 1872, c. 152, s. 10, v. 17, p. 94.

SEC. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

What evidence of possession, &c., to establish a right to a patent.

9 July, 1870, c. 235, s. 13, v. 16, p. 217.

SEC. 2332. 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; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Proceedings
for patent for
placer claim,
&c.

10 May, 1872,
c. 152, s. 11, v.
17, p. 94.

SEC. 2334. The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the

Surveyor-
general to ap-
point survey-
ors of mining
claims, &c.

10 May, 1872,
c. 152, s. 12, v.
17, p. 95.

other papers in the case, to the Commissioner of the General Land Office.

Verification
of affidavits,
&c.

10 May, 1872,
c. 152, s. 13, v.
17, p. 95.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Where veins
intersect, &c.

10 May, 1872,
c. 152, s. 14, v.
17, p. 96.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Patents for
non mineral
lands, &c.

10 May, 1872,
c. 152, s. 15, v.
17, p. 96.

SEC. 2337. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

What condi-
tions of sale
may be made
by local legis-
lature.

26 July, 1866,
c. 262, s. 5, v.
14, p. 252.

Vested rights
to use of water
for mining, &c.;
right of way
for canals.

26 July, 1866,
c. 262, s. 9, v.
14, p. 253.

SEC. 2338. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors

and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Sec. 2340. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

Patents, preemptions, and homesteads subject to vested and accrued water rights.

9 July, 1870, c. 235, s. 17, v. 16, p. 218.

Sec. 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of preemption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads."

Mineral lands in which no valuable mines are discovered open to homesteads.

26 July, 1866, c. 262, s. 10, v. 14, p. 253.

Sec. 2342. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to preemption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

Mineral lands, how set apart as agricultural lands.

26 July, 1866, c. 262, s. 11, v. 14, p. 253.

Sec. 2343. The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

Additional land districts and officers, power of the President to provide.

26 July, 1866, c. 262, s. 7, v. 14, p. 252.

Sec. 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

Provisions of this chapter not to affect certain rights.

10 May, 1872, c. 152, s. 16, v. 17, p. 96.

9 July, 1870, c. 235, s. 17, v. 16, p. 218.

Mineral lands in certain States excepted.

18 Feb., 1873, c. 159, v. 17, p. 465.

SEC. 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona fide entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of preemption as other public lands.

Grant of lands to States or corporations not to include mineral lands.

30 Jan., 1865, Res. No. 10, v. 13, p. 567.

SEC. 2346. No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

ACTS OF CONGRESS PASSED SUBSEQUENT TO THE REVISED STATUTES.

AN ACT To amend the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two.

Claim located prior to May 10, 1872, first annual expenditure extended to Jan. 1, 1875.

Act of Congress approved June 6, 1874 (18 Stat. L., 61).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five.

AN ACT To amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

Money expended in a tunnel considered as expended on the lode.

Act of Congress approved February 11, 1875 (18 Stat. L., 315).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so

expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.

AN ACT To exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said States shall be subject to disposal as agricultural lands.

Missouri and Kansas excluded from the operation of the mineral laws.

Act of Congress approved May 5, 1876 (19 Stat. L., 52).

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.

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

Citizens of Colorado, Nevada, and the Territories authorized to fell and remove timber on the public domain for mining and domestic purposes.

Act of Congress approved June 3, 1878 (20 Stat. L., 88).

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid

and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

AN ACT To amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States concerning mineral lands.

Application for patent may be made by authorized agent.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided,* That this section shall apply to all applications now pending for patents to mineral lands."

On unpatented claims period commences on Jan. 1 succeeding date of location.

Act of Congress approved Jan. 22, 1880 (21 Stat. L., 61).

SEC. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."

AN ACT To amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title to mining claims.

In action brought title not established in either party.

Act of Congress approved Mar. 3, 1881 (21 Stat. L., 605).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

AN ACT To amend section twenty-three hundred and twenty-six of the Revised Statutes in regard to mineral lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

Adverse claim may be verified by agent.

Sec. 1, act of Congress approved Apr. 26, 1882 (22 Stat. L., 49).

SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory.

Affidavit of citizenship; before whom made.

Sec. 2, act of Congress approved Apr. 26, 1882 (22 Stat. L., 49).

AN ACT To exclude the public lands in Alabama from the operation of the laws relating to mineral lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however,* That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further,* That any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

Alabama excepted from the operation of the mineral laws.

Act of Congress approved Mar. 3, 1883 (22 Stat. L., 487).

AN ACT Providing a civil government for Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public

Mining laws extended to the district of Alaska.

Act of Congress approved May 17, 1884 (23 Stat. L., 24).

moneys, and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

AN ACT Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

Right of entry under all the land laws restricted to 320 acres. (Repealed, see act Mar. 3, 1891, sec. 17).

Reservation in patents for right of way for ditches and canals constructed.

Act of Congress approved Aug. 30, 1890 (26 Stat. L., 871).

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. * * *

AN ACT To repeal the timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

SEC. 16. That town-site entries may be made by in-
 corporated towns and cities on the mineral lands of the
 United States, but no title shall be acquired by such
 towns or cities to any vein of gold, silver, cinnabar, cop-
 per, or lead, or to any valid mining claim or possession
 held under existing law. When mineral veins are pos-
 sessed within the limits of an incorporated town or city,
 and such possession is recognized by local authority or
 by the laws of the United States, the title to town lots
 shall be subject to such recognized possession and the
 necessary use thereof, and when entry has been made or
 patent issued for such town sites to such incorporated
 town or city, the possessor of such mineral vein may enter
 and receive patent for such mineral vein, and the surface
 ground appertaining thereto: *Provided*, That no entry
 shall be made by such mineral-vein claimant for surface
 ground where the owner or occupier of the surface
 ground shall have had possession of the same before the
 inception of the title of the mineral-vein applicant.

Town sites
on mineral
lands author-
ized.
Lands en-
tered under
the mineral
laws not in-
cluded in re-
striction to 320
acres.
Act of Con-
gress approved
Mar. 3, 1891
(26 Stat. L.,
1095).

SEC. 17. That reservoir sites located or selected and to
 be located and selected under the provisions of "An act
 making appropriations for sundry civil expenses of the
 Government for the fiscal year ending June thirtieth,
 eighteen hundred and eighty-nine, and for other pur-
 poses," and amendments thereto, shall be restricted to and
 shall contain only so much land as is actually necessary
 for the construction and maintenance of reservoirs, ex-
 cluding so far as practicable lands occupied by actual
 settlers at the date of the location of said reservoirs, and
 that the provisions of "An act making appropriations
 for sundry civil expenses of the Government for the
 fiscal year ending June thirtieth, eighteen hundred and
 ninety-one, and for other purposes," which reads as fol-
 lows, viz: "No person who shall after the passage of this
 act enter upon any of the public lands with a view to
 occupation, entry, or settlement under any of the land
 laws shall be permitted to acquire title to more than three
 hundred and twenty acres in the aggregate under all said
 laws," shall be construed to include in the maximum
 amount of lands the title to which is permitted to be
 acquired by one person only agricultural lands and not
 include lands entered or sought to be entered under
 mineral land laws.

* * * * *

AN ACT To authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims: *Provided,* That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

Act of Congress approved Aug. 4, 1892 (27 Stat. L., 348).

AN ACT To amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-three: *Provided,* That the claimant or claimants of any mining location, in order to secure the benefits of this act shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: *Provided, however,* That the provisions of this act shall not apply to the State of South Dakota.

Requirement of proof of expenditure for the year 1893 suspended except as to South Dakota.
Act of Congress approved Nov. 3, 1893 (28 Stat. L., 6).

This act shall take effect from and after its passage.

AN ACT To amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be

Requirement of proof of expenditure for the year 1894 suspended except as to South Dakota.

Act of Congress approved July 18, 1894 (28 Stat. L., 114).

suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-four: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

SEC. 2. That this act shall take effect from and after its passage.

AN ACT Making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-six, and for other purposes.

[WICHITA LANDS, OKLAHOMA.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

The said Wichita and affiliated bands of Indians in the Indian Territory hereby cede, convey, transfer, relinquish, forever and absolutely, without any reservation whatever, all their claim, title and interest of every kind and character in and to the lands embraced in the following-described tract of country in the Indian Territory, to wit:

Lands ceded.
Act of Mar.
2, 1895 (28
Stat. L., 876,
894, 899).

Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of ninety-eight degrees forty minutes west longitude, thence on said line of ninety-eight degrees forty minutes due north to the middle of the channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning.

* * * * *

That the laws relating to the mineral lands of the United States are hereby extended over the lands ceded by the foregoing agreement.

Mineral laws.

AN ACT Making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, and for other purposes.

* * * * *

[FORT BELKNAP INDIAN RESERVATION, MONTANA.]

SEC. 8.

* * * * *

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be open to occupation, location, and purchase, under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided*, That said lands shall be sold at ten dollars per acre: *And provided further*, That the terms of this section shall not be construed to authorize the occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey. * * *

Proviso.
Price.
No occupancy prior to opening.

[BLACKFEET INDIAN RESERVATION, MONTANA.]

SEC. 9.

* * * * *

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be opened to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided*, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey.

Proviso.
No occupancy prior to opening.

[SAN CARLOS INDIAN RESERVATION, ARIZONA.]

SEC. 10.

* * * * *

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be opened to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided*, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey: *Provided, however*, That any person who in good faith prior to the passage of this

Proviso.
No occupancy prior to opening.

Preference to discoverers of coal, etc.

act had discovered and opened, or located, a mine of coal or other mineral, shall have a preference right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section.

Act of Congress approved June 10, 1896 (29 Stat. L., 353, 357, 360).

AN ACT To authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided,* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

Entry and patenting of lands containing petroleum and other mineral oils under the placer-mining laws.

Act of Congress approved Feb. 11, 1897 (29 Stat. L., 526).

AN ACT Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

* * * * *

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspending and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

Act of Congress approved June 4, 1897 (30 Stat. L., 34, 35, 36).

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

Forest reservations, when to be established.

* * * * *

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, pros-

Use of timber, etc., by settlers, etc.

pecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Egress and ingress of settlers within reservations, etc.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

* * * * *

Restoration of mineral or agricultural lands to the public domain.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

AN ACT Extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes.

* * * * *

Mining rights in Alaska to native-born citizens of the Dominion of Canada.

Act of Congress approved May 14, 1898 (30 Stat. L., 415).

Sec. 13. That native-born citizens of the Dominion of Canada shall be accorded in said district of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States, or persons who have declared their intention to become such, may enjoy in said district of Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect.

AN ACT Making further provisions for a civil government for Alaska, and for other purposes.

* * * * *

Sec. 15. The respective recorders shall, upon the payment of the fees for the same prescribed by the Attorney-General, record separately, in large and well-bound separate books, in fair hand:

What recorded.
Act of Congress approved June 6, 1900 (31 Stat. L., 321, 326, 330).

First. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney, leases which have been acknowledged or proved, mortgages upon personal property;

* * * * *

Ninth. Affidavits of annual work done on mining claims;

Tenth. Notices of mining location and declaratory statements;

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others: *Provided*, Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject-matter is situated.

Provido.
Mining claims.

Where instruments recorded.

* * * * *

Provided, Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: *Provided further*, All records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act.

Provido.
Miners' regulations for recording, etc.
—recorder.

Records at Dyea, etc., legalized.

Mining laws. SEC. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto

Provisos.

Gold, etc. Explorations on Bering Sea.

are hereby extended to the district of Alaska: *Provided*, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further*, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permits shall be granted by the Secretary of War authorizing any person or persons, corporation, or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation; and the reservation of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," shall not apply to mineral lands or town sites.

—miners' regulations.

—not to conflict with Federal laws.

Exclusive permits to mine void, etc.

Provision reserving roadway, etc., not to apply. Vol. 30, p. 413.

* * * * *

Act of Congress approved June 6, 1900 (31 Stat. L., 672, 676, 680).

AN ACT To ratify an agreement with the Indians of the Fort Hall Indian Reservation in Idaho, and making appropriations to carry the same into effect.

(32 Stat. L., 1997.)

SEC. 5. That on the completion of the allotments and the preparation of the schedule provided for in the preceding section, and the classification of the lands as provided for herein, the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, town site, stone and timber, and mining laws of the United States only, excepting as to price and excepting the sixteenth and thirty-sixth sections in each congressional

township, which shall be reserved for common-school purposes and be subject to the laws of Idaho, etc. * * *
And provided further, That all of said lands within five miles of the boundary line of the town of Pocatello shall be sold at public auction, payable as aforesaid, under the direction of the Secretary of the Interior for not less than ten dollars per acre: *And provided further*, That any mineral lands within said five-mile limit shall be disposed of under the mineral-land laws of the United States, excepting that the price of such mineral lands shall be fixed at ten dollars per acre instead of the price fixed by the said mineral-land laws.

See also act of Congress approved Mar. 30, 1904 (33 Stat. L., 153).

[DISPOSITION OF COMANCHE, KIOWA, AND APACHE LANDS.]

* * * * *
 SEC. 6. That should any of said lands allotted to said Indians or opened to settlement under this act contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act, and the mineral laws of the United States are hereby extended over said lands.
 * * * * *

Act of Congress approved June 6, 1900 (31 Stat. L., 680).

AN ACT Extending the mining laws to saline lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: *Provided*, That the same person shall not locate or enter more than one claim hereunder.

Mining laws extended to saline lands. Act of Congress approved Jan. 31, 1901 (31 Stat. L., 745).

AN ACT Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, 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, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nine-

Uintah and White River Utes. Allotment of irrigable land.

Unallotted lands restored to public domain.

Provisos. Homestead entries.

Mineral leases.

Raven Mining Company.

Application of proceeds from sales.

Act of Congress approved May 27, 1902 (32 Stat. L., 263).

teen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians.

* * * * *

Assessment required for oil mining claims.

Act of Congress approved Feb. 12, 1903 (32 Stat. L., 825).

AN ACT Defining what shall constitute and providing for assessments on oil mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, 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 or corporation, not exceeding five claims in all: *Provided*, That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims.

AN ACT Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

Uncompahgre Indian Reservation.

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilson-

ite, asphaltum, elaterite, or other like substances, which were reserved from location and entry by provision in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the county recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral-land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the county recorder of Uintah County, Utah, within ninety days after the passage of this act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even-numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this act, and not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

Mining claims located on prior to Jan. 1, 1891, valid.

30 Stat., p. 87.

Patents to issue on relocations, etc., of claims.

Claims located after Jan. 1, 1891, invalid.

Sale of remainder of mineral lands.

Restrictions.

Act of Congress approved Mar. 3, 1903 (32 Stat. L., 998).

* * * * *

AN ACT For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

* * * * *

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be

Classification, etc., of lands.

lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

* * * * *

Disposal of lands.

SEC. 8. That when said commission shall have completed the classification and appraisalment of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. * * *

Timber and school lands excepted.

* * * * *

Mineral land entries.

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

Proviso. Exceptions. Act of Congress approved Apr. 23, 1904 (33 Stat. L., 302).

AN ACT To ratify and amend an agreement with the Indians of the Crow Reservation, in Montana, and making appropriations to carry the same into effect.

* * * * *

Town-site and mineral lands.

SEC. 5. * * * *And provided further*, That the price of said lands shall be four dollars per acre, when entered under the homestead laws. * * * Lands entered under the town-site and mineral land laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws. * * *

Act of Congress approved Apr. 27, 1904 (33 Stat. L., 352).

AN ACT To authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation, in the State of Washington.

* * * * *

Appraisal of unallotted lands, etc.

SEC. 3. That the residue of the lands of said reservation—that is, the lands not allotted and not reserved—shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the mineral lands, which need not be appraised, and the timber on the lands classified as timber lands shall be appraised separately from the land. The basis for the appraisal of the timber shall be the amount of

standing merchantable timber thereon, which shall be ascertained and reported.

* * * * *

The lands classified as mineral lands shall be subject to location and disposal under the mineral-land laws of the United States: *Provided*, That lands not classified as mineral may also be located and entered as mineral lands, subject to approval by the Secretary of the Interior and conditioned upon the payment, within one year from the date when located, of the appraised value of the lands per acre fixed prior to the date of such location, but at not less than the price fixed by existing law for mineral lands: *Provided further*, That no such mineral locations shall be permitted on any lands allotted to Indians in severalty or reserved for any purpose as herein authorized.

Mineral lands.

Provisos.
Lands not classified as mineral lands.

Restriction.
Act of Congress approved Dec. 21, 1904 (33 Stat. L., 595).

AN ACT To ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect.

* * * * *

SEC. 2. That the lands ceded to the United States under the said agreement shall be disposed of under the provisions of the homestead, town-site, coal, and mineral land laws of the United States and shall be opened to settlement and entry by proclamation of the President.

Opening of lands to entry.

Proclamation.

* * * * *

* * * Lands entered under the town-site, coal, and mineral land laws shall be paid for in amount and manner as provided by said laws. Notice of location of all mineral entries shall be filed in the local land office of the district in which the lands covered by the location are situated, and unless entry and payment shall be made within three years from the date of location all rights thereunder shall cease; * * * that all lands, except mineral and coal lands, herein ceded remaining undisposed of at the expiration of five years from the opening of 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.

Town-site, coal, and mineral entries.

Act of Congress approved Mar. 3, 1905 (33 Stat. L., 1016).

AN ACT To authorize the sale and disposition of surplus or unallotted lands of the diminished Colville Indian Reservation, in the State of Washington, and for other purposes.

* * * * *

SEC. 3. That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said diminished Colville Indian Reservation shall be classified under the direction of the

Mineral lands.

Act of Congress approved Mar. 22, 1906.

Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the lands classed as mineral lands, which need not be appraised, and which shall be disposed of under the general mining laws of the United States.

AN ACT Making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seven.

[COEUR D'ALENE INDIAN LANDS.]

* * * * *

Mineral lands. Act of Congress approved June 21, 1906 (34 Stat. L., 336).

Coal and oil deposits reserved.

Provided further, That the general mining laws of the United States shall extend after the approval of this act to any of said lands, and mineral entry may be made on any of said lands, but no such mineral selection shall be permitted upon any lands allotted in severality to the Indians: *Provided further,* That all the coal or oil deposits in or under the lands on the said reservation shall be and remain the property of the United States, and no patent that may be issued under the provisions of this or any other act of Congress shall convey any title thereto. * *

Act of Congress approved Mar. 2, 1907 (35 Stat. L., 1243).

Alaska. Annual improvements, etc., required on a mining claims.

Filing affidavits.

Contents.

Prima facie evidence of performance of work, etc.

AN ACT To amend the laws governing labor or improvements upon mining claims in Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days' work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by

this act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

Forfeiture.

Officer before whom affidavits may be made. R. S., secs. 5392, 5393, p. 1045.

Time of filing.

Fee.

SEC. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded.

AN ACT Authorizing a resurvey of certain townships in the State of Wyoming, and for other purposes.

[BITTER ROOT VALLEY, MONTANA.]

SEC. 11. That all the provisions of the mining laws of the United States are hereby extended and made applicable to the undisposed-of lands in the Bitter Root Valley, State of Montana, above the mouth of the Lo Lo Fork of the Bitter Root River, designated in the act of June fifth, eighteen hundred and seventy-two: *Provided*, That all mining locations and entries heretofore made or attempted to be made upon said lands shall be determined by the Department of the Interior as if said lands had been subject to mineral location and entry at the time such locations and entries were made or attempted to be made: *And provided further*, That this act shall not be applicable to lands withdrawn for administration sites for use of the Forest Service.

Mining laws extended to lands. Act of Congress approved May 29, 1908 (35 Stat. L., 467).

AN ACT For relief of applicants for mineral surveys.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of the moneys heretofore or hereafter covered into the Treasury from deposits made by individuals to cover cost of work performed and to be performed in the offices of the United States surveyors general in connection with the survey of mineral lands, any excess in the amount deposited over and above the actual cost of the work performed, including all expenses incident thereto for which the deposits were severally made or the whole of any unused deposit; and such sums, as the several cases may be, shall be deemed to be annually and permanently appropriated for

Repayment of deposits for mineral surveys. Act of Congress approved Feb. 24, 1909 (35 Stat. L., 645).

that purpose. Such repayments shall be made to the person or persons who made the several deposits, or to his or their legal representatives, after the completion or abandonment of the work for which the deposits were made, and upon an account certified by the surveyor general of the district in which the mineral land surveyed, or sought to be surveyed, is situated and approved by the Commissioner of the General Land Office.

AN ACT Extending the time for final entry of mineral claims within the Shoshone or Wind River Reservation in Wyoming.

Time ex-
tended for mak-
ing entry.
Act of Con-
gress approved
Feb. 25, 1909
(85 Stat. L.,
650).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of chapter fourteen hundred and fifty-two of the Statutes of the Fifty-eighth Congress (United States Statutes at Large, volume thirty-three, part one), being "An act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation, in the State of Wyoming, and to make appropriations to carry the same into effect," be, and the same is hereby, amended so that all claimants and locators of mineral lands within the ceded portion of said reservation shall have five years from the date of location within which to make entry and payment instead of three years, as now provided by the said act.

AN ACT Extending the time in which to file adverse claims and institute adverse suits against mineral entries in the District of Alaska.

Time ex-
tended for fil-
ing adverse
mineral claims,
etc., in Alaska.
(R. S., secs.
2325, 2326, pp.
426, 427.)
Act of Con-
gress approved
June 7, 1910
(36 Stat. L.,
459).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the District of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days' period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office.

AN ACT To authorize the President of the United States to make withdrawals of public lands in certain cases.

Temporary
withdrawals by
President for
power sites, ir-
rigation, etc.,
authorized.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reserva-

tions shall remain in force until revoked by him or by an act of Congress.

SEC. 2.¹ That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

Mining rights continued.

Exceptions. Provisos.

Rights of bona fide oil or gas claimants.

Status of prior claims.

Homestead, etc. settlements excepted.

Restriction on new forest reserves.

Report of withdrawals to Congress.

Act of Congress approved June 25, 1910 (36 Stat. L., 847).

SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim is in all

Locators of mineral oil lands.

Patents not to be denied, solely for transfer before discovery, etc.

¹ Sec. 2 amended by act of Aug. 24, 1912, to permit exploration, location, and purchase of lands containing metalliferous minerals only.

Proviso.
Condition.
Act of Con-
gress approved
Mar. 2, 1911
(36 Stat. L.,
1015).

other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: *Provided, however,* That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.¹

AN ACT to modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes.

Alaska.

Association
placer-mining
claims limited.
Assessment
required.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no association placer-mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer-mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof.

Location by
attorneys.

SEC. 2. That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this act.

Number of
locations limit-
ed.
Proviso.
Ownership.

SEC. 3. That no person shall hereafter locate, cause or procure to be located, for himself more than two placer-mining claims in any calendar month: *Provided,* That one or both of such locations may be included in an association claim.

Area of
claims.

SEC. 4. That no placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.

Effect of vio-
lations.

Act of Con-
gress approved
Aug. 1, 1912
(37 Stat. L.,
242, 243).

SEC. 5. That any placer-mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.

Withdrawals
for specified
purposes.
Vol. 36, p.
847.

AN ACT To amend section two of an act to authorize the President of the United States to make withdrawals of public lands in certain cases, approved June twenty-fifth, nineteen hundred and ten.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of the act of Congress approved

¹ Act amended by act of Aug. 25, 1914 (38 Stat. L., 708), by adding another section thereto, permitting agreements with Government for working certain oil or gas lands prior to issue of patents.

June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and forty-seven), be, and the same hereby is, amended to read as follows:

"SEC. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in 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: *Provided further*, That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress."

Mining rights continued.

Provisos.
Rights of bona fide oil or gas claimants.

Status of prior claims.

Homestead, etc., entries not affected.

Creation of forest reserves restricted.
Vol. 34, p. 1271.

Act of Congress approved Aug. 24, 1912 (37 Stat. L., 497).

AN ACT To amend section twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section twenty-three hundred and twenty-four of the Revised Statutes of the United States, which requires that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year, be suspended for the year nineteen hundred and thirteen as to mining claims situated on Seward Peninsular, in the district or Territory of Alaska west of longitude one hundred and fifty-eight west and north of latitude sixty-four, so that no mining claim which has been regularly located and recorded as

Alaska.
Assessment work on mining claims, Seward Peninsula, remitted for 1913.
(R. S., sec. 2324, p. 426.)

required by the local laws and mining regulations within such area so described shall be subject to forfeiture for nonperformance of the annual assessment for the year nineteen hundred and thirteen: *Provided*, That the claimant or claimants of any mining location in order to secure the benefits of this Act shall cause to be recorded in the office where the location notice and certificate is filed on or before December thirty-first, nineteen hundred and thirteen, a notice that he, she, or they in good faith intend to hold or work said claim: *And provided further*, That this amendment shall in no way annul, modify, or repeal said section as to any mining claims, either in the district of Alaska or elsewhere, except those said mining claims within the area herein particularly described.

AN ACT To provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals.

Entry of classified non-metallic mineral lands for agriculture, etc.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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.

Mining reserved.

Desert entries.

Proviso. Condition in application.

Issue of conditional patent.

SEC. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent 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. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the pay-

Bond for prospecting.

Proviso. Notice required.

Limited to specified area.

Act of Congress approved Dec. 1, 1913 (38 Stat. L., 235).

ment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, 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.

Mining entries permitted.

Proviso.
Application to disprove mineral classification.

For subsequent withdrawals.

Conditional nonmineral patents for lands subsequently withdrawn, etc.

Reservation for mining.

Act of Congress approved July 17, 1914 (38 Stat. L., 509).

SEC. 3. 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.

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 second, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act to 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

Locators of mineral oil and gas lands. (Vol. 36, p. 1015, amended.)

the United States, or their successors in interest," approved March second, nineteen hundred and eleven, be amended by adding thereto the following section:

Agreements for working reserved lands prior to issue of patents.

"SEC. 2. That where applications for patents have been or may hereafter be offered for any oil or gas land included in an order of withdrawal upon which oil or gas has heretofore been discovered, or is being produced, or upon which drilling operations were in actual progress on October third, nineteen hundred and ten, and oil or gas is thereafter discovered thereon, and where there has been no final determination by the Secretary of the Interior upon such applications for patent, said Secretary, in his discretion, may enter into agreements, under such conditions as he may prescribe with such applicants for patents in possession of such land or any portions thereof, relative to the disposition of the oil or gas produced therefrom or the proceeds thereof, pending final determination of the title thereto by the Secretary of the Interior, or such other disposition of the same as may be authorized by law. Any money which may accrue to the United States under the provisions of this act from lands within the Naval Petroleum Reserves shall be set aside for the needs of the Navy and deposited in the Treasury to the credit of a fund to be known as the Navy Petroleum Fund, which fund shall be applied to the needs of the Navy as Congress may from time to time direct, by appropriation or otherwise."

Disposal of proceeds thereunder.

Lands in naval petroleum reserves.

Disposal of receipts.

Act of Congress approved Aug. 25, 1914 (38 Stat. L., 708).

AN ACT Providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, formerly a part of the Rosebud Indian Reservation in South Dakota.

Public lands. Entries allowed for kaolin, etc., on ceded lands of Rosebud Indian Reservation, S. Dak.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County in what was formerly within the Rosebud Indian Reservation in South Dakota, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands, shall be open to exploration and purchase and be disposed of under the general provisions of the mining laws of the United States, and the proceeds arising therefrom shall be deposited in the Treasury for the same purpose for which the proceeds arising from the disposal of other lands within the reservation in which such mineral-bearing lands are located were deposited: *Provided*, That the same person, association, or corporation shall not locate or enter more than one claim, not exceeding one hundred and sixty acres in area, hereunder: *Provided further*, That none of the lands or mineral deposits, the disposal of which is herein provided for, shall be disposed of at less

Provisos. Area restriction.

Minimum price.

price than that fixed by the applicable mining or coal-lands laws, and in no instance at less than their appraised value, to be determined by the Secretary of the Interior.

Act of Congress approved Jan. 11, 1915 (38 Stat. L., 792).

AN ACT Validating locations of deposits of phosphate rock heretofore made in good faith under the placer-mining laws of the United States.

Public lands. Placer locations for phosphate rock validated.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where public lands containing deposits of phosphate rock have heretofore been located in good faith under the placer-mining laws of the United States and upon which assessment work has been annually performed, such locations shall be valid and may be perfected under the provisions of said placer-mining laws, and patents, whether heretofore or hereafter issued thereon, shall give title to and possession of such deposits: *Provided,* That this act shall not apply to any locations made subsequent to the withdrawal of such lands from location, nor shall it apply to lands included in an adverse or conflicting lode location unless such adverse or conflicting location is abandoned.

Proviso. Application restricted.

Act of Congress approved Jan. 11, 1915 (38 Stat. L., 792).

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,

* * * * *
 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,

Coal and mineral deposits reserved.

Disposal under mining laws.

Locating and prospecting allowed.

Surface entries for mining purposes permitted.

Conditions.

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. (Act December 29, 1916, 39 Stat. L., 862.)

Proviso.
Mining patents subject to grazing rights, etc.

JOINT RESOLUTION To relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each mining claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year, shall not apply to claims or parts of claims owned by officers or enlisted men who have been or may, during the present war with Germany, be mustered into the military or naval service of the United States to serve during their enlistment in the war with Germany, so that no mining claim or any part thereof owned by such person which has been regularly located and recorded shall be subject to forfeiture for nonperformance of the annual assessments during the period of his service or until six months after such owner is mustered out of the service or until six months after his death in the service: *Provided*, That the claimant of any mining location, in order to obtain the benefits of this resolution, shall file, or cause to be filed, a notice in the office where the location notice or certificate is recorded, before the expiration of the assessment year during which he is so

mustered, giving notice of his muster into the service of the United States and of his desire to hold said mining claim under this resolution.

Approved, July 17, 1917 (40 Stat., 243).

JOINT RESOLUTION To suspend the requirements of annual assessment work on mining claims during the years nineteen hundred and seventeen and nineteen hundred and eighteen.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order that labor may be most effectively used in raising and producing those things needed in the prosecution of the present war with Germany, that the provision of section twenty-three hundred and twenty-four of the Revised Statutes of the United States which requires on each mining claim located, and until a patent has been issued therefor, not less than \$100 worth of labor to be performed or improvements to be made during each year, be, and the same is hereby, suspended during the years nineteen hundred and seventeen and nineteen hundred and eighteen: *Provided,* That every claimant of any such mining claim in order to obtain the benefits of this resolution shall file or cause to be filed in the office where the location notice or certificate is recorded on or before December thirty-first, of each of the years nineteen hundred and seventeen and nineteen hundred and eighteen, a notice of his desire to hold said mining claim under this resolution: *Provided further,* That this resolution shall not apply to oil placer locations or claims.

This resolution shall not be deemed to amend or repeal the public resolution entitled "Joint resolution to relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service," approved July seventh, nineteen hundred and seventeen.

Approved, October 5, 1917 (40 Stat., 343).

JOINT RESOLUTION To suspend the legal requirements of assessment work on mining claims in Alaska for the years 1917, 1918, and 1919, and extending to that Territory the provisions of public resolution numbered ten, Sixty-fifth Congress, approved July 17, 1917, and public resolution numbered twelve, Sixty-fifth Congress, approved October 5, 1917, as amended, and for other purposes.

Resolved by the Senate and House of Representatives of the United States in Congress assembled, That the provisions of public resolution numbered ten, Sixty-fifth Congress, approved July 17, 1917, and the provisions of public resolution numbered twelve, Sixty-fifth Congress, approved October 5, 1917, and amendments thereto, be, and they are hereby, extended to the Territory of Alaska. The laws requiring assessment work to be made upon mining claims in the Territory of Alaska for the years

1917, 1918, and 1919 are hereby suspended for such period; and no forfeiture or relocation of any mining claim or mining location in said Territory shall be permitted or adjudged for failure to do or have done the annual assessment work thereon for either of said years; and no mining claim or location therein shall be held to be forfeited or subject to relocation for any failure to have done the annual assessment work thereon where the owner or anyone for him complied with the provisions of public resolution numbered ten, Sixty-fifth Congress, approved July 17, 1917, or public resolution numbered twelve, Sixty-fifth Congress, approved October 5, 1917, and amendments thereto.

Approved February 28, 1919 (40 Stat., 1213).

JOINT RESOLUTION To suspend the requirements of annual assessment work on mining claims during the year 1919.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located and until a patent has been issued therefor, not less than \$100 worth of labor to be performed, or improvements aggregating such amount to be made each year, be, and the same is hereby suspended as to all mining claims in the United States, including Alaska, during the calendar year 1919: Provided, That every claimant of any such mining claim in order to obtain the benefits of this resolution shall file or cause to be filed in the office where the location notice or certificate is recorded on or before December 31, 1919, a notice of his desire to hold said mining claim under this resolution.

Approved, November 13, 1919 (41 Stat., 354).

AN ACT Extending the time for the doing of annual assessment work on mining claims for the year 1920 to and including July 1, 1921.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the period within which work may be performed or improvements made for the year 1920, upon mining claims as required under section 2324 of the Revised Statutes of the United States, is hereby extended to and including the first day of July, 1921; so that work done or improvements made upon any mining claim in the United States or Alaska on or before July 1, 1921, shall have the same effect as if the same had been performed within the calendar year of 1920: Provided, That this Act shall not in any way change or modify the requirements of existing law as to work to be done or improvements made upon mining claims for the year 1921,

Approved, December 31, 1920 (41 Stat., 1084).

AN ACT Changing the period for doing annual assessment work on unpatented mineral claims from the calendar year to the fiscal year beginning July 1 each year.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of "An Act to amend sections 2324 and 2325 of the Revised Statutes of the United States concerning mineral lands," approved January 22, 1880, be, and the same is hereby, amended to read as follows:

"SEC. 2. That section 2324 of the Revised Statutes of the United States be amended by adding the following words: '*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim: *Provided further*, That on all such valid existing claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.'"

Approved, August 24, 1921 (42 Stat., 186).

SPECIAL ACTS.

The act of March 2, 1907 (34 Stat. L. 1232), section 4, provides that the surveyor general of Alaska, under the direction of the Secretary of the Interior, shall furnish receivers a sufficient quantity of numbers to be used in the different classes of official surveys that may be made in the Nome and Fairbanks land districts to meet the requirements thereof, authorizes receivers to furnish numbers for official surveys and an order directing surveyor to make same, such application order and the fee required to be paid to the surveyor general shall be transmitted to the surveyor general, and provides that all surveys thus made shall be approved by the surveyor general as at present.

The act of May 27, 1908 (35 Stat. 317, 365), prohibited mining locations thereafter within the Mount Rainier National Park, but prior valid existent claims were not affected.

Sections 7, 8, and 12, of the act of May 30, 1908 (35 Stat. 558), provides for the extension of the mineral land laws to the classified surplus lands of the Fort Peck Indian Reservation, in the State of Montana.

The act of May 11, 1910 (36 Stat. 354), provides for the establishment of the Glacier National Park, in Montana, and reserves and withdraws from occupancy or disposal under any of the land laws of the United States the lands therein, but protects valid existing claims and locations.

The act of June 7, 1910 (36 Stat. 459), provides for the granting of public lands to certain cities and towns in the State of Colorado for public park purposes and reserves to the United States the oil, coal, and other mineral deposits in such lands.

The act of June 25, 1910 (36 Stat. 848), contains provisions for the establishment and enforcement of miners' labor liens in the Territory of Alaska.

The act of September 30, 1913 (38 Stat. 113), authorizes the President to provide a method for opening public lands restored from reservations, etc.

The act of August 21, 1916 (39 Stat., 519), authorizes the Secretary of the Interior to lease for production of oil and gas ceded lands of the Shoshone or Wind River Indian Reservation in Wyoming. This act is administered through the Commissioner of Indian Affairs.

The act of October 2, 1917 (40 Stat., 297), makes potash deposits subject to disposition only under prospecting permits and leases issued by the Secretary of the Interior, except valid claims existent at date of the act and thereafter duly maintained in compliance with the laws under which initiated, which claims may be perfected under such laws. Regulations under said act are contained in a separate circular.

Section 26 of the act of June 30, 1919 (41 Stat., 3), authorized the Secretary of the Interior to lease for the purpose of mining metallif-

erous mineral lands in Indian reservations in certain States. This act is administered through the Commissioner of Indian Affairs.

By the act of February 25, 1920 (41 Stat., 437), deposits of coal, phosphate, sodium, oil, oil shale, and gas in lands valuable for such minerals were made subject to disposition only under prospecting permits and leases issued by the Secretary of the Interior, except valid claims existent at date of said act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. Regulations under said act are contained in separate circulars.

REGULATIONS.

NOTE.—In view of the repealing provisions of the potash act of October 2, 1917 (40 Stat., 297), and the leasing act of February 25, 1920 (41 Stat., 437), the following regulations are not applicable to deposits of potash, oil, oil shale, gas, phosphate or sodium, except as to valid claims existent at date of such repeal and thereafter duly maintained pursuant to the law under which located.

NATURE AND EXTENT OF MINING CLAIMS.

1. Mining claims are of two distinct classes: Lode claims and placers.

Lode Claims.

2. The status of lode claims located or patented previous to the 10th day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged by sections 2322 and 2328, by investing the locator, his heirs or assigns, with the right to follow, upon the conditions stated therein, all veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his claim.

3. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May 10, 1872*, and that where such other vein or ledge was so adversely claimed at that date the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

4. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made after the 10th day of May, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

5. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements can not extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet can not be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

6. By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

7. Locators can not exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

8. No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

9. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

10. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery, it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

11. The location notice must be filed for record in all respects as required by the State or Territorial laws and local rules and regulations, if there be any.

12. In order to hold the possessory title to a mining claim located prior to May 10, 1872, the law requires that *ten dollars* shall be expended annually in labor or improvements for each *one hundred feet* in length along the vein or lode. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made thereon annually. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. (See change, Act August 24, 1921, page 41 hereof.) Where a number of contiguous claims are held in common, the aggregate expenditure that would be necessary to hold all the claims, may be made upon any one claim. Cornering locations are held not to be contiguous.

13. Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.

14. Annual expenditure is not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

15. Upon the failure of any one of several coowners to contribute his proportion of the required expenditures, the coowners, who have performed the labor or made the improvements as required, may, at the expiration of the year, give such delinquent coowner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent coowner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his coowners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates, and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent coowner failed to contribute his proper proportion within the period fixed by the statute.

TUNNELS.

16. The effect of section 2323, Revised Statutes, is to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on

the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

17. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel, the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

18. A full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

Placer Claims.

19. But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.

20. The act of August 4, 1892, extends the mineral-land laws so as to bring lands chiefly valuable for building stone within the provisions of said law by authorizing a placer entry of such lands. Registers and receivers should make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. Lands reserved for the benefit of public schools or donated to any State are not subject to entry under said act.

21. The act of February 11, 1897, provides for the location and entry of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

22. Upon the presentation of every case within the purview of the act of March 2, 1911 (36 Stat. L., 1015), the local officers must advise the chiefs of field division, in order that the latter may make such field examinations as are advisable or necessary, particularly if the land involved has been embraced in a withdrawal, as to the time when the development work was begun, and be prepared to submit the results, if possible, before entry is allowed. Each such case will be considered and adjudicated upon its record in the regular manner.

Observing that the operation of the act is retrospective only, being confined to locations made prior to the date thereof, you will, upon the presentation of any application for patent affected by the provisions of said act, immediately communicate to the proper chief of field division due and full information thereof, to the end that he may procure to be made such investigations as may be necessary to ascertain the facts concerning the inception and subsequent prosecution of development operations, the extent and character of such works, and any other facts bearing upon and affecting the validity of the claim, including the continuousness and diligence with which development proceeded from the date of inception.

Report made of the results of such examinations will be submitted to this office, upon receipt of which the local officers will be advised as to the action to be taken.

23. By section 2330 authority is given for subdividing forty-acre legal subdivisions into ten-acre tracts. These ten-acre tracts should be considered and dealt with as legal subdivisions, and an applicant having a placer claim which conforms to one or more of such ten-acre tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat.

24. A ten-acre subdivision may be described, for instance if situated in the extreme northeast of the section, as the "NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ " of the section, or, in like manner, by appropriate terms, wherever situated; but, in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. The proofs submitted with applications must show clearly the character and extent of the improvements upon the premises.

25. The proof of improvements must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors. This proof should consist of the affidavit of two or more disinterested witnesses. The annual expenditure to the amount of \$100, required by section 2324, Revised Statutes, must be made upon placer as well as lode locations.

26. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the

fact should be distinctly stated in the application for patent and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat, the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. An application which omits to claim such known vein or lode must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

27. By section 2330 it is declared that no location of a placer claim made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

28. Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and such locations shall not include more than twenty acres for each individual claimant.

29. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed twenty acres for each individual participating therein; that is, a location by two persons can not exceed forty acres, and one by three persons can not exceed sixty acres.

30. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that all placer-mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands.

Conformity to the public land surveys and the rectangular subdivisions thereof will not be required where compliance with such requirement would necessitate the placing of the lines thereof upon other prior located claims or where the claim is surrounded by prior locations.

Where a placer location by one or two persons can be entirely included within a square forty-acre tract, by three or four persons within two square forty-acre tracts placed end to end, by five or six persons within three square forty-acre tracts, and by seven or eight persons within four square forty-acre tracts, such locations will be regarded as within the requirements where strict conformity is impracticable.

Whether a placer location conforms reasonably with the legal subdivisions of the public surveys is a question of fact to be determined in each case, and no location will be passed to patent without satisfactory evidence in this regard. Claimants should bear in mind that it is the policy of the Government to have all entries whether of agricultural or mineral lands as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations

which cut the public domain into long narrow strips or grossly irregular or fantastically shaped tracts. (Snow Flake Fraction Placer, 37 L. D., 250.)

REGULATIONS UNDER SALINE ACT.

31. Under the act approved January 31, 1901, extending the mining laws to saline lands, the provisions of the law relating to placer-mining claims are extended to all States and the Territory of Alaska, so as to permit the location and purchase thereunder of all unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, with the proviso, "That the same person shall not locate or enter more than one claim hereunder."

32. Rights obtained by location under the placer-mining laws are assignable, and the assignee may make the entry in his own name; so, under this act a person holding as assignee may make entry in his own name: *Provided*, He has not held under this act, at any time, either as locator or entryman, any other lands; his right is exhausted by having held under this act any particular tract, either as locator or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

33. In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the application for patent must contain or be accompanied by a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located or entered any other lands under the provisions of this act. The application for patent should also be accompanied by a showing under oath, fully disclosing the qualifications as defined by the proviso, of the applicants' predecessors in interest.

PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

Lode Claims.

34. The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor general of the State or Territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes in each case will be prepared by the surveyor general; one plat and the original field notes to be retained in the office of the surveyor general; one copy of the plat to be given the claimant for posting upon the claim; one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor general to the register of the proper land district, to be retained on his files for future reference. As there is no resident surveyor general for the State of Arkansas, applications for the survey of mineral claims in said State should be made to the Commissioner of this office, who, under the law, is *ex officio* the United States surveyor general.

The surveyor general will prepare the original plat on Form 4-675. All lines clear and sharp in black. All letters and figures clear and sharp in black.

The original plat, so prepared, will be signed and dated by the surveyor general and forwarded to the General Land Office flat or in tube and unmounted.

As to plats of survey of mining claims outside of the Territory of Alaska, the Commissioner will have three photolithographic copies made upon drawing paper, which copies, with the original plat, will be forwarded to the surveyor general, the four plats to be filed and disposed of in the same manner as provided in paragraph 34 of the Mining Regulations, viz: One plat and the original field notes to be retained in the office of the surveyor general; one copy of the plat to be given the claimant for posting upon the claim; one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor general to the register of the proper land district, to be retained on his files for future reference.

As to plats of survey of mining claims in the Territory of Alaska, the Commissioner will have three photolithographic copies made upon drawing paper, two copies of which, with the original plat, will be forwarded to the surveyor general, the three plats to be filed and disposed of as follows: One plat and the original field notes to be retained in the office of the surveyor general; one plat and a copy of the field notes to be given the claimant, for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor general to the register of the proper land district to be retained in his files for future reference. The Commissioner will mail one photolithographic copy of the plat, made upon drawing paper, direct to the applicant for survey, or to his agent or attorney, when the application is made by agent or attorney, at his record address, to be used for posting on the land.

A certain number of photolithographic copies will be furnished the surveyor general for sale at a cost of 25 cents each, and a photolithographic copy printed on tracing paper will be furnished the surveyor general, from which blue prints may be made, to be sold at cost.

35. The survey and plat of mineral claims required to be filed in the proper land office with application for patent must be made subsequent to the recording of the location of the claim (if the laws of the State or Territory or the regulations of the mining district require the notice of location to be recorded), and when the original location is made by survey of a United States mineral surveyor such location survey can not be substituted for that required by the statute, as above indicated.

36. The surveyors general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order

therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length, and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line or traverse line must be surveyed by the mineral surveyor at the time of his making the particular survey and be made a part thereof.

37. (a) Promptly upon the approval of a mineral survey the surveyor general will advise both this office and the appropriate local land office, by letter (Form 4-286), of the date of approval, number of the survey, name and area of the claim, name and survey number of each approved mineral survey with which actually in conflict, name and address of the applicant for survey, and name of the mineral surveyor who made the survey; and will also briefly describe therein the *locus* of the claim, specifying each legal subdivision or portion thereof, when upon surveyed lands, covered in whole or in part by the survey; but hereafter no segregation of any such claim upon the official township-survey records will be made until mineral entry has been made and approved for patent, unless otherwise directed by this office.

(b) Upon application to make agricultural entry of the residue of any original lot or legal subdivision of forty acres, reduced by mining claims for which patent applications have been filed and which residue has been already reallocated in accordance therewith, the local officers will accept and approve the application as usual, if found to be regular. When such an application is filed for any such original lot or subdivision, reduced in available area by duly asserted mining claims but not yet relotted accordingly, the local officers will promptly advise this office thereof; and will also report and identify any pending application for mineral patent affecting such subdivision which the agricultural applicant does not desire to contest. The surveyor general will thereupon be advised by this office of such mining claims, or portions thereof, as are proper to be segregated, and directed to prepare at once, upon the usual drawing-paper township blank, diagram of amended township survey of such original lot or legal forty-acre subdivision so made fractional by such mineral segregation, designating the agricultural portion by appropriate lot number, beginning with No. 1 in each section and giving the area of each lot, and will forthwith transmit one approved copy to the local land office and one to this office. In the meantime the local officers will accept the agricultural application (if no other objection appears), suspend it with reservation of all rights of the applicant if continuously asserted by

him, and upon receipt of amended township diagram will approve the application (if then otherwise satisfactory) as of the date of filing, corrected to describe the tract as designated in the amended survey.

(c) The register and receiver will allow no agricultural claim for any portion of an original lot or legal forty-acre subdivision, where the reduced area is made to appear by reason of approved surveys of mining claims and for which applications for patent have not been filed, until there is submitted by such agricultural applicant a satisfactory showing that such surveyed claims are in fact mineral in character; and applications to have lands asserted to be mineral, or mining locations, segregated by survey, with the view to agricultural appropriation of the remainder, will be made to the register and receiver for submission to the Commissioner of the General Land Office, for his consideration and direction, and must be supported by the affidavit of the party in interest, duly corroborated by two or more disinterested persons, or by such other or further evidence as may be required in any case, that the lands sought to be segregated as *mineral* are in fact mineral in character; otherwise, in the absence of satisfactory showing in any such case, such original lot or legal subdivision will be subject to agricultural appropriation only. When any such showing shall be found to be satisfactory and the necessary survey is had, amended township diagram will be required and made as prescribed in the preceding section.

38. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on the vein in each direction from the point of discovery or other well-defined place on the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim-----	10.50
Area in conflict with survey No. 302-----	1.56
Area in conflict with survey No. 948-----	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed-----	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. The application for patent should state the portions to be excluded in express terms.

39. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of

his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat survey. Too much care can not be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent.

(a) The notices of applications for patent for lands in Alaska are, in many cases, not sufficient to apprise adverse claimants and the public generally of the location of the land applied for, and therefore do not serve the purpose for which such notices are required; nor can the location of the land be ascertained from the application papers themselves and without obtaining information from other sources. This is due principally to the large area of unsurveyed land in the district and remoteness from centers of population of much of the country. In order to give a more definite description of the land applied for the following special instructions with reference to the Territory of Alaska are issued, which are supplemental to but do not change or modify existing regulations:

(b) The field notes of survey of all claims within the Territory of Alaska, where the survey is not tied to a corner of the public survey, shall contain a description of the location or mineral monument to which the survey is tied, by giving its latitude and longitude, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other prominent topographical points or natural objects or monuments, giving the distances and directions as nearly accurate as possible, especially with reference to any well-known trail to a town or mining camp, or to a river or mountain appearing on the map of Alaska, which description shall appear in the field notes regardless of whether or not the survey be tied to an existing monument, or to a monument established by the surveyor when making the survey in accordance with existing regulations with reference to the establishment of such monuments. The description of such monument shall appear in a paragraph separate from the description of the courses and distances of the survey.

(c) All notices of applications for patent for lands in the Territory of Alaska, where the survey on which the application is based is not tied to a corner of the public survey, shall, in addition to the description required to be given by existing regulations, describe the monument to which the claim is tied by giving its latitude and longitude and a reference by approximate course and distance to a town, mining camp, river, creek, mountain, mountain peak, or other natural object appearing on the map of Alaska, and any other facts shown by the field notes of survey which shall aid in determining the exact location of such claim without an examination of the record or a reference to other sources. The registers and receivers will exercise discretion in the matter of such descriptions in the published notices, bearing in mind the object to be attained, of so describing the land embraced in the claim as to enable its location to be ascertained from the notice of application.

40. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to and form a part of said affidavit.

41. At the time the foregoing are filed, the claimant must file an application for patent, under oath, showing that he has the possessory right to the claim, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession and the basis of his claim to a patent. The application should contain a full description of the kind and character of the vein or lode and should state whether ore has been extracted therefrom, and, if so, in what amount and of what value. It should also show the precise place within the limits of each of the locations embraced in the application where the vein or lode has been exposed or discovered and the width thereof. The showing in these regards should contain sufficient data to enable representatives of the Government to confirm the same by examination in the field and also enable the land department to determine whether a valuable deposit of mineral actually exists within the limits of each of the locations embraced in the application.

(a) The register and receiver will require each person applying to enter or in any manner acquire title to any of the lands in Alaska, under any law of the United States, 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 the act of May 17, 1906 (34 Stat., 197), or in any pending allotment; that no part of said land was at the date of the location of the land claimed under the mining law occupied or claimed by any Indian, whose occupancy or claim existed on the date of the acts granting to natives of Alaska the right to hold land used, occupied, or claimed by them (Acts of Congress of May 17, 1884, 23 Stat., 24, and June 6, 1900, 31 Stat., 330); and had been continued down to and including date of location; that such land is in the *bona fide* legal possession of the applicant; and that no part of such land is in the *bona fide* legal possession of or is occupied by any Indian or native. (37 L. D., 616, and 43 L. D., 88, 272.)

42. This sworn statement must be supported by a copy of each location notice, certified by the legal custodian of the record thereof, and also by an abstract of title of each claim certified by the legal custodian of the records of transfers, or by a duly authorized abstracter of titles. The certificate must state that no conveyances affecting, or purporting to affect, the title to the claim or claims appear of record other than those set forth.

Outside of the Territory of Alaska, the application for patent will be received and filed if the abstract is brought down to a day reasonably near the date of the presentation of the application and shows full title in the applicant, who must as soon as practicable thereafter file a supplemental abstract brought down so as to include the

date of the filing of the application. Publication will not be ordered until the showing as to title is thus completed and the local land officers are satisfied that full title was in the applicant on the day of the filing of the application.

In the Territory of Alaska the application for patent will be received and filed and the order for publication issued if the abstract showing full title in the applicant is brought down to a day reasonably near the date of the presentation of the application. A supplemental abstract of title brought down so as to include the date of the filing of the application must be furnished prior to the expiration of the 60-day period of publication.

No certificate from an abstracter or abstract company will be accepted until approval by the Commissioner of the General Land Office of a favorable report of the chief of field division, or United States district attorney whose division or district embraces the lands in question, as to the reliability and responsibility of such abstracter or company.

43. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

44. Before approving for publication any notice of an application for mineral patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any land embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that notice of a mineral application should not, for this or other reasons, be approved for publication, they should formally reject the same, giving the reasons therefor, and allow the applicant 30 days for appeal to this office under the Rules of Practice.

Local officers will give prompt and appropriate notice to the railroad grantee of the filing of every application for mineral patent which embraces any portion of an odd-numbered section of surveyed lands within the primary limits of a railroad land grant, and of every such application embracing any portion of unsurveyed lands within such limits (except as to any such application which embraces a portion or portions of those ascertained or prospective odd-numbered sections only, within the limits of the grant in Montana and Idaho to the Northern Pacific Railroad Company, which have been classified as mineral under the act of February 26, 1895, without protest by the company within the time limited by the statute or the mineral classification whereof has been approved).

Should the railroad grantee file protest and apply for a hearing to determine the character of the land involved in any such application for mineral patent, proceedings thereunder will be had in the usual manner.

Any application for mineral patent, however, which embraces lands previously listed or selected by a railroad company will be disposed of as provided by the first section of this paragraph, and the applicant afforded opportunity to protest and apply for a hearing or to appeal.

Notice should be given to the duly authorized representative of the railroad grantee, in accordance with the Rules of Practice. When the claims applied for are upon unsurveyed land, the burden of proving that they are situate within prospective odd-numbered sections will rest upon the railroad.

Evidence of service of notice should be filed with the record in each case.

45. Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper, nine consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

46. The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances. (See also par. 39 (a), (b), (c).)

47. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

48. The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register a certificate of the surveyor general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several contiguous locations held in common, that an amount equal to five hundred dollars for each location has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated in a patent, serve to identify the premises fully, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof: *Provided*, That as to all applications for patents made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient, and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

49. The surveyor general may derive his information upon which to base his certificate as to the value of labor expended or improvements made from the mineral surveyor who actually makes survey and examination of the premises, in so far as such matters rest in the personal knowledge of the mineral surveyor. The mineral surveyor should specify with particularity and full detail the character and extent of such improvements. As to when and by whom the improvements were made and other essential matters not within such mineral surveyor's personal knowledge, recourse may be had by the surveyor general to corroborated affidavits by persons possessing such personal knowledge, or the best evidence in this behalf otherwise obtainable. This showing should accompany the report of the mineral surveyor as to improvements.

50. It will be convenient to have this certificate indorsed by the surveyor general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

51. After the sixty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

52. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, and no other objection appears, permit the claimant to pay for the land to which he is entitled at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

53. At any time prior to the issuance of patent protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Such protest can not, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a co-owner excluded from an application for patent does not have an "adverse" claim within the meaning of sections 2325 and 2326 of the Revised Statutes. (See *Turner v. Sawyer*, 150 U. S., 578-586.)

54. Any party applying for patent as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust*; and such

trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

55. The annual expenditure of one hundred dollars in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes, is, with the exception of certain phosphate placer locations, validated by the act of January 11, 1915 (see regulations thereunder, dated Mar. 31, 1915, in Addenda, p. 92), solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts.

56. The failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

57. The proceedings necessary to the completion of an application for patent to a mining claim, against which an adverse claim or protest has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

Placer Claims.

58. The proceedings to obtain patents for placer claims, including all forms of mineral deposits excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where a placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required. Where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

59. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; the price of placer claims being fixed, however, at two dollars and fifty cents per acre or fractional part of an acre.

60. In placer applications, in addition to the recitals necessary in and to both vein or lode and placer applications, the placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation and that title is sought not to control water courses or to obtain valuable timber but in good faith because of the mineral therein. This statement, of course, must depend upon the character of the deposit and the natural features of the ground, but the following details should be covered as fully as possible: If the claim be for a deposit of placer gold, there must be

stated the yield per pan, or cubic yard, as shown by prospecting and development work, distance to bedrock, formation and extent of the deposit, and all other facts upon which he bases his allegation that the claim is valuable for its deposits of placer gold. If it be a building stone or other deposit than gold claimed under the placer laws, he must describe fully the kind, nature, and extent of the deposit, stating the reasons why same is by him regarded as a valuable mineral claim. He will also be required to describe fully the natural features of the claim; streams, if any, must be fully described as to their course, amount of water carried, fall within the claim; and he must state kind and amount of timber and other vegetation thereon and adaptability to mining or other uses.

If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

While these data are required as a part of the mineral surveyor's report under paragraph 167, in case of placers taken by special survey, it is proper that the application for patent incorporate these facts under the oath of the claimant.

Inasmuch as in case of claims taken by legal subdivisions, no report by a mineral surveyor is required, the claimant, in his application in addition to the data above required, should describe in detail the shafts, cuts, tunnels, or other workings claimed as improvements, giving their dimensions, value, and the course and distance thereof to the nearest corner of the public surveys.

As prescribed by paragraph 25, this statement as to the description and value of the improvements must be corroborated by the affidavits of two disinterested witnesses.

Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to proof as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

Local land officers are instructed that if the proofs submitted in placer applications under this paragraph are not satisfactory as showing the land as a whole to be placer in character, or if the claims impinge upon or embrace water courses or bodies of water, and thus raise a doubt as to the *bona fides* of the location and application, or the character and extent of the deposit claimed thereunder, to call for further evidence, or if deemed necessary, request the specific attention of the Chief of Field Service thereto in connection with the usual notification to him under the circular instructions of April 24, 1907¹ and suspend further action on the application until a report thereon is received from the field officer.

Attention is directed to the act of Congress approved August 1, 1912 (37 Stat. L., 242), entitled "An act to modify and amend the mining laws in their application to the Territory of Alaska, and for

¹ Rule 7 of this circular amended Oct. 30, 1913. (See 42 L. D., 474; see also addenda, 49 L. D., 96.)

other purposes." In administering this act the foregoing regulations should be followed in so far as they are applicable, and these additional instructions of October 29, 1912, are prescribed:

It is important to note that this act applies exclusively to placer mining claims located in Alaska on or after August 1, 1912. It does not in any manner relate to lode mining claims, or to placer mining claims located prior to said date. The terms of the act lay strict limitations and conditions with respect to placer locations made upon or after said date.

Section 1 of the act provides that no association placer claim shall be located after August 1, 1912, in excess of 40 acres. This limitation is positive whatever may be the number of persons associated together or whatever the local district rules or regulations may permit.

Said section further provides that on every placer mining claim located in Alaska after the passage of the act, and until patent therefor has been issued, not less than \$100 worth of labor must be performed or improvements made during each year, including the year of location, for each and every 20 acres or excess fraction thereof included in the claim. This means that the *first* annual expenditure on such a placer mining location must be accomplished for and during the calendar year in which the claim is located, instead of during the calendar year succeeding that in which the location is made. Moreover, the amount of annual expenditure is dependent upon the size of the claim, it being required that at least \$100 must be expended for each 20 acres, or excess fraction thereof, embraced in the location.

By section 2 it is provided that no person, as attorney or agent for another, may locate any placer mining claim unless duly authorized by a power of attorney properly acknowledged and recorded in some recorder's office within the judicial division where the location is made. Furthermore, an authorized agent or attorney can act in making locations of placer mining claims for only two individual principals or one associate principal during any calendar month and during that period may not lawfully locate more than two claims for any one principal either individual or association. No placer claim can lawfully be located except in compliance with and under the limitations of the act.

In order that the land department may be fully advised in the premises, the following requirements must be met with regard to applications for placer mining claims located in Alaska on or after August 1, 1912:

(a) Where location is made by agent or attorney the power of attorney must be in writing and must be executed and acknowledged in accordance with the laws of the Territory of Alaska or of the State, Territory, or District in which it shall be executed. It must be recorded in the proper recorder's office, as prescribed by the act. The application for patent must be accompanied by a certified copy of such power of attorney which must show the recordation thereof; but it will be sufficient if such certified copy is attached to and made a part of the abstract of title.

(b) One of the principal purposes of the act is to limit the number of placer mining locations made in Alaska through agents or attorneys. An agent or attorney can not at one time represent more than *two individuals* or *one association* under powers of attorney. A duly

authorized agent may make two locations for each of two individual principals, or for one association principal, during any calendar month, but he can make no further locations during that month for those or other principals.

The application for patent should accordingly be accompanied by the sworn statement of the agent or attorney setting forth specifically the names of all placer mining claims, together with the date of location and names of the locators, which were located or attempted to be located by him under powers of attorney during the calendar month in which the placer claim applied for was located.

(c) By section 3 it is prescribed that no person shall directly locate, or through an agent or attorney cause or procure to be located, for himself more than two placer mining claims in any calendar month: *Provided, however,* That one or both of such locations may be included in an association claim.

Whenever a person or an association has participated in the locating of placer mining claims in Alaska to the extent of two such claims in any calendar month, such person or such association thereby exhausts the right to make placer location for that month. The application for patent, therefore, for a placer mining claim located in Alaska on or after August 1, 1912, must contain or be accompanied by a specific statement, under oath, as to each locator who had an interest therein, showing specifically and in detail all placer locations made by him, or in which he was associated, either directly or through any agent or attorney, during the calendar month in which the claim applied for was located. If no locations in excess of those permitted by law were made during such calendar month a specific statement, under oath, to that effect, should be submitted. This showing must be made in addition to that hereinabove required of the agent himself.

Section 4 of the act prohibits the patenting of any placer mining claim located in Alaska after the passage of the act, which contains a greater area than that fixed by law or which is longer than three times its greatest width. The surveyor general will be careful to observe the above requirements and will not approve any survey of a placer location which does not in area and dimensions conform to the provisions of law.

By section 5 of the act it is declared that any placer mining claim attempted to be located in violation of the provisions and limitations of the act shall be null and void and the whole area covered by such attempted location may be located by any qualified person the same as if no such prior attempted location had been made. Consequently, any attempted placer location not made in conformity with the act is a nullity and the land covered thereby is open for and subject to proper location at any time.

It will be observed that the act does not affect the number of claims, lode or placer, and if placer whether located before or after the passage of the act, which may be included in a single application proceeding.

MILL SITES.

61. Land entered as a mill site must be shown to be nonmineral. Mill sites are simply auxiliary to the working of mineral claims, and as section 2337, which provides for the patenting of mill sites, is

embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

62. To avail themselves of this provision of law, parties holding the possessory right to a vein or lode claim, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to the vein or lode claim, such non-contiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may, by an independent application, secure a mill site if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

63. Where the original survey includes a lode claim and also a mill site the lode claim should be described in the plat and field notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode claim for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

64. In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode claim the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

65. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable, from acquaintance with the land, to testify understandingly.

CITIZENSHIP.

66. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

67. In case of an individual or an association of individuals who do not appear by their duly authorized agent, the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence, will be required.

68. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

69. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land districts; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any State or Territory.

70. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

71. No entry will be allowed until the register has satisfied himself, by careful examination, that proper proofs have been filed upon the points indicated in the law and official regulations. Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the transferee of such applicant where a transfer has been made pending the application for patent.

72. The mineral entries will be given the current serial numbers according to the provisions of the circular of June 10, 1908, whether the same are of lode or of placer claims or of mill sites.

73. In sending up the papers in a case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued. The schedule of papers, form 4-252f, should accompany the returns with all mineral applications and entries allowed.

POSSESSORY RIGHT.

74. The provisions of section 2332, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

75. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by

his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and *bona fides* which he may desire to submit in support of his claim.

76. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid other than that which has been finally decided in favor of the claimant.

77. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

ADVERSE CLAIMS.

78. An adverse claim must be filed with the register and receiver of the land office where the application for patent is filed or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.

79. Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

80. The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

81. The adverse claim so filed must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator. If the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

82. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict: *Provided, however,* That if the application for patent describes the claim by

legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a mineral surveyor, and its correctness officially certified thereon by him.

83. Upon the foregoing being filed within the sixty days' period of publication, the register, or in his absence the receiver, will immediately give notice in writing to *the parties* that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived and the application for patent be allowed to proceed upon its merits.

84. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be stayed with the exception of the completion of the publication and posting of notices and plat and the filing of the necessary proof thereof, until the controversy shall have been finally adjudicated in court or the adverse claim waived or withdrawn.

(a) The act of Congress approved June 7, 1910 (36 Stat. L., 459), relates to the filing of adverse claims and the institution of suits thereon, with respect to mineral applications in the Territory of Alaska.

In administering this act the foregoing regulations should be followed in so far as they are applicable, and these additional instructions are prescribed.

EXTENSION OF TIME FOR FILING ADVERSE CLAIMS.

The act provides that adverse claims may be filed at any time during the 60-day period of publication or within 8 months thereafter. This provision applies to any application where the 60-day period of publication ended with, or ends after, June 7, 1910, and operates to enlarge by 8 months additional the time within which an adverse claim may be filed. This provision does not apply to any application under which the 60-day period of publication ended with, or before, June 6, 1910, for, if no adverse claim was seasonably filed in such case, the statutory assumption that none existed has arisen, upon the expiration of the publication period, in favor of the applicant.

EXTENSION OF TIME WITHIN WHICH ADVERSE SUITS MAY BE INSTITUTED.

(b) It is also provided by the act that adverse suits may be instituted at any time within 60 days after the filing of adverse claims in the local land office. This provision applies to any adverse claim under which the 30-day period fixed under the former law for commencing the adverse suit was running on, or expired with, June 7,

1910, and enlarges such time to a period of 60 days, and also to any adverse claim which is seasonably filed on, or after, June 7, 1910. Such provision has no operation in a case where, under the former law, the 30-day period within which to institute suit on an adverse claim expired with, or ended before, June 6, 1910, and the 60-day publication period also expired on or before June 6, 1910.

Registers and receivers of United States land offices in Alaska will exercise the greatest care in applying the provisions of the act, and will allow no mineral entry until after the expiration of the full period granted for the filing of adverse claims. For example, on any application under which the publication period ended with, or after, June 7, 1910, no entry will in any event be allowed until after the expiration of the eight-months period following the publication period.

85. Where an adverse claim has been filed and suit thereon commenced within the statutory period and final judgment rendered determining the right of possession, it will not be sufficient to file with the register a certificate of the clerk of the court setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment roll, together with the other evidence required by section 2326, Revised Statutes, and a certificate of the clerk of the court under the seal of the court showing, in accord with the record facts of the case, that the judgment mentioned and described in the judgment roll aforesaid is a final judgment; that the time for appeal therefrom has, under the law, expired, and that no such appeal has been filed, or that the defeated party has waived his right to appeal. Other evidence showing such waiver or an abandonment of the litigation may be filed.

86. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

87. After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment of the adverse claim will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

88. Where an adverse claim has been filed but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the district court of the United States for the district in which the claim is situated, will be required.

APPOINTMENT OF SURVEYORS FOR SURVEY OF MINING CLAIMS AND CHARGES.

89. Section 2334 provides for the appointment of surveyors to survey mining claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications in mining cases. Under this authority of law, the following rates have been established as the maximum charges for newspaper publications:

(1) The charge for the publication of notice of application for patent in a mining case, in all districts, exclusive of Fairbanks,

Alaska, shall not exceed the legal rates allowed by the laws of the State, wherein the notice is published, for the publication of legal notices, and in no case shall the charge exceed \$7 for each 10 lines of space occupied where publication is had in a daily newspaper, and where a weekly newspaper is used as a medium of publication \$5 shall be the maximum charge for the same space. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

For such publications in the Fairbanks and Nome districts the maximum rate is fixed at \$10 for each 10 lines of space in a daily newspaper for the required period, and at \$7 for the same space and time if publication be had in a weekly newspaper.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates are established upon the understanding that they are to be in the usual body type used for legal notices.

(2) For the publication of citations in contests or hearings, involving the character of lands, the charges may not exceed the rates provided for similar notices by the law of the State, and shall not exceed \$8 for 5 publications in a weekly newspaper, or \$10 for publication in a daily newspaper for 30 days.

90. The surveyors general of the several districts will, in pursuance of said law, appoint in each land district as many competent surveyors for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The statute provides that the claimant shall also be at liberty to employ any United States mineral surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into a bond of not less than \$5,000 for the faithful performance of his duties.

91. With regard to the platting of the claim and other office work in the surveyor general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "deposits by individuals for surveying public lands," and file with the surveyor general duplicate certificates of such deposit in the usual manner.

92. The surveyors general will endeavor to appoint surveyors to survey mining claims so that one or more may be located in each mining district for the greater convenience of miners.

93. The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them.

The duty of the surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors general and local land officers are expected to report any infringement of this regulation to this office.

94. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

FEEES OF REGISTERS AND RECEIVERS.

95. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., par. 9.)

[Paragraphs 96, 97, and 98 are superseded by the general circular instructions of August 9, 1918 (46 L. D., 513), prescribing the method of keeping records and accounts relating to the public lands.]

HEARINGS TO DETERMINE CHARACTER OF LANDS.

99. The Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the character of lands.

100. Public land returned by the surveyor general as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return shall be overcome by testimony taken in the manner hereinafter described.

101. Hearings to determine the character of lands:

(1) Lands returned as mineral by the surveyor general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

[Paragraphs 102 to 104, inclusive, are superseded by appropriate instructions relative to nonmineral proofs in railroad, State, and forest lieu selections contained in separate circulars.]

105. At hearings to determine the character of lands the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow-surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all. In every case, where practicable, an adequate quantity or number of representative samples of the alleged mineral-bearing matter or material should be offered in evidence, with proper identification, to be considered in connection with the record, with which they will be transmitted upon each appeal that may be taken. Testimony may be submitted as to the geological formation and development of mineral on adjoining or adjacent lands and their relevancy.

106. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

107. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of minerals were first known to exist on the lands.

108. When the case comes before this office, such decision will be made as the law and facts may justify. In cases where a survey is necessary to set apart the mineral from the agricultural land, the United States surveyor general for the district in which the lands are located will be authorized to prepare special instructions for its execution, and upon approval of such instructions by this office, assignment will be made to a United States surveyor to make the survey. The work will be performed without expense to the agricultural claimant or to the mineral claimant, and upon completion, approval, and acceptance thereof the local land office will be supplied with an authenticated copy of the plat of said segregation survey, which will become the basis for the disposal of the nonmineral lands exhibited thereon. The local land office will, in all cases, be advised of the issuance of authority for the survey and a copy thereof will be furnished for service on the mineral claimant.

[109 and 110, omitted.]

111. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land, he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the General Land Office.

TERRITORY OF ALASKA.

112. Section 13, act of May 14, 1898, according to native-born citizens of Canada "the same mining rights and privileges" in the Territory of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

113. For the sections of the act of June 6, 1900, making further provision for a civil government for Alaska, which provide for the establishment of recording districts and the recording of mining locations; for the making of rules and regulations by the miners and for the legalization of mining records; for the extension of the mining laws to the Territory of Alaska, and for the exploration and mining of tide lands and lands below low tide; and relating to the rights of Indians and persons conducting schools or missions, see page 21 of this circular.

MINERAL LANDS WITHIN NATIONAL FORESTS.

114. The act of June 4, 1897, provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

The act also provides that "The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing, building, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located."

Transfer of National Forests.

Act of February 1, 1905 (33 Stat., 628).

The Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the

provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March 3, 1891, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands.

(For further information see Use Book—Forest Service.)

SURVEYS OF MINING CLAIMS.

General Provisions.

115. Under section 2334, Revised Statutes, the United States surveyor general "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims."

116. Persons desiring such appointment should therefore file their applications with the surveyor general for the district wherein appointment is asked, who will furnish all information necessary.

117. All appointments of mineral surveyors must be submitted to the Commissioner of the General Land Office for approval.

118. The surveyors general have authority to suspend or revoke the appointments of mineral surveyors at any time, for cause, and to suspend or revoke the appointments at such times as the bonds become subject to renewal under the act of March 2, 1895 (28 Stat., 808), for reasons appearing sufficient to sustain a refusal to appoint in the first instance. The surveyors, however, will be allowed the right of appeal from the action of the surveyor general in the usual manner. The appeal must be filed with the surveyor general, who will at once transmit the same, with a full report, to the General Land Office. (20 L. D., 283.)

119. [Omitted.]

120. Neither the surveyor general nor the Commissioner of the General Land Office has jurisdiction to settle differences relative to the payment of charges for field work, between mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner—i. e., in the local courts. The Department has, however, authority to investigate charges affecting the official actions of mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment.

121. The surveyors general should appoint as many competent mineral surveyors as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms.

122. The schedule of charges for office work should be as low as is possible. No additional charges should be made for orders for amended surveys, unless the necessity therefor is clearly the fault of the claimant, or considerable additional office work results therefrom.

123. [Omitted.]

124. Mineral surveyors will address all official communications to the surveyor general. They will, when a mining claim is the subject of correspondence, give the name and survey number. In replying to letters they will give the subject matter and date of the letter. They will promptly notify the surveyor general of any change in post-office address.

125. Mineral surveyors should keep a complete record of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field notes and other reports must be written in a clear and legible hand or typewritten, in non-copying ink, and upon the proper blanks furnished gratuitously by the surveyor general's office upon application therefor. No inter-lineations or erasures will be allowed.

126. No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States mineral surveyor, and made in pursuance of a special order from the surveyor general's office. After he has received an order for survey he is required to make the survey and return correct field notes thereof to the surveyor general's office without delay.

127. The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same.

128. A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His duty in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat, with his report, to the surveyor general. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the same case by administering oaths to the parties in interest. It is preferable that both preliminary and final oaths of assistants should be taken before some officer duly authorized to administer oaths, other than the mineral surveyor. In cases, however, where great delay, expense, or inconvenience would result from a strict compliance with this rule, the mineral surveyor is authorized to administer the necessary oaths to his assistants, but in each case where this is done, he will submit to the proper surveyor general a full written report of the circumstances which required his stated action; otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will not employ chainmen interested therein in any manner.

Method of Survey.

129. The survey made and returned must, in every case, be an actual survey on the ground in full detail, made by the mineral surveyor in person after the receipt of the order, and without reference to any knowledge he may have previously acquired by reason of having made the location survey or otherwise, and must show the actual facts existing at the time. This precludes him from calculating the connections to corners of the public survey and location monuments, or any other lines of his survey through prior surveys made by others and substituting the same for connections or lines of the survey returned by him. The term *survey* in this paragraph applies not only to the usual field work, but also to the examinations required

for the preparation of affidavits of five hundred dollars expenditure, descriptive reports on placer claims, and all other reports.

130. The survey of a mining claim may consist of several contiguous locations, but such survey must, in conformity with statutory requirements, distinguish the several locations, and exhibit the boundaries of each. The survey will be given but one number.

131. The survey must be made in strict conformity with, or be embraced within, the lines of the location upon which the order is based. If the survey and location are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of survey to the corresponding corner of the location, and the location corner must be fully described, so that it can be identified. The lines of the location, as found upon the ground, must be laid down upon the preliminary plat in such a manner as to contrast and show their relation to the lines of survey.

132. In view of the principle that courses and distances must give way when in conflict with fixed objects and monuments, the surveyor will not, under any circumstances, change the corners of the location for the purpose of making them conform to the description in the record. If the difference from the location be slight, it may be explained in the field notes.

133. No mining claim located subsequent to May 10, 1872, should exceed the statutory limit in width on each side of the center of vein or 1,500 feet in length, and all surveys must close within 50-100 feet in 1,000 feet, and the error must not be such as to make the location exceed the statutory limit, and in absence of other proof the discovery point is held to be the center of the vein on the surface. The course and length of the vein should be marked upon the plat.

134. All mineral surveys must be made with a transit, with or without solar attachment, by which the meridian can be determined independently of the magnetic needle, and all courses must be referred to the true meridian. The variation should be noted at each corner of the survey. The true course of at least one line of each survey must be ascertained by astronomical observations made at the time of the survey; the data for determining the same and details as to how these data were arrived at must be given. Or, in lieu of the foregoing, the survey must be connected with some line the true course of which has been previously established beyond question, and in a similar manner, and, when such lines exist, it is desirable in all cases that they should be used as a proof of the accuracy of subsequent work.

135. Corner No. 1 of each location embraced in a survey must be connected by course and distance with nearest corner of the public survey or with a United States location monument, if the claim lies within two miles of such corner or monument. If both are within the required distance, the connection must be with the corner of the public survey.

136. Surveys and connections of mineral claims may be made in suspended townships in the same manner as though the claims were upon unsurveyed land, except as hereinafter specified, by connecting them with independent mineral monuments. At the same time, the position of any public-land corner which may be found in the neighborhood of the claim should be noted, so that, in case of the release

of the township from suspension, the position of the claim can be shown on the plat.

137. A mineral survey must not be returned with its connection made only with a corner of the public survey, where the survey of the township within which it is situated is under suspension, nor connected with a mineral monument alone, when situated within the limits of a township the regularity and correctness of the survey of which is unquestioned.

138. In making an official survey, corner No. 1 of each location must be established at the corner nearest the corner of the public survey or location monument, unless good cause is shown for its being placed otherwise. If connections are given to both a corner of the public survey and location monument, corners Nos. 1 should be placed at the corner nearest the corner of the public survey.

139. In case a survey is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, a mineral monument must be established, in the location of which the greatest care must be exercised to insure permanency as to site and construction. (See, also, provisions of par. 397.)

140. The site, when practicable, should be some prominent point, visible for a long distance from every direction, and should be so chosen that the permanency of the monument will not be endangered by snow, rock, or landslides, or other natural causes.

141. The monument should consist of a stone not less than 30 inches long, 20 inches wide, and 6 inches thick, set halfway in the ground, with a conical mound of stone 4 feet high and 6 feet base alongside. The letters U. S. L. M., followed by the consecutive number of the monument in the district, must be plainly chiseled upon the stone. If impracticable to obtain a stone of required dimensions, then a post 8 feet long, 6 inches square, set 3 feet in the ground, scribed as for a stone monument, protected by a well-built conical mound of stone of not less than 3 feet high and 6 feet base around it, may be used. The exact point for connection must be indicated on the monument by an X chiseled thereon; if a post is used, then a tack must be driven into the post to indicate the point.

142. From the monument, connections by course and distance must be taken to two or three bearing trees or rocks, and to any well-known and permanent objects in the vicinity, such as the confluence of streams, prominent rocks, buildings, shafts, or mouths of adits. Bearing trees must be properly scribed B. T. and bearing rocks chiseled B. R., together with the number of the location monument; the exact point on the tree or stone to which the connection is taken should be indicated by a cross or other unmistakable mark. Bearings should also be taken to prominent mountain peaks, and the approximate distance and direction ascertained from the nearest town or mining camp. A detailed description of the locating monument, with a topographical map of its location, should be furnished the office of the surveyor general by the surveyor.

143. Corners may consist of—

First. A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone $1\frac{1}{2}$ feet high, 2 feet base, alongside.

Second. A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third. A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

144. All corners must be established in a permanent and workman-like manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The *exact* corner point must be permanently indicated on the corner. When a rock in place is used, its dimensions above ground must be stated and a cross chiseled at the exact corner point.

145. In case the point for the corner be inaccessible or unsuitable a witness corner, which must be marked with the letters W. C. in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes, and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

146. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other objects, as prescribed in the establishment of location monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

147. If an official mineral survey has been made in the vicinity, within a reasonable distance, a further connecting line should be run to some corner thereof; and in like manner all conflicting surveys and locations should be so connected, and the corner with which connection is made in each case described. Such connections will be made and conflicts shown according to the boundaries of the neighboring or conflicting claims as each is marked, defined, and actually established upon the ground. The mineral surveyor will fully and specifically state in his return *how* and by what *visible evidences* he was able to identify on the ground the several conflicting surveys and those which appear according to their returned tie or boundary lines to conflict, if they were so identified, and report errors or discrepancies found by him in any such surveys. In the survey of contiguous claims which constitute a consolidated group, where corners are common, bearings should be mentioned but once.

148. The mineral surveyor should note carefully all topographical features of the claim, taking distances on his lines to intersections with all streams, gulches, ditches, ravines, mountain ridges, roads, trails, etc., with their widths, courses, and other data that may be required to map them correctly. All municipal or private improvements, such as blocks, streets, and buildings, should be located.

149. If, in running the exterior lines of a claim, the survey is found to conflict with the survey of another claim, the distances to the points of intersection, and the courses and distances along the line intersected from an established corner of such conflicting claim to such points of intersection, should be described in the field notes: *Provided*, That where a corner of the conflicting survey falls within the claim being surveyed, such corner should be selected from which to give the bearing, otherwise the corner nearest the intersection should be taken. The same rule should govern in the survey of claims embracing two or more locations the lines of which intersect.

150. A lode and mill-site claim in one survey will be distinguished by the letters A and B following the number of the survey. The corners of the mill site will be numbered independently of those of the lode. Corner No. 1 of the mill site must be connected with a corner of the lode claim as well as with a corner of the public survey or United States location monument.

151. When a placer claim includes lodes, or when several contiguous placer or lode locations are included as one claim in one survey, there must be given to the corners of each location constituting the same a separate consecutive numerical designation, beginning with corner No. 1 in each case.

152. Throughout the description of the survey, after each reference to the lines or corners of a location, the name thereof must be given, and if unsurveyed, the fact stated. If reference is made to a location included in a prior official survey, the survey number must be given, followed by the name of the location. Corners should be described once only.

153. The total area of each location and also the area in conflict with each intersecting survey or claim should be stated. But when locations embraced in one survey conflict with each other such conflicts should only be stated in connection with the location from which the conflicting area is excluded.

154. It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

155. The title-page of the field notes must contain the post-office address of the claimant or his authorized agent.

156. In the mineral surveyor's report of the value of the improvements all *actual* expenditures and *mining* improvements made by the claimant or his grantors, having a direct relation to the development of the claim, must be included in the estimate.

157. The expenditures required may be made from the surface or in running a tunnel, drifts, or crosscuts for the development of the claim. Expenditures for drill holes for the purpose of prospecting and securing data upon which further development of a group of lode mining claims held in common may be based are available toward meeting the statutory provision requiring an expenditure of five hundred dollars as a basis for patent as to all of the claims of the group situated in close proximity to such common improvement. Improvements of any other character, such as buildings, machinery, or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of and actually facilitate the extraction of mineral from the claim.

158. All mining and other improvements claimed will be located by courses and distances from corners of the survey, or from points on the center or side lines, specifying with particularity and detail the dimensions and character of each, and the improvements upon each location should be numbered consecutively, the point of discovery being always No. 1. Improvements made by a former locator who has abandoned his claim can not be included in the estimate, but should be described and located in the notes and plat.

159. In case of a lode and mill-site claim in the same survey the expenditure of five hundred dollars must be shown upon the lode claim.

160. If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey the mineral surveyor may file with the surveyor general supplemental proof showing five hundred dollars expenditure made prior to the expiration of the period of publication.

161. The mineral surveyor will return with his field notes a preliminary plat on blank sent to him for that purpose, protracted on a scale of two hundred feet to an inch, if practicable. In preparing plats the top is north. Copy of the calculations of areas by double meridian distances and of all triangulations or traverse lines must be furnished. The lines of the claim surveyed should be heavier than the lines of conflicting claims.

162. Whenever a survey has been reported in error the surveyor may, in the discretion of the surveyor general, be required promptly to make a thorough examination upon the premises and report the result, under oath, to the surveyor general's office. In case he finds his survey in error he will report in detail all discrepancies with the original survey and submit any explanation he may have to offer as to the cause. If, on the contrary, he should report his survey correct, the surveyor general will, if necessary, order a joint survey to settle the differences with the surveyor who reported the error. A joint survey must be made within ten days after the date of order, unless satisfactory reasons are submitted, under oath, for a postponement. The field work must in every sense of the term be a *joint* survey, and not a separate survey, and the observations and measurements taken with the same instrument and chain, previously tested and agreed upon.

Nothing contained in the foregoing paragraph shall be construed as intending to invest surveyors general with jurisdiction to try and determine purely adverse claims to mining ground, and the procedure herein prescribed shall not be resorted to in any case where it is apparent that the controversy is not one concerning the professional efficiency of the surveyor, or the accuracy of results achieved by the methods employed by him in the execution of the survey, but relates substantially to the relative merits of rival claims to the same parcel of ground.

163. The mineral surveyor found in error, or, if both are in error, the one who reported the same, will make out the field notes of the joint survey, which, after being duly signed and sworn to by both parties, must be transmitted to the surveyor general's office.

164. Inasmuch as amended surveys are ordered only by special instructions from the General Land Office, and the conditions and circumstances peculiar to each separate case and the object sought by the required amendment, alone govern all special matters relative to the manner of making such survey and the form and subject matter to be embraced in the field notes thereof, but few general rules applicable to all cases can be laid down.

The expense of amended surveys, including amendment of plat and field notes, and office work in the surveyor general's office will be borne by the claimant.

165. The amended survey must be made in strict conformity with, or be embraced within, the lines of the original survey. If the amended and original surveys are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of the amended survey to the corresponding corner of the original survey. The lines of the original survey, as found upon the ground, must be laid down upon the preliminary plat in such manner as to contrast and show their relation to the lines of the amended survey.

166. The field notes of the amended survey must be prepared on the same size and form of blanks as are the field notes of the original survey, and the word "amended" must be used before the word "survey" wherever it occurs in the field notes.

167. Mineral surveyors are required to make full examinations of all placer claims at the time of survey and file with the field notes a descriptive report, in which will be described—

(a) The quality and composition of the soil, and the kind and amount of timber and other vegetation.

(b) The *locus* and size of streams, and such other matter as may appear upon the surface of the claims.

(c) The character and extent of all surface and underground workings, whether placer or lode, for mining purposes, locating and describing them.

(d) The proximity of centers of trade or residence.

(e) The proximity of well-known systems of lode deposits or of individual lodes.

(f) The use or adaptability of the claim for placer mining, and whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose.

(g) What works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(h) The true situation of all mines, salt licks, salt springs, and mill sites which come to the surveyor's knowledge, or a report by him that none exist on the claim, as the facts may warrant.

(i) Said report must be made under oath and duly corroborated by one or more disinterested persons.

168. The employing of claimants, their attorneys, or parties in interest, as assistants in making surveys of mineral claims will not be allowed.

169. The field work must be accurately and properly performed and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability for the faithful discharge of his duties, and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If found incompetent as a surveyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

WILLIAM SPRY, *Commissioner.*

Approved:

E. C. FINNEY,

First Assistant Secretary.

APPENDIX.

INSTRUCTIONS UNDER ACTS OF JUNE 22 AND 25, 1910, AND
MARCH 3, 1909.DEPARTMENT OF THE INTERIOR,
Washington, March 6, 1911.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: The act of June 25, 1910 (36 Stat., 847), provides that the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification, or other public purposes, to be specified in the orders of withdrawal, such withdrawal to remain in force until revoked by him or by an act of Congress.

Section 2 of the act¹ provides that lands so withdrawn shall at all times be open to exploration, discovery, occupancy, and purchase under the mining laws, excepting those relating to coal, oil, gas, and phosphates, there being a further provision, however, to the effect that the order of withdrawal shall not impair or affect the rights of any person who, prior to the date of the withdrawal, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to the discovery of oil or gas. No hard or fast rule can be established fixing the amount of work which must have been done by the occupant prosecuting work leading to the discovery of oil or gas. Each case must rest upon its own showing of diligence when application for patent is filed.

The chief of field division should be advised of all such applications and should be prepared to submit showing, if possible, before the issuance of final certificate of entry.

This section contains further 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 or upon which any valid settlement has been made, and is at that time being maintained and perfected pursuant to law. Applications to make nonmineral entries by settlers claiming the benefits of the above-mentioned provisions of section 2 will be referred to the chief of the appropriate field division for investigation and report before final action is taken thereon.

Withdrawals provided for under this act include those made for the purpose of classifying coal lands, and it seems that after the

¹ Sec. 2 amended by act of Aug. 24, 1912, to permit exploration, location, and purchase of lands containing metalliferous minerals only.

passage of this act the previous coal withdrawals were renewed thereunder.

The act of March 3, 1909 (35 Stat., 844), is for the protection of surface rights of nonmineral entrymen where the lands were subsequently classified, claimed, or reported as being valuable for coal, and the act of June 22, 1910 (36 Stat., 583), provides for the allowance of certain nonmineral entries for land having been withdrawn or classified as coal lands. These acts have separated the surface from the coal deposits for the purpose of allowance of certain nonmineral entries, and it is not believed that the act of June 25, 1910, under consideration was intended to repeal said acts. Therefore, where applications are presented to make final proof on nonmineral entries made prior to withdrawal, for the purposes of classifying the coal deposits, the disposition of such applications should be made with especial reference to the provisions of the act of March 3, 1909, supra, and as to such lands certain nonmineral entries may be allowed, as provided for by the act of June 22, 1910, supra, notwithstanding their withdrawal under act of June 25, 1910.

Mineral applications for mining claims perfected upon oil, gas, or phosphate lands prior to withdrawal, or for such claims upon lands chiefly valuable for other minerals, whether perfected before or after withdrawal, or for claims of the latter class within power-site withdrawals, and applications to submit final proof upon homestead, desert-land, and settlement claims initiated prior to a withdrawal, will be referred to the chief of field division, with the appropriate notation of the character of the withdrawal involved, in accordance with the practice under paragraphs 5 et seq. of the circular of April 24, 1907, supra, for field examination and full report of all facts touching the character of the land and affecting the validity of the location, claim, or entry, as the case may be, including the possibility of water-power development, if any.

In the administration of the act hereunder you will also be governed by the circular approved January 27, 1911, relative to cooperation between the Geological Survey and the General Land Office.

It is believed that the foregoing will enable you to properly advise the local officers in all matters necessary to put this act into operation; and where an application is received not specifically provided for herein, you will act upon the same, affording aggrieved parties the usual right of appeal.

Very respectfully,

R. A. BALLINGER,
Secretary.

MODIFICATION OF OUTSTANDING ORDERS OF WITHDRAWAL.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 21, 1912.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Your attention is called to the act of Congress approved August 24, 1912 (37 Stat. L., 497), amending section 2 of the act of Congress approved June 25, 1910 (36 Stat., 847).

You will note that the provision of the said act of June 25, 1910, that all lands withdrawn under the provisions of that act shall, at all times, be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, "so far as the same apply to minerals other than coal, oil, gas, and phosphates," is changed by the amendment, so as to provide that such lands shall, at all times, be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, "so far as the same apply to metalliferous minerals." By the approval, on August 24, 1912, of the said act, all outstanding orders of withdrawal under the act of June 25, 1910, were modified to conform to the act approved June 25, 1910, as amended by the act of August 24, 1912; and, upon the approval of said last-named act, the lands embraced in such orders of withdrawal ceased to be and are not open to exploration, discovery, occupation, or purchase under the mining laws of the United States, except for metalliferous minerals.

These instructions are in addition and supplementary to instructions of March 6, 1911 (36 L. D., 544).

You will exercise care in the enforcement of this important modification of the withdrawal orders.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

SAMUEL ADAMS,
First Assistant Secretary.

RULE 7, CIRCULAR OF APRIL 24, 1907, AMENDED.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 30, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Rule 7 of the circular of April 24, 1907 (35 L. D., 681, 682), is hereby amended so as to read:

When copy of notice is returned with indorsement not protesting the validity of the entry, the register and receiver will act upon the merits of the proof as submitted.

Where returned notice by chief of field division or other officer protests the validity of the entry, the register and receiver will forward all papers to this office without action, except in cases of mineral applications for patent. In mineral applications for patent the proof should be considered upon its merits, and, if found regular, certificate issued, although a protest may have been filed; but the claimant should be advised in such a case that patent will be withheld by the General Land Office pending a report by the chief of field division upon the *bona fides* of the claim.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

**VALIDATED PLACER LOCATIONS ON PHOSPHATE LANDS—PROOFS
AND NOTICE—ACT OF JANUARY 11, 1915 (38 STAT. L., 792).**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, March 31, 1915.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Your attention is directed to the act of Congress approved January 11, 1915 (38 Stat. L., 792), entitled "An act validating locations of deposits of phosphate rock heretofore made in good faith under the placer-mining laws of the United States."

The act applies only to placer-mining locations made on lands containing deposit of phosphate rock. It prescribes that phosphate placer locations made in good faith prior to the passage of the act, and prior to the withdrawal of such lands from location, upon which assessment work has been annually performed, shall be valid and may be perfected under the placer-mining laws, except as to lands included in an adverse or conflicting lode location. It authorizes the issuance of patents for such locations, where the provisions of the mining laws in other respects have been complied with.

In addition to the usual proofs claimants, under all pending and future applications based on such validated locations, must submit evidence showing that the assessment work has been annually performed up to and including the year preceding that in which the entry certificate is issued. Such proof may be made by filing the original or authenticated copies of the proofs of annual labor of record in the local recording office, provided such proofs are definite and specific. Where such evidence is not available, a sufficient corroborated affidavit, describing the nature and giving the approximate cost and reasonable value of the work done each year upon or for the benefit of each claim included in the application for patent, will be accepted. Similar proof must be furnished in support of all pending cases, where the entry certificates are outstanding, before such entries will be approved for patent, all else being regular.

The act does not apply to lands included in an adverse or conflicting lode location, unless such adverse or conflicting claim is abandoned. The usual statutory notice of the application must have been or will be given in all cases. Section 2325, Revised Statutes, provides that if no adverse claim is filed during the sixty days of publication "it shall be assumed that the applicant is entitled to a patent * * * and that no adverse claim exists."

Where proper statutory notice has been given and no adverse claim or protests has been filed, it will be conclusively assumed, for patent purposes, that no adverse or conflicting lode location exists; and that if any such once existed, it has been abandoned. No new notice, if the notice already given be found regular and sufficient, will be required in support of any pending entry or application.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIBUS A. JONES,
First Assistant Secretary.

INSTRUCTIONS UNDER ACT OF JANUARY 11, 1915 (38 STAT. L., 792), PROVIDING FOR THE PURCHASE AND DISPOSAL OF CERTAIN LANDS CONTAINING THE MINERALS KAOLIN, KAOLINITE, FULLER'S EARTH, CHINA CLAY, AND BALL CLAY, IN TRIPP COUNTY, FORMERLY A PART OF THE ROSEBUD INDIAN RESERVATION, IN SOUTH DAKOTA.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, July 15, 1915.

REGISTER AND RECEIVER,
*United States Land Office,
Gregory, South Dakota.*

SIRS: 1. The act approved January 11, 1915 (38 Stat. L., 792), provides that all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, in what was formerly within the Rosebud Indian Reservation in South Dakota, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands, shall be open to exploration and purchase and be disposed of under the general provisions of the mining laws of the United States, and the proceeds arising therefrom shall be deposited in the Treasury for the same purpose for which the proceeds arising from the disposal of other lands within the reservation in which such mineral-bearing lands are located were deposited.

2. The territory referred to in said act is that portion of the former Rosebud Indian Reservation in Tripp County, South Dakota, opened to settlement and entry by the act of March 2, 1907 (34 Stat., 1230). No mineral locations or entries may be made in said area except for lands containing the minerals described in said act of January 11, 1915.

3. Applications for patents for lands described in said act of January 11, 1915, must contain, in addition to the matter required by paragraph 60 of the mining regulations, approved March 29, 1909,¹ (37 L. D., 769), full and explicit data showing clearly that the lands sought to be patented thereunder are of the character contemplated by said act.

4. By the first proviso to said act of January 11, 1915, it is provided "that the same person, association, or corporation shall not locate or enter more than one claim, not exceeding one hundred and sixty acres in area, hereunder."

(a) Under this clause and the preceding part of the act to which it relates, which provides that the lands containing the designated mineral deposits "shall be open to exploration and purchase and be disposed of under the general provisions of the mining laws of the United States," no location or entry of a claim under said act of January 11, 1915, by a single natural person or corporation can exceed twenty acres in area and in the case of an association no location or entry can exceed twenty acres for each individual participating therein; that is, a location by two persons can not exceed forty acres, one by three persons can not exceed sixty acres, and one by eight persons can not exceed one hundred sixty acres.

¹New regulations of August 6, 1915 (44 L. D., 247), of which these instructions are a part.

(b) Rights obtained by location under the mining laws are assignable, and the assignee may make the entry in his own name; so, under this act a person, association, or corporation holding as assignee may make entry in his, their or its name: *Provided*, such person, association, or corporation has not held under said act of January 11, 1915, at any time, either as locator or entryman, any other lands; his, their or its right is exhausted by having held under said act any particular tract, either as locator or entryman, either as an individual or as a member of an association or corporation. It follows, therefore, that no application for patent or entry, made under said act, shall embrace more than one single location.

(c) In order that the conditions imposed by said first proviso may duly appear, the application for patent must contain or be accompanied by a specific statement, under oath, by each person whose name appears therein that he never has, either as an individual or as a member of an association or corporation, located, held, or entered any other lands under the provisions of said act of January 11, 1915. Where the application is by an association or corporation, it must, in like form as above provided, show that each person forming the association or holding stock in the corporation is qualified to make entry in his own right and that he is not a member of any other association or a stockholder in any other corporation which has located a claim or filed an application for other lands under the provisions of said act of January 11, 1915.

5. Said act of January 11, 1915, contains the further proviso "that none of the lands or mineral deposits, the disposal of which is herein provided for, shall be disposed of at less price than that fixed by the applicable mining or coal-land laws, and in no instance at less than their appraised value, to be determined by the Secretary of the Interior."

As soon as the register and receiver shall have filed and acted upon the mineral application for patent, and issued notice of allowance thereof they will forward to the chief of field division a duplicate of the sworn statement filed with said application for patent, which duplicate must be furnished by the mineral applicant, and, among other things, fully and accurately describe the land applied for and contain the other data herein prescribed. In the letter transmitting said duplicate sworn statement the local officers will advise the chief of field division as to the land for which the application for patent has been allowed, and the status of such land as shown by their records. Upon the receipt of these papers the chief of field division will docket the case and will promptly make, or cause to be made by a competent special agent, a personal examination of the land as to which the application for patent has been allowed and appraise said land for the purpose of determining the price at which the same shall be sold, which, however, must, in no event, be less than five dollars per acre, or fraction of an acre. The schedule of appraisement must be prepared in duplicate, and fully describe, by legal subdivisions, each ten-acre tract, examined and valued, be signed by the appraiser and be approved by the chief of field division; and, on being so completed (which must be prior to the expiration of the sixty-day period of publication of notice of application for patent), they must be at once transmitted to the register and receiver, who will immediately send,

by registered mail, one copy of the schedule of appraisement to the record address of the applicant for patent.

When the appraisement is completed, the register and receiver will note the price on their records, and thereafter the land will be sold at such price only, under the provisions of said act of January 11, 1915, in the absence of instructions to the contrary by the Commissioner of the General Land Office. If appraisement be not made and returned prior to the expiration of the period of newspaper publication and within 30 days thereafter, the applicant may, if duly qualified, and in the absence of other objections, purchase the land applied for at the minimum price—viz, five dollars for each acre and five dollars for each fractional part of an acre.

6. As to matters not covered by these regulations, you will, in general, be governed in the administration of said act of January 11, 1915, by the provisions of the United States mining laws and, so far as applicable, the regulations thereunder of March 29, 1909, and the various amendments thereof.¹

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

A. A. JONES,

First Assistant Secretary.

**EXCERPTS FROM INSTRUCTIONS UNDER THE ACT APPROVED
DECEMBER 29, 1916 (39 STAT. L., 862), TO PROVIDE FOR STOCK-
RAISING HOMESTEADS, AND FOR OTHER PURPOSES.**

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 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

¹ New regulations of April 11, 1922 (49 L. D., 15), of which these instructions are a part.

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 owner of the lands, said register and receiver may, if all else be regular, approve the bond.

Mineral applications and coal declaratory statements for and applications to purchase the coal or other mineral deposits in lands entered or patented under the act, reserved as provided in the act, will, if all else be regular, be received and filed at any time after the homestead entry has been received and allowed of record: *Provided*, That the lands or the coal or other mineral deposits therein are not at the time withdrawn or reserved from disposition.

* * * * *

Mineral applications and coal-declaratory statements, applications to purchase, certificates and patents issued subject to the provisions of this act for the reserved deposits will describe the coal or other mineral according to legal subdivisions or by official mineral survey, as the case may be, and payment will be made at the price fixed for the whole acreage.

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:

Patent shall contain appropriate notations declaring same subject to the provisions of the act of December 29, 1916 (Public, 290), 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.

(Form approved by the Secretary of the Interior January 18, 1917.)

NOTE.—In the preparation, execution, approval, and acceptance of this bond all parties concerned will be governed by the general regulations of January 8, 1917, entitled "Regulations Governing the Preparation and Execution of Official Bonds," as far as same are applicable; by the act of December 29, 1916, authorizing this bond, and by paragraph 14 (a) of the January 27, 1917, "Instructions" under said act.

BOND FOR MINERAL CLAIMANTS.

(Act of December 29, 1916—39 Stat. L., 862.)

KNOW ALL MEN BY THESE PRESENTS, That _____ (Give full name and address.) _____ citizen— of the United States, or having declared _____ (My or our.) _____ intention to become _____ citizen— of the United States, as principal—, and _____ (Give full name and address.) _____ and _____ (Give full name and address.) _____

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. L., 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

ha— acquired from the United States the _____ deposits (together with the right to mine and remove the same) situate, lying, and being within the _____ of section _____, township _____, range _____, _____ m., _____ 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, by _____

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 remain in full force and effect.

Signed and sealed in the presence of, and witnessed by the undersigned :

FULL NAME AND WITNESS.	ADDRESS.	(The principal should sign first.)
_____	_____	_____ [SEAL] (Principal.)
_____	_____	_____ [SEAL] (Surety.)
_____	_____	_____ [SEAL] (Surety.)

APPLICATIONS FOR LEASES BY OIL AND GAS PROSPECTING PERMITTEES UNDER SECTION 14, ACT OF FEBRUARY 25, 1920.

INSTRUCTIONS.

[Circular No. 823.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 5, 1922.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

In order to expedite and coordinate the work of the General Land Office and of the Bureau of Mines in acting upon applications for leases filed under section 14 of the act of February 25, 1920 (41 Stat., 437), by the holders of oil and gas prospecting permits, you are instructed as follows:

Leases Following Permits.—An application for lease as a reward for discovery by permittees shall be filed in duplicate in the United States land office of the district in which the land is situated. The register and receiver will immediately transmit the original to the Commissioner of the General Land Office, by special letter, and the duplicate to the deputy supervisor of the Bureau of Mines having jurisdiction in the district.

Such applications should set out the following items:

- (1) Serial number of permit.
- (2) Name and address of permittee.
- (3) Name and address of operator.
- (4) Subdivisions on which discoveries have been made. Character of discoveries. Exact date of discovery.
- (5) Number and definite location of each well brought in.
- (6) Complete itemized production statement by calendar months from first discovery to date of application.

7. The applicant must give description of the land for which he desires a lease at the minimum royalty accorded discoverers under permits. He must also at the same time apply for lease of the remaining lands covered by the permit, or waive claim to his preference right to lease same or such part thereof as he does not desire to lease. A permittee under section 13, and a permittee under section 19 of the act (for lands not within the known geologic structure of a producing oil and gas field at the date the permit application was filed) is entitled to lease one-fourth of the land in the permit, or at least 160 acres, if the permit includes that area, at a flat royalty of 5 per cent. If a permit under section 19 includes areas which were at the date the permit application was filed partly inside and partly outside the known geologic structure of a producing oil and gas field, the permittee is entitled to select one-fourth of the area for lease wholly outside, or wholly inside, or partly inside and partly outside the known structure, provided, however, that the royalty on lands within the known structure shall in no event be less than 12½ per cent, and provided, further, that the permittee is entitled to a

lease at 5 per cent flat royalty upon so much of the outside area as does not exceed one-fourth of the total area covered by the permit.

A permittee under section 20 of the act is entitled to lease one-fourth of the area of land embraced in his permit or at least 160 acres of said lands, if there be that number of acres within the permit, at a flat royalty of 5 per cent, whether the land covered by the permit, or any part thereof, was within or without the known structure of a producing oil and gas field at the date the permit application was filed.

8. A statement of what interests are to be held under the lease, together with (a) the necessary contracts, assignments, etc., for the approval of the Secretary of the Interior; (b) proof of citizenship of any assignee or interested party by affidavit of such fact if native-born, or, if naturalized, by certified copy of the certificate of naturalization on the form provided for use in public land matters unless such copy is already on file, or, if a corporation, by certified copy of the articles of incorporation, and a showing as to the residence and citizenship of its stockholders; (c) a statement as to interests held by the assignee or interested party in leases and permits in the geologic structure of the same producing oil or gas field. If the showings required under (a) and (b) have already been made, a reference thereto may be made giving the land office district and serial number of the case in which the showings were made.

The permittee must exercise his preferential right to the remaining part of the permit at the time of application for lease of the one-fourth part of the area affected.

Relinquishments and Bonds.—Relinquishments of permits will not be accepted and bonds released until all requirements under the permits and the regulations have been fulfilled. When any drilling has been done on the property, the relinquishment should be approved by a representative of the Bureau of Mines or other person so designated by the Secretary of the Interior.

Abandonment of Wells.—Upon plugging or abandoning a well drilled under a permit or lease, the casing shall not be drawn from the well until authority has been obtained in writing from the deputy supervisor of the Bureau of Mines or other authorized agent of the Department of the Interior.

Sales Contracts.—Sales contracts submitted for the approval of the Secretary of the Interior under paragraph 2 (d) of the lease must be filed in duplicate with the deputy supervisor of the Bureau of Mines having jurisdiction in the district in which the leased land is situated. The deputy supervisor will retain the duplicate in his files and forward the original, together with a copy of his report, to the Commissioner of the General Land Office. The original report of the deputy supervisor will be transmitted to the Director of the Bureau of Mines.

If a sales contract is submitted to any official of the Interior Department other than the deputy supervisor without its having been approved by the deputy or other authorized official, the contract should be returned to the person submitting it with instructions to

file it in duplicate at the office of the local deputy supervisor, who will handle it in the regular manner.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

GEORGE W. MYERS AND LILLIE A. MYERS.

Decided May 8, 1922.

CLAIMS—RECLAMATION—WATER RIGHT—LAKE—DAMAGES—SURVEY—STATUTES.

Diversion by the United States Reclamation Service of the waters of a lake, thereby depriving meadowland of its moisture derived from subirrigation, even though the land was not contiguous to the meander line of the lake, constitutes a valid claim for damages within the contemplation of the act of March 3, 1915, which authorizes payment of damages caused by reason of the operations of the United States in the survey, construction, operation, or maintenance of irrigation works.

CLAIMS—RECLAMATION—WATER RIGHT—LAKE—DAMAGES.

Where meadowland is damaged by the diversion of the waters of a lake, the landowner is not entitled to general damages to his remaining lands as incidental to the damage to the former, if the latter were not directly benefited by those waters prior to their diversion.

CLAIMS—COURTS—CALIFORNIA—STATUTES.

A State statute prescribing the period of time within which action may be initiated in its courts, has no application with reference to a claim asserted against the United States pursuant to a Federal statute, where the remedy is not sought in a tribunal of that State.

FINNEY, *First Assistant Secretary:*

George W. and Lillie A. Myers have appealed from the decision of December 20, 1921, by the Acting Director of the Reclamation Service reversing the decision of the project manager, Klamath Project, and rejecting their claim for \$5,750 for damages caused by works of the Reclamation Service.

The claimants are owners of 310 acres of land in Sec. 6, T. 47 N., R. 6 E., M. D. M. California, acquired by purchase in October, 1912. This land is situated near Tule or Rhett Lake, and about 50 acres formerly received moisture by subirrigation from the waters of the lake so that grass grew naturally thereon, making a meadow without the necessity for surface irrigation.

The water formerly stood near the level of the land, and at times even overflowed portions of it. When the land was surveyed in 1872, the lake was meandered at approximately the contour line of 4,055 feet elevation. This is one foot below the nearest approach of the

land to the lake. None of the survey subdivisions touch the said meander line. However, it is shown that the water of the lake actually covered portions of this land every year from 1904 to 1911 inclusive. It has gradually receded until it is now 15 or 20 feet below the level of the meadow land. By 1916 it was about 10 feet below the level of the meadow, and the effect of the lack of moisture became apparent. It is now so dry that the grass has ceased to grow.

It is satisfactorily shown by the evidence submitted at the hearing that the recession of the waters in the lake was mainly caused by diversion of the flow which formerly supplied the lake.

The project manager in his decision stated—

In June, 1909, the gates of a dam constructed by the United States at the outlet of Clear Lake in California, were closed, thus holding back much of the water that naturally would flow from the lake into Lost River, eventually reaching Tule Lake. This had an appreciable effect in lowering the level of Tule Lake.

In June, 1912, a dam across Lost River and a canal to divert the water from Lost River into Klamath River were completed, almost entirely diverting the waters that would naturally reach Tule Lake. The escape of the lake water through evaporation has so greatly exceeded the small inflow, since that time, that the lake level has been lowered about 17 feet, uncovering a large area of the lake bed.

In reporting on this case to the district counsel prior to rendering his decision, the project manager stated—

It was generally known that the United States planned to lower the water surface of Tule Lake and in order that there might be no damage claims, all riparian rights bordering the lake were purchased except those of Koppock and Harter. The rights purchased by the United States included those pertaining to the lots between the land in question and the lake. Under such conditions it seems to me doubtful if Myers has any legal claim against the United States.

It would appear from this statement that the Government proceeded on the theory that only persons owning land contiguous to the meander line of the lake would be entitled to claim damages resulting from the diversion of the lake waters. However, when he rendered his decision, the project manager followed the rule announced by the Supreme Court of California in the case of *Katz v. Walkinshaw* (70 Pac., 663), involving the question of rights to percolating waters, and concluded that the Government was liable. He fixed the damages at \$1750. There are no values given in the testimony in the case from which the amount stated could have been arrived at. The sum allowed by the project manager seems to have been arrived at as the result of his own observations. However, he did not testify in the case. The claimants appealed from that action on the ground that the amount allowed was insufficient. The Acting Director in the decision from which the pending appeal

was taken, held that the damage suffered afforded no ground for a legal claim, the principle of *damnum absque injuria* being applied. It was also held that the claim was barred by lapse of time under the California Code of Civil Procedure, sections 338 and 339, as no claim was made until June 7, 1920, whereas the cause of action, if any, arose as early as 1916, when the damage complained of was completed.

With reference to the holding that the claim is barred by the statutes of limitation, it is urged on appeal that if the California statutes of limitation have any bearing at all on the case, it would be section 343; which provides that action must be brought within four years after the cause of action shall have accrued. It is further urged, however, that the damage to the meadow, wells, and orchards was not completed until 1920, and in fact is not altogether completed at this time, as it still becomes necessary to dig the wells deeper each year to reach the water as it gradually recedes.

Little need be said on this feature of the case, as it is quite clear that the statutes of California prescribing periods of time within which action may be initiated on various accounts in the courts of that State, can have no application in this matter, as the remedy is not sought in a tribunal governed by those laws.

This claim is brought under the fifth amendment to the United States Constitution, which provides that private property shall not be taken for public use without just compensation, and also under the act of March 3, 1915 (38 Stat., 859), and subsequent appropriation acts which authorize—

* * * payment of damages caused to the owners of lands or private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works, and which may be compromised by agreement between the claimant and the Secretary of the Interior; * * *

With reference to this provision in the yearly appropriation acts, it was stated in instructions of May 7, 1920 (47 L. D., 392), that—

The only class of claims which may not be compromised under this provision is that resulting from an accident growing out of an act of God, the public enemy, or the act of some person in his private capacity. This authority will not be invoked to compromise any claim which would not be a legal claim against a private irrigation concern under similar circumstances.

Under the well-settled law of California, riparian rights are protected against subsequent appropriation, and the Department is of opinion that the mere fact that the lands in question do not extend to the old meander line of the lake would not preclude the claim that they were riparian to the lake, inasmuch as it is shown that the lake waters for many years next prior to the diversion actually touched upon and covered portions of the land. Even though the owners

could not pursue the waters beyond the subdivisions of the lands owned, yet so long as the waters under natural conditions flowed to their lands, they were entitled to claim the benefits unaffected by artificial obstructions or diversion. Furthermore, even if the lands were not strictly riparian to the lake in the sense that they were not actually contiguous to the surface flow of the waters, it is clear that they received direct benefit by the subsurface high water plane which furnished moisture to produce natural meadow and afforded easy access to an abundant water supply for domestic purposes by the sinking of shallow wells. It is equally well settled that such rights are protected from destruction by diversion, especially where the waters are carried away, as in this case, for sale or use on non-riparian lands. *Miller v. Bay Cities Water Company* (107 Pac., 115).

Where waters are appropriated and diverted from their natural watershed or basin and transported to reclaim nonriparian lands, or for distant use, it seems eminently just that the owners of land changed from a moist to a desert condition as a direct result of such appropriation, should be compensated for the damage thus inflicted. At least, such is the law known as the California doctrine, and that is the rule applicable in this case. Even in the *Kansas v. Colorado* case (206 U. S., 46), which involved the rights of Kansas, where the California doctrine obtains, as well as the rights of Colorado, where the right of appropriation is recognized as superior to riparian claims, known as the Colorado doctrine, the Supreme Court plainly indicated that appropriations in Colorado could not wholly monopolize the waters of the Arkansas River, an interstate stream, so as to obtain more than an equitable portion thereof. In the present case, the entire flow into the lake has been appropriated and diverted, and it was the avowed purpose to dry up the lake.

It only remains to arrive at the reasonable damage suffered by the claimants as the direct result of the appropriation and diversion in question.

They claim \$4,750 for damage to the 50 acres which were formerly irrigated or subirrigated, and \$1,000 additional for general damage to the remaining portion of their holdings as incidental to the loss of the meadow.

They claim to have paid \$6,200 for the entire 310 acres in 1912. The improvements on the land are not clearly described but there was a house and presumably there was fencing and other ordinary improvements incidental to ranch purposes, for which it was used. Various values were given by the several witnesses as to the meadowland and the remaining dry land. G. W. Myers, one of the claimants, testified in one place that when the land was purchased he

estimated that the meadowland was worth \$5,000, that is \$100 per acre. The house seems to be located on that part of the ranch. At another place, however, he said he valued the meadowland as between \$4,000 and \$5,000 at the time of the purchase, and that it now is worth less than \$15 per acre. Another witness estimated the value of the meadowland at about \$15 per acre in its present condition. If this meadowland be estimated at \$15 per acre in its present condition, its value would be \$750. This amount deducted from \$4,000, one of the values placed upon it by the claimant-witness, in its former condition, would leave \$3,250 as the damage to this area. General damage to the ranch as incidental to the injury to the meadowland can not be recognized, as the remaining lands were not directly benefited by the waters prior to diversion. *Bothwell et al. v. United States* (254 U. S., 231).

Upon consideration of the entire record, the Department is of opinion that the amount above stated represents the reasonable and fair damage which should be paid the claimants, and it is so ordered. The decision appealed from is accordingly reversed.

OIL AND GAS PERMITS UNDER SECTION 13, ACT OF FEBRUARY 25, 1920—EXTENSION OF TIME FOR BEGINNING DRILLING OPERATIONS.

INSTRUCTIONS.

[Circular No. 801.]¹

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., January 16, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

By act of Congress approved January 11, 1922 (Public No. 127), the Secretary of the Interior was authorized to grant an extension of time under oil and gas permits granted pursuant to the act of February 25, 1920 (41 Stat., 437).

The text of the act is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may, if he shall find that any oil or gas permittee has been unable, with the exercise of diligence, to begin drilling operations or to drill wells of the depth and within the time prescribed by section 13 of the Act of Congress approved February 25, 1920 (Forty-first Statutes, page 437), extend the time for beginning such drilling or completing it, to the amount specified in the Act for such time, not exceeding three years, and upon such conditions as he shall prescribe."

¹ Reprint as amended March 28, 1922, and May 12, 1922.

Accordingly, a permittee who has been unable with the exercise of due diligence to comply with the terms of the permit issued under any section of the act of February 25, 1920, may, if the facts warrant, be granted an extension of time upon filing an application therefor, accompanied by his own affidavit setting forth what efforts, if any, he has made to comply with the terms of his permit and the reasons for delay in the full compliance therewith, such showing to be accompanied by a corroborating affidavit of at least one disinterested person having actual knowledge of the facts.

The affidavit by the applicant must also show the time when he proposes to commence or resume his operations and any arrangements he has made for complying with the terms of the permit.

In cases where the extension to be granted will serve to extend the life of the permit beyond the period of two years prescribed by the act of February 25, 1920, *supra*, the permittee must furnish a properly executed assent to the extension by the sureties on the bond furnished.

The application may be filed in the General Land Office or in the local land office having jurisdiction over the land involved by the permit. In the latter event the application will be promptly forwarded to this office by the local officers.

You will give the widest publicity to the above regulation that may be possible without expense to the United States.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

ROBERT R. BIDDLE.

Decided May 16, 1922.

PREFERENCE RIGHT—WITHDRAWAL—RESTORATION—MILITARY SERVICE—OREGON
AND CALIFORNIA RAILROAD LANDS.

The preference right privilege accorded by Congress to discharged soldiers, sailors, and marines upon the restoration of withdrawn lands is to be applied impartially and cannot be defeated by the filing of an application to make entry prior to the restoration, even though the applicant be one of the preferred class.

FINNEY, *First Assistant Secretary:*

Lots 3 and 4, Sec. 1, T. 17 S., R. 2 E., W. M., Roseburg, Oregon, land district, being a part of the area known as revested Oregon and California Railroad grant lands, and being subject to disposal in one of the particular methods prescribed for the sale of such lands

by the act of June 9, 1916 (39 Stat., 218), were on July 31, 1916, temporarily withdrawn from all forms of disposal in aid of the proper execution of that act and that withdrawal is still in effect. Furthermore, those lots were on December 12, 1917, included within and are now a part of Water Power Reserve No. 14.

While the lands were thus doubly withdrawn, Robert R. Biddle filed his application, Roseburg 01419, for said lots and the adjoining S. $\frac{1}{2}$ NW. $\frac{1}{4}$, of that section which was rejected by the register and receiver because of said withdrawals.

Biddle later filed an appeal from that action accompanied by petitions and showings under which he hoped to secure the restoration of lots 3 and 4 to entry under section 24 of the Federal Water Power Act.

By its decision of January 14, 1922, the General Land Office sustained the action of the register and receiver and directed that Biddle be notified that his application for the restoration of the land from the power site withdrawal would be forwarded for consideration of the power commission. It is also directed in that decision that he be further notified that the restoration of the lots from the power site withdrawal would not relieve them from the hindering effect of the other withdrawal mentioned and also that he would not gain a preference right to enter those lots for the reason that they must, if relieved from the power site withdrawal, be restored to entry in the manner prescribed for the restoration of such lands generally.

In his appeal from that decision Biddle in effect admits that his application could not properly be allowed at this time, but he contends that it should be suspended to await the final restoration of the lands because such a suspension is provided for in the act of March 4, 1915 (38 Stat., 1162).

This Department is informally advised that the restoration of the lands has been recommended by the Federal Power Commission and that they will probably be restored under section 24 of the Federal Power Act within a short time; but that fact will not justify the allowance of this application as to the lots mentioned, because those tracts must, when so restored, be opened to entry in the manner provided in Circulars Nos. 324 (43 L. D., 245), 729 (47 L. D., 595), and 822 (49 L. D., 1), and the pending application can not be allowed as to them for the reasons disclosed by those circulars; nor does the fact that the restoration was made on a petition of this applicant justify any other action than the rejection of the application at this time, because section 4 of the instructions (Circular No. 729) directs that when an applicant such as the present one is notified of the rejection of his application he should also be informed that the

presentation of a petition for the restoration of the land "will not give the applicant any preference right, or right to preferential treatment if or when the lands are finally restored."

When those lots are restored they will be subject to entry by former soldiers or service men only for a period of not less than ninety days, and after that, if they then remain unentered, they may be entered by any other person. But the regulations provide that within twenty days before lands so restored become subject to entry by soldiers or other service men, such persons as desire to may file their applications, and in cases where more than one application is filed for the same tract they will be treated as having been simultaneously filed and the question as to which of them will be finally allowed will be determined by a drawing as between all the applicants for that particular tract.

The object of these regulations is to prevent any soldier from gaining an advantage over other soldiers by the fact that his application may be possibly the first to be filed, and for that reason and the reasons heretofore given it must be held that the present application was properly rejected.

From what has been said it will be observed that the fact that this applicant may have been a former soldier does not give him any right under his application that would be superior to the right of other soldiers.

There is no merit in this applicant's contention that his application should be suspended to await restoration because it was presented under the enlarged homestead law which says that when such applications are presented before the designation of the land, they shall be received "and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character" (the character of land subject to entry under that act). The only object and effect of that provision was to give a superior right of entry to the person who first presented his application to enter prior to the designation of the land, and it has no connection whatever with or influence upon applications in cases involving questions such as the one here under consideration.

It is not contended that there are equities in this case that would warrant this Department in recognizing this claim to the land as superior to that of other former service men; but aside from these considerations, it must be remembered that this land is still embraced in the further withdrawal of July 31, 1916, mentioned above, which would necessarily have to be revoked before this application could be allowed. It is needless, however, to now consider the advisability or the possibility of the revocation of that withdrawal, because this application must be rejected for the reasons stated, in

order that all former soldiers may have an equal privilege of applying to enter those lots when they are opened to entry.

The decision appealed from must, therefore, be, and is hereby, affirmed.

HOMESTEAD EXEMPTION MADE APPLICABLE TO ALL HOMESTEAD ENTRIES BY ACT OF APRIL 28, 1922, WHICH AMENDED SECTION 2296, REVISED STATUTES.

[Circular No. 826.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 19, 1922.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Attention is directed to Public Resolution No. 53, approved April 28, 1922, which provides as follows:

That the provisions of section 2296 of the United States Revised Statutes have been and are applicable to all entries made under the homestead laws and laws supplemental and amendatory thereof.

Section 2296, Revised Statutes, provides:

No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

LACY v. WOODBURY.

Decided May 20, 1922.

DESERT LAND—CITIZENSHIP—RESIDENCE—CONTEST.

The provision contained in section 8 of the act of March 3, 1891, specifying that no person shall be entitled to make entry of desert land except he be a resident citizen of the State in which the land is situated, is not a continuing requirement, coextensive with the life of the entry, but merely one which must exist at the time entry is made.

DESERT LAND—CITIZENSHIP—RESIDENCE—CONTEST.

The resident citizenship qualification imposed by section 8, of the act of March 3, 1891, is sufficiently met by a desert land entryman, if, at the time of making entry, he had established his residence in the State in which the land is situated and his acts indicated a *bona fide* intent to make his future home in that State, although he thereafter temporarily maintained his domicile elsewhere.

FINNEY, *First Assistant Secretary*:

Harry H. Lacy has appealed from a decision of the Commissioner of the General Land Office dated December 15, 1921, dismissing his contest against the desert-land entry of Belle S. Woodbury, embracing the NW. $\frac{1}{4}$, Sec. 29, T. 7 S., R. 7 E., G. & S. R. M., Phoenix, Arizona, land district.

The entry was made on October 1, 1918, and on May 22, 1920, Lacy filed contest against same alleging that entrywoman was not a resident citizen of the State of Arizona at the time she made the entry and that she has never been such citizen and that the entry was made for speculation and not in good faith. Answer was duly filed and by stipulation oral depositions were taken before a designated officer. Upon consideration of same the local officers rendered a decision recommending dismissal of the contest. Their action was affirmed by the Commissioner in the decision from which this appeal is taken.

No testimony was introduced by the contestant to substantiate his charge that the entry was speculative. The only issue in the case is whether or not the entrywoman became "a resident citizen" of the State of Arizona at the time she made the desert-land entry involved. Section 8 of the act of March 3, 1891 (26 Stat., 1095), provides that "no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land to be entered is located."

The facts as to this issue are undisputed. It appears that entrywoman is the wife of Alfred D. Woodbury; that her husband has been the store manager for a clothing house in Kansas City, Missouri, for the past fourteen years. In February, 1918, he went to Arizona for the purpose of inspecting the country and making it his future home if he became satisfied with the prospects. Conditions there appearing favorable, he paid \$5,000 for relinquishments to the W. $\frac{1}{2}$ and the SE. $\frac{1}{4}$, Sec. 29, T. 7 S., R. 7 E., paying \$2,000 for the NW. $\frac{1}{4}$, Sec. 29, the land in controversy. After spending about two weeks in Arizona he returned to Kansas City. In September, 1918, accompanied by his wife, he returned to Arizona, at which time Mrs. Woodbury made her entry, giving her post office address in her application as Toltec, Arizona. After remaining about a week in Arizona they returned to Kansas City, where they have since resided. Upon his return Woodbury tendered his resignation to the clothing company, same to become effective the following February.

The record further discloses that soon after making his entry Woodbury installed an engine and pump on his land, sunk a well to a depth of 248 feet and had the same cased; that the well has a capacity of 1,500 gallons per minute; that during the year 1918;

about 40 acres were cleared, leveled and ditched and the same planted to crop. He received a patent to his land in the spring of 1919 and after obtaining same he purchased a house, remodeled same and moved it upon the land, built a barn and stocked the entry with a small herd, placing 40 additional acres under cultivation, and during that year planted the 80 acres in cotton, alfalfa and grain. During 1920 he again planted said 80 acres, together with a portion of another 40-acre tract which he had cleared. He values all of his improvements at \$10,000, which seems a reasonable estimate on account of their extensive character. Soon after making his entry, Woodbury also purchased a lot in the town of Toltec, Arizona, near the land, intending to build a house thereon in which to reside until such time as he could get his desert entry on a working and paying basis. After Mrs. Woodbury made her entry he also caused 20 acres thereof to be cleared, leveled, ditched and placed in crop. As further evidence that Woodbury intended to make Arizona his permanent home, he employed a landscape architect from the agricultural college of that State to plan a scheme for laying out and beautifying the place.

During 1918 Woodbury registered for the draft in Toltec, Arizona. He owns no real estate in Kansas City. He refused to take a lease on any house or apartment there. Prior to 1918 he voted and took an active part in political matters in Kansas City, but since making his entry he has refused to do so on account of his Arizona citizenship. He refused to renew his contract of employment with the clothing company but at the date of the hearing he had not severed his connection with said company for the reason that his employers had been unable to find a suitable man to take his place and they were unwilling to allow him to resign until they could do so. His statement that he claimed Arizona as his home and intended to remove there permanently as soon as he could arrange his affairs to that end is corroborated by his neighbors who had often discussed the matter with the Woodburys.

It is argued by contestant that by reason of Woodbury's return to Kansas City after his trips to Arizona and the continued residence of himself and wife in said city since that time, it is evident that they did not become resident citizens of Arizona.

Under the facts disclosed the Department can not accept this view of the case. It is a well settled principle of law that no specified time is required in fixing a domicile and the shortest period of residence, if only for a day, will be sufficient when coupled with the evidence of intent (See 14 Cyc. 837). The acts on the part of Woodbury indicate a *bona fide* intent to make Arizona his future home. He initiated his residence by going to that State and begin-

ning same, with the intention, which is evidenced by his further acts in connection with his entry, of continuing same as soon as he could arrange his affairs in Kansas City. The requirement in said act of March 3, 1891, that no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land to be entered is located is not a continuing requirement, coextensive with the life of the entry, but only one which must appear at the time the entry is made.

In view of the facts disclosed it is the opinion of the Department that the intent of Woodbury and his wife to make Arizona their future home, coupled with their acts in support of such intent, was sufficient to constitute him a resident citizen of said State in October, 1918, the time when the entry under attack was made, within the meaning and contemplation of said act, *supra*, and in view thereof, for the reasons above stated, it becomes immaterial that he was temporarily residing in Kansas City at the time of the hearing. Under the general rule of law that the domicile of the husband is that of the wife, the Department is of the opinion that entrywoman was qualified to make the entry involved.

The decision appealed from is affirmed.

SOLDIERS' AND SAILORS' HOMESTEAD RIGHTS.**INSTRUCTIONS.**

[Circular No. 302.]

Reprint of regulations of February 28, 1914 (43 L. D., 138), as revised February 18, 1922, including regulations contained in Circular No. 821, approved April 29, 1922 (43 L. D., 650).

DEPARTMENT OF THE INTERIOR,**GENERAL LAND OFFICE,***Washington, D. C., May 26, 1922.*

1. Any officer, soldier, seaman, or marine who served for not less than 90 days in the Army or Navy of the United States during the Civil War and who was honorably discharged and has remained loyal to the Government, and who makes a homestead entry, is entitled under section 2305 of the Revised Statutes and the act of June 6, 1912 (37 Stat. 123), to have the term of his service in the Army or Navy, not exceeding two years, deducted from the three years' residence required under the homestead laws.

Similar provisions are made in the acts of June 16, 1898 (30 Stat. 473), and March 1, 1901 (31 Stat. 847), for the benefit of like persons who served in the War with Spain, or during the suppression of the insurrection in the Philippines. The act of February 25, 1919 (40 Stat. 1161), as amended by act of April 6, 1922 (Public 187), makes similar provisions for the benefit of like persons who rendered military or naval service in connection with the Mexican border operations or during the late war with Germany.

2. A soldier or sailor of the classes above mentioned who makes entry as such must begin his residence and cultivation of the land entered by him within six months from the date of filing his declaratory statement, but if he makes entry without filing a declaratory statement he must begin his residence within six months after the date of the entry. Thereafter he must continue both residence and cultivation for such period as will, when added to the time of his military or naval service (under enlistment or enlistments covering war periods), amount to three years; but if he was discharged on account of wounds or disabilities incurred in the line of duty, or honorably discharged but subsequently 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), 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 by him for at least one year.

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.

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

4. A party claiming the benefit of his military service must file with the register and receiver a certified copy of his certificate of discharge, showing when he enlisted, when he was discharged, and the organization in which he served, or the affidavit of two respectable, disinterested witnesses, corroborative of the allegations contained in his affidavit on these points, or if neither can be procured his own affidavit to that effect.

PERIODS OF SERVICE FOR WHICH CREDIT MAY BE GIVEN IN LIEU OF RESIDENCE.

5. In determining the rights of parties under sections 2304-2309 of the Revised Statutes the Civil War is held to have lasted from April 15, 1861, to August 20, 1866; the Spanish War and Philippine Insurrection from April 21, 1898, to July 15, 1903. The operations in Mexico or along the borders thereof began May 9, 1916, and continued until the beginning of the war with Germany, April 6, 1917; which was officially terminated March 3, 1921, by public resolution No. 64 of that date.

No credit for military service can be given unless a soldier or sailor served for at least 90 days between the dates above mentioned.

In computing the period of service of a soldier "who has served in the Army of the United States," within the meaning of that phrase as used in section 2304 of the Revised Statutes, the entrance of the soldier into the Army will be considered as dating from the time of voluntary entrance of privates into the Army, Navy, or Marine Corps, or appointment of officers (including those appointed from the Officers' Training Corps); in the case of a person enlisted in the Naval Reserve, from the time he was called into active service; in the case of a drafted man, from the time he was mustered into the service; in the case of members of the Federalized National Guard, from the time they were mustered into the United States service.

An entryman having enlisted and served 90 days during any one of the wars above mentioned is entitled under section 2305 of the Revised Statutes as amended to credit for the full term of his service under that enlistment, although such term did not expire until after the war ceased.

6. A person who served for less than 90 days in the Army or Navy of the United States during said wars is not entitled to have credit for military service on the required period of residence upon his homestead, although he may have been discharged for disability incurred in line of duty.

7. 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 upon the land 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. Such soldier or sailor is not required to reside personally upon the land, but may receive patent if his family maintain the necessary residence and cultivation until the entry is three years old or until it has been commuted. The soldier's family in this connection is restricted to his wife and minor children.

8. A soldier is entitled to the same credit for military service in connection with homestead entries under the enlarged homestead act of February 19, 1909 (35 Stat. 639), and its amendments, and the stock-raising act of December 29, 1916 (39 Stat. 862), and its amendments, as is allowed in connection with ordinary homestead entries, but the improvements required by the stock-raising act must be placed upon the land as prescribed by the act.

9. The special privileges accorded soldiers or sailors, as above indicated, are not subject to sale or transfer, and can only be exercised by the soldier or sailor himself; but the unmarried widow or minor orphan children of a veteran of the Civil War, the Spanish-American War, or the Philippine Insurrection is entitled to the same privileges under the homestead laws as the deceased soldier or sailor if he died possessed of a homestead right. The adult child of a soldier has no special privileges in connection with the homestead laws on account of his father's military service.

HOMESTEAD RIGHTS OF WIDOWS AND MINOR ORPHAN CHILDREN OF DECEASED SOLDIERS AND SAILORS.

10. (a) If a soldier or sailor makes an entry or files a declaratory statement, and dies before perfecting the same, the right to perfect the claim, including the right to claim credit for the soldier's military service, passes to the persons named in section 2291, Revised Statutes; that is, to his widow, or, if there be no widow, to his heirs or devisees.

(b) In case of the death of a veteran of the Civil War, the Spanish War, or the Philippine Insurrection, who would be entitled to a homestead under the provisions of section 2304 of the Revised Statutes, but who died prior to the initiation of a claim thereunder, his widow, or in case of her death or remarriage, his minor orphan children, by a guardian, duly appointed and officially accredited at the Department of the Interior, may make the filing and entry in the same manner that the soldier or sailor might have done, subject to

all the provisions of the homestead laws in respect to settlement and improvements; and the whole term of service, or in case of death during the term of enlistment, the entire period of enlistment in the military or naval service will be deducted from the time otherwise required to perfect the title to the same extent as might have been allowed the soldier. (Sec. 2307, Rev. Stat.)

Where a homestead entry is made under section 2307, Revised Statutes, by the widow or minor orphan children of a deceased soldier or sailor of the Civil War, the Spanish War, or the Philippine Insurrection, compliance with law both as to residence and improvement is required to be shown to the same extent as would have been required of the soldier or sailor in making entry under section 2304, Revised Statutes, except that credit will be given upon the three-year period for the entire term of the enlistment, not exceeding two years, where the soldier or sailor died during the term of his enlistment, provided he served at least ninety days.

(c) In case of widows the prescribed evidence of military service of the husband must be furnished, with affidavit of widowhood, giving the date of her husband's death.

In case of minor orphan children, in addition to the prescribed evidence of military service of the father, proof of death or remarriage of the mother must be furnished. Evidence of death may be the testimony of two witnesses or a physician's certificate, duly attested. Evidence of marriage may be certified copy of marriage certificate, or of record of same, or testimony of two witnesses to the marriage ceremony.

Minor orphan children must make a joint entry through their duly appointed guardian, who must file certified copies of the powers of guardianship, which must be transmitted to the General Land Office by the registers and receivers.

11. All homestead applicants who are not native-born citizens of the United States must have declared their intention to become citizens of this country, and before submitting proof must be fully naturalized. An honorable discharge from the United States Army, or an honorable discharge from the United States Navy or Marine Corps, after five years' consecutive service in the Navy, or one enlistment in the United States Marine Corps, is equivalent to a declaration of intention on the part of such soldier, sailor, or marine, and he may, therefore, make a homestead entry without formally declaring his intention to become a citizen, but must, of course, perfect final naturalization before submitting proof.

SOLDIERS' DECLARATORY STATEMENTS.

12. (a) Soldiers' and sailors' declaratory statements may be filed in the land office for the district in which the lands desired are located by any person entitled to the benefit of sections 2304 and 2307, Revised Statutes, as explained above. Veterans of the Civil War, the Spanish War, or the Philippine Insurrection may file declaratory statements of this character, either in person or through an agent acting under power of attorney, but the entry must be made in person and not through an agent within six months from the filing of the declaratory statement, and residence must also be established within

that time. Veterans of the World War may file such declaratory statements in person, but not through agent.

The party entitled to file a declaratory statement may make entry in person without filing a declaratory statement if he so desires.

The soldier's declaratory statement, if filed in person, must be accompanied by the prescribed evidence of military service and the oath of the person filing the same, stating his residence and post-office address, and setting forth that the claim is made for his exclusive use and benefit for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person; that he has not heretofore made a homestead entry or filed a declaratory statement under the homestead law (or if he has done so, he must show his qualifications to make a second or additional homestead entry); that he is not the proprietor of more than 160 acres of land in any State or Territory; and that since August 30, 1890, he has not entered or acquired title under the agricultural land laws of the United States, nor is he now claiming under said laws a quantity of land which with the tracts applied for would make more than 320 acres, or, in the case of a claim under the enlarged homestead laws, 480 acres, or in case of a claim under the stock-raising laws, 800 acres.

(b) In case of filing a soldier's declaratory statement by agent, the oath must further declare the name and authority of the agent and the date of the power of attorney or other instrument creating the agency, adding that the name of the agent was inserted therein before its execution. It should also state in terms that the agent has no right or interest, direct or indirect, in the filing of such a declaratory statement.

The agent must file (in addition to his power of attorney) his own oath to the effect that he has no interest, either present or prospective, direct or indirect, in the claim; that the same is filed for the sole benefit of the soldier, and that no arrangement has been made whereby said agent has been empowered at any future time to sell or relinquish such claim, either as agent or by filing an original relinquishment of the claimant.

(c) Where a soldier's declaratory statement is filed in person, the affidavit of the soldier or sailor must be sworn to before either the register or the receiver, or before a United States commissioner, or a judge, or clerk of a court of record in the county or land district in which the land sought is situated. Where a declaratory statement is filed by an agent, the agent's affidavit must be executed before one of the officers above mentioned, but the soldier's affidavit may be executed before any officer having a seal and authorized to administer oaths generally, and not necessarily within the land district in which the land is situated.

The fee to be paid to the register and receiver of the land office where the declaratory statement is filed is \$2, except in the Pacific States, where it is \$3.

(d) A homestead entry under a declaratory statement can not be made through an agent, and the entry must be made and settlement on the land commenced within six months after the filing of the declaratory statement. Residence, cultivation, and improve-

ments must be shown to the same extent as though no declaratory statement had been filed.

13. The filing of a declaratory statement will not be held to bar the admission of filings and entries by others, but any person making entry or claim during the period allowed by law for the entry of the soldier will do so subject to his right; and the soldier's application, when offered within such time, will be allowed as a matter of right, and the intervening claimant will be notified and afforded an opportunity to be heard.

14. As implied by the requirements of the oath, a soldier will be held to have exhausted his homestead right by the filing of his declaratory statement, it being manifest that the right to file is a privilege granted to soldiers in addition to the ordinary privilege only in the matter of giving them power to hold their claims for six months after selection before entry, but is not a license to abandon such selection with the right thereafter to make a regular homestead entry independently of such filing. This is clear from the statutory language. Section 2304 provides: "A settler shall be allowed six months after locating his homestead and filing his declaratory statement in which to make entry and commence his settlement and improvement"; and section 2309 requires him "in person" to "make his actual entry, commence settlement, and improvement on the same, and thereafter fulfill all the requirements of the law." These must be done on the same lands selected and located by the filing.

15. Soldiers and sailors are cautioned against dealing with the so-called soldiers' claim agencies, or persons or companies who represent themselves as authorized by the Government to make entries or filings for soldiers. The Government does not employ nor authorize particular individuals to locate soldiers or sailors, or to file declaratory statements for them, except under the conditions above set forth.

RIGHTS OF WORLD WAR VETERANS.

16. House joint resolution No. 30, approved January 21, 1922, amended joint resolution No. 29 approved February 14, 1920 (41 Stat. 434) by extending the provisions of the last-mentioned resolution for a period of 10 years from and after February 14, 1920, and increased the preference right conferred thereby from not less than 60 to not less than 90 days from the beginning of the preference right period. Said resolution as amended is applicable to all openings of public or Indian lands to entry or the restoration to entry of public lands withdrawn from entry, and confers upon officers, soldiers, sailors, and marines in the Army or Navy of the United States during the late war, who were honorably separated or discharged from such service or placed in the regular Army or Naval service, a preference right of not less than 90 days from the date of opening or restoration in which to make entry for the land under the homestead or desert-land laws, except as against prior existing valid settlement rights and preference rights conferred by existing laws or equitable claims subject to allowance and confirmation.

17. The act of July 28, 1917 (40 Stat. 248), protects persons who after making entry or initiating claims under the homestead laws by settlement, application, or entry and thereafter enlisted or were

mustered into the military or naval service during the World War or prior to March 3, 1921, from a forfeiture of their claims by reason of the failure of the claimant to do any act otherwise required by law during the period of his service and credits the time in the service as equivalent to residence on and cultivation of the homestead with a maximum credit of two years in case of discharge for disability incurred in line of duty, regardless of actual period of residence, and grants complete exemption from further compliance with law by the widow, minor orphan children, or legal representatives where the claimant died in the service, and forbids contest against any homestead entry unless it be alleged and proved that the absence from the land was not due to employment in the military or naval service of the United States.

18. Under the act of February 25, 1919 (40 Stat. 1161), as amended by section 1 of the act of April 6, 1922 (Public 187), one who was in the military or naval service of the United States during the Mexican border operations (regarded as having begun May 9, 1916, and continued until the declaration of war with Germany); or the late war, and who was honorably discharged after having served at least 90 days during such period, is entitled to a deduction from the homestead residence requirements (three years) equal to the period of service but not to exceed two years—that is, there must be shown residence on the homestead for at least one year even though the military or naval service exceeded two years. If the soldier or sailor after having served for at least 90 days was discharged because of disability incurred in line of duty or regularly discharged from the service but subsequently awarded compensation by the Government for wounds received or disabilities incurred in line of duty, he may claim credit for the full period of his enlistment, subject to the requirement that residence on the homestead for at least one year must be shown. In either case the credit is in lieu of the cultivation specified by law as well as residence and if the period of service is such that residence for but one year need be shown, no cultivation is required to be shown for that year. A year's residence under the homestead laws consists of actual residence for at least seven months and allowable absence of five months in not more than two periods, notice of leaving the homestead and returning thereto to be given to the proper district land officers. The final proof must show that there is a habitable house on the land.

19. The act of September 29, 1919 (41 Stat. 288), as amended by section 2 of the act of April 6, 1922 (Public 187), grants to ex-service men of the late war who made or may hereafter make entry under the homestead laws or who initiate valid homestead claim by settlement or application, and thereafter enter upon a course of training under the vocational rehabilitation act or are furnished hospital treatment by the Government for wounds received or disabilities incurred in line of duty, a leave of absence from the homestead for the purpose of taking such course, or to receive hospital treatment by the Government, and allows the time while so engaged to be credited as constructive residence upon and cultivation of the homestead, subject to the condition that before title by patent may be granted the claimant shall have resided upon, improved, and cultivated the homestead for a period of at least one year. A person who is entitled to

the benefits of this act should forward to the local district land office notice of his absence from the land and of the fact that he has been admitted to take a course of vocational training under the act of June 27, 1918 (40 Stat. 617), or that he is receiving hospital treatment by the Government, together with a certificate to that fact by the proper official. He should also file notice of his return to the land so that the local officers may make due notation on their records.

20. The act of March 1, 1921 (41 Stat. 1902), authorizes homesteaders, applicants, or entrymen who initiated their claims and thereafter 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.

Notice of intention to submit proof under this act must be given in the usual manner by posting and publication, and the proof should consist of the affidavit of the homesteader, executed before an official authorized to administer oaths and use an official seal, showing that he is unable to return to the land on account of physical incapacities, due to service in the United States Army, Navy, or Marine Corps during the War with Germany, and should describe the nature and extent of the disability, which facts should be corroborated by the testimony of two witnesses taken in similar manner, one of whom must be a practicing physician. Such affidavit should be accompanied by a copy of the claimant's discharge from the Army, Navy, or Marine Corps, or an affidavit showing all the facts about his service and discharge.

Very respectfully,

WILLIAM SPRY,
Commissioner.

Approved: May 26, 1922.

E. C. FINNEY,
First Assistant Secretary.

REVISED STATUTES.

SEC. 2293. In case of any person desirous of availing himself of the benefits of this chapter, but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land office which the preceding sections require; and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a bona fide improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law.

SEC. 2304.¹ Every private soldier and officer who has served in the Army of the United States during the recent rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, including the troops mustered into the service of the United State by virtue of the third section of an act approved February thirteenth, eighteen hundred and sixty-two, and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, and every private soldier and officer who has served in the Army of the United States during the Spanish war, or who has served, is serving, or shall have served in the said Army during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged; and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the Spanish war, or who has served, is serving, or shall have served in the said forces during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement

¹ The provisions of sections 2304 and 2305 of the Revised Statutes were extended to veterans of the World War by act of Feb. 25, 1919 (40 Stat. 1161).

within which to make his entry and commence his settlement and improvement. (As amended by act Mar. 1, 1901.)

SEC. 2305.² The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served; but 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 after he shall have commenced his improvements: *Provided*, That in every case in which a settler on the public land of the United States under the homestead laws died while actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the War with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, to make final proof upon and receive Government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage, his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such land shall issue. (As amended by act March 1, 1901.)

* * * * *

SEC. 2307. In case of the death of any person who would be entitled to a homestead under the provisions of section two thousand three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

* * * * *

SEC. 2309. Every soldier, sailor, marine, officer, or other person coming within the provisions of section two thousand three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in preemption cases;

²The provisions of sections 2304 and 2305 of the Revised Statutes were extended to veterans of the World War by act of Feb. 25, 1919 (40 Stat. 1161).

but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill the requirements of the law.

PREFERENCE RIGHTS AND PRIVILEGES BASED ON MILITARY SERVICE.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a joint resolution entitled "Joint resolution giving to discharged soldiers, sailors, and marines a preferred right of homestead entry," approved February 14, 1920, be, and the same is hereby, amended to read as follows:

That hereafter, for the period of ten years following the passage of this Act, on the opening of public or Indian lands to entry, or the restoration to entry of public lands theretofore withdrawn from entry, such opening or restoration shall, in the order therefor, provide for a period of not less than ninety days before the general opening of such lands to disposal in which officers, soldiers, sailors or marines who have served in the Army or Navy of the United States in the war with Germany and been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have a preferred right of entry under the homestead or desert-land laws, if qualified thereunder, 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: *Provided*, That the rights and benefits conferred by this act shall not extend to any person who, having been drafted for service under the provisions of the Selective Service Act, shall have refused to render such service or to wear the uniform of such service of the United States.

SEC. 2. 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.

Approved, January 21, 1922 (Public, No. 36).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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; and 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; that if he shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence, without reference to the time

of actual service: *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.

SEC. 2. 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 dies while 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, then 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 such entry or application thereafter allowed, and shall be entitled to receive Government patent for such land; and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation upon such homestead.

Approved, July 28, 1917 (40 Stat. 248).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subject to the conditions therein expressed, as to length of service and honorable discharge, the provisions of sections twenty-three hundred and four and twenty-three hundred and five, Revised Statutes of the United States, shall be applicable in all cases of military and naval service rendered in connection with the Mexican border operations or during the war with Germany and its allies as defined by public resolution numbered thirty-two, approved August twenty-ninth, nineteen hundred and sixteen (Thirty-ninth Statutes at Large, page six hundred and seventy-one), and the act approved July twenty-eight, nineteen hundred and seventeen (Fortieth Statutes at Large, page two hundred and forty-eight):

Approved, February 25, 1919 (40 Stat. 1161).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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 3 of the Act of October 6, 1917 (40 Stat. 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.

Approved, September 29, 1919 (41 Stat. 288).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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.

Approved, March 1, 1921 (41 Stat. 1202).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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.

Approved, April 6, 1922 (Public No. 187).

CHEYENNE RIVER AND STANDING ROCK INDIAN LANDS—EXTENSIONS OF TIME FOR PAYMENTS.

INSTRUCTIONS.

[Circular No. 829.]

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

Washington, D. C., May 26, 1922.

REGISTERS AND RECEIVERS,

BISMARCK, NORTH DAKOTA,

TIMBER LAKE AND LEMMON, SOUTH DAKOTA:

The act of April 25, 1922 (Public 198), provides:

"That any homestead entryman or purchaser of Government lands within the former Cheyenne River and Standing Rock Indian Reservations in North Dakota and South Dakota who is unable to make payment of purchase money due under his entry or contract of purchase as required by existing law or regulations, on application duly verified showing that he is unable to make payment as required, shall be granted an extension to the 1923 anniversary of the date of his entry or contract of purchase upon payment of interest in advance at the rate of 5 per centum per annum on the amounts due from the maturity thereof to the said anniversary; and if at the expiration of the extended period the entryman or purchaser is still unable to make the payment he may, upon the same terms and conditions, in the discretion of the Secretary of the Interior, be granted such further extensions of time, not exceeding a period of three years, as the facts warrant."

1. *Entries and sales affected.*—The act applies to homestead entries made either in the Cheyenne River and Standing Rock Indian Reservations, opened under the act of May 29, 1908 (35 Stat., 460), or in that part of the Standing Rock Indian Reservation opened under the act of February 14, 1913 (37 Stat., 675), and also to sales made under authority of the said act of May 29, 1908, and Departmental regulations of February 27, 1920 (47 L. D., 340).

2. *Manner of obtaining extensions of time for payment.*—In order to obtain an extension under the said act of April 25, 1922, the entryman must file in your office a duly corroborated affidavit setting out that he is unable to make the required payments. No particular form of application will be required, but as a condition precedent to the granting of an extension, interest must be paid on the amount for which the extension is sought, at the rate of five per cent per annum. Upon compliance with the requirements you will allow the application and report the allowance to this office for notation on the records.

3. *Previous requirements in the matter of payments in connection with homestead entries made under the act of May 29, 1908.*—The said act, as amended by the act of March 26, 1910 (36 Stat., 265, 266), provides that one-fifth of the purchase price of the land shall be paid when entered and the balance in five equal annual installments, com-

mencing two years from the date of entry. The act of April 13, 1912 (37 Stat., 84), as amended by the act of May 28, 1914 (38 Stat., 383, 384), provides for an extension of time for the payment of any installment upon the payment of interest in advance at the rate of five per cent per annum, and that any payment so extended may annually thereafter be extended in like manner, provided that all payments are completed within a period not exceeding one year after the last payment becomes due under the act under which made. The utmost time allowed for completion of payments made under said act of May 29, 1908, was seven years from the date of entry.

4. *Previous requirements in connection with homestead entries made under the act of February 14, 1913.*—The said act provides that one-fifth of the purchase price shall be paid at the time of entry and the balance in five equal annual installments, commencing two years from the date of entry. Section 1 of the act of March 4, 1921 (41 Stat., 1446), authorizes an extension of time for the payment of any installment, upon the payment of interest in advance at the rate of five per cent per annum, and that any payment so extended may annually thereafter be extended in like manner, but that all payments must be completed within a period not exceeding one year from the date the last payment becomes due, under the act under which it was made. The utmost time allowed for the completion of payments on homestead entries made under said act of February 14, 1913, was seven years from the date of entry.

5. *Previous requirements in 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 regulations provided that purchasers might 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 five per cent per annum. Section 2 of the act of March 4, 1921 (41 Stat., 1446), provides for an extension of time for the payment of any installment upon the payment of interest in advance at the rate of five per cent per annum, and that any payment so extended may annually thereafter be extended in like manner, provided that all payments are completed within one year after the last payment becomes due under the regulations. The utmost time allowed for completion of payments on these sales was three years from the date of purchase (48 L. D., 80).

6. *Modifications necessitated by the act of April 25, 1922.*—The said act of April 25, 1922, modifies the above requirements in the following respects:

(a). On those entries on which the seven year period for payment allowed under the acts cited above expires prior to the 1923 anniver-

saries thereof, an extension of time may be obtained to said anniversary upon the filing of an application duly verified, accompanied by payment of interest in advance on the amounts due from the maturity thereof to the 1923 anniversaries of the dates of the entries, at the rate of five per cent per annum. If, at the expiration of the extended period the entryman is still unable to make the required payment, further extensions may be obtained from year to year in the same manner, but no extension will be granted beyond a period of three years from the 1923 anniversary of the date of the entry.

(b). Under the regulations of February 27, 1920, *supra*, and section 2 of the act of March 4, 1921 (41 Stat., 1446), final payment on sales made under the said regulations must be completed by the 1923 anniversaries of the dates of the purchases. Under the present act of April 25, 1922, if on said anniversary the purchaser is still unable to complete the payments, he may obtain an extension of time in the same manner provided for homestead entrymen, no extension to be allowed beyond a period of three years from the date on which final payment becomes due under the said regulations and the act of March 4, 1921.

You are directed to serve notice on each entryman who is in default in the matter of payments, either of principal or interest, that if the required sums are not paid or an extension of time obtained as herein provided, or as provided in Circulars Nos. 106 and 751 (41 L. D., 12; 48 L. D., 80), prior to October 1, 1922, you will report his entry to this office for cancellation.

In granting extensions of time for payments you will be governed by instructions contained in Circulars Nos. 106 and 751, where the time for final payments under the acts under which the entries were made and the extension acts of April 13, 1912, and March 4, 1921, have not expired.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

RESTORATION TO ENTRY OF LANDS IN THE SOUTH HALF OF THE COLVILLE INDIAN RESERVATION, WASHINGTON.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 26, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES,

SPOKANE AND WATERTVILLE, WASHINGTON:

Lands within the south half of the former Colville Indian Reservation were opened to entry on September 5, 1916, by the President's proclamation of May 3, 1916 (39 Stat., 1778), under authority of the act of March 22, 1906 (34 Stat., 80). That act 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 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."

Under this proviso all said land remaining undisposed of on September 4, 1921, was automatically withdrawn from homestead entry on that date for the purpose of sale. The act of Congress approved May 9, 1922 (Public No. 215), directs—

"That the period provided by law for the filing of homestead entries upon lands of the south half of the Diminished Colville Indian Reservation in the State of Washington, as provided by the act of Congress approved March 22, 1906, be, and is hereby extended for a period of five years from and after the 4th day of September, 1921."

Under the authority of said act, all the lands within the south half of the former Colville Indian Reservation, which was withdrawn from entry on September 4, 1921, became subject to homestead entry in the following manner:

1. *Preference to ex-service men.*—Prior to August 8, 1922, the lands may be applied for only under the homestead laws and only by ex-service men of the war with Germany, who have been honorably discharged or separated from the service or placed in the Regular Army or Naval Reserves, all such applications to be treated as simultaneously filed.

2. *General disposition.*—The lands, if any, not disposed of during said preference right period, will become subject to appropriation under applicable laws including settlement under the homestead laws in advance of entry by any qualified persons on August 28,

1922, and not before then, provided that from August 8, 1922, to August 27, 1922, both dates inclusive, any qualified persons may present applications for the lands under the homestead laws only, such applications to be treated as simultaneously filed and disposed of before action is taken on other non-preference right applications.

In the event conflicts appear between the applications treated as simultaneously filed as herein provided, drawings will be held to determine the order in which the conflicting applications will be taken up for consideration.

You will make the proper notations of these regulations on your records, post a copy thereof in your office and give as much publicity to the opening as possible, as a matter of news without expense to the Government, by forwarding a copy of these regulations to the post-office nearest the land for posting therein for the information of the public, and by transmitting copies of such order or an item concerning the restoration, to the newspapers published nearest the land, being careful not to send such copies or items without calling the particular attention of the publishers to the fact that the matter is sent as news, and that the Government will not be responsible for the cost of any publication thereof.

Promptly report your compliance with the instructions herein given.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**RECLAMATION HOMESTEAD ENTRIES—DESERT LAND ENTRIES
SUBJECT TO THE PROVISIONS OF THE RECLAMATION ACT—
PROOFS BY INCAPACITATED SOLDIERS—ACT OF APRIL 7, 1922.**

INSTRUCTIONS.

[Circular No. 830.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 29, 1922.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Your attention is called to the amendatory act of April 7, 1922 (Public No. 188), which provides:

That the Act approved March 1, 1921 (Forty First Statutes, page 1202), be amended to read as follows: "That any bona fide settler, applicant, or entry-

man under the homestead laws of the United States, or any desert land entryman whose entry is subject to the provisions of the Act of June 17, 1902 (Thirty-second Statutes, page 388), 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 the service is unable to return to the land, may make final proof, without further residence, improvement, cultivation, or reclamation, 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, subject to the provisions of the Act or Acts under which such settlement or entry was made: *Provided*, That no such patent shall issue prior to the conformation of the entry to a single farm unit, as required by the Act of August 13, 1914 (Thirty-eighth Statutes, page 686): *And provided further*, That this Act shall not be construed to exempt or relieve such applicant or entryman from payment of any lawful fees, commissions, purchase moneys, water charges, or other sums due to the United States, or its successors in control of the reclamation project, in connection with such lands."

2. This amendatory act relates to lands in Federal reclamation projects lawfully subject to homestead entry or for which homestead or desert land entry has been allowed, and 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 homestead entry thereof, or after making a homestead or desert land entry for surveyed lands, and who, having been honorably discharged, are unable to accomplish reclamation of the land on account of physical disabilities due to such service, provided, however, that in the case of a homestead entry, the entry be conformed to a single farm unit.

3. Notice of intention to submit proof must be given in the usual manner by posting and publication. The proof shall consist (a) of affidavit of 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; (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 claimant's discharge from the Army, Navy, or Marine Corps, or an affidavit showing all the facts regarding his service and discharge, in which latter case the facts will be verified so far as possible from the records of the War Department; and (d) claimant's sworn statement, corroborated by two persons having personal knowledge of the facts, and whose testimony must be taken in the county or land district in which the land

is situated, setting forth in detail the date when he settled on the land (if a homestead entry) and what acts he performed thereon touching the matter of residence, improvement and reclamation up to the time of his entering the military establishment.

4. Where no application for homestead 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 the testimony of two witnesses showing the facts as to claimant's compliance with the law before entrance into the service, the testimony of these witnesses to be taken in the usual manner in the county or land district in which the land is situated.

5. Where entry for the land has been allowed and the final proof appears satisfactory, and also shows payment of all reclamation moneys which are due to the time of submission of such final proof, you will, in the absence of other objection, issue final certificate, subject to the provisions of the act of June 17, 1902 (32 Stat., 388), and also subject to lien under the act of August 9, 1912 (37 Stat., 265), for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water right. In cases of claims based upon settlement only and where no application has been filed prior to claimant's entering the military service, or where application has been filed but entry not yet allowed, or protest is filed, you will forward all the papers to the General Land Office for consideration.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

AXEL NORDSTROM.

Decided May 31, 1922.

STOCK-RAISING HOMESTEAD—ADDITIONAL ENTRY.

An application for an additional entry under the stock-raising homestead act, which can not be allowed because the lands applied for are more than twenty miles distant from the original entry, confers no right upon the applicant to have it treated as an application for an original entry, if his only remaining unexhausted homestead right was that of making an additional entry under that act.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

Case of Charles Makela (46 L. D., 509), cited and distinguished.

FINNEY, *First Assistant Secretary*:

On October 11, 1916, a patent was issued to Axel Nordstrom for 320 acres, under the homestead laws, on final proof which showed the successful cultivation of various areas, ranging from 20 acres in 1910 to 107 acres in 1916.

On November 19, 1920, Nordstrom presented his application, Hayre 045880, to enter certain described tracts in Sec. 12, T. 37 N., R. 5 E., and Sec. 7, T. 37 N., R. 6 E., M. M., Montana, as additional to the land embraced in his patent, which was rejected by the General Land Office in its decision of January 24, 1922, for the reason that the land last applied for was located more than 20 miles from the patented lands.

In his appeal from that action Nordstrom admits that the land applied for is not within 20 miles of the patented lands and states that there are no other available lands near the patented lands that he could enter under the stock-raising homestead act.

Nordstrom has expressed his willingness to have this application considered as an application to make an original stock-raising homestead entry, and the Commissioner in his decision stated that inasmuch as Nordstrom had exhausted all of his homestead rights except his right to make an additional entry under the stock-raising homestead law, he could not invoke the ruling in the case of Charles Makela (46 L. D., 509), and being unable to make an additional entry of this land under the stock-raising law, his application therefore gave him no rights and must be rejected.

The decision appealed from being correct, is hereby affirmed.

ACCOUNTS—SUBVOUCHERS—PARAGRAPH 267 (A), CIRCULAR NO. 616, AMENDED.

[Circular No. 832.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 8, 1922.

SURVEYORS GENERAL,
SUPERVISORS AND ASSISTANT
SUPERVISORS OF SURVEYS,
CHIEFS OF FIELD DIVISIONS,
SPECIAL DISBURSING OFFICERS:

Paragraph 267 (a) of Circular No. 616 (46 L. D., 513, 575-576), is hereby amended to read as follows:

267. *Subvouchers—When not required.*—(a) Subvouchers are not required for railroad or steamboat fares, fares on regular stage lines, sleeping or parlor car

fares, taxicab fares (see pars. 233 and 234), nor for separate meals specifically named which were not taken in connection with lodging.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

E. M. HARRISON.

Decided June 9, 1922.

INDIAN LANDS—RESERVATION—WITHDRAWAL—RESTORATION.

The title or ownership of the United States in lands within a reservation for Indian purposes, created by Executive order, not controlled by any treaty or act of Congress, is in nowise affected by the withdrawal, and such lands may be restored to the public domain by the President at any time within his discretion.

INDIAN LANDS—RESERVATION—MINERAL LANDS—OIL AND GAS LANDS—LEASE—STATUTES.

The general leasing act of February 25, 1920, did not, expressly or by implication, repeal or modify those provisions of the act of February 28, 1891, which relate to the leasing by allottees of lands within Indian reservations.

INDIAN LANDS—RESERVATION—MINERAL LANDS—OIL AND GAS LANDS—WITHDRAWAL—LEASE—STATUTES.

The provisions of the act of February 28, 1891, relating to the leasing by allottees of lands within Indian reservations, were applicable only to such reservations as those created by treaty or Congressional action, and prior to the enactment of the act of February 25, 1920, no authority existed for the leasing of lands withdrawn from the public domain by Executive order for the use of the Indians.

INDIAN LANDS—RESERVATION—OIL AND GAS LANDS—WORDS AND PHRASES—STATUTES.

Nothing contained in the terms of the act of February 25, 1920, authorize that a construction shall be given to the term "Indian reservations," as used in paragraph 2 of the departmental regulations of March 11, 1920, so as to include therein lands merely withdrawn by Executive order for Indian purposes.

INDIAN LANDS—WITHDRAWAL—OIL AND GAS LANDS—PROSPECTING PERMIT—WORDS AND PHRASES—STATUTES.

Lands withdrawn from the public domain by Executive order for the use of the Indians, are lands "owned by the United States," within the purview of that term as used in the act of February 25, 1920, and may be included within an oil and gas prospecting permit under section 13 thereof.

OIL AND GAS LANDS—INDIAN LANDS—LEASE—PAYMENT—RESERVATION.

Proceeds from the rents and royalties derived through leases made pursuant to the act of February 25, 1920, of lands within Indian reservations created by Executive order, should be deposited in the United States Treasury and held in a special fund to await such disposition as Congress may see fit to direct.

OIL AND GAS LANDS—PROSPECTING PERMIT—SURVEY.

The provisions of section 14 of the leasing act, which must be construed with reference to the granting of oil and gas prospecting permits under section 13 of that act, contemplate that the location of lands embraced within a permit shall be in general conformity with the system of public land surveys.

FALL, Secretary:

E. M. Harrison has appealed from the decision of the Commissioner of the General Land Office, of January 14, 1922, in which, his application (030647) for a prospecting permit, under section 13 of the act of February 25, 1920 (41 Stat., 437), for a tract of land described by metes and bounds in unsurveyed T. 43 S., R. 22 E., S. L. M., Salt Lake City land district, Utah, was rejected. The application was rejected for the reason that the tract of land included in the application is embraced within lands set apart as a reservation for Indian purposes, by Executive order of May 17, 1884.

The decision of the Commissioner was doubtless based on the provisions of paragraph 2 of the departmental regulations of March 11, 1920 (47 L. D., 437), which as far as applicable reads:

“Such permits may not include land or deposits in (a) national parks; (b) forests created under the act of March 1, 1911 (36 Stat., 961), known as the Appalachian Forest Reserve Act; (c) lands in military or naval reservations; or (d) Indian reservations.”

The first section of the act of February 25, 1920, provides:

“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. * * *”

It will be observed that the provisions of the law do not expressly include Indian reservations among the classes of land excepted from its provisions. The scope and meaning of the exception contained in the departmental regulations in the use of the words “Indian reservations” and whether such words include lands such as involved here is of primary importance.

Indian reservations may be created and established for use and occupancy of tribes or bands of Indians by either the following methods: (1) by treaty stipulation; (2) by virtue of congressional action; or (3) by Executive order.

There is a material difference and distinct line of demarcation between Indian reservations created by treaty stipulations, or by virtue of congressional action, and those created by Executive order.

The authority of the Congress of the United States over the tribal relations of Indians has never been questioned and at all times recognized by the courts. Up until the year 1871 the policy of the Federal Government in dealing with the Indian tribes was by means of treaty stipulations. In later years the policy has been adopted of governing the Indians by means of acts of Congress. While the moral obligation has always rested upon Congress to act in good faith in performing the agreements and stipulations either entered into by treaty or imposed by legislative action, yet the power to abrogate the stipulations and provisions of either treaty or legislative action has been uniformly recognized by the courts.

It must be conceded that stipulations and provisions made in creating a reservation either by treaty or by legislative action, can be disregarded only by the direct action of the Congress of the United States. No power other than Congress can vacate, annul, or set aside the order of establishment of the reservation so created, and provide for the disposition of the lands included therein.

Under the settled doctrine by repeated decisions of the Supreme Court of the United States, the Indians are not recognized as having any title to the lands included in Indian reservations except the mere right of occupancy which Congress has the right at any time to extinguish.

"The right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. * * * The right of the United States to dispose of the fee of lands occupied by them has always been recognized * * * from the foundation of the Government." *Beecher v. Wetherby* (95 U. S., 517, 525).

See also *Johnson v. McIntosh* (8 Wheat., 543); *United States v. Cook* (19 Wall., 591); *Spalding v. Chandler* (160 U. S., 394); *Lone Wolf v. Hitchcock* (187 U. S., 553).

Lands included within a reservation for Indian purposes created by Executive order may be restored to the public domain for disposition under the provisions of the law at any time within the discretion of the President of the United States.

The power to divest the Indian of his right of occupancy of the lands within Indian reservations in the first instance is vested with Congress while in the latter case it may be exercised by the President. The power to create includes the power to take away and remove the benefits of occupancy of lands included within a reservation.

The treaty of June 1, 1868 (15 Stat., 667), included in a reservation and set apart for the use and occupation of the Navajo Tribe of Indians, a tract of land and in which treaty the United States—

"agrees that no persons except those herein so authorized to do * * * shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

The Executive order setting apart a tract of land for Indian purposes and which is used by the Navajo Indians provided:

"It is hereby ordered that the following described lands in the Territories of Arizona and Utah be and the same are withheld from sale and settlement and set apart as a reservation for Indian purposes."

Reference to these provisions of the treaty stipulation and the language of the Executive order serves to illustrate the material differences between the two characters of reservations for Indian purposes. In the one the Government made a solemn compact to recognize certain specific rights of the Indian in the enjoyment of his occupancy; in the other the Government, speaking by and through the Chief Executive, merely withheld the land from sale and settlement and set apart as a reservation for Indian purposes certain tracts of land.

The land involved is not within the reservation enacted by the treaty of June 1, 1868 (15 Stat., 667), but is embraced within the Executive order of May 17, 1884.

The distinction as to the different characters of Indian reservations is plainly recognized and indicated throughout the legislation of Congress.

Section 3 of the act of February 28, 1891 (26 Stat., 794), provides:

"That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

In construing this provision, the Assistant Attorney General for the Interior Department in an opinion (unpublished) dated January 11, 1892, said:

"The parties who may lease lands are Indians who have 'bought and paid for' the same. Congress was legislating with reference to those Indians who have under treaty or otherwise become possessors or owners of certain specific tracts or bodies of land by purchase or exchange or surrender of other property in contradistinction to those Indians who are occupying reservations created by Executive order or legislative enactment."

Following this opinion it has since been held and is so provided in the departmental regulations of June 28, 1916 (unpublished), that the act of February 28, 1891 (26 Stat., 794), applies to Indian tribal lands but that—

"lands withdrawn from the public domain by Executive order for the use of the Indians are not subject to lease for mining purposes."

Lands withdrawn by Executive order for Indian purposes, with a view to permitting the occupancy by Indians are not subject to

lease under the act of February 28, 1891, by the Indians for mining purposes for the very evident reason that the Indians have no title thereto, and for the further reason that the right of occupancy by virtue of the Executive order may be terminated at any time.

The President, by Executive order, could convey no title to the lands set apart for the use of the Indians. Manifestly, neither the minerals nor the right to prospect or explore for the same is in any just sense necessary to the objects for which the reservation was created. The explorations for minerals beneath the surface neither defeats nor impedes the fulfillment of the purposes which actuated the creation of the reservation by Executive order. The United States can not be held to have reserved for Indian purposes the minerals beneath the surface which it had never used for such Indian purposes. To so hold would in effect be a subordination on the part of the Government of its right to authorize the exploration and development of its natural resources.

No just object of the creation of the reservation will be made to suffer by granting permits to explore the land for minerals beneath the surface. There are no treaty rights of the Indians involved, nor any equities growing out of any previous treaty or agreement in this case.

Thus at the date of the passage of the act of February 25, 1920, generally designated the leasing act, there was in existence special legislation providing for the leasing, for mining purposes, of lands bought and paid for by the Indians or included within Indian reservations created by treaty or congressional action.

It is a well settled and uniformly recognized rule of statutory construction, that a statute, general in its terms, does not repeal by implication the provisions of a former law of special, local, or particular application unless there is some language in the general law or in the course of legislation upon its subject matter that makes it clearly manifest that the legislative body contemplated and intended a repeal. Neither is a general act to be construed as applying to cases covered by a prior special act upon the same subject. See Lewis' Sutherland Statutory Construction, 2d Ed., page 526; *United States v. Nix* (189 U. S., 199); 36 Cyc., 1151.

None of the provisions contained in the general leasing act indicates any intention on the part of Congress to either directly or by implication affect or repeal the provisions of the act of February 28, 1891, *supra*. Under the application of the rules of statutory construction cited, it is clear that the act of February 25, 1920, did not repeal or modify the provisions of the act of February 28, 1891, and that the provisions of the general leasing act have no application to lands in Indian reservations created by treaty or by congressional legislation. On the other hand on February 25, 1920, as to lands

within reservations created by Executive order for Indian purposes, there existed no legislation authorizing their lease or disposal for mining purposes.

The status of lands included within Executive order Indian reservations, was undoubtedly fully understood by Congress. Congress is presumed to know the existing statutes and the state of the law with relation to subjects with which it deals. A consideration of the leasing act leads to the inevitable conclusion that Congress acted with full knowledge of the law and facts surrounding the lands owned by the United States.

The passage of the leasing act of February 25, 1920, was the enactment into law of a broad and comprehensive plan of general application by which an entire new system respecting the disposition of lands and the deposits of minerals beneath the surface owned by the United States and valuable for certain specified minerals was adopted.

The purpose of the leasing act was to encourage the development of the mineral resources of the country under the principle of permits for exploration and the leasing of the lands owned by the United States.

It will be noted that under the terms of the act of February 25, 1920, *supra*, all lands owned by the United States were included within its provisions, except as to certain lands therein specifically enumerated. Its provisions are not inconsistent with nor repugnant to the provisions of the act of February 28, 1891, *supra*, in which the Indians are given the right to lease lands bought and paid for by them and *not* owned by the United States.

The lands within reservations created by Executive order are without question lands "owned by the United States." The withdrawal in nowise affects the title or ownership of the United States in the land withdrawn. Such lands are not expressly excepted from the provisions of the leasing act, which act does make exception of lands acquired under the Appalachian Forest Act, those in national forests, or lands withdrawn for military or naval uses or purposes.

In determining the intention of Congress in view of the status of the existing law and all the conditions surrounding these lands, the maxim, "*Expressio unius est exclusio alterius*," is applicable. Congress by having expressly excepted certain classes of withdrawn and reserved lands, the plain implication is that no further exception was intended. The leasing act has been applied to lands within other forms of withdrawal including those under the reclamation act, and the Federal water power act. As to the latter, see the opinion of the Solicitor for the Interior Department, September 30, 1921 (48 L. D., 459).

To hold otherwise would result in defeating the very purpose of the act of February 25, 1920, for the Indians can not lease the lands

as their right to lease is specifically limited to lands bought and paid for, and if they are not subject to lease under the general provisions of the leasing act, then there is no other form of disposition permissible and further legislation for the development of mineral resources upon this character of lands owned by the United States would be required. In the view of the Department no such condition was contemplated by Congress in the passage of the leasing act. For the reasons herein set forth it is the opinion of the Department that the term "Indian reservations" as used in the departmental regulations of March 11, 1920, should not be construed to include lands within Executive order Indian reservations, and it is the further view of the Department and it is held that the mineral deposits, beneath the surface of such lands, specifically enumerated in the provisions of the act of February 25, 1920, are subject to lease by the Department under the provisions of that act.

The provisions of the act of February 25, 1920, governing the method of and providing for final disposition of the profits, if any, which may accrue from rents and royalties by reason of the discovery of valuable minerals in pursuance of operations conducted under the terms of the permit to prospect, or lease to extract the minerals from, or beneath the surface of any of the lands included in such Indian reservations created by Executive order, has no force or effect in the determination of the question here involved.

With regard to the final disposition of rentals and royalties which may accrue from this or any other permits or leases which may be granted by the Department in this or any other Executive order reservation, it is only necessary to state that there is pending before the Congress of the United States with the favorable recommendation of the Department of the Interior, a resolution proposing to grant and devote one-third of any such proceeds to the use and benefit of the particular Indians interested; one-third of such proceeds for the use and benefit of the reclamation fund of the Government in aid of reclaiming arid land; and one-third of such proceeds to the State in which any such land is situated. In the event that any rentals or royalties shall accrue to the Government of the United States for any permits or leases granted by the Department of the Interior prior to the enactment of legislation providing for the final disposition of such rents and royalties, the Department of the Interior will, with the consent of the Secretary of the Treasury, order and direct that such rentals and royalties so accruing be placed in the Treasury of the United States in a special fund subject to such disposition as shall be finally determined by the Congress of the United States.

The Commissioner also stated in his decision:

"It is further noted that the application, although describing the lands by metes and bounds and courses and distances, does not locate the lands by cardinal directions, so as to be readily conformable to legal subdivisions, when surveyed, as is required by the act prior to the granting of a lease. This objection, however, needs no further consideration at this time, as the lands are not subject to disposal."

The requirement referred to by the Commissioner is that made in section 14 of the leasing act:

"The area to be selected by the permittee shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public-land surveys; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and regulations to be prescribed by the Secretary of the Interior, and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys."

While the law and regulations do not expressly require that the lands for which section 13 permits are sought shall be located with east and west and north and south boundary lines, it is evident from the provisions of section 14, requiring actual conformation before lease, that the law intended that the lands should be located in general conformity with the system of public land surveys. The applicant will, therefore, be required to amend his application in this respect.

The decision of the Commissioner is reversed, the case closed, and the record returned to the General Land Office for appropriate action.

RALPH E. COLVIN (ON REHEARING).

Decided June 16, 1922.

SCRIP—REINSTATEMENT—ARKANSAS—MISSOURI—STATUTES.

The provision of the act of December 28, 1876, which directed the issuance of a certificate of location to the legal representatives of Samuel Ware, authorizing them to locate said certificate on "any land in what was Missouri Territory, subject to sale," contemplated that "Missouri Territory" was to be restricted to the territory as organized into counties, that is, to the area now embraced within the States of Arkansas and Missouri.

FINNEY, *First Assistant Secretary:*

Ralph E. Colvin has filed motion for rehearing in the matter of his application to locate Ware scrip on the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 35, T. 33 S., R. 32 W., 6th P. M., Kansas, wherein, on appeal from adverse action by the Commissioner of the General Land Office, decision was rendered by the Department under date of March 31, 1922, rejecting said application on the ground, as stated—

that this land could never have formed a part of even the entire area of the Missouri Territory, because it is located about 40 miles west of the 100th

parallel, west longitude and south of the Arkansas River, and therefore a part of Mexico during all the time the Missouri Territory was in existence, and did not completely pass to our Government until after the State of Texas, as Mexico's successor in interest, ceded to the United States her claim to the area of which it forms a part in 1850 for \$10,000,000. See 8 Stat., 372, 374, and 9 Stat., 446.

The motion specifies a number of errors but summarized the contention is that the region of country above described, west of the 100th parallel and south of the Arkansas River, was part of the Louisiana Purchase, was later by acts of March 3, 1805 (2 Stat., 331), and June 4, 1812 (2 Stat., 743), comprised within the territory of Missouri and consequently that the land applied for is subject to scrip location pursuant to the provisions of the acts of February 17, 1815 (3 Stat., 211), and December 28, 1876 (19 Stat., 500).

The proposition is argued with considerable force but careful examination shows that it is not well grounded.

The Province of Louisiana first belonged to France, next to Spain, then to France again, being ceded to the United States by Napoleon under the treaty of April 30, 1803. It was ceded simply as the Province of Louisiana, as France had received it from Spain under the secret treaty of San Ildefonso of October 1, 1800. No boundaries or limits were mentioned. No dimensions given. The treaty of San Ildefonso transferred it to France "with the same extent it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other States." In this connection Chief Justice Marshall in the case of *Foster v. Neilson* (2 Peters, 253, 306), said—

The phrase * * * that Spain retrocedes Louisiana, with the same extent that it had when France possessed it, might so readily have been expressed in plain language, that it is difficult to resist the persuasion that the ambiguity was intentional.

The western boundary of the United States prior to the acquisition of Louisiana was the Mississippi River. This had been determined by the treaty with Spain of October 27, 1795 (8 Stat., 138), whereby the south boundary between the United States and the Spanish Colonies of East and West Florida was fixed at 31 degrees north latitude from the Mississippi River going east. The fourth article of this treaty stipulated—

that the western boundary of the United States which separates them from the Spanish colony of Louisiana is in the middle of the channel or bed of the river Mississippi from the northern boundary of the said states to the thirty-first degree of latitude north of the equator.

At this time, it should be observed, Spain held and was exercising sovereignty over a vast territory in America, which aside from Louisiana and the entire Louisiana Purchase, included all that area south of the 31st parallel of north latitude, now in Alabama,

Florida and Mississippi; the territory embraced in the Texas annexation of 1845 and the Mexican Cession by the treaty of Guadalupe Hidalgo February 2, 1848. So the scope and extent of the territory acquired from France was unknown. Its boundaries had never been fixed or defined and it was largely unexplored wilderness. Congress, however, by act of October 31, 1803 (2 Stat., 245), authorized the President to take possession of said territory, and the formal transfer was made at New Orleans in December, 1803. See Public Domain, page 100. Thereafter by act of March 26, 1804 (2 Stat., 283), it was provided:

that all that portion of country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line to commence on the Mississippi river, at the thirty-third degree of north latitude, and to extend west to the western boundary of the said cession, shall constitute a territory of the United States, under the name of the territory of Orleans.

The 12th section provided that—

the residue of the province of Louisiana, ceded to the United States, shall be called the District of Louisiana.

By section 1 of the act approved March 3, 1805 (2 Stat., 331), it was provided:

That all that part of the country ceded by France to the United States, under the general name of Louisiana, which, by an act of the last session of Congress, was erected into a separate district, to be called the district of Louisiana, shall henceforth be known and designated by the name and title of the Territory of Louisiana, the government whereof shall be organized and administered as follows:

Thereafter by act approved June 4, 1812 (2 Stat., 743), Congress reorganized the territorial government and gave the territory a new name calling it Missouri. During this period seriously disturbing difficulties had arisen between Spain and the United States in connection with the navigation of the Mississippi and respecting national boundaries on the east between Louisiana and the provinces of East and West Florida; likewise as to the western boundary of the Louisiana Purchase between that country and the Spanish possessions known as New Spain, later the Republic of Mexico. See Public Domain, page 108, and American State Papers, vol. 12, pages 1 to 195. After long negotiations a treaty styled "Treaty of Amity, Settlement and Limits," was concluded February 22, 1819 (8 Stat., 252). The preamble to this treaty reads as follows:

The United States of America and his Catholic Majesty, desiring to consolidate, on a permanent basis, the friendship and good correspondence which happily prevails between the two parties, have determined to settle and terminate all their differences and pretensions, by a Treaty, which shall designate, with precision, the limits of their respective bordering territories in North America.

By article 2 thereof the provinces of East and West Florida were ceded to the United States. Article 3 provides:

The boundary line between the two countries, west of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or Red River; then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But, if the source of the Arkansas river shall be found to fall north or south of latitude 42 then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea: All the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions, to the territories described by the said line; that is to say: the United States hereby cede to his Catholic Majesty, and renounce forever, all their rights, claims, and pretensions, to the territories lying west and south of the above-described line; and, in like manner, his Catholic Majesty cedes to the said United States, all his rights, claims, and pretensions, to any territories east and north of the said line; and for himself, his heirs, and successors, renounces all claim to the said territories forever.

All the difficulties between the two nations were terminated by this treaty. The second article is by its terms an article of cession. The third purports to fix limits, to adjust and define boundaries, but its provisions are expressly confined to the territories west of the Mississippi. It did not transfer or cede territory, did not change the relative rights of the parties. It merely fixed and determined what had theretofore been vague and undefined. There was a mutual abandonment and renunciation of claims and pretensions and our western limits were for the first time clearly marked out and settled.

It is evident, therefore, beyond question that the district of country referred to and described in the Department's decision of March 31, 1922, was not within the limits of the Louisiana Purchase and was never at any time a part of what was called Missouri Territory.

The motion is accordingly denied.

Another phase of this question remains to be considered inasmuch as a definite ruling has been requested as to the confines of the country to which the location of Ware scrip is restricted.

This question is not altogether free from difficulty. Examination of the act of February 17, 1815 (3 Stat., 211), in connection with the act of March 1, 1843 (5 Stat., 603), shows very clearly, however, that it was the intention of Congress at the time of the passage of the act of 1815 for the relief of the New Madrid sufferers to restrict the right of location to a like quantity of the public lands, the sale of which was authorized by law, or to which the Indian title had been extinguished, within what was then known as Missouri Territory. It must be borne in mind that at that time all of the vast domain to the west of the Mississippi and beyond the limits of the organized counties within the territory of Missouri was treated and looked upon as Indian country and it was a prerequisite to the survey and sale of lands by the Government that the Indian title should have been extinguished. All contemporaneous legislation on the subject makes this abundantly clear. See section 1 of the act of May 18, 1796 (1 Stat., 464); section 1 of the act of February 28, 1806 (2 Stat., 352); sections 8 and 9 of the act of March 3, 1811 (2 Stat., 662); section 1 of the act of April 29, 1816 (3 Stat., 325); the act of February 17, 1818 (3 Stat., 406), and section 1 of the act of June 30, 1834 (4 Stat., 729).

The circumstances that prompted the passage of the act of December 28, 1876 (19 Stat., 500), authorizing the issuance of the certificates here in question, are stated in the preamble, clearly indicating that the purpose of the act directing the Commissioner of the General Land Office to issue a certificate of new location was to reinstate in the representatives of Samuel Ware all the rights that were conferred by the act of February 17, 1815, *supra*, and lost under such circumstances as entitled the beneficiary to relief by Congress. This act authorized the location of "640 acres of any land in what was Missouri Territory, subject to sale."

In determining what lands were subject to sale, in what was the Missouri Territory, we must return to the early legislative history of the region, commencing with the act of March 26, 1804, *supra*, which, after creating the Territory of Orleans, later the State of Louisiana, directed that the residue of the country ceded by France should be called the District of Louisiana. The executive power at that time vested in the Governor of Indiana Territory was extended over the district. Practically all settlements were then confined to a strip along the Mississippi River extending from about the present Missouri-Arkansas boundary line north to St. Louis. Section 12 of this act directed, among other things that the district should be—divided into districts by the Governor, under the direction of the President, as the convenience of the settlements shall require, subject to such alterations hereafter as experience may prove more convenient.

The territory did not long remain under that form of government for on the 3d of March, 1805 (2 Stat., 331), as hereinbefore pointed out, Congress passed an act by which the name of the District of Louisiana was changed to that of the Territory of Louisiana and provision was made for its government. Legislative power was to be vested in a governor and three territorial judges. By section 5 of this act it was provided:

That for the more convenient distribution of justice, the prevention of crimes and injuries, and execution of process criminal and civil, the governor shall proceed from time to time as circumstances may require, to lay out those parts of the territory in which the Indian title shall have been extinguished, into districts, subject to such alteration as may be found necessary; and he shall appoint thereto such magistrates and other civil officers as he may deem necessary, whose several powers and authorities shall be regulated and defined by law.

Originally there were five districts or counties in the territory, viz, St. Louis, St. Charles, St. Genevieve, Cape Girardeau and New Madrid, all extending westward from the Mississippi.

On June 4, 1812, as hereinbefore stated, Congress reorganized the territorial government. The territory was thenceforth to be known as Missouri. Its government was made representative and the legislature was required to hold annual sessions in St. Louis. Following this reorganization the legislative assembly under date of August 21, 1813, divided St. Genevieve County and created a new county called Washington and December 31, 1813, an act was passed establishing counties and county lines. The boundaries of St. Louis, St. Charles, St. Genevieve, Cape Girardeau, New Madrid and Washington were established and fixed, the organized boundaries extending westward to the western boundary of the Osage purchase, the limits on the west having been gradually extended by treaties with the Indians. See treaty of November 10, 1808, with the Osage Nation (7 Stat., 107). At the same session the County of Arkansas was created, including the southern part of the territory to the northern boundary of Orleans or State of Louisiana. On the 23d of January, 1816, Howard County was formed out of the western parts of the Counties of St. Charles and St. Louis and included all country on both sides of the Missouri from the mouth of the Osage to the mouth of the Kansas. See subsequent treaty of September 25, 1818 (7 Stat., 183), with the Osage Nation. Shortly thereafter the Counties of Jefferson, Franklin, Wayne, Lincoln, Pike, Madison, Montgomery, and Cooper were established.

By act of March 2, 1819 (3 Stat., 493), Congress established separate territorial government in the southern part of the Territory of Missouri, to be called Arkansas, embracing approximately

all that part of Missouri Territory within the county of Arkansas as established by the legislature.

By act of March 6, 1820 (3 Stat., 545), Congress authorized the people of the Missouri Territory to form a constitution and State government and defined the boundaries of the territory to be included therein.

By act of June 7, 1836 (5 Stat., 34), the western boundary of the State, north of the mouth of the Kansas River, was extended to the Missouri River, when the Indian title should be extinguished.

Considering the foregoing in the light of all the surrounding circumstances, the Department is convinced that the question presented was correctly decided by the Commissioner of the General Land Office in his decision herein of November 23, 1921, holding in effect that for legislative purposes, within the meaning of the acts of February 17, 1815, and December 28, 1876, *supra*, the Territory of Missouri was the territory as organized into counties, thus restricting the location of Ware scrip to an area now embraced in the States of Arkansas and Missouri.

OFFICERS AND EMPLOYEES OF GENERAL LAND OFFICE—CIRCULAR OF MAY 12, 1906, AMENDED TO INCLUDE LEASES, PERMITS OR ANY FORM OF APPLICATION.

INSTRUCTIONS.

[Circular No. 836.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 21, 1922.

TO ALL OFFICERS, CLERKS, AND EMPLOYEES OF THE GENERAL LAND OFFICE AT WASHINGTON OR ELSEWHERE:

1. Your attention is called to section 452, Revised Statutes, which reads as follows:

"The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

2. Departmental circular of September 15, 1890 (11 L. D., 348), stated that said section applied to all officers, clerks, and employees in the offices of the surveyors general, the local land offices, and the General Land Office, or any person wherever located or employed, under the supervision of the General Land Office.

3. Departmental circular of May 12, 1906 (34 L. D., 605), extended the regulations of September 15, 1890, so as to include the *wives* of officers and employees.

4. The Supreme Court of the United States, in the case of *Waskey v. Hammer* (223 U. S., 85, 93), referred with approval to the departmental instructions, and held that:

"The term 'purchase' is inclusive of the various modes of securing title to or rights in the public lands under the general laws regulating their disposal."

5. Said circulars of February 15, 1890, and May 12, 1906, are hereby amended so as to apply to the act of September 25, 1920 (41 Stat., 437), and all other acts whereby and whereunder any claim or interest whatsoever in and to the public lands is sought by sale, entry, selection, location, lease, permit, license or any other form of application.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
Acting Secretary.

AVY PAGE BENNETT.

Decided June 26, 1922.

FINAL PROOF—HOMESTEAD—RESIDENCE—LEAVE OF ABSENCE—ENTRY—SETTLEMENT—STATUTES.

Section 2291, Revised Statutes, as amended by the acts of June 6, 1912, and August 22, 1914, permits an entryman to make proof at any time when he can show compliance with the law as to residence and cultivation, provided that either his entry or his settlement has subsisted for three years, and nothing contained in the language used therein pertaining to leaves of absence is to be construed as requiring a lapse of three years from the establishment of residence.

DEPARTMENTAL DECISION CITED AND APPLIED.

The case of Robert G. McDougall (43 L. D., 186), cited and applied.

FINNEY, *First Assistant Secretary:*

On December 4, 1918, Avy Page Bennett made homestead entry Santa Fe 036655 under the general provisions of the homestead law for the SW. $\frac{1}{4}$, Sec. 20, T. 2 N., R. 7 E., N. M. P. M., New Mexico, under which he, on December 19, 1921, or three years and fifteen days after the date of his entry made final proof showing that he established residence on the land on March 11, 1919, and thereafter continuously resided there until the date of his proof.

This proof shows improvements valued at \$1000, and cultivation of 14 acres during 1919, 12 acres during 1920, and 33 acres during 1921.

By its decision of March 22, 1922, the General Land Office held that the proof was insufficient and should be rejected in the absence of a further showing for the reason that residence was not established until March 11, 1919, or less than three years prior to the date of filing proof.

This Department can not concur in the conclusion thus reached and believes that this entryman's appeal from that action should be sustained.

While section 2291, Revised Statutes, as amended by the acts of June 6, 1912 (37 Stat., 123), and August 22, 1914 (38 Stat., 704), says that each homestead entryman "shall be entitled to a leave of absence in one or two continuous periods not exceeding in the aggregate five months in each year after establishing residence" on the land entered by him, it is nowhere stated in terms that such an entryman can not make proof at any time when he can show that during each year for three years he has resided on the land at least seven months and cultivated the prescribed area.

This entryman abundantly and in evident good faith met all the requirements as to the above residence and cultivation and to hold that he could not make proof until March 11, 1922, or three years after he had established his residence, and more than three years and three months after the date of his entry, would be to deny him the right given him in the first part of the section cited to make proof "at the expiration of three years from the date of" his entry.

If the words of the statute are to be strictly construed and enforced, this Department has for many years been proceeding erroneously when it permitted homestead entrymen to make final proof immediately, or at any time after the date of the entry and before the expiration of five years by taking "credit for residence as well as cultivation before the date of the 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." See Circular No. 414 (44 L. D., 91, 100), and Robert G. McDougall (43 L. D., 186).

When Congress used the language of amended section 2291, on which the Commissioner's decision was evidently based—the provision authorizing leaves of absence—it evidently had in mind only the granting of leaves of absence and the time when they should be taken, and used that language for the purpose of preventing entrymen from claiming the right to be absent from the land prior to the time when they established their residence and did not intend to limit the provision already made in that section which said that proof could be made "at the expiration of three years from the date of the entry."

These considerations lead to the conclusion that a homestead entryman is entitled to make proof at any time when he can show that he has resided upon the land for the period and cultivated it to the extent prescribed by law, provided, however, that either his entry or his settlement has subsisted for three years.

The decision appealed from is consequently reversed.

JOHN MULLIGAN.

Decided June 28, 1922.

RECLAMATION—ARID LAND—WATER RIGHT—APPLICATION—PAYMENT—TRANSFEREE—RELINQUISHMENT.

Where one who has entered into a contract to purchase privately owned lands, title remaining in the vendor, files water-right application and makes payments on account of the construction or building charge, and all rights of the vendee under the contract are reacquired by the vendor, the latter is entitled to receive credit for such payments and to complete the same upon showing proper qualifications to acquire and hold, notwithstanding that the transfer was the result of voluntary action instead of foreclosure proceeding, provided, however, that if the original vendor is not so qualified he must within two years from reacquisition of the land, dispose of such excess holding as directed by paragraph 76 of the departmental regulations of May 18, 1916.

FINNEY, First Assistant Secretary:

December 6, 1919, John Mulligan sold under escrow agreement to George B. Allen the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 9, T. 9 S., R. 24 W., G. & S. R. M., situated within the Yuma, Arizona, Reclamation Project.

May 13, 1920, Allen filed water-right application covering the NW. $\frac{1}{4}$, said section 9, and made payment of all construction charges for the years 1917, 1918, and 1919, amounting to \$384, exclusive of penalties.

December 7, 1920, Allen released to the said Mulligan all of his right, title, and interest claimed under the escrow agreement to purchase, and on January 5, 1921, he gave a quitclaim deed to Mulligan, relinquishing all rights to the said land under the said agreement.

The question at issue is whether the payments made by Allen on account of the water right shall be forfeited to the Government or be credited to Mulligan as requested by the latter. The project manager held the Allen water-right application for rejection with forfeiture to the Government of the money paid thereon. By decision of March 25, 1922, the Acting Director of the Reclamation Service affirmed the action of the project manager. Mulligan has appealed to the Department.

The action below was predicated upon section 77 of the general reclamation circular of May 18, 1916 (45 L. D., 385, 405), which provides for forfeiture of payment made on account of a water right by a contract purchaser of land in case the contract vendor cancels the contract because of default on the part of the purchaser. It will be observed that while the contract for delivery of the deed was in effect canceled, it was accomplished by process of a transfer to the vendor of all of the rights of the vendee to the land and waiver of all rights under the contract. The case does not appear to come precisely within the terms of that section.

Section 76 of the regulations allows a person to hold excess lands for two years after their acquisition and the right to be furnished with water under the reclamation law, where the lands were acquired by descent, will, or by foreclosure of any lien. The facts in this case seem more analogous to the condition stated in section 76, as the rights of the vendee were reacquired by the vendor, although it was the result of voluntary action instead of foreclosure proceeding.

Section 78 of the regulations also provides that a successor in interest of the original contract purchaser will succeed to the benefits of any payments made by the original contract vendee on his water-right application, where the new purchaser enters into agreement with the original vendor and purchases the rights of the original contract vendee.

Under the circumstances of the case, it appears appropriate to allow Mulligan credit for the payments made by Allen on the water right and the privilege of completing the same upon showing proper qualifications to so acquire and hold, and if not so qualified within two years from the reacquisition of the land, he should be required to dispose of such excess holding as provided by section 76 of the regulations. It is so ordered. The decision appealed from is modified accordingly.

**RESTORATION TO ENTRY OF RECLASSIFIED LANDS IN THE
SOUTH HALF OF THE COLVILLE INDIAN RESERVATION, WASH-
INGTON.**

INSTRUCTIONS.

[Circular No. 836½.]

**DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 29, 1922.**

**REGISTER AND RECEIVER,
UNITED STATES LAND OFFICE,
SPOKANE, WASHINGTON:**

February 12, 1920, the Department approved the reclassification as nonmineral, of certain lands within the south-half of the former Colville Indian Reservation.

Complaints were made that many tracts classified as mineral were nonmineral. A reexamination and reclassification seemed desirable, and same was made in 1920.

On November 23, 1921, the Secretary of the Interior approved the said reexamination and reclassification as recommended by this office by letter of November 5, 1921.

The said lands are subject to disposal under the act of March 22, 1906 (34 Stat., 80), and the President's proclamation of May 3, 1916 (39 Stat., 1778).

Where mining claims are on lands formerly classified as mineral whether or not a mineral survey has been made, and is or is not shown as a segregated survey on the plats, applications for such land reclassified as nonmineral may not be allowed, as to such portions as are in fact mineral in character nor as to portions claimed, occupied, and being worked under the mining laws for valid mining claims. As to applications for patent for claims under the mining laws your attention is again directed to the instructions of February 1, 1910, (38 L. D., 409).

Persons qualified to make homestead entry who have performed military or naval service during the war with Germany and who are honorably discharged or separated from the service or placed in the Regular Army or Naval Reserve are by the act of February 14, 1920, as amended, given a preferred right to make homestead entry for ninety days prior to the opening of the lands to entry to other applicants.

The preference right period provided for by the said law will commence at 10 a. m., on August 21, 1922, and will end November 18, 1922.

From August 21, 1922, to November 18, 1922, both dates inclusive, the lands may be entered only under the homestead laws and only by ex-service men of the war with Germany who have been honorably discharged or separated from the service or placed in the Regular Army or Naval Reserve; provided that from July 31, 1922, to August 21, 1922, both dates inclusive, applications may be presented by such persons under said laws, such applications to be treated as simultaneously filed and disposed of before action is taken on other preference applications.

The lands, if any, not disposed of during such period will become subject to appropriation under any applicable law including settlement under the homestead law in advance of entry by any qualified person on December 11, 1922, and not before then, provided that from November 20, 1922, to December 9, 1922, both dates inclusive, any qualified person may present applications to be treated as simultaneously filed and disposed of before action is taken on other non-preference applications.

In the event that conflicts appear between applications treated as simultaneously filed as herein provided, drawings will be held to determine the order in which the conflicting applications will be taken up for consideration.

Acknowledge receipt of these regulations giving them all the publicity possible without expense to the government by furnish-

ing copies thereof for publication as an item of news to the various newspapers in your district. You will also post a copy of the same in your office and transmit a copy to the postmaster nearest the land for posting in his office.

The list of reexamined and reclassified lands is inclosed herewith.¹

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

ROBERT C. RAYBURN.²

Decided May 17, 1922.

DESERT LAND—PAYMENT—ACT OF AUGUST 11, 1916.

The provisions of the act of August 11, 1916, do not authorize the taxing authorities of a State or county to impose penalties for nonpayment of taxes assessed against unentered public lands subjected to taxation by that act.

FINNEY, *First Assistant Secretary:*

The appeal of Robert C. Rayburn from a decision of the Commissioner of the General Land Office dated January 3, 1922, presents for determination the question whether penalties for nonpayment of taxes assessed against unentered lands are properly collectible under the act of August 11, 1916 (39 Stat., 506).

On October 15, 1917, Robert C. Rayburn applied at the Phoenix, Arizona, land office to make desert-land entry for NW. $\frac{1}{4}$, Sec. 27, T. 3 N., R. 5 E., G. & S. R. M., stating that he expected to irrigate the land with water obtained from the Paradise-Verde Water Users' Association.

The map of the Paradise-Verde Irrigation District was approved by the Department on June 7, 1921, and under date of September 24, 1921, the Commissioner of the General Land Office returned Rayburn's application for allowance, it appearing that the tract applied for is within the exterior limits of said district. The local officers required applicant to furnish a certificate by the proper officers of said district that he was in good standing and had paid "all proper assessments which might be delinquent." The secretary of the irrigation district refused to issue the required certificate until all assessments and penalties had been paid. Applicant appealed, and by decision dated January 3, 1922, the Commissioner of the General Land Office held, in effect, that the penalties imposed were a proper

¹ List omitted.

² See decision on petition, page 160.

charge which must be paid before the application in question could be allowed.

The penalties referred to amount to \$59.62, and were added to the taxes assessed for 1918, 1919, and 1920.

Section 1 of the act of August 11, 1916, *supra*, provides that when an irrigation district has been created, all public lands within the district—

are hereby made and declared to be subject to all the provisions of the laws of the State in which such lands shall be situated relating to the organization, government, and regulation of irrigation districts for the reclamation and irrigation of arid lands for agricultural purposes, to the same extent and in the same manner in which the lands of a like character held under private ownership are or may be subject to said laws.

Section 2 provides that the cost of construction and maintenance shall be equitably apportioned among lands "held under private ownership, lands legally covered by unpatented entries, and unentered public lands included in said irrigation district." Further:

That all charges legally assessed shall be a lien upon unentered lands and upon lands covered by unpatented entries included in said irrigation district; and said lien upon said land covered by unpatented entries may be enforced upon said unpatented lands by the sale thereof in the same manner and under the same proceeding whereby said assessments are enforced against lands held under private ownership.

Section 5 provides—

That no public lands which were unentered at the time any tax or assessment was levied against same by such irrigation district shall be sold for such taxes or assessments, but such tax or assessment shall be and continue a lien upon such lands. * * *

It is clearly indicated by the provisions of the act that Congress did not intend to permit the tax-levying authorities of a State or county to add any penalties to taxes or assessments levied against unentered public lands. As the act prohibited the sale of such lands for unpaid taxes or assessments, it follows that no penalties can be properly collected.

The case is remanded, with directions that the officers of the irrigation district be advised, by service of a copy hereof, that the Department is of opinion that the penalties sought to be collected from applicant, Rayburn, are not collectible, to the end that the irrigation district may request the proper county authorities to remit the same. The application of Rayburn should be returned to the local office for allowance as soon as the proper officer of the irrigation district has certified that all taxes and assessments properly levied against the land have been paid.

Remanded.

ROBERT C. RAYBURN (ON PETITION).

Decided August 28, 1922.

DESERT LAND—PAYMENT—ACT OF AUGUST 11, 1916.

The fact that the collection of penalties for nonpayment of taxes assessed against unentered public lands is not authorized by the act of August 11, 1916, does not warrant the allowance of a desert land entry prior to the payment of all taxes and assessments properly levied.

FINNEY, *First Assistant Secretary:*

By decision of May 17, 1922 (49 L. D., 158), in the case of Robert C. Rayburn (Phoenix 036464), the Department held that the provisions of the act of August 11, 1916 (39 Stat., 506), do not authorize the tax-levying authorities of a State or county to impose penalties for nonpayment of taxes assessed against unentered public lands subjected to taxation by that act. Said decision directed that the officers of the Paradise-Verde Irrigation District be advised, by service of a copy of the decision, that the Department is of opinion that the penalties sought to be collected from Rayburn in connection with his application to make desert-land entry for NW $\frac{1}{4}$, Sec. 27, T. 3 N., R. 5 E., G. & S. R. M., are not collectible, to the end that the irrigation district may request the proper county authorities to remit the same.

It appears that a copy of the departmental decision was forwarded to the president of said irrigation district on July 5, 1922, by the register of the Phoenix land office, the register's letter containing the following:

If denial of statement made by Robert C. Rayburn is not made within 30 days from delivery of the inclosed decision, the register and receiver of this office will allow the entry of said Robert C. Rayburn without further notice and without showing of any payment on the part of the said Rayburn.

The Paradise-Verde Irrigation District has filed a petition for the exercise of supervisory authority, contending that the departmental decision and the ruling of the local officers, above referred to, make it practically impossible for an irrigation district to collect assessments upon Government lands within an irrigation district.

It appears that the treasurer and ex-officio tax collector of the county in which the land lies demanded that Rayburn pay the following penalties on the county and State taxes for the years named:

1918, \$21.60; 1919, \$17.89; 1920, \$20.13; total, \$59.62.

The penalties for each year were made up of clerk fees, interest on the unpaid taxes, and collection charges.

Rayburn did not object to the payment of the taxes which had been assessed against the land, but contended that the act of August

11, 1916, *supra*, did not warrant the collection of the penalties sought to be collected.

Consideration of the petition reveals no error in the departmental decision, which followed the plain provisions of section 5 of the said act.

It is apparent that the officers of the irrigation district are alarmed because of the statement made by the register of the Phoenix land office in his letter of July 5, 1922, wherein he announced his intention of allowing the application of Rayburn "without the showing of any payment."

The ruling of the Department wherein directions were given to allow the application of Rayburn "when the irrigation district officer shall have certified that all taxes against the said land have been paid," was apparently not clearly understood.

The departmental decision contemplated that the irrigation district would request the county authorities to remit the penalties, and that the request would be granted. Meanwhile, the application of Rayburn should have been suspended, as the allowance thereof prior to the payment of all taxes and assessments properly levied would not be warranted.

The petition of the irrigation district is denied, but the Commissioner of the General Land Office will instruct the register of the Phoenix land office in accordance with the foregoing.

SANTA FE PACIFIC RAILROAD COMPANY.¹

Decided June 16, 1922.

APPROXIMATION—LIEU SELECTION—SUPERVISORY AUTHORITY—ACT OF APRIL 21, 1904.

A departmental regulation issued pursuant to the act of April 21, 1904, declaring that the rules of approximation obtaining in other classes of entries will be observed in effecting the exchange of lands under that act, does not entitle a selector thereunder to invoke the benefits of the rule as a matter of right, inasmuch as the rule of approximation, being purely an administrative invention of equitable purpose, not founded upon any law, may with impunity be modified, suspended, limited in its operation, or abrogated altogether, if the proper execution of the laws calls for such action.

LIEU SELECTION—APPROXIMATION—ACT OF APRIL 21, 1904.

A lieu selection of land approximately twice the area of the tract tendered as base does not fulfill the requirement contained in the act of April 21, 1904, that the selected and the relinquished lands must be "as nearly as practicable equal in area."

¹ See decision on motion for rehearing, page 164.

LIEU SELECTION—SCRIP—LAND DEPARTMENT.

The Land Department may permit the tender of any applicable scrip or right as supplemental to an insufficient base upon which a lieu selection is predicated.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

The case of George E. Lemmon, (36 L. D., 543), cited and followed.

FINNEY, *First Assistant Secretary*:

The act of April 21, 1904 (33 Stat., 189, 211), provides:

That any private land over which an Indian reservation has been extended by Executive order, may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant, nonmineral, nontimbered, surveyed public lands of equal area and value and situated in the same State or Territory. [Italics supplied.]

In its application Roswell 049983 the Santa Fe Pacific Railroad Company invoked the privilege given by that act and offered to exchange its 22.28 acres described as lot 1, Sec. 33, T. 10 N., R. 4 W., N. M. P. M., New Mexico, for 40 acres belonging to the United States and embraced in the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4, T. 24 N., R. 31 E., N. M. P. M., and secure title thereto by making a cash payment of \$22.15, or at the rate of \$1.25 per acre for the 17.72 acres it desired in excess of the area it offered to surrender.

By its decision of March 9, 1922, the General Land Office rejected that application "because the area of the selected lands and the area of the base lands are not approximately equal;" and in its appeal from that action the company contends that it is entitled to have its selection approved for the reason that the regulations issued under the act mentioned (43 L. D., 565, 569) declare in paragraph 17 that "the land relinquished and the land selected must be, as nearly as practicable, equal in area, *but the rules of approximation obtaining in other classes of entries will be observed.*" (Italics supplied.)

All the statutes relating to the disposal of nonmineral public lands, except the reclamation homestead act, fix specific areas in multiples of 40-acre tracts as the maximum number of acres that may be entered by any one person; but, it was found that it was not always possible to permit entries for such maximum amounts because the surveying of the public domain necessarily results in the formation of many tracts designated as lots which are irregular in their areas, and do not often, either singly or in combination, aggregate the prescribed maximum enterable areas.

From this it will be seen that a strict enforcement of the statutes would of necessity deprive many applicants of the privilege of securing title to all the lands they were entitled to enter; and it was to meet that contingency, and for the purpose of relieving that class of entrymen of the embarrassment imposed by the statute, as well as to expedite and facilitate the disposal of the public lands, that

the rule of approximation on which the company relies in this case was devised as a matter of necessity by departmental action.

Under that rule any qualified person is permitted to include in his application to enter such a number of tracts, either regular or irregular in form, or both, as will most closely approximate the total area the law authorizes him to enter, and, in cases where the area applied for exceeds the permitted maximum area, he is required to pay in cash for the area applied for that is in excess of the statutory area at the rate of \$1.25 per acre, or such larger sum per acre as may have been fixed by Congress as the sale price of the particular lands applied for.

From this it will be observed, as was said in the case of George E. Lemmon (36 L. D., 543, 544), "that the rule permitting the approximation of entries rests on no law and was never, in legal sense, the *right* of one seeking to appropriate public lands. It is, as it has always been, an administrative invention, of equitable purpose," and having been prescribed by this Department it may be extended or limited in its application in any particular case or class of cases in such manner and at such times as the equities of applicants may warrant, or the best interests of the Government may demand; and no applicant can be heard to successfully contend that his particular case should be adjudicated in accordance with the way in which that rule was construed and applied at the time he filed his application. And being nothing more than a departmental regulation it may with impunity be modified, suspended, limited in its operation to particular kinds of entries, or abrogated altogether, if the proper execution of the laws call for such action. See Instructions, 47 L. D., 205, and George E. Lemmon, *supra*.

With these considerations in mind we can turn now to the issue presented by the appeal in this case; and in doing so we find that that contention can not be sustained, notwithstanding the language of the regulation on which it is based.

In the first place it must be said that that regulation gave a very liberal interpretation to the words "lands equal in value and area" used in the statute, when it said that the land selected and the land surrendered should be "as *nearly as practicable* equal in area," and even if this case be disposed of under that regulation it can not be said that this base, containing, as it does, only a little more than one-half the number of acres contained in the selected tract is as "nearly as *practicable*" equal to it in area. To so hold would be tantamount to saying that this company having the right to exchange a large number of tracts under the act mentioned could possibly so shape its applications as to enable it to secure an area almost twice as large as the acreage it surrenders by the mere payment of \$1.25 per acre for the excess. Such a practice can not be

tolerated because it would in a measure circumvent the provisions of the act of March 2, 1889 (25 Stat., 854), in which Congress forbade the further sale of lands at private cash sale.

However, it is not deemed advisable to reject the application in this case at this time, or at all if the applicant will substitute some sufficient base for this selection, which may be done by the withdrawal of the base here offered and the furnishing of a new base in sufficient area, or by supplementing the present base by the offering of a base of the same kind, or a scrip or right of some other kind in such an area as will with the present base justify the approval of the selection.

While it has heretofore been the practice to accept supplemental bases arising under the same law under which the base already assigned is claimed, it was held by this Department in its unpublished decision of May 16, 1922, involving this same company's kindred application, Las Cruces 014331, that any applicable scrip or right might be offered as supplemental to a base offered under the act under which the selection is claimed.

After giving this matter full and careful consideration this case is remanded for further action in accordance with the views here expressed and with directions that the applicant be informed that the application will be finally rejected if it fails to take the action suggested within thirty days from notice of this decision.

SANTA FE PACIFIC RAILROAD COMPANY (ON REHEARING).

Decided September 22, 1922.

APPROXIMATION—LIEU SELECTION—SUPERVISORY AUTHORITY—LAND DEPARTMENT.

Assumption of authority by the Land Department to extend or limit the application of the rule of approximation in each particular case to satisfy equities or to prevent its abuse, is not a basis for a charge of the exercise of arbitrary power or disregard of law.

FINNEY, *First Assistant Secretary.*

Motion for rehearing has been filed in the above entitled case, wherein the Department by decision rendered June 16, 1922 (49 L. D., 161), remanded the case for further action in accordance with the views therein expressed, with directions that the application be finally rejected if the applicant failed to take the action suggested within 30 days from notice of decision.

No new questions of law or fact are presented, but in view of certain statements found in the brief of counsel filed in support of the motion, the record and departmental decisions in connection with the rule of approximation, have again been reviewed and considered. The question is upon the holding of the Department with

respect to the rule of approximation, and the brief submitted contains the following language:

The attempted rejection of the selection by the Department is an attempt to nullify the effect of an act of Congress; is a direct breach of faith by the Department; is an arbitrary revocation by the Department of its own rules without notice, to the prejudice of the one who stands as an innocent purchaser, relying and entitled to rely on those rules.

The act of April 21, 1904 (33 Stat., 189, 211), provides that private holdings of land within an Indian reservation may be exchanged at the discretion of the Secretary of the Interior under such rules and regulations as may be prescribed, "for vacant, non-mineral, nontimbered surveyed public lands of equal area and value."

The regulations thereunder (43 L. D., 565, 569), prescribe that; "the land relinquished and the land selected must be as nearly as practicable equal in area, but the rules of approximation obtaining in other classes of entries will be observed." It is sought to exchange an area of 22.28 acres for a tract of 40 acres belonging to the United States, and the language in the regulations above quoted permitting the exercise of the rule of approximation, has been seized upon to charge the Department in said decision as attempting to nullify an act of Congress, that such action in the premises is a breach of good faith, and an arbitrary revocation of its own rules without notice.

This is an assertion without sufficient foundation. Aside from the language of the act itself, requiring that the exchange shall be for lands of "equal area and value," and the language of the regulations requiring an "equal area," the Department is unable to follow the contention and views of counsel with respect to the rule of approximation "obtaining in other classes of entries."

A number of cases defining the rule of approximation in other classes of entries, can be cited, showing that the Department has uniformly interpreted and enforced the rule as held in the decision under consideration. See 36 L. D., 305; 36 L. D., 417; 36 L. D., 543; 37 L. D., 28; 39 L. D., 550.

It is agreed that the rule is a reasonable one of long standing, and while not resting upon any law, it is an administrative invention for equitable purposes.

Each case, however, must stand or fall on its own merits or lack of merits. To prevent its abuse, of which the instant case is a fair example, the Department has uniformly reserved the right to extend or limit its application in such manner and in such way as the facts and equities appear to warrant in each case. The charge of arbitrary action and disregard of the law on the part of the Department, is not sustained by the facts, and has no basis of justification in so far as the law applicable to this case is concerned.

The motion for rehearing is denied.

FLATHEAD TIMBER LANDS.

June 29, 1922.

FLATHEAD LANDS—INDIAN LANDS—MINERAL LANDS—TIMBER LANDS.

Lands within the Flathead Indian reservation, Montana, classified as timber lands pursuant to the act of April 23, 1904, are specifically excepted by section 8 of that act from disposition under the mineral land laws, and nothing contained in other parts of the act or in any of the acts of Congress subsequently enacted, relating to the disposition of lands within that reservation, may be interpreted as importing a contrary intention.

BOOTH, *Solicitor*:

My opinion is requested on the question as to whether lands classified as timber lands on the Flathead Indian Reservation, Montana, are subject to mineral entry, in view of provisions contained in the act of April 23, 1904 (33 Stat., 302). The pertinent provisions are found in sections 8 and 10, which read as follows:

"SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. * * *

* * * * *

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian."

It will be noted that the act in section 8 thereof excepts lands classified as timber from disposal under the mining laws, while the language used in section 10, in the absence of any other provisions respecting timber lands, would seem to authorize mineral entry of any lands affected by the act, except lands allotted in severalty to an Indian. An interpretation of the above provisions of the act of 1904, may be found in sections 6 and 11 of the same act, and also in the subsequent acts of March 3, 1909 (35 Stat., 781, 796), and February 25, 1920 (41 Stat., 452). The said act of 1904 after directing that the Commission in making classification of the lands embraced in the Flathead Indian Reservation, should divide the same into the following classes:

SEC. 5. * * * First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and, fifth, grazing lands.

Further provided as follows:

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof. * * * Mineral lands shall not be appraised as to value.

SEC. 11. That all of said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

It is provided in section 11 of the act of March 3, 1909, *supra*,

SEC. 11. That all merchantable timber on said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior, for cash, under sealed bids or at public auction, as the Secretary of the Interior may determine, and under such regulations as he may prescribe: *Provided*, That after the sale and removal of the timber such of said lands as are valuable for agricultural purposes shall be sold and disposed of by the Secretary of the Interior in such manner and under such regulations as he may prescribe.

The act of 1909 was on May 18, 1916 (39 Stat., 123, 139), amended to provide that lands thereunder classified as timber lands which in the opinion of the Secretary of the Interior, were suitable for agricultural or horticultural purposes might be opened to homestead entry upon payment at the time of entry of the full value of the timber standing thereon.

The act of February 25, 1920, *supra*, authorized allotments to be made on the Flathead Reservation to all unallotted living children enrolled with the tribe or entitled to enrollment with the provisos:

That such allotments be made from any unallotted or unsold lands within the original limits of the Flathead Indian Reservation, including the area now classified and reserved as timber lands * * * and patents issued for allotments hereunder for any lands from which such timber has not been cut and marketed, shall contain a clause reserving to the United States the right to cut and market, for the tribal benefit, as now authorized by law, the merchantable timber on lands so allotted: *Provided further*, That when the merchantable timber has been cut from any lands allotted hereunder, the title to such timber as remains on such lands will thereupon pass to the respective allottees, and the Secretary of the Interior is hereby directed to withhold from sale or entry all lands unsold and unentered within the said reservation at the date of the passage of this Act until allotments hereunder have been completed.

The above provisions are in entire accord with the provision in section 8 of the act of April 23, 1904, which excepts lands classified as timber lands from disposal under the mining laws, showing that it could not have been contemplated by Congress in section 10 of said act to subject timber lands to mineral entry, and this for the reason that provision was subsequently made for the disposal of such timber lands other than under the mining laws.

In view of the foregoing, my opinion is that the specific provision in section 8 of the act of April 23, 1904, which excepts timber land on the Flathead Indian Reservation from mineral entry is not affected by the general provisions contained in section 10 of the same act, as the latter provisions clearly refer to lands other than those classified as timber lands and for whose disposal Congress subsequently provided in strict accordance with the original legislation.

Approved: October 5, 1922.

E. C. FINNEY,

First Assistant Secretary.

RECLAMATION HOMESTEAD ENTRIES—WHEN TAXABLE.

INSTRUCTIONS.

[Circular No. 838.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 8, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Your attention is invited to instructions issued under date of April 16, 1910 (38 L. D., 575), authorizing you to furnish the proper State authorities lists of entries made for lands in their districts, upon which final certificates have issued, for purposes of taxation.

If, in compliance with requests from such authorities, you have also been furnishing a list of reclamation homestead entries upon which this office has accepted final proof of residence, cultivation and improvements as required by the ordinary provisions of the homestead law, you will discontinue this practice and, upon the receipt of such a request in the future, advise the authorities that on March 20, 1922, the United States Supreme Court, in the case of *Irwin v. Wright, County Treasurer, et al.* (258 U. S., 219), held that lands in reclamation homestead entries are not subject to taxation until *final certificate* has issued upon the entry.

These instructions are not intended as a modification of the instructions dated April 16, 1910, but as merely additional thereto and supplementary thereof.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

ANNA HESS, WIDOW OF WILLIAM J. HESS.

Decided July 10, 1922.

HOMESTEAD—WIDOW; HEIRS; DEVISEE—PATENT—SECTION 2291, REVISED STATUTES.

On the death of a homestead entryman, leaving a widow and heirs, the right to perfect his claim and receive title thereto vests under section 2291, Revised Statutes, in the widow, free from any claim on behalf of the heirs, and a State statute relating to inheritance which conflicts therewith, can not be invoked to defeat that right.

HOMESTEAD—WIDOW; HEIRS; DEVISEE—INSANITY—RESIDENCE—CULTIVATION—PATENT—ACT OF JUNE 8, 1880.

The benefits of the act of June 8, 1880, which provides that a person who becomes insane after initiating a claim under the homestead laws and before he has earned a patent, shall be entitled to a patent on proper proof without further residence and cultivation, if he had in good faith complied with the legal requirements up to the time he became insane, inure to an insane widow who succeeds to all of the rights held by her husband at the time of his death.

HOMESTEAD—WIDOW; HEIRS; DEVISEE—INSANITY—PATENT—RELINQUISHMENT—WAIVER.

The fact that the widow of a homestead entryman, who died before he had earned patent, was insane and confined in an asylum at the time that the claim was initiated, and thereafter remained in that condition, does not deprive her of her exclusive right to perfect the claim and receive title thereto, and her guardian has no power to relinquish the entry or in any way divest her of her interest therein.

FINNEY, *First Assistant Secretary:*

On June 21, 1910, William J. Hess, whose wife Anna Hess was then and now is insane, made homestead entry Helena 04304 for lots 1 and 2 and S $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 4, T. 21 N., R. 5 W., M. M., Montana, upon which he established and maintained a residence until his death on January 29, 1911.

On August 2, 1917, Clarence W. Hess, a son of the entryman, and his insane wife, made final proof under this entry showing that he, the son, had successfully cultivated the land during each year after his father's death, in areas ranging from 18 acres in 1911 to 155 acres in 1916, and had made improvements of the value of \$1,500.

The question arose as to whether the patent should issue under this proof to the widow or to entryman's heirs and the superintendent of the asylum in which the widow has since the date of the entry been an inmate, acting as her "duly appointed and qualified guardian" filed a waiver of all her interest and right in and to the land covered by her husband's entry.

By its decision of January 12, 1922, the General Land Office required the son to show cause why final certificate and patent should

not be issued to the widow and in response to that requirement he set up the insanity and confinement of his mother and said that—

She has never been on this land, has never been in the State of Montana, and was not living with her husband as his wife, at the time he filed on this land and has not lived with him at any time since the filing.

It is further contended by the son in his showing and appeal from the Commissioner's decision, that the patent should issue to the heirs for the reasons (1) that neither the widow nor the guardian ever made any effort to meet the requirements of the law as to residence or cultivation; (2) that under the laws of the State of Montana where the land is located, his mother had no interest, either dower or otherwise in this land; (3) that the widow was in effect civilly dead.

None of these contentions can be sustained. It is needless to inquire into the correctness of the contention that a wife has no interest in an entry for lands held by her husband under the laws of the State of Montana because this case is entirely controlled by the Federal statute, section 2291, Revised Statutes, under which this widow succeeded at her husband's death to all the rights held by him under his entry to the entire exclusion of his children, and she alone was entitled to make proof and receive patent. *Thaddeus M. Armstrong* (18 L. D., 421); *Steberg v. Hanelt* (26 L. D., 436); *Buller v. Gordon Heirs* (29 L. D., 325).

The only exception to the rule that the widow has the exclusive right to make proof and take title is found in cases where she renounces her right in favor of the heirs. In such cases the heirs may perfect the entry, make proof and take title in their own names. *Phillippina Adam et al.* (40 L. D., 625).

But such an exception can not be invoked in this case because this widow succeeded to all the rights of her husband, among which was the right to have a patent issued to her without any effort on her part at cultivation or residence as soon as the fact of her insanity was established. The act of June 8, 1880 (21 Stat., 166), declares that when a person becomes insane after initiating a claim under the homestead laws and before he has earned a patent, patent shall issue to him on proper proof without further residence or cultivation by him or for him if he had in good faith complied with the legal requirements up to the time he became insane; and there is no reason why the benefits of that act should not be extended to an insane widow who succeeds to all the rights held by her husband at the time of his death.

It can not be successfully contended that the waiver filed by the widow's guardian in this case in any way affected or divested her of any rights under this entry because the guardian of one holding an interest under a homestead entry has no power to relinquish the

entry or in any way divest his ward of his or her interest therein. See *Dyche v. Beleele* (24 L. D., 494), as modified by *William Duffield* (43 L. D., 56).

The suggestion that this widow has no rights because she was not living with her husband during the time after he made this entry, hardly needs an answer, but the fact that she was insane and not voluntarily absent furnishes an unanswerable reason why that suggestion is unsound. However, even if she had temporarily failed to live with him through her own election, that fact would not have prevented her from succeeding to her husband's interest under this entry. *Bucher v. Benham* (28 L. D., 53).

From these considerations it will be seen that the Commissioner's decision and requirement was entirely correct and his action is hereby affirmed.

MARTIN JUDGE.

Decided July 12, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—RELINQUISHMENT—COMMISSIONER OF THE GENERAL LAND OFFICE—RECORDS.

Prior to the cancellation by the Commissioner of the General Land Office of an outstanding oil and gas prospecting permit and notation thereof upon the records of the local land office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application, or by the posting of a notice of intention to apply for such a permit.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

Case of California and Oregon Land Company *v. Hulen and Hunnicutt* (46 L. D., 55), cited and followed.

FINNEY, *First Assistant Secretary.*

Martin Judge has appealed from the decision of the Commissioner of the General Land Office of April 1, 1922, rejecting his application 034445 filed September 29, 1921, for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), for the reason that the land involved, all Sec. 14, SW. $\frac{1}{4}$, Sec. 15, N. $\frac{1}{2}$, Sec. 22, T. 11 N., R. 23 W., S. B. M., Los Angeles land district, California, was included in prospecting permits 032743 granted to the Seaboard Petroleum Company December 11, 1920, and March 24, 1921. On August 29, 1921, the permittee filed a relinquishment in the local office, but the permits were not canceled until May 4, 1922. The Commissioner, citing the case of California and Oregon Land Company *v. Hulen and Hunnicutt* (46 L. D., 55), held that until the relinquishment was accepted and notation thereof made on the records of the local office the land was not subject to any form of appropriation.

Relinquishments of prospecting permits under the leasing act are not governed by section 1 of the act of May 14, 1880 (21 Stat., 140), which provides:

That when a preemption, homestead, or timber culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action of the part of the Commissioner of the General Land Office.

nor has the Department adopted a similar rule of procedure with respect to them. The practice has been to require the acceptance of the relinquishment by the Commissioner of the General Land Office, the necessity therefor being indicated in the instructions of May 5, 1922, Circular No. 823 (49 L. D., 104), providing:

Relinquishments of permits will not be accepted and bonds released until all requirements under the permits and the regulations have been fulfilled. When any drilling has been done on the property, the relinquishment should be approved by a representative of the Bureau of Mines or other person so designated by the Secretary of the Interior.

Proper administration requires that where permit applications for lands included in outstanding permits under the leasing act are filed the Department should follow the rule expressed in *California and Oregon Land Company v. Hulen and Hunnicutt, supra*, that—

the orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

It is recognized that a permit does not constitute a technical segregation or entry, as those terms are ordinarily used in connection with the public land laws, as it is not an appropriation with a view to the acquisition of title, but that does not prevent the application of the principle of the general administrative rule, and until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor, or by the posting of notice of intention to apply for such a permit.

The decision of the Commissioner is affirmed, and the record returned to the General Land Office.

GEORGE B. PERKINS.

Decided July 12, 1922.

REPAYMENT—DESERT LAND—RAILROAD GRANT—PAYMENT—WITHDRAWAL.

Congress intended by the proviso to the forfeiture act of February 28, 1885, to fix the future price of all lands in the forfeited Texas and Pacific Railroad Company grant at \$2.50 per acre, and one who thereafter, and prior to the passage of the general act of March 2, 1889, which fixed the price of lands within forfeited railroad grants at \$1.25 per acre, made a desert-land entry of lands within the limits of the withdrawal based upon the map filed by the company of its general route, and paid the double minimum price therefor, did not make payment in excess of lawful requirements and has no ground for a claim of repayment.

COURT DECISION CITED AND APPLIED.

Case of United States *v.* Laughlin (249 U. S., 440), cited and applied.

FINNEY, *First Assistant Secretary:*

The Department has considered the above entitled case upon appeal from decision of the Commissioner of the General Land Office rendered July 19, 1921, denying application for repayment of moneys alleged to have been paid in excess of lawful requirements upon desert-land entry No. 1277, for entire section 20, T. 1 N., R. 6 E., Tucson land district, Arizona, in connection with which original desert-land declaration was filed by Perkins, June 7, 1887, and initial payment made April 10, 1888, at the double minimum rate of 50 cents per acre.

The described section fell within the limits of the withdrawal based upon the Texas Pacific Railroad Company's map of general route filed September 2, 1871.¹ No map of definite location of the proposed railroad was ever filed, the road was never constructed, and the grant was forfeited by the act of February 28, 1885 (23 Stat., 337), which provided—

That all lands granted to the Texas Pacific Railroad Company under the act of Congress entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, and acts amendatory thereof or supplemental thereto, be, and they are hereby, declared forfeited, and the whole of said lands restored to the public domain and made subject to disposal under the general laws of the United States, as though said grant had never been made: *Provided*, That the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant.

Adverse action was taken by the Commissioner upon the ground that the proviso to the act of February 28, 1885, *supra*, fixing the

¹ Descriptive language as amended in decision on petition rendered August 17, 1922 (unreported).

price of the forfeited odd sections at the same price as "heretofore fixed for the even sections within said grant" was enacted by Congress in the belief, or under the impression, that the existing fixed price of the even sections at the date of the approval of said forfeiture act was \$2.50 per acre; and further that the prevailing lawful price of the even sections involved remained \$2.50 per acre upon approval of the act of February 28, 1885, and until the price thereof was reduced by section 4 of the act of March 2, 1889 (25 Stat., 854), which provides—

That the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double minimum price, and, also, of all lands within the limits of any such railroad grant, but not embraced in such grant lying adjacent to and coterminous with the portions of the line of any such railroad which shall not be completed at the date of this act, is hereby fixed at one dollar and twenty-five cents per acre.

The forfeiture clause of the act of February 28, 1885, *supra*, had restored the Texas Pacific granted lands (they being the odd numbered sections) "to the public domain * * * subject to disposal under the general land laws of the United States as though said grant had never been made." The proviso related in terms to the forfeited lands only but directs "that the price of the lands so forfeited shall be the same as heretofore fixed for the even sections within said grant." There can be no valid or substantial argument advanced, however, that Congress did not intend to fix the future sale price of these lands the same for the odd as for the even sections, because, obviously, if the odd sections were thereafter to be sold at the same price as theretofore fixed for the even sections, then it was intended to continue the price theretofore fixed for the even sections. But what did Congress mean by "price * * * heretofore fixed for the even sections?" Inasmuch as the road had not been definitely located by the filing of a map or by construction of the line there had been *by operation of law* no increase in price of either the odd or even sections within the limits of this grant. These lands had remained at all times and were at the date of said act of February 28, 1885, single minimum lands and subject to sale at \$1.25 per acre. In this situation, therefore, Congress must have meant something other than a direction that said lands should thereafter be sold at \$1.25 per acre. That was their lawful price under subsisting law. *United States v. Laughlin* (249 U. S., 440). Within the knowledge of Congress the price of these lands had been theretofore fixed by the Land Department at \$2.50 per acre.

and, plainly, the legislation in question was based on this known fact. Otherwise, the proviso in question is meaningless. It is a primary rule of statutory construction that a meaning must be given to the *words* of legislation consistent with the intention of the law-making body and the most rational method to interpret the will of the legislature is to explore its intentions. It may be admitted for the sake of the argument that the Congress as a body believed that the then double minimum price of these lands had been *lawfully* fixed but such admission or such fact, if it be a fact, has no bearing whatever on the question of the intention of Congress in fixing a future price for the sale thereof, except that it was intended and directed that the future price should be the same as theretofore fixed in fact and exacted in practice. Such direction was well within the powers of Congress whether the intention was to continue a price theretofore exacted without warrant of law or to fix a price for future sale at double minimum.

The purpose of the proviso to the act of February 28, 1885, was, therefore, to fix the price of all lands within the forfeited Texas Pacific Railroad Company grant, for future sale, at \$2.50 per acre. The entry involved having been made subsequently to the date of the approval of the forfeiture act and prior to approval of the act of March 2, 1889, *supra*, reducing the price of the land in question to \$1.25 per acre, the entryman made no payment in excess of lawful requirements.

The decision appealed from is accordingly affirmed.

GEORGE B. PERKINS.

Motion for rehearing of departmental decision of July 12, 1922, 49 L. D., 173, denied by First Assistant Secretary Finney, August 9, 1922.

THOMAS A. LEE ET AL.

Decided July 14, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—NOTICE—ACT OF FEBRUARY 25, 1920, SECTION 13.

Rights to an oil and gas prospecting permit do not attach prior to the filing of an application in the form and manner prescribed by the act of February 25, 1920, and the departmental regulations issued thereunder, and the mere posting of a notice of intention to apply for a permit is not sufficient to defeat the provision of section 13 of the act, which limits its operation to land that is "not within any known geological structure of a producing oil or gas field."

FINNEY, *First Assistant Secretary*:

Thomas A. Lee, E. M. Schmuck, William J. Reyes, and Carolyn M. Kaufman have appealed from so much of a decision of the Commissioner of the General Land Office dated July 27, 1921, as rejected as to S. $\frac{1}{2}$, Sec. 8, T. 14 N., R. 31 E., M. M., their application for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon 2,560 acres in scattered tracts in the Lewistown, Montana, land district.

The application was filed April 23, 1920, and was rejected as to the tract described because within the known geologic structure of the Cat Creek field as defined by the Director of the Geological Survey on April 2, 1920, and redefined on April 4, 1921.

The appeal, which is in the form of an affidavit, sets forth that although at the date of the application no claim of preference right was made, notice of intention to apply for a prospecting permit had been posted on the land on March 27, 1920, six days before the limits of the structure had been defined.

By instructions of April 23, 1921 (48 L. D., 98), the Department held that qualified persons who filed proper applications for oil or gas prospecting permits 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 of the lands as being within the geological structure of a producing oil or gas field occasioned by a discovery of oil or gas subsequently to the filing of the application in the local land office.

The effect of posting of a notice of intention to apply for a prospecting permit is merely to secure a preference right over others. A person's right to a prospecting permit does not attach until he has done everything required by the act and the regulations thereunder. It was not until after the limits of the Cat Creek field had been defined that Lee and his associates filed their application, and the fact that on March 27, 1920, they had declared their intention of applying for a prospecting permit can not be made the basis for a holding that their rights on that date were such as to defeat the provision of section 13 of the act of February 25, 1920, *supra*, which limits its application to land which is "not within any known geological structure of a producing oil or gas field."

The rejection of the application as to the tract herein described is affirmed, the case closed, and the record returned to the General Land Office.

MILLER AND LUX, INC. v. HOW (ON REHEARING).*Decided July 14, 1922.***OIL AND GAS LANDS—PROSPECTING PERMIT—SCHOOL LAND—INDEMNITY—RESERVATION—TRANSFEREE—PREFERENCE RIGHT.**

Where an indemnity school selection was made for lands not withdrawn or classified as mineral when selected, but which were afterwards approved with a reservation of the oil deposits to the United States, a transferee is entitled to a preference permit under section 20 of the act of February 25, 1920, if the State had completed the selection and made the transfer prior to January 1, 1918, notwithstanding that the approval was subsequent to that date.

COURT AND DEPARTMENTAL DECISIONS CITED, DISTINGUISHED, AND APPLIED—DEPARTMENTAL REGULATIONS AMENDED.

Case of State of California, F. W. Robinson, Transferee (48 L. D., 384, 387), cited and distinguished; cases of State of Wyoming *et al. v. United States* (255 U. S., 489), and Alexander Frazer and Carl Harvey (48 L. D., 238), cited and applied; departmental regulations of March 11, 1920, Circular No. 672, Appendix (47 L. D., 437, 472), amended.

FINNEY, First Assistant Secretary:

Jared How has filed a motion for rehearing of departmental decision of March 25, 1922, rejecting his prospecting permit application 09271, under section 13 of the act of February 25, 1920 (41 Stat., 437), for the SE. $\frac{1}{4}$, Sec. 13, and NE. $\frac{1}{4}$, Sec. 24, T. 29 S., R. 20 E., M. D. M., Visalia land district, California, and holding that Miller & Lux, Inc., transferees of the State of California, are entitled to a preference right under section 20 of the same act.

Briefly stated the material facts are that in 1895 the State of California filed school indemnity selections for the tracts described which were subsequently rejected for failure to publish notice as required by the regulations. On September 4, 1905, and June 27, 1906, new selections were made, and completed October 14, 1905, and September 29, 1907, respectively. The lands were thereafter included in temporary petroleum withdrawal of September 27, 1909, and Petroleum Reserve No. 2 by Executive order of July 2, 1910, and after proceedings in accordance with the regulations under the act of July 17, 1914 (38 Stat., 509), and prior to January 1, 1918, the State consented to the approval of the selections with reservation of oil and gas to the United States under the act of July 17, 1914, and on January 17, 1918, the selections were approved with such reservation. On April 3, 1895, the State issued its certificates of purchase for the said lands, showing full payment of the purchase price under the State laws, to John Hapgood and S. S. Brown, and the State title by mesne conveyances became vested in Miller & Lux,

Inc., on June 14, 1905. State patents issued in the name of the original purchasers on September 26, 1918, and March 11, 1918.

In support of the motion it is urged that the case is controlled by the decisions of the Department in State of California, Robinson, transferee (48 L. D., 384, 387).

That case involved an indemnity school selection filed and completed in 1907. The land was included in a petroleum reserve in 1911, and after a hearing in 1918, under the regulations of March 20, 1915 (44 L. D., 32), at which the land was found to be mineral in character, the State and its transferees filed oil waivers under the provisions of the act of July 17, 1914, *supra*, and the selection was approved March 3, 1920, with oil reservation. Thereafter a petition was filed asking for an unrestricted title, basing the claim on the decision of the Supreme Court of the United States in the case of State of Wyoming *et al. v. United States* (255 U. S., 489). The Department denied the petition, holding that the State was estopped from further claim to the oil deposits by its election and waiver, and that the case was *res adjudicata*. It is now contended that because in the Robinson case the Department held that the State by filing its consent to the reservation of oil to the United States had waived its right to thereafter claim an unlimited title, it should be held in this case that by taking similar action it waived its claim to a preference right to a prospecting permit under section 20 of the leasing act. The two cases are wholly dissimilar. In the Robinson case the State after having waived its right to the oil, and accepted title with reservation, thereafter claimed title to the oil deposits. In this case the State is not claiming title to the oil deposits, which it formerly waived, but is claiming a right created by the leasing act, and conditioned upon the fact, and allowable only in the event that it had waived its claim to the oil deposits and taken title with reservation thereof to the United States. The Department can not concur in the contention that by doing the very act on which the existence of the right depends, i. e., waiving title to the oil deposits, the State can be held to have waived the right itself.

It is also argued that under the proviso to section 2 of the act of July 17, 1914, the United States retains jurisdiction over a State selection affected thereby and that equitable title to the lands does not vest until the approval of the selection. The question as to when equitable title to land in a State selection vests has been decided by the Supreme Court in the Wyoming case, *supra*, and it is not necessary to give further consideration to that argument.

In the decision of March 25, 1922, it was said:

It is well established that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued the patent relates back to the time when the right to it became fixed. Applying this

familiar rule, it must be held that the State was vested with the equitable title of the land described in the selections long prior to January 1, 1918, and that the formal approval of January 17, 1918, related back to the date when the selections were completed.

This statement must be considered in connection with and limited to the statement of fact that preceded it, showing that the State and its transferees had elected to receive certification with reservation of the oil deposits to the United States under the act of July 17, 1914, and that approval was made with such a reservation. It was not intended to hold that the State was entitled to the oil deposits, or to modify or change the holding in the Robinson case. The doctrine of relationship was properly invoked for the purpose of establishing that the State had an assignable right, within the meaning of section 20 of the leasing act, prior to January 1, 1918.

Section 20 of the leasing act 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; and within an area not greater than a township such entryman and patentees or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres, for the purpose of making joint application.

In construing this section, in the case of Alexander Fraser and Carl Harvey (48 L. D., 237, 238), it was said:

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.

On page 40 of Circular No. 672 (47 L. D., 437, 470), it is stated:

9. Where a patented entry, or one on which final certificate has issued, has been sold or transferred, the transferee would have the same rights as the entryman, provided he acquired the land before January 1, 1918. * * *

In other words to entitle an assignee or transferee to a section 20 preference right it is not necessary that patent had actually issued, or in case of a State selection, that approval had actually been given, if the entry or selection had been perfected so that equitable title had vested, and an assignment had been made before January 1, 1918.

The statement contained on page 42 of Circular No. 672 (47 L. D., 437, 472), that—

To entitle the grantee of a State to a preference right under section 20 of the mineral leasing law, the selection must have been approved and transferred by the State prior to January 1, 1918,

was based on the law as it was construed prior to the decision in the Wyoming case, *supra*, and in conformity with that decision the word "completed" will be substituted for "approved."

The decision of March 25, 1922, is adhered to, and the motion denied.

SANTA FE PACIFIC RAILROAD COMPANY.

Decided July 25, 1922.

RAILROAD GRANT—INDEMNITY—LIEU SELECTION—ENTRY.

The act of June 22, 1874, as amended by the act of August 29, 1890, authorizing the exchange of lands within railroad grants where entries were allowed after the rights of a railroad company had attached, was not a grant of lands in place, nor an indemnity grant in the ordinary sense of that term, but one more in the nature of a lieu selection, not limited to odd numbered sections.

RAILROAD GRANT—COAL LANDS—MINERAL LANDS—SELECTION.

Lands of the United States, within the limits of the grant to the Atlantic and Pacific Railroad Company, known to be valuable for their deposits of iron or coal are not subject to selection under the exchange provisions of the act of June 22, 1874, inasmuch as Congress did not contemplate that the exception of iron and coal contained in the proviso to section 3 of the granting act of July 27, 1866, should be extended thereto.

COAL LANDS—WITHDRAWAL—SELECTION—SECTION 37, ACT OF FEBRUARY 25, 1920.

The leasing act of February 25, 1920, includes within its operation lands not lawfully appropriated at the date of its passage, which had previously been withdrawn, classified as coal lands, and restored subject to sale at a fixed price, and nothing contained in the act of June 22, 1874, can be construed as conferring a right to relief under section 37 of the former act upon a selector who made selection of classified coal lands subsequently to its enactment.

COAL LANDS—LEASE—SELECTION—PREFERENCE RIGHT.

A selector who, subsequently to the passage of the act of February 25, 1920, in good faith made a selection under the act of June 22, 1874, for and developed unappropriated, classified coal lands, should be given consideration both in the matter of priorities and equities in connection with the award of a lease under section 2 of the leasing act.

FINNEY, *First Assistant Secretary*:

The Commissioner of the General Land Office has submitted for instructions the question whether the Santa Fe Pacific Railroad Company is entitled to select coal lands under the conditions stated in his letter of March 24, 1922, as follows:

December 1, 1921, there were filed in the Santa Fe, New Mexico, land office under the act of June 22, 1874 (18 Stat., 194), as amended by the act of August 29, 1890 (26 Stat., 369), by the Santa Fe Pacific Railroad Company as successor in interest of the Atlantic and Pacific Railroad Company, the following selections.

Selections—New Mexico.

Base—Arizona.

Serial.	Subd.	Sec.	T.	R.	Area.	In lieu of Subd.	Sec.	T.	R.	Area.
			N.	W.				N.	W.	
043513.....	NE. $\frac{1}{4}$ NW. $\frac{1}{4}$	32	16	18	40.00	SE. $\frac{1}{4}$ NE. $\frac{1}{4}$	13	15	13	40.00
043512.....	NW. $\frac{1}{4}$ NW. $\frac{1}{4}$	"	"	"	"	NE. $\frac{1}{4}$ SW. $\frac{1}{4}$	27	16 $\frac{1}{2}$	13	"
043511.....	SE. $\frac{1}{4}$ NW. $\frac{1}{4}$	"	"	"	"	NE. $\frac{1}{4}$ NE. $\frac{1}{4}$	13	15	13	"
043518.....	SW. $\frac{1}{4}$ NW. $\frac{1}{4}$	"	"	"	"	SE. $\frac{1}{4}$ SW. $\frac{1}{4}$	27	16 $\frac{1}{2}$	13	"
043514.....	NE. $\frac{1}{4}$ SW. $\frac{1}{4}$	"	"	"	"	NW. $\frac{1}{4}$ NE. $\frac{1}{4}$	13	15	13	"
043517.....	NW. $\frac{1}{4}$ SW. $\frac{1}{4}$	"	"	"	"	NW. $\frac{1}{4}$ NW. $\frac{1}{4}$	13	15	13	"
043515.....	SE. $\frac{1}{4}$ SW. $\frac{1}{4}$	"	"	"	"	SE. $\frac{1}{4}$ SE. $\frac{1}{4}$	11	15	13	"
043516.....	SW. $\frac{1}{4}$ SW. $\frac{1}{4}$	"	"	"	"	NE. $\frac{1}{4}$ NW. $\frac{1}{4}$	13	15	13	"

As set out in above all these selections were filed December 1, 1921. The lands selected were originally withdrawn from all entry as possible coal lands on July 26, 1906, and such order was modified later in 1906 to apply to coal entry merely. On August 25, 1915, the land was embraced in coal withdrawal No. 8. By Executive order of February 18, 1918, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ were classified as coal at \$135.00 per acre and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ at \$133.00 per acre. The company has filed affidavits showing the lands to be nonmineral other than coal or iron and the Geological Survey in its reports on the cases corroborates such fact. At the time the applications were filed the State's claim to the tracts under its school land grant by the act of June 20, 1910 (36 Stat., 557), was not determined but the State's right was finally denied on the ground that such tracts were mineral (coal) on January 25, 1922. The lands offered as bases contain no coal or other minerals so far as the records of this office show and have been all patented to individuals. The selected and base lands are within the primary limits of the grant to the railroad and except for the coal character of the selected land, there appears no reason why the selection should not be allowed.

Section 3 of the act of July 27, 1866 (14 Stat., 292), granted to the Atlantic and Pacific Railroad Company, its successors and assigns, the odd-numbered sections within forty miles on each side of its road through the Territories of the United States, where the Government had full title, not reserved or otherwise appropriated, and free from adverse claim at the time of the location of the road; also in case of adverse claim, reservation, or disposal prior to that time of any of said sections or parts of sections, the company was authorized to select other land in lieu thereof, in alternate sections, not more than ten miles beyond the limits of the primary grant. The section further provides:

* * * *Provided further*, 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 the road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal.

The act of June 22, 1874 (18 Stat., 194), provides in part as follows:

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the

lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes.

The act of August 29, 1890 (26 Stat., 369), extended the provisions of the said act of June 22, 1874, to homestead and preemption claims, after residence and improvement for five years, but which for any cause have not been admitted to record.

The particular question involved in this case is whether lands withdrawn by the Government for classification and valuation, and thereafter, prior to the date of selection, are classified and valued as coal lands at \$133 and \$135 per acre, are subject to selection and patent under said act of June 22, 1874. While the granting act of July 27, 1866, *supra*, expressly provides that the exception of mineral lands from the place and indemnity grant "shall not be held to include iron or coal," the act of June 22, 1874, *supra*, provides that the company may select in lieu of the lands surrendered "an equal quantity of other lands * * * upon any of the public lands not mineral and within the limits of the grant * * *." In short, the act of June 22, 1874, provides that mineral lands shall not be subject to selection thereunder and does not, like the act granting lands to the railroad company in place or indemnity limits, contain the provision that the word "mineral" when it occurs in the act "shall not be held to include iron or coal."

It is, therefore, incumbent upon the Department to ascertain the intent of Congress in this particular, and to consider not only the language but the purpose Congress had in mind, as well as the effect of the language used in the several acts. The granting act, designed to encourage and aid the railroad company in the construction and operation of its line, was enacted at a time when coal was the chief, if not the only, fuel used in the operation of railroads. Iron in manufactured form was and is used for the rails and other items involved in the construction and operation of a railroad. Therefore, Congress in granting to the company specified lands within defined limits, and excepting minerals therefrom, added another specific exception or clause to the act, which had the effect of

granting to the railroad company any odd-numbered sections of public lands within its primary or indemnity limits containing deposits of iron or coal.

The act of June 22, 1874, is not a grant of lands in place, nor is it an indemnity grant in the ordinary sense of that term. It relates to lands which passed to the railroad company under its grant and which the company had a right to keep and hold thereunder. The act was an equitable or relief law, designed to permit the railroad company at its option to recognize the equitable claim of a preemption or homestead settler or entryman, relinquishing its claim to the lands which had inured to it under its grant, in favor of such settler or entryman, and to select in lieu thereof an equal quantity of other public lands not "mineral" and located anywhere within the limits of the company's grant. It will be seen that the act is in the nature of a lieu selection act, not limited to odd-numbered sections, but applicable to any lands of the character described within the exterior limits of the company's grant. The bases of these lieu selections are not mineral, coal, or iron, but agricultural claims, for at the date of the passage of the act of 1874 preemption and homestead entries could not be made upon lands of the United States valuable for their deposits of coal or iron. The same is true at the present time, as a homestead or preemption entryman can not acquire title to public lands of the United States known to be valuable for coal or iron, lands valuable for iron not being subject to entry at all under said laws, and lands containing coal being subject to entry under said laws only when the entryman expressly agrees to a reservation of the coal deposits to the United States, with the right of the United States, or its lessees, to enter upon, mine, and remove the same.

It, therefore, seems to follow clearly that Congress intended to limit these lieu selections to the same character of lands or rights which could be acquired under the homestead or preemption laws, and which the company recognized, by the surrender of its vested right. In other words, that the lieu selections which the railroad company was authorized to make would be of lands "not mineral" and that this term as used in the act of June 22, 1874, meant that lands containing coal or iron, as well as lands containing other minerals, could not be selected thereunder. This view is supported by the fact that in the granting act, in order to permit the railroad company to take lands containing coal or iron, the Congress deemed it necessary to insert an express provision to that effect; while in the act of June 22, 1874, it made the broad exclusion of all minerals, and placed in the act no express language which would warrant the conclusion that it intended to permit the railroad company, in making these optional lieu selections, to take public lands valuable for iron or coal.

This construction of the act of June 22, 1874, comports with the policy of Congress and with the decisions of this Department in the case of other lieu selections or lieu scrip acts, the effect of which has uniformly been to exclude from selection, lands valuable for coal, iron, or other minerals.

The case under consideration sharply illustrates the result of a contrary construction. Lands of a probable value of from \$1.25 to \$3 per acre are offered on December 1, 1921, as a basis for the selection of lands of the United States included in a coal withdrawal August 25, 1915, and classified by Executive order of February 8, 1918, as containing coal of the value of from \$133 to \$135 per acre.

I can not conceive that Congress intended that a lieu selection, based upon nonmineral lands of trivial value, could be made for mineral lands of the value of those here involved. While I do not find that the precise question has been determined by the Secretary of the Interior, I find that it has been the uniform policy of the General Land Office to confine such selections to lands not known to contain coal, iron, or other minerals, and that other railroad companies have acquiesced therein by furnishing proofs of the non-coal or iron character of the land. This construction, in my opinion, harmonizes and is in full accord with the language, purpose, and effect of the said act of June 22, 1874.

It is accordingly held that lands of the United States known to be valuable for their deposits of coal or iron are not subject to selection under the act of June 22, 1874, *supra*, as amended by the act of August 29, 1890, *supra*.

FALL, *Secretary (Concurring Opinion)* :

I have concurred in the conclusions arrived at by First Assistant Secretary Finney, in re Santa Fe 043511-043518, inclusive.

In addition to the reasoning set forth as the basis for his conclusions, I am impelled to my acquiescence therein, to a very considerable degree, through consideration of matters casually referred to by him, to-wit :

The application for the location of this scrip was made in 1921.

Up to the year 1915 no such application had been made for these lands, insofar as I am aware. In that year these lands, among others, were withdrawn by Executive order both under Executive power and under provisions of the act of 1910.

During the period that these lands were withdrawn their status had been affected so that location of such scrip could not have been made thereupon, nor could any other entry have been so made, except subject to the results of the classification and price-fixing for which purposes the lands had been withdrawn.

In my judgment, this withdrawal and classification of these lands had an effect upon the status thereof, which must be considered in a decision of the case now before us.

In other words, prior to the attempted location of this scrip, before any rights of any kind had been acquired or claimed in the lands by the owners or locators of the scrip, the Government of the United States had intervened, withdrawing the lands and classifying them for sale.

When these lands were restored, they were restored to be sold at the valuation thereof and this status undoubtedly remained the actual status of the lands in question until the law itself should have been changed.

In February, 1920, the law *was* changed, and provision was made for the acquisition of such lands by lease properly made under the terms of the last act.

Such lease could be made under section 2 of the act of February 25, 1920.

Under section 37 of the same act, it is provided that deposits of coal, phosphates, sodium, etc., "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, etc."

Now, it is apparent that the claim in question was not initiated as to this particular land until after the passage of the act of February 25, 1920. It could only be sustained upon the ground that under the act of 1874, any lands upon which such lieu scrip might be located thereafter, could be charged with a private right wherever found, which would remove such lands from the provisions of the act of 1920. The act of 1874 created no such vested right.

Therefore, the claim in question, not having such status as that provided in section 37 of the act of 1920, that is, the status of a "valid claim existent at date of passage of this Act" (1920), the only method by which title could be obtained to the lands in question would seem to be under the provisions of section 2 *et seq.*, of the latter act.

I am inclined to hold that the parties claimant have proceeded in good faith insofar as their sincerity of purpose is concerned, in insisting upon their right to locate this scrip, and I presume that your records will show development of the land in question.

If you find such good faith to exist and to be borne out by acts of the claimants, you would, in my judgment, be at liberty to consider such matter in fixing the lease rental upon these premises, and to "recognize equitable rights of such occupants or claimants."

Of course, this would not relieve from the necessity of advertising the proposed lease, but I think such facts, if established, would

justify your notifying the parties that a filing of an application for lease, if made by them immediately, say within thirty or sixty days, being based upon recognition of some equitable right of theirs, will be considered both in the matter of priorities and equities in passing upon such application.

SANTA FE PACIFIC RAILROAD COMPANY.

Motion for rehearing of departmental decision of July 25, 1922, 49 L. D., 180, denied by First Assistant Secretary Finney, August 24, 1922.

MUSOLF v. COWGILL.

Decided July 28, 1922.

RELINQUISHMENT—OIL AND GAS LANDS—HOMESTEAD—PURCHASER—PROSPECTING PERMIT—APPLICATION—ACT OF FEBRUARY 25, 1920, SECTION 13.

The purchase of a relinquishment together with the improvements of one who had made an unrestricted homestead entry does not vest in the purchaser any rights that will interfere with the allowance of an oil and gas prospecting permit under section 13 of the act of February 25, 1920, pursuant to an application that was pending when the relinquishment was executed.

RELINQUISHMENT—HOMESTEAD—PURCHASER—OIL AND GAS LANDS—PROSPECTING PERMIT—SURFACE RIGHTS.

A purchaser of a relinquishment executed during the pendency of an oil and gas prospecting permit application by one who had made an unrestricted homestead entry will be allowed to make a surface homestead entry only, and then only upon his consenting to the use by the permittee of so much of the surface of the land without compensation to the nonmineral entryman as shall be needed in extracting and removing the mineral deposits.

FINNEY, First Assistant Secretary:

At the Douglas, Wyoming, land office on August 27, 1921, Jesse M. Cowgill applied for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon all of Secs. 4, 5, 8, and 9, T. 36 N., R. 85 W., 6th P. M. At the date of said application the NW $\frac{1}{4}$, said Sec. 9, was embraced in the homestead entry of Giles B. Nickerson, made June 28, 1920, without the reservation of the oil and gas content, and the NE $\frac{1}{4}$ and S $\frac{1}{2}$, said Sec. 9, were embraced in said Nickerson's additional entry under the stock-raising homestead act. Nickerson's entries were canceled on relinquishment filed September 14, 1921, and on the same day Walter A. Musolf applied (029880) to make entry under section 2289, Revised Statutes, for the NW $\frac{1}{4}$, and to make an additional entry (029881) under the stock-raising homestead act for the NE $\frac{1}{4}$ and S $\frac{1}{2}$. In view of the pendency of Cowgill's application for a prospecting permit, the local officers forwarded the applications of Musolf to the General Land Office

pursuant to the instruction of October 6, 1920 (47 L. D., 474). By decision dated March 14, 1922, the Commissioner of the General Land Office required Musolf to consent to the amendment of his original application (for NW $\frac{1}{4}$, Sec. 9) to show that it is made subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas, and subject to the right of Cowgill to prospect for oil and gas and to use so much of the surface of the land as is necessary in prospecting for, extracting, and removing the oil and gas, without compensation to the homesteader for such use. Said decision also rejected the application to make additional entry because the original entry had not been allowed. Musolf has appealed contending that as the entries of Nickerson were intact at the date of Cowgill's application for a prospecting permit, and the improvements on the land had been purchased by him, he had the superior right to the land.

The fact that the land had been embraced in Nickerson's entries does not affect Cowgill's rights. Relinquishments of entries run only to the United States, and any payment by Musolf to Nickerson for his relinquishment and the improvements on the land did not vest in him any rights.

In requiring the consents in connection with the application to make the original entry, the Commissioner followed the regulations of October 6, 1920, *supra*. When the application was filed, the local officers suspended it to await instructions under said regulations, and while the application was so suspended Musolf was not qualified to make an additional entry.

If Musolf executes and files in the local office the consents required in connection with his application to make homestead entry for NW $\frac{1}{4}$, Sec. 9, the same will become immediately allowable, and he can then renew his application to make an additional entry for the remainder of said Sec. 9, but in connection therewith he must file the same consent as to the free use of the surface by Cowgill as he is required to file in connection with his application to make the original entry.

The decision appealed from is affirmed.

NED O'CONNOR.

Decided July 28, 1922.

RIGHT OF WAY—RECLAMATION—DEEDS—EFFECT OF ACKNOWLEDGMENT—OREGON.

By the weight of authority in the United States, one who signs and acknowledges a deed, though his name be omitted from the body of the instrument, makes the deed his own, and becomes bound in the premises conveyed, but even if that rule did not prevail in the State of Oregon, any defect resulting from such omission is cured by statute.

RIGHT OF WAY—RECLAMATION—CANALS AND DITCHES—DAMAGES.

In the necessary construction, maintenance, and operation of canals and other structures upon a right of way conveyed to the Government for reclamation purposes, the United States is not liable for the value of loss of the land conveyed or for general damages resulting from the use of the easement.

RIGHT OF WAY—RECLAMATION—CANALS AND DITCHES—REPAYMENT.

Lands covered by a canal or other structures constructed by the Reclamation Service for reclamation purposes, and lands made nonirrigable thereby are not properly a part of an irrigation unit, and one who has paid construction charges thereupon is entitled to credit or reimbursement therefor.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Sterling v. Park* (129 Ga., 309; 121 Am. St. Rep., 224), and *Albert W. C. Smith* (47 L. D., 158), cited and applied.

FINNEY, *First Assistant Secretary*:

This is an appeal by Ned O'Connor from decision of March 2, 1922, by the Acting Director of the Reclamation Service, rejecting in part his claim for damages to his land by construction works of the Reclamation Service.

The tracts involved are lots 2, 3, 4, and 5, Sec. 8, T. 41 S., R. 11 E., W. M., Oregon. It is claimed that an area of 25.2 acres has been covered or made useless for farming purposes by the construction of a Government canal and other structures thereon for reclamation purposes.

The Reclamation Service relies upon a grant of right of way over said tracts executed April 25, 1913, by Eliza A. Whitlatch, and her husband, W. W. Whitlatch. The claimant maintains that this grant is without force for the reason that Eliza A. Whitlatch is described therein as the grantor, when in fact she was not the owner of the land but held merely a contract of purchase and bond for a deed from her husband, who was the real owner and who was not described as grantor in the grant of right of way, but simply signed same with his wife who was not then the owner and who never became the owner. In support of this contention, a number of authorities are cited to the effect that a deed signed and acknowledged by a person who was not named in the body thereof as grantor is ineffective.

This appears to be the usual rule in some jurisdictions, but it is not without its exceptions even in those jurisdictions where the general rule obtains, and the rule is not sanctioned in other jurisdictions, and seems to have been discredited by leading text writers.

In the case of *Sterling v. Park* (129 Ga., 309; 121 Amer. State Reports, 224), it was explained that the old rule grew out of the fact that at common law signing of a deed was not required because people were at that time so generally uneducated that they were unable to write. It was therefore essential that the grantor be otherwise identified in the body of the instrument. The form of attestation was "sealed and delivered." The crude manner of execution

of old legal instruments is indicated by reference to a charter of Edward III of which the last two lines run, in the English translation, as follows:

And in witness that it was sooth,
He bit the wax with his foretooth.

In this connection, the court in the case above referred to said:

Thus it will be seen, from the conditions prevailing at common law, the prime importance of the grantor's name appearing in the body of the deed was to identify the deed as the act of a particular grantor. Without signature, and executed with a seal indented by the prick of a pin, or imprint of a tooth, the deed could not disclose the identity of the grantor, except by mention of his name in the grant. From the very necessity of the case grew the rule that the name of the grantor should appear in connection with apt words indicating that the deed was his grant.

The following excerpt is also taken from said decision:

As was very pertinently said by Woodbury, J., in *Elliott v. Sleeper*, 2 N. H. 525, decided as early as 1823: "Here, however, a deed must by statute be attested; and since seals have ceased to be distinguished by peculiar devices, and education has become more generally diffused, signing would seem to be proper and indispensable. When (313) a deed is signed, the utility of naming the grantor in the premises or any part of the body of the instrument appears in a great measure superseded; for 'know', says Perkins, section 36, 'that the name of the grantor is not put in the deed to any other intent but to make certainty by the grantor': Bacon's Abridgment, 'Grant' C. This certainly is attained whenever a person signs, seals, acknowledges and delivers an instrument as his deed, though no mention whatever be made of him in the body of it; because he can perform these acts for no other possible purpose than to make the deed his own. In a deed-poll, like that under consideration, where only the grantor speaks or signs or covenants, there is still less danger of mistake and uncertainty concerning the party bound, than in deeds indented." In agreement with the New Hampshire case are *Armstrong v. Stovall*, 26 Miss. 275; *Ingoldsby v. Juan*, 12 Cal. 564; *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166. Text-writers now very generally discard as unsound the proposition that the grantor should be named as such in the deed, and approve those cases which hold that the conveyance is operative when signed by the grantor, though his name be omitted from the body of the instrument: 3 Washburn on Real Property, 2120; 1 Devlin on Deeds, sec. 204.

The claimant has not cited any decision by the Oregon courts to show what the law is in that State on this subject, but if, under the rule applicable in that State, there was a defect in the grant as contended, it would appear to be no longer a valid objection in view of the legislative act of 1919, chapter 302 of the Oregon laws, designed to cure defects in deeds, section 5 of which in part provides:

All deeds or other instruments affecting or purporting to affect the title to real property, heretofore executed in this state, or in any foreign country, or in any state or territory of the United States, which shall have been signed by the grantor, shall be effective according to the terms of such instrument, without sealing or other execution, acknowledgment or witnesses thereto whatever and shall be subject to record in the deed records of the county in which said land is situated.

It is further urged that even if the said instrument be considered a valid grant of right of way, yet the Government is not relieved of the legal requirement of paying for the value of the land taken and for all damages resulting from the use of such right of way.

O'Connor as present owner of the land under deed from Whitlatch dated November 17, 1919, has asked payment for the area of land taken or damaged at the rate of \$125 per acre, \$3,162.50; the cost of two bridges across the canal to give him access to the river and the strip of land between the canal and the river, \$1,000; the cost of two drain culverts under the canal, \$500; cost of drain ditch paralleling the canal, \$500; general damage to his ranch, \$3,500, making a total of \$8,662.50.

The Reclamation Service offered him about \$1,800 for the loss of the improvements on the right of way and, in addition, offered to bear the expense of moving two or three small buildings and the fencing from the right of way, and to construct one farm bridge over the canal. It seems to be a very liberal offer for the improvements, as it allowed \$100 an acre for 6.4 acres in alfalfa, grain, garden, or corral; also \$50 an acre for 19.1 acres classified as feed yard or pasture. The amount of \$200 was allowed also for a pumping plant, in lieu of a second bridge, to provide water for stock purposes.

In the appeal, a total of \$10,562.50 is claimed. The value of improvements actually destroyed is placed by the claimant at \$2,000, but the different items of loss are not stated. He also claims reimbursement for \$392.50 for water charges heretofore paid on said land, presumably on that part covered by the canal or rendered unsuitable for use by reason of the irrigation structures.

The grant in question conveyed to the United States all rights of way for ditches, canals, flumes, pipe lines, telephone and telegraph transmission lines, or other structures needed for or in connection with the reclamation project.

The rights of the United States under this grant are similar to its rights under the reservation provided by the act of August 30, 1890 (26 Stat., 371, 391), requiring reservation of rights of way in all patents issued for lands west of the 100th meridian for ditches or canals constructed by authority of the United States.

In the case of Albert W. C. Smith (47 L. D., 158), it was held (syllabus):

The act of August 30, 1890, reserves perpetually to the United States an easement and right of way through and over all lands west of the one hundredth meridian thereafter patented under any of the public-land laws; and thereunder, in the necessary construction, maintenance, and operation of any ditches, canals, or laterals for the purpose of irrigation and reclamation of arid lands, the Government is not liable for damages resulting to the land; nor can they be included in the computation of the actual value of improvements thereon for which compensation may be made.

From the description of the improvements destroyed or interfered with, the Department is of opinion that the offer made by the Reclamation Service on that account was very liberal, and no liability for loss of the land or for general damage to the ranch can be recognized.

The record is obscure as to the claim for \$392.50 said to have been paid on water charges. If, as may be supposed, the claimant has been required to pay construction charges on the land covered by the canal or other reclamation structures or on lands thereby made non-irrigable, such condition would justly entitle him to refund or credit for such amount, because such lands could not properly be considered as a part of the reclamation unit for which the claimant should be charged. It is directed that the Reclamation Service make proper adjustment of this item, if necessary under the facts and the general regulations applicable to such conditions. Except as modified in this respect, the action appealed from is affirmed.

NED O'CONNOR.

Motion for rehearing of departmental decision of July 28, 1922 (49 L. D., 187), denied by First Assistant Secretary Finney, October 17, 1922.

GARFIELD A. PALTENGHE.

Decided July 28, 1922.

STOCK-RAISING HOMESTEAD—ADDITIONAL—COMPACTNESS—CONTIGUITY.

Sections 1 and 3 of the stock-raising homestead act are to be construed so as to harmonize with the interpretation given to sections 4 and 5 thereof, as amended by the act of September 29, 1919, and, when so construed, it is obvious that two or more incontiguous tracts of designated land within a radius of twenty miles may be included in an original or an additional entry, but the lands entered must be in a reasonably compact form.

DEPARTMENTAL DECISION CITED AND APPLIED—DEPARTMENTAL REGULATIONS AMENDED.

Case of Fred Mathews (48 L. D., 239), cited and applied; instructions of December 14, 1921, Circular No. 523 (48 L. D., 485), amended.¹

FINNEY, *First Assistant Secretary:*

An appeal by Garfield A. Paltenghe from a decision of the Commissioner of the General Land Office questions the correctness of the prevailing interpretation of certain provisions of the stock-raising homestead act.

It appears that on July 1, 1921, said Paltenghe applied at the Santa Fe, New Mexico, land office to make an original entry under

¹ See instructions of September 9, 1922, Circular No. 846 (49 L. D., 266), amending Circular No. 523 (48 L. D., 485).

the said act of the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 6, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 9, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 17, T. 18 N., R. 23 E., N. M. M. (400 acres). All the land applied for had been theretofore designated as subject to entry under the said act. The local officers rejected the application because it described four inconiguous tracts, the applicant being advised that he might make an original entry for the 200 acres in Sec. 9 and an additional entry for not more than one of the other tracts. On appeal, the Commissioner of the General Land Office, by decision dated March 25, 1922, affirmed the action of the local officers, and the applicant has appealed to the Department.

Section 1 of the stock-raising homestead act provides for the making of entries "for not exceeding 640 acres of unappropriated unreserved public land in reasonably compact form." Section 3 as amended by the act of October 25, 1918 (40 Stat., 1016), provides:

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. * * *

Sections 4 and 5 of the act were amended by the act of September 29, 1919 (41 Stat., 287), and now read as follows:

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 home-

stead 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.

Under the present regulations, an additional entry under section 4 or 5 of the act may embrace two or more incontiguous tracts, whereas original entries are limited to one tract, and additional entries under the first proviso to section 3 may embrace two incontiguous tracts if one of them adjoins the original entry.

Considering the act as a whole, the Department has become convinced that its interpretation as to the requirements of compactness of entries thereunder is not in harmony with what was intended by Congress. Such interpretation has been influenced apparently by the regulations pertaining to entries under section 2289, Revised Statutes, and the enlarged homestead acts. Entries under said section 2289 are limited to "one quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands." The enlarged homestead acts—February 19, 1909 (35 Stat., 639), and June 17, 1910 (36 Stat., 531)—provide in section 1 for original entries of 320 acres or less "located in a reasonably compact body, and not over one and one-half miles in extreme length." But nowhere in the stock-raising homestead act is the word "tract" used except in the first proviso to section 3; and the second proviso to said section is so worded as to indicate that Congress did not intend to limit entries thereunder to one tract.

One who has made an entry under section 2289, Revised Statutes, or under one of the enlarged homestead acts, can not make entry for incontiguous land until he has perfected his original entry or will have completed the period of residence required within six months from the date of his application to make an additional entry. But under sections 4 and 5 of the stock-raising homestead act, one can enter such a quantity of designated land, in two or more tracts, as will aggregate, with his prior entry or entries, approximately 640 acres, whether or not final proof has been submitted on his prior entries, the only limitations being that the land in the additional entry must be within a radius of twenty miles from the existing entry or the land theretofore acquired under the homestead laws, and that all tracts contiguous to the prior entry or entries must be entered before any incontiguous tracts.

The interpretation heretofore given to section 1 of the stock-raising homestead act is not in harmony with the departmental construction of section 13 of the act of February 25, 1920 (41 Stat.,

437), which authorizes the granting of permits to prospect for oil and gas upon not to exceed 2,560 acres of lands "in a reasonably compact form."

In construing said provision, the Department has held that in-contiguous 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. Fred Mathews (48 L. D., 239).

Under existing regulations, it is possible for one to secure three or more in-contiguous tracts under the stock-raising homestead act by making an original entry for one of the tracts and an additional entry for two or more of the tracts. Such a proceeding requires the payment of two filing fees, and is repugnant to the rule that one should be allowed to do in a direct manner that which he can do in a circuitous or indirect way. In other words, the provisions of sections 1 and 3 of the act should be construed so as to harmonize with the interpretation given to sections 4 and 5 as amended. As so construed, two or more in-contiguous tracts of designated land within a radius of 20 miles may be included in an original entry or an additional entry under the proviso to section 3; but the entry, when made, must be in a reasonably compact form. The General Land Office is directed to prepare and submit for departmental consideration a regulation embodying the substance of this decision.¹

The decision appealed from is reversed, and the application in question will be allowed in the absence of objection not now appearing.

EXTENSION OF TIME FOR PAYMENTS—CROW INDIAN LANDS.

INSTRUCTIONS.

[Circular No. 840.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 28, 1922.

REGISTER AND RECEIVER,
BILLINGS, MONTANA:

The President's proclamation issued July 10, 1922, providing for future extensions of time for payment by purchasers and entrymen under the President's proclamations of September 28, 1914, (38 Stat., 2029), and April 6, 1917, (40 Stat., 1653), of lands in ceded portions of the Crow Indian Reservation, Montana, directs—

* * * that an extension of time for payment until the 1923 anniversaries of the dates of the purchases and entries be allowed to all purchasers and entrymen of lands on the reservation purchased or entered under the said

¹ See instructions of September 9, 1922, Circular No. 846 (49 L. D., 266).

Proclamation of September 28, 1914, or under the said Proclamation of April 6, 1917, upon the payment to the receiver of the district land office of interest at the rate of five per centum per annum on the amounts extended, from the maturities thereof to the expiration of the periods of the extensions. The district land office will promptly notify all purchasers and entrymen entitled to the extension of the manner in which it may be obtained. Those whose payments are not in default at the time of the receipt of the notice will be allowed sixty days from the maturities of the unpaid amounts within which to make payment of the interest. If the interest is not paid within the time stated, or, if, within such time, the amounts in arrears are not paid in full, without interest, the purchases or entries for which the amounts are due will be reported by the district land office to the General Land Office for cancellation.

Pursuant to the said proclamations, the following regulations are prescribed:

1. The said proclamation of September 8, 1914, provided that one-third of the price of the land must be paid when the entry or purchase is made. In the case of a purchase the balance of the price must be paid in two equal payments, one year and two years, thereafter, and in the case of an entry, in two equal payments, three years and four years, thereafter, unless paid sooner. The said proclamation of April 6, 1917, provides that one-fifth of the purchase price must be paid on the day following the sale and that the balance must be paid in four equal, annual installments in one, two, three, and four years after the date of sale, unless paid sooner. The President's proclamation of May 5, 1920 (41 Stat., 1793), allowed an extension of time until the 1921 anniversaries of the dates of the purchases and entries made under the provisions of the two previous proclamations. The President's proclamation of August 11, 1921, allowed a further extension of time until the 1922 anniversaries of the dates of such purchases and entries. Under the present proclamation an extension of time to the 1923 anniversaries of said purchases and entries may be secured.

2. Within sixty days from receipt of notice to be given by you immediately, any purchaser or entryman whose payments are in default at the time of such receipt, must either pay the amounts due in full without interest, or he may pay interest on the amounts extended from the maturities thereof to the 1923 anniversaries. Any entryman or purchaser whose payments are not in default at the time of the receipt of notice must within sixty days from the maturities of the unpaid amounts either pay the installment due in full without interest, or he may pay interest from the date of the maturities thereof to the 1923 anniversaries. You will promptly report to this office for cancellation all entries or purchases on which the interest is not paid within the time stated, or on which the amounts in arrears are not paid in full without interest.

3. The time for any payment can not be extended to a date beyond the 1923 anniversary.

4. Proof may be submitted at any time before such anniversary, provided the requirements of the law as to payments are complied with.

5. No special form of application for extension of time to make payment will be required. The payment of the required sums will be sufficient and the receiver will note upon receipts and abstracts the nature and purpose of the payment.

You will forward copies of these instructions to all purchasers and entrymen who are affected hereby, advising them that in order to secure the benefits of this proclamation they must comply with its requirements as herein explained.

GEO. R. WICKHAM,
Acting Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

AGRICULTURAL ENTRIES ON COAL, OIL, AND GAS LANDS IN THE TERRITORY OF ALASKA.

INSTRUCTIONS.

[Circular No. 842.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 31, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES IN ALASKA:

The following instructions are issued under the provisions of the act of March 8, 1922 (42 Stat., 415), entitled "An Act to provide for agricultural entries on coal lands in Alaska":

1. *Scope of the act.*—The act provides that, upon the unreserved, unwithdrawn public lands in the Territory of Alaska, homestead claims may be initiated by actual settlers on public lands which are known to contain workable coal, oil, or gas deposits, or which may be, in fact, valuable for the coal, oil, or gas contained therein. Thus, by the class last-named, provision is made for cases in which land is not at the date of the initiation of the claim thereto actually known to contain workable coal, oil, or gas deposits, but in which it becomes known, during the interval between the initiation of the claim and its completion, that the land is, in fact, valuable for the coal, oil, or gas contained therein.

It also provides that homestead claims so initiated may be perfected under the appropriate public land laws and that, upon satis-

factory proof of full compliance with these laws, the claimant shall be entitled to patent to the lands entered by him, which patent shall contain a reservation to the United States of all the coal, oil, or gas in the land patented, together with the right to prospect for, mine, and remove the same.

The act constitutes, therefore, an extension to the Territory of Alaska of the principles of the surface homestead acts already in force in the public land States, namely, the acts of March 3, 1909 (35 Stat., 844), June 22, 1910 (36 Stat., 583), and July 17, 1914 (38 Stat., 509).

2. *Homestead Applications.*—Applications to make homestead entry for land embraced in a coal, oil, or gas prospecting permit or lease should be suspended and forwarded to the General Land Office for consideration and instructions.

Applications to make homestead entry for lands classified as, or known to be valuable for coal, oil, or gas must have 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 March 8, 1922 (Public No. 165).

Like notations will be made by registers upon the face of the notices of allowance issued on applications filed under this act. If, prior to the date of the filing of the homestead application, the land was embraced in a prospecting permit or lease, the notice of allowance should contain substantially the following:

The records of this office show that (*here insert the name of permittee or lessee*) has been granted a prospecting permit (*or lease, as the case may be*) affecting the (*here insert the description of land*), and has the right to occupy so much of the surface thereof as may be required for all purposes reasonably incident to prospecting for and the removal of the coal (*or drilling for and the extraction of the oil and gas, as the case may be*), without liability to the homestead entryman for resulting damages to his crops and improvements.

3. *Final Certificates and Patents.*—Final certificates issued to homestead claimants under this act will contain the following provision, which you will cause to be written or stamped thereon:

Patent will contain provisions, reservations, conditions and limitations of the act of March 8, 1922 (Public No. 165).

There will be incorporated in patents issued to homestead claimants under this act the following:

Excepting and reserving, however, to the United States all the coal, oil, or gas in the lands so patented, and to it or persons authorized by it, the right to prospect for, mine and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the act of March 8, 1922 (Public No. 165).

4. *Notation of Records.*—Upon the acceptance by you of any filing under this act, you will make appropriate notation on your records to show that the filing was made under the provisions of the act.

You will make a similar notation on the margin of the township plat, if any, giving the description of the land in which the deposits have been reserved.

5. *Soldiers' Additional Homesteads.*—The final proviso to the act excludes all the lands in Alaska withdrawn, classified, or valuable for coal, oil, or gas, from entry or disposition by means of the location of rights under Section 2306, Revised Statutes, commonly known as soldiers' additional homestead entries.

6. *Disposal of Mineral Deposits.*—Section 2 of the act provides, that, upon satisfactory proof of full compliance with the provisions of the laws under which entry was made and with the provisions of the act itself, the homestead claimant shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal, oil, and gas in the land so patented, together with the right to prospect for, mine, and remove the same; and that the coal, oil, and gas deposits so reserved shall be subject to disposal by the United States in accordance with the provisions of the laws applicable to coal, oil, or gas deposits, or coal, oil, or gas lands in Alaska in force at the time of such disposal. It also provides that any person qualified to acquire coal, oil, or gas deposits, or the right to mine, and remove the coal, or to drill for, and remove the oil, or gas, under the laws of the United States, shall have the right at all times to enter upon the lands as provided by this act for the purpose of prospecting for coal, oil, or gas upon the approval, by the Secretary of the Interior, of a bond or undertaking to be filed with him as security for the payment of all the damages to the crops and improvements on such lands, by reason of such prospecting; and that any person who has acquired from the United States coal, oil, or gas deposits in any such land or the right to mine, drill for, or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal, oil, or gas therefrom, and mine, and remove the coal, or drill for, and remove the oil or gas upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking, in an action instituted in any competent court to ascertain and fix said damages.

There is no provision under the law for prospecting prior to the actual issuance of a permit therefor.

7. *Permittees' Bonds.*—Provision is made by the act of March 4, 1921 (41 Stat., 1363), for coal prospecting permits in Alaska, and by the act of February 25, 1920 (41 Stat., 437), for oil prospecting permits. In order lawfully to mine, remove or drill for the coal, oil, or gas affected by this act, the permittee must file a waiver from, or a

consent of the homestead claimant, or there must be presented to and be approved by the Secretary of the Interior, a bond or undertaking for the payment of all damages to the crops, and improvements on the lands prospected, caused by the prospecting.

8. *Form of Permittee's Bond.*—There must be filed with such bond or undertaking, evidence of service of a copy thereof upon the homestead claimant. The bond must be executed by the prospector as principal with two competent individual sureties, or a corporate surety which has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), as amended by the act of March 23, 1910 (36 Stat., 241), in the sum of \$1,000. 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 Postmaster as to the identity, signatures, and financial competency of the sureties.

This bond or undertaking may be filed as a matter of expedition at the time of the filing by the mineral claimant of his application for a permit or the filing may be deferred until formal notice of the necessity therefor shall be received from this office (forms of bonds which should be utilized are appended).

9. *Lessees' Bonds.*—There is no provision for the presentation to this office of bonds *executed to or for homestead claimants* by lessees or by persons who have acquired from the United States coal, oil, or gas deposits or the right to mine, drill for, or remove the same. In such cases bonds are to be arranged for in an action instituted in any competent court to ascertain and fix the damages suffered.

10. *Homestead Claimants' limited Right to make use of the Coal Deposits.*—The homestead claimant under this act may, at any time prior to the disposal by the United States of the coal deposits on his claim, make use of them for his domestic purposes and this may be done without the filing of any application therefor. This privilege does not, however, authorize the mining of the coal deposits for the purpose of barter or sale.

11. *Supplementary Circulars.*—The general regulations and procedure under the various classes of public land filings affected by this act are contained and may be referred to in the specific circulars relating to those filings.

WILLIAM SPRY,
Commissioner.

Approved:

ALBERT B. FALL,
Secretary.

[Public No. 165—42 Stat., 415.]

[H. R. 8842.]

An Act To provide for agricultural entries on coal lands in Alaska.

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 homestead claims may be initiated by actual settlers on public lands of the United States in Alaska known to contain workable coal, oil, or gas deposits, or that may be valuable for the coal, oil, or gas contained therein, and which are not otherwise reserved or withdrawn, whenever such claim shall be initiated with a view of obtaining or passing title with a reservation to the United States of the coal, oil, or gas in such lands, and of the right to prospect for, mine, and remove the same; and any settler who has initiated a homestead claim in good faith on lands containing workable deposits of coal, oil, or gas, or that may be valuable for the coal, oil, or gas contained therein, may perfect the same under the provisions of the laws under which the claim was initiated, but shall receive the limited patent provided for in this Act: *Provided, however,* That should it be discovered at any time prior to the issuance of a final certificate on any claim initiated for unreserved lands in Alaska that the lands are coal, oil, or gas in character, the patent issued on such entry shall contain the reservation required by this Act.

SEC. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the entry is made and of this Act the entryman shall be entitled to a patent to the lands entered by him, which patent shall contain a reservation to the United States of all the coal, oil, or gas in the land so patented, together with the right to prospect for, mine, and remove the same. The coal, oil, or gas deposits so reserved shall be subject to disposal by the United States in accordance with the provisions of the laws applicable to coal, oil, or gas deposits on coal, oil or gas lands in Alaska in force at the time of such disposal. Any person qualified to acquire coal, oil, or gas deposits, or the right to mine and remove the coal or to drill for and remove the oil or gas 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 the provisions of this Act, for the purpose of prospecting for coal, oil, or gas therein, upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal, oil, or gas deposits in any such land, or the right to mine, drill for, or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal, oil, or gas therefrom, and mine and remove the coal or drill for and remove the oil or gas upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided,* That the owner under such limited patent shall have the right to mine the coal for use on the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided further,* That nothing in this Act shall be construed as authorizing the exploration upon or entry of any coal deposits withdrawn from such exploration and purchase: *And provided further,* That nothing herein contained shall be held or construed to authorize the entry or disposition, under section 2306, United States Revised Statutes, or under Acts amendatory thereof or supplemental thereto, of withdrawn or classified coal, oil, or gas lands or of lands valuable for coal, oil, or gas.

Approved, March 8, 1922.

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE.

Coal Prospector's Bond.

[Form approved July 31, 1922.]

Under the acts of March 4, 1921 (41 Stat., 1363) and March 8, 1922 (Public No. 165).

KNOW ALL MEN BY THESE PRESENTS: That I (or We), _____ of _____, a citizen (or citizens) of the United States, as principal (or principals), and _____ of _____, as surety (or sureties) are held and firmly bound unto the present surface owner or claimant of the hereinafter described lands, his heirs, executors, administrators, and assigns, in the sum of one thousand dollars (\$1,000) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, 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 _____ 192__.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT, Whereas the principal (or principals) above named _____ is (or are) desirous of entering upon the following-described land, to wit: _____

in the _____ land district, _____ for the purpose of prospecting for coal thereon under the provisions of the acts of March 4, 1921 (41 Stat., 1363) and March 8, 1922 (Public No. 165); and,

WHEREAS, the said land has been disposed of, or is subject to disposition, with a reservation of the coal therein to the United States with the right to prospect for, mine and remove the same, pursuant to the said act of March 4, 1921,

Now, THEREFORE, if the said principal (or principals), surety (or sureties), or any of them, or their heirs, executors, administrators, or assigns, or any of them, upon demand, shall make good and sufficient recompense, satisfaction, and payment unto the lawful surface owner or claimant of said land, his heirs, executors, administrators, or assigns, for all damages to the crops and improvements on the said land as the said claimant, his heirs, executors, administrators, or assigns, shall suffer or sustain by reason of the said prospecting for coal on the said land, then this obligation shall be null and void; otherwise the same shall remain in full force and effect.

Signed and sealed in the presence _____
of, and witnessed by, the undersigned: _____ Principal

Witnesses: _____ Residence

Name _____ Surety

Residence _____ Residence

Name _____ Surety

Residence _____ Residence

Any erasure, insertion, or mutilation must be certified to as made before signing.

Approved and accepted _____ 192 .

Secretary of the Interior.

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Oil Prospector's Bond.

[Form approved July 31, 1922.]

Under the acts of February 25, 1920 (41 Stat., 437) and March 8, 1922 (Public No. 165).

KNOW ALL MEN BY THESE PRESENTS: That I (or We), _____, of _____, a citizen (or citizens) of the United States, as principal (or principals), and _____ of _____, as surety (or sureties), are held and firmly bound unto the United States, for the use and benefit of the United States, and of any entryman or owner of any of the herein-after described lands in the sum of one thousand dollars (\$1,000) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, 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 _____ 1922.

THE CONDITION OF THE OBLIGATION IS SUCH THAT, Whereas the principal (or principals) above named _____ is (or are) desirous of entering upon the following-described land, to wit: _____

in the _____ land district, _____ for the purpose of prospecting for, drilling for and removing the oil and gas thereon under the provisions of the acts of February 25, 1920 (41 Stat., 437), and March 8, 1922 (Public No. 165), on condition that he or they shall (a) promptly repair, so far as possible, any damage to the oil strata or deposits resulting from improper methods of operation, and (b) reimburse any entryman or owner of any portion of the said lands heretofore entered with a reservation of the oil and gas deposits to the United States made pursuant to the said act of March 8, 1922, for any damage to the crops and improvements of such entryman or owner resulting from drilling or other prospecting operations, and,

WHEREAS, the said land has been disposed of, or is subject to disposition, with a reservation of the oil and gas therein to the United States with the right to prospect for, drill for and remove the same, pursuant to the said act of March 8, 1922,

Now, THEREFORE, if the said principal (or principals), surety (or sureties), or their heirs, executors, administrators, or assigns, or any of them, shall promptly and in all respects comply with the said conditions, then the above obligation shall be void and of no effect; otherwise the same shall remain in full force and effect.

Signed and sealed in the presence of,
and witnessed by, the undersigned:

Principal

Residence

Surety

Residence

Surety

Residence

Witnesses:

Name _____
Residence _____
Name _____
Residence _____

Any erasure, insertion, or mutilation must be certified to as made before signing.
Approved and accepted _____, 1922

Secretary of the Interior.

CHAMBERS v. HALL.*Decided August 10, 1922.***SUPERVISORY AUTHORITY—LAND DEPARTMENT—HOMESTEAD—EQUITY.**

The Land Department, in the exercise of its supervisory authority, may permit the inclusion of less than a legal subdivision of public land in a homestead entry, if the controlling circumstances and the protection of equities justify it.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Williams v. United States* (138 U. S., 514), and *Ex parte Sands, Nicholson and Schmidt* (46 L. D., 169), cited and applied.

FINNEY, First Assistant Secretary:

On January 29, 1920, Joseph Chambers filed his application Phoenix 045072, under which his homestead entry was allowed on January 14, 1921, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW $\frac{1}{4}$, and SE. $\frac{1}{4}$, Sec. 13, T. 13 S., R. 27 E., G. & S. R. M., Arizona.

Through an inadvertence his application was not posted on the local office records as to the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, and later Eva E. Hall was permitted to make homestead entry, 047620, for that tract and the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, and W. $\frac{1}{2}$ SW $\frac{1}{4}$ of that section.

Without knowing that the E. $\frac{1}{2}$ SW $\frac{1}{4}$ was embraced in Chambers's entry, and fully believing that it was covered by her entry, Hall went upon that tract and erected on the west side thereof a good concrete house 15 by 30 feet in size, a barn, a chicken-house, and other valuable improvements.

After the conflict between the two entries had been discovered Chambers and Hall entered into an amicable agreement under which she relinquished the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ E. $\frac{1}{2}$ SW. $\frac{1}{4}$, and he relinquished the W. $\frac{1}{2}$ E. $\frac{1}{2}$ SW. $\frac{1}{4}$.

When this adjustment and these relinquishments came to the attention of the General Land Office, it, by its decision of February 27, 1922, declined to recognize the relinquishments and held Hall's entry for cancellation as to the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ on the ground that her entry was as to that tract in fatal conflict with Chambers's prior entry.

This action was based on the assumption by the Commissioner that under no circumstances could an entry be permitted to be either made or relinquished for a tract embracing less than a legal subdivision.

While the rule thus invoked is one of very general application, it is largely one of administration, and this Department has heretofore, through the exercise of its supervisory power, recognized exceptions to it when controlling circumstances and the protection of equities seemed to justify it in doing so. Such is the case with homestead entries in national forests where entries are allowed for parts of regularly surveyed rectangular tracts. There is no statute which specifically authorizes the allowance of such entries, but the ex-

ceptions to the general rule were further extended in the case of Sands, Nicholson, and Schmidt (46 L. D., 169), and in kindred cases there mentioned, where an action of that kind was necessary to prevent adverse claimants from suffering serious loss of improvements already erected in good faith, such as will result to Hall in the present case if the action of the Commissioner is sustained.

There is no statute which in terms forbids the commendable action undertaken by the parties in this case, and the courts have frequently sanctioned departures from established practices in order that the ends of justice might be met.

In *Williams v. United States* (138 U. S., 514, 524), the Supreme Court, in speaking on this subject, said:

It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

Under all the circumstances it is believed that a departure from the usual rule should be made in this case, and the decision complained of by both the parties on appeal is consequently hereby reversed.

EX PARTE ADA FLETCHER (ON PETITION).

Decided August 10, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—ENLARGED HOMESTEAD—PREFERENCE RIGHT.

The privilege of being preferred in the award of an oil and gas prospecting permit accorded by section 20 of the act of February 25, 1920, in favor of an entryman of lands *bona fide* entered as agricultural, and not withdrawn or classified as mineral at the time of entry, does not inure to the benefit of one who had only a settlement claim for surveyed public land at the date of the withdrawal.

COURT AND DEPARTMENTAL DECISIONS CITED, DISTINGUISHED AND APPLIED.

Cases of *St. Paul, Minneapolis, and Manitoba Railway Company v. Donohue* (210 U. S., 21), and *Louise E. Johnson* (48 L. D., 349), cited and distinguished; case of *Cliff L. Roots* (42 L. D., 82), cited and applied.

FINNEY, *First Assistant Secretary*:

This case is before the Department on a petition for the exercise of the supervisory authority of the Secretary in the matter of the application 013436 of Ada Fletcher (formerly Ada Budno), for a permit to prospect for oil and gas upon the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 23, and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 24, T. 44 N., R. 95 W., 6th P. M., Lander land district, Wyoming, said application having been filed August 18, 1921, in the asserted exer-

cise of a preference right to a permit under section 20 of the act of February 25, 1920 (41 Stat., 437), on the basis of the enlarged homestead entry made for said land by Anton Budno, the deceased husband of the applicant.

The land here in question was withdrawn from oil and gas location by Executive order of December 11, 1914, and the application is in conflict with the large number of prospecting permit applications filed in 1920 under section 13 of the leasing act and of one seasonably filed under section 19 of said act.

The entry of Anton Budno was allowed, with a reservation to the Government of oil and gas deposits, April 10, 1916, upon an application filed July 22, 1915, over seven months after the date of withdrawal. Final proof was submitted on the entry by the said Ada Fletcher as the heir of the entryman, July 21, 1921, upon which final certificate issued January 11, 1922. At the final hearing Mrs. Fletcher testified that her husband was living on the land April 10, 1916, while her corroborating witnesses testified that the entryman established his residence on the land about April 10, 1916.

The Commissioner of the General Land Office in a letter dated August 24, 1921, and addressed to one Robert Cunningham, which letter is found in the files relating to the homestead entry of Budno, informally held that inasmuch as the entry was allowed on an application filed after the petroleum reserve affecting the land had been created, and was made with a mineral reservation, neither the entryman, if living, nor his heir would be entitled to a preference right to a prospecting permit covering said land under section 20 of the act, on account of said entry.

With the petition there are filed affidavits of the petitioner and the two corroborating final proof witnesses, and others, wherein it is averred that the entryman was actually residing on the land in the summer of 1914 and prior to the withdrawal, and it is urged in the petition that, because of the settlement upon the land as alleged prior to the withdrawal, and of the later filing and allowance of the homestead application, the applicant should be held to be entitled to a preference right to a permit under the provisions of said section upon proof of such settlement at a hearing which is prayed for in the petition.

The said section 20 reads in part as follows:

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.

While it is conceded on behalf of the petitioner that the land here in question was not technically entered until long after the date of

the withdrawal, it is argued that the alleged settlement upon the land in the summer of 1914, and prior to the date of the withdrawal, constituted a "juridicial" entry of the land, which should be recognized by the Department as entitling the applicant to a preference right to a permit under the provisions of said section 20. To support this contention there is cited in the petition the decision in *St. Paul, Minneapolis, and Manitoba Railway Company v. Donohue* (210 U. S., 21), as holding that a valid settlement is in legal contemplation a homestead entry. The Department, however, does not so construe said decision and is unable to find any authority for holding that a settlement constitutes anything more than the initiation of a claim under the homestead laws, conferring upon the settler merely a right, if seasonably followed by an application, to make a homestead entry of the land so settled upon, as against some other person.

In the somewhat similar case of the *Heirs of Cliff L. Roots* (42 L. D., 82), it was contended by the appellant that inasmuch as the entry, although not actually made after the withdrawal of the land from coal filing and entry, was initiated and based on a settlement which long antedated the withdrawal and was continuously maintained until after the entry and final proof, the case should be adjudicated under the provisions of the act of March 3, 1909 (35 Stat., 844), applicable to those persons who had in good faith located, selected, or entered, under the nonmineral land laws, public lands of the United States which were thereafter classified, claimed, or reported as being valuable for coal, and hence, that the act of June 22, 1910 (36 Stat., 583), relating to those cases where locations, selections, or entries, were made of land thereafter withdrawn or classified as coal lands, or valuable for coal, was without application, it being further urged that because the Government had not, at the time of final proof, shown the land to be chiefly valuable for coal, the appellants were entitled to an unrestricted patent. Answering those contentions the Department said:

The only word used in either act having direct reference to homesteads or settlement claims, is the word "entered." Had Congress intended to recognize some preceding act upon the part of the claimant, upon which the homestead was initiated, such as settlement, it would clearly have indicated the same by the specific expression "a settlement" or "settled upon." It did so in the so-called withdrawal act of June 25, 1910 (36 Stat., 847). The Department does not believe, therefore, that a settlement *without entry* prior to the withdrawal or classification of the land for coal brings the case within the act of 1909. Accordingly, the case of *John W. McClinton, supra*, in so far as it conflicts with the views here expressed, is overruled.

The Department believes that the same principle applies to cases such as the one at bar, where the alleged settlement was, prior to withdrawal made upon surveyed land and not followed by an appli-

cation to enter for a period of more than a year after the alleged settlement and long after the date of the withdrawal.

The petitioner cites the case of Louise E. Johnson (48 L. D., 349), wherein, following the principles announced in Charles C. Conrad (39 L. D., 432), and Rippey *v.* Snowden (47 L. D., 321), the Department held that a perfect and complete application to make an enlarged homestead entry, filed prior to the inclusion of the land in a petroleum withdrawal, but not allowed until after the withdrawal, should be deemed, for the purposes of said section 20 of the leasing act, to have been allowed as of the date of the filing of the application, and hence, would entitle the entryman to a preference right to a permit thereunder. In that case, however, the applicant had, prior to the withdrawal, done everything that she herself could do toward perfecting her entry, which application, without any fault on the part of the applicant, was not actually allowed until after the withdrawal because of the delay on the part of the Government incident to the designation of the land.

Upon careful consideration of the petition, and the arguments advanced in support thereof, the Department sees no legal or equitable warrant for holding that the petitioner is entitled to a preference right to a permit for said land under section 20 of the act. In the presence, therefore, of the prior permit applications, the application of the petitioner must be rejected.

REGULATIONS GOVERNING OIL AND GAS PERMITS AND LEASES IN ALASKA—ACT OF FEBRUARY 25, 1920.

[Circular No. 845.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 12, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES IN ALASKA:

Under the authority of the act of Congress approved February 25, 1920 (41 Stat., 437), the following rules and regulations, taken from General Land Office Circular No. 672, entitled "Regulations concerning oil and gas permits and leases * * * authorized by the act of February 25, 1920," as amended to October 29, 1920 (47 L. D., 437), and as since from time to time amended, have been adopted to govern the administration of said act in so far as it applies specially to the Territory of Alaska; and the same renumbered and with incidental verbal modifications are recodified as follows for the information of those concerned:

1. *General provisions under section 13.*—Paragraphs 1 to 9 of Regulations as amended to October 29, 1920, as Pars. 1 to 9,
Circular No. 672.

sions which govern permits under section 13 of the act. Alterations of paragraphs 7 and 8 to meet changed conditions are indicated below.

Par. 7, as changed by act of Jan. 11, 1922 (42 Stat., 356). (Circular No. 801.)

Extensions of time.—The provision in section 13 of the act providing for extension of the life of permits granted upon lands in the United States has been superseded by an act approved January 11, 1922 (42 Stat., 356), which provides that the Secretary of the Interior may, if he shall find that any oil or gas permittee has been unable, with the exercise of diligence, to begin drilling operations or to drill wells of the depth and within the time prescribed by section 12 of the act of Congress approved February 25, 1920 (41 Stat., 437), extend the time for beginning such drilling or completing it to the amount specified in the act for such time, not exceeding three years, and upon such conditions as he shall prescribe. Extensions of time may be granted thereunder, in proper cases, both in Alaska and the United States, where applications therefor are filed in accordance with the Regulations, Circular No. 801, approved January 16, 1922, as amended March 28, 1922, and May 12, 1922 (49 L. D., 110).

Par. 8(a), Circular No. 672, added June 15, 1921 (48 L. D., 152).

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.

Par. 10, Circular No. 672.

2. *Permits in Alaska.*—Paragraphs 1 to 9, inclusive, of said "Regulations" as they appear in said Circular No. 672 will apply to permits in Alaska, under section 13 of the act, with some modifications, viz:

Par. 10(a), *id.*, as amended (1) Jan. 15, 1921 (47 L. D., 613); (2) Mar. 28, 1921 (48 L. D., 46).

(a) A person, association, or corporation is authorized to hold five permits at one time in said Territory—only one permit, however, in any one (1) geologic structure of a nonproducing field; but, for development purposes (2) assignments to a qualified individual, corporation, or association outside producing oil or gas fields, for not exceeding five permits, whether contiguous or noncontiguous, may be presented for the consideration of the Secretary of the Interior and his approval if he shall find the same to be in the public interest; hence subdivision *c* of section 4 of the "Regulations" contained in said Circular No. 672 should be modified accordingly in making application for permits for lands in Alaska under section 13 of the act.

(b) The preference right treated under section 5 of the "Regulations" (Circular No. 672) extends for a period of six months after the erection of monument and posting of notice provided for therein, and the period for

marking of the corners is extended to one year after the granting of the permit.

(c) The time for exploratory work in Alaska is four years, instead of two. The various items necessary in this exploratory work are set forth in the form of permit provided in said "Regulations" (Circular No. 672), those applying to Alaska being included in parentheses (1). In cases where unsurveyed lands in Alaska are located in fields where compliance with paragraph 4(d) of Circular 672 with reference to public survey corners is not possible and conflicts may exist, the extent of which can not then be determined, permits are granted with the following additional conditions:

Par. 10(a),
id. (1), Par. 73
added to permit
in certain cases.

"7. This permit is granted upon the express condition that the permittee will adjust any conflict with any prior applicant within six months from date hereof."

3. *Permits upon lands embraced in nonmineral entries.*—The act of Congress approved March 8, 1922 (42 Stat., 415), provides for the allowance of homesteads on lands in Alaska valuable for coal, oil, or gas, with reservations of such deposits and upon conditions similar to those of the act of July 17, 1914 (38 Stat., 509), relating to lands in the United States, and the provisions of paragraph 11 of said Circular No. 672 will apply to Alaska in cases where entries are patented with a reservation under said act of March 8, 1922.

Par. 11, Circular No. 672, extended by act of Mar. 8, 1922 (42 Stat., 415).

4. *Preference right of owner of surface.*—Nonmineral claimants upon lands in Alaska are entitled to preference right permits under section 20 of the act wherever the mineral deposits are reserved under the act of March 8, 1922 (42 Stat., 415), under the conditions indicated in paragraph 12 and subsections thereunder of Circular No. 672.

Par. 12, Circular No. 672, extended by act Mar. 8, 1922 (42 Stat., 415).

5. *Relief measures—Alaska claims—Conditions for relief under section 22:*

Par. 22, Circular No. 672.

A. *For permit.*—(a) That claimant must have been an occupant or claimant of the land on February 25, 1920, under a claim initiated under the placer mining laws by claimant or predecessors prior to November 3, 1910, the date of the Executive order withdrawing all public lands in Alaska containing petroleum deposits, including those in national forests.

(b) That claimant must have performed all acts prior to November 3, 1910, under the then existing laws necessary to valid locations except to make discovery.

(c) That claimant (1) prior to November 3, 1910, must have made substantial improvements for the discovery of oil or gas on or for each location, or (2) prior to February 25, 1920, expended not less than \$250 for improvements on or for the benefit of each location.

(d) That claimant must on or before February 25, 1921, or within six months after final denial or withdrawal of application for patent, file a relinquishment

to the United States of all right, title, and interest in and to the land. This relinquishment must be in the form of an unconditional quitclaim deed, duly executed and acknowledged, but not recorded, and when filed will be held for such action as the facts and the law in the case warrant and require.

In addition to the above, the conditions outlined in paragraph (e) of section 20 of the Regulations (Circular 672) are applicable to relief in Alaska.

B. For lease.—The conditions necessary to obtain a lease under section 22 of the act are identical with those outlined in the paragraphs relating to permits in Alaska together with the following additional conditions:

(a) That claimant or predecessors must have drilled an oil or gas well on the land to discovery.

(b) That claimant must pay for one-eighth of the past production exclusive of that used on the land for production purposes or unavoidably lost.

Par. 23, Circular No. 672.

6. *Relief that may be granted under section 22:*

(a) A claimant qualified under the above conditions relating to permits, upon complying with the conditions of the act and these regulations, will be entitled to prospecting permits under the same terms and conditions as other permits in Alaska provided for in section 13 of the act, substantially in the form prescribed in section 6 of the Regulations (Circular No. 672).

(b) A claimant qualified under the above conditions relating to leases is entitled to a lease substantially in the form prescribed in section 17 of the Regulations (Circular No. 672), the rental and royalty to be fixed by the Secretary of the Interior and specified in the lease, subject to readjustment at the end of each 20-year period of the lease.

(c) A claimant under section 22 of the act shall be entitled to not exceeding five permits or leases in number and not exceeding an aggregate of 1,280 acres in each.

Par. 23½, Circular No. 672.

7. *Royalties and rentals on oil and gas leases in Alaska:*

The royalties and rentals payable under oil and gas leases granted in Alaska pursuant to sections 14 and 22 of the act of February 25, 1920, are hereby determined and prescribed as follows:

(a) For leases granted under section 22 of the act, the royalty shall be: (1) For the first five years from and after the date of the lease no royalty, except in case of leases whereon the producing wells yield an average of 100 barrels or more per well per day for the calendar month, in which event the royalty shall be 5 per cent of all oil produced; (2) for the second period of five years from and after the date of each lease, under section 22 of the act, the royalty upon all leases shall be 5 per cent; (3) for the succeeding 10 years the royalty upon all leases under section 22 of the act shall be 10 per cent of all oil produced.

(b) Upon leases granted in Alaska, under section 14 of the act, the permittee who discovers oil will be entitled to a lease for one-fourth of the area of the permit without payment of royalty for the first five years succeeding the date of the lease and thereafter shall pay a royalty of 5 per cent upon all oil produced. On the remaining lands included within the area of the permit, the permittee will be given a preference right to a lease without payment of royalty for the first five years succeeding the date of the lease, except in the case of leases whereon the producing wells yield an average of 100 barrels or more per well per day for the calendar month, in which event the royalty shall be 5 per cent; for the second five years, the lessee will be required to pay a royalty of 5 per cent upon all oil produced, and for the succeeding 10 years, a royalty of 10 per cent upon all oil produced.

(c) No royalty will be charged in any case upon leases wherein the wells upon the lands average less than 10 barrels per well per day for the calendar month.

(d) No rental upon any oil or gas lease in Alaska will be charged during the first five years succeeding the date of the lease. After the expiration of the first five years succeeding the date of the lease, a rental of 10 cents per acre per annum will be charged on all leases, payable in advance; *Provided*, That the rentals so paid for any one year shall be credited upon the royalties accruing for that year.

(e) The royalties on gas produced, if any, will be fixed and determined in each lease.

(f) The foregoing subsections (a) to (c), inclusive, are applicable to cases where but one permit area in a single field or structure is held by the permittee or lessee. Where one or more additional permits, not exceeding five, are secured by assignment, the rentals and royalties on one of the permits shall be as prescribed in classes a, b, c, and d of this paragraph, and upon the remaining areas secured by assignment the rentals and royalties shall be as provided in paragraph 8 of the said regulations approved March 11, 1920, amended October 29, 1920, unless modified in a proper case when such a permit or lease is granted or approved.

8. *Permits for deposits reserved under the act of March 8, 1922 (42 Stat., 415).*—The provisions relative to reserved deposits under the act of July 17, 1914 (38 Stat., 509), indicated on page 34 of Circular No. 672, will be incorporated in permits in Alaska in proper cases without change other than the substitution of “acts of March 8, 1922 (42 Stat., 415)” for, “Act of July 17, 1914 (38 Stat., 509),” and the bond required will be identical with that indicated on pages 34 and 35 of said Circular No. 672, except for the substitution of the act of March 8, 1922, *supra*, as above indicated.

Amendment of
June 2, 1922.

Pages 34 and
35, Circular No.
672 (47 L. D.,
437, 464-465),
adopted with
substitution of
act Mar. 8, 1922
(42 Stat., 415).

Pages 44, 45,
and 46, Circular
No. 672 (47 L.
D., 437, 474-
476), extended to
govern entries
pursuant to act
of Mar. 8, 1922
(42 Stat., 415).

9. *Procedure in Relation to Agricultural Claims in Conflict with Permits or Leases, or subject to Preferential Rights.*—The procedure indicated in Circular No. 842, approved July 31, 1922 (49 L. D., 196), with reference to nonmineral entries made with a reservation of the oil and gas to the Government, will be followed where entries are made pursuant to the act of March 8, 1922 (42 Stat., 415).

10. *In General.*—The general regulations as contained in said Circular No. 672, and as since modified or amended, are to be regarded, in so far as they are appropriate and are not modified by any rule or regulation herein, as regulations affecting oil and gas permits and leases in Alaska, under said act of February 25, 1920.

WILLIAM SPRY,
Commissioner.

Approved: Aug. 12, 1922.

ALBERT B. FALL,
Secretary.

STATE OF UTAH, PLEASANT VALLEY COAL COMPANY, INTER- VENER v. BRAFFET.

Decided July 31, 1922.

SCHOOL LAND—COAL LANDS—CONTESTANT—BURDEN OF PROOF—SURVEY—UTAH.

Where the school grant to the State of Utah under section 6 of the enabling act of July 16, 1894, presumptively attached on January 4, 1896, the date of its admission, as to lands then identified by the Government survey, and the question of the vesting of title is subsequently put in issue on the ground that the land contains deposits of coal, the burden of proof is on the contestant to show that the land was of known coal character on the latter date.

SCHOOL LAND—COAL LANDS—EVIDENCE—UTAH.

In order to except lands from the school grant to the State of Utah, it must be shown that at the date the grant presumptively attached the known conditions were such as to engender the belief that the land contained coal of such quality and quantity as would render its extraction profitable and justify expenditures to that end.

SCHOOL LAND—COAL LANDS—EVIDENCE—UTAH.

In determining whether or not a tract of public land was known to be valuable for its coal deposits at the date of the admission of Utah to statehood, proof of its character is not limited to actual discoveries within its boundaries, but whatever is relevant and bears in any degree on the question of its known character at that time, such as adjacent disclosures and other surrounding or external conditions, is admissible as evidence.

CONTEST—REGISTER AND RECEIVER—COMMISSIONER OF THE GENERAL LAND OFFICE—HEARING—EVIDENCE.

Where a contest is erroneously dismissed by the local officers on a motion of the contestee on the ground of insufficiency of evidence, the Commissioner of the General Land Office is without authority to dispose of the case upon his reversal thereof, without first affording the contestee an opportunity to submit testimony.

SCHOOL LAND—COAL LANDS—APPLICATION—CONTEST—SECTION 37, ACT OF FEBRUARY 25, 1920.

A coal application filed under section 2347, Revised Statutes, for lands, the presumptive title to which has been at all times since statehood and still is in the State of Utah under its school land grant, is merely an application to contest the right of the State to the lands in question, and does not confer upon the applicant any right which, upon a decision against the State, can constitute a valid claim within the purview of the saving clause of the act of February 25, 1920.

COURT AND DEPARTMENTAL DECISIONS CITED AND FOLLOWED.

Cases of *Diamond Coal and Coke Company v. United States* (233 U. S., 236), *United States v. Sweet* (245 U. S., 563), and *Don C. Roberts* (41 L. D., 639), cited and followed.

FINNEY, *First Assistant Secretary*:

The State of Utah and the Pleasant Valley Coal Company have appealed from the decision of the Commissioner of the General Land Office dated February 28, 1921, dismissing the protest against coal application 022470, under section 2347, Revised Statutes, filed by Mark P. Braffet for the SE. $\frac{1}{4}$, Sec. 32, T. 12 S., R. 10 E., S. L. M., Salt Lake City land district.

The plat of survey of the township, with the exception of the SW. $\frac{1}{4}$, Sec. 31, was approved by the surveyor general on February 26, 1895, and filed in the local land office May 20, 1895, the land being returned as agricultural. The SE. $\frac{1}{4}$, Sec. 32, was classified as coal land at \$50 per acre on April 5, 1907, and reclassified at from \$195 to \$210 per acre, May 31, 1911. On February 4, 1918, Braffet filed his application to purchase. On July 25, 1918, notice for publication issued, copy of which was forwarded to the State, and on August 13, 1918, the State, through its Board of Land Commissioners, filed a protest alleging that the land was not known coal land on January 4, 1896, the date of the admission of Utah into the Union (29 Stat., 876), and therefore passed to the State under section 6 of the enabling act of July 16, 1894 (28 Stat., 107), for the support of its common schools. The Pleasant Valley Coal Company filed a petition of intervention, alleging that the land was sold by the State at public auction in 1902 to one Laura J. Bird, to whom certificate of sale issued April 1, 1902, and State patent May 14, 1902; that Laura J. Bird on April 9, 1902, conveyed her interest to the company for a valuable consideration and that it has since been the owner of and in possession of the land; that the land was not known to be coal land at the date of the admission of the State; that there were no artificial or natural exposures of coal thereon and that at the date of the purchase from Laura J. Bird there was—

a ruling in force in the State promulgated by a Commissioner of the General Land Office, that lands can not be classed as coal lands unless commercially valuable coal is exposed in each legal subdivision of forty acres proposed for sale.

The petitioner asked that in the event it should be determined that the land was of known coal character on January 4, 1896, it be given such relief as might be deemed equitable and just in the premises. Braffet filed an answer to this petition, denying that Laura J. Bird ever received any consideration for her conveyance, and alleging that the intervener is not entitled to any equitable consideration or relief because it had through the employment of dummy entrymen and other fraudulent means and devices acquired upwards of 20,000 acres of public coal lands in the State of Utah, and in conjunction with the Utah Fuel Corporation, a corporation which owns all of its stock, had acquired additional acreage in excess of 20,000 in Utah and Colorado; that the corporations and their officers had been indicted because of such frauds and equity suits brought for cancellation of evidences of title acquired, which were partially compromised by the payment of large sums into the Treasury of the United States and the reconveyance of large areas; that the Pleasant Valley Coal Company had acquired lands adjacent to the lands involved in this controversy aggregating 3,000 acres, through the medium of State selections, with full knowledge that they were coal lands.

A hearing was held before the local office at which the coal applicant assumed the burden of proof. No testimony was submitted on behalf of the State and the intervener, who at the conclusion of Braffet's case on December 1, 1919, filed a motion to dismiss. On February 18, 1920, the register and receiver rendered their decision sustaining the motion, from which Braffet appealed. The Commissioner reversed the local officers, and dismissed the protest and the claim of the intervener for equitable consideration. Appeal has been taken from his decision, briefs filed, and the case orally argued before the Department, the State being represented at the argument by an Assistant Attorney General.

It has been settled by the decision of the Supreme Court in the case of *United States v. Sweet* (245 U. S., 563), that the Utah school grant does not include lands known to be valuable for coal at the date the grant takes effect, and it is further settled that the grant became operative on the admission of the State, January 4, 1896, as to lands already surveyed. *State of Utah v. Allen et al.* (27 L. D., 53). It follows in the case now under consideration that the land passed to the State under the school land grant unless it is shown that it was of known coal character on that date. In so far as this issue is concerned there can be no question of fraud. No proof of any kind was required to be submitted by the State, and whether or not title passed is dependent solely on the known character of the land at statehood.

Presumptively, however, the title is in the State (*State of Utah*, 32 L. D., 117; *Charles L. Ostenfeldt*, 41 L. D., 265; *State of Utah v.*

Olson, 47 L. D., 58), and while the State has been styled the protestant herein, the term protestant or contestant is properly applied to the coal applicant, and he has the burden of proving that the grant did not attach.

The evidence in the case shows that there are no exposures or outcrops of valuable coal on the land, and it is, therefore, vigorously contended that under the rules, regulations, and decisions as formerly promulgated and applied by the Department, it must be held to have been noncoal in character on the decisive date. It is urged that prior to the instructions of October 26, 1905 (34 L. D., 194), an actual exposure of coal, either artificial or natural, on the particular subdivision involved, was necessary to establish its coal character, and that this rule, adhered to in a long line of decisions, became a rule of property and should be followed in the determination of rights which attached prior to its revocation. In support of these contentions numerous decisions, reported and unreported, are cited, including *Dughi v. Harkins* (2 L. D., 721); instructions of October 26, 1905, *supra*; *Henry W. Fuss* (5 L. D., 167); *William Thompson* (8 L. D., 104); *William Drew* (8 L. D., 399); *Rough Rider and Other Lode Mining Claims* (42 L. D., 584); *Bertram C. Noble* (43 L. D., 75); *Howe et al. v. Parker et al.* (190 Fed., 738); *Shreve v. Cheesman* (69 Fed., 785); *Germania Iron Co. v. James et al.* (89 Fed., 811); *James et al. v. Germania Iron Co.* (107 Fed., 597). The Commissioner concluded from the instructions of October 26, 1905, that the Secretary of the Interior did not recognize any such rule for the determination of coal lands; that it is apparent from the decision of the Supreme Court of the United States in the case of the *Diamond Coal and Coke Company v. United States* (233 U. S., 236), that no such rule exists, and that any doubt as to the attitude of the Department was dispelled by the decision in the case of *Don C. Roberts* (41 L. D., 639).

In the instructions of October 26, 1905, the Department discussed its previous decisions and those of courts, finding that there was nothing in the decisions of the Supreme Court to warrant the construction that evidence exclusively of the mineral character of lands adjoining or surrounding a particular tract in controversy is incompetent to establish the like character of the latter, and held that in determining whether a tract of public land contains coal deposits, whatever is relevant and bears in any degree on the question is admissible in evidence; that the characteristics peculiar to such deposits are to be kept in view and that the presence of such deposits may be determined upon authenticated evidence of conditions which constitute a sufficient guide of the geologist or coal expert.

Subsequently the same question arose in the *Diamond Coal and Coke Company v. United States*, *supra*, and the decision of the

Supreme Court, in harmony with the rule established by the Department, is expressed with such clarity and emphasis as to leave no doubt of its meaning. It was a suit by the Government to set aside patents granted in 1901 under the soldiers' additional homestead law on the ground that they were procured through fraud, in that the lands were known coal lands. The defendants appealed from a decision of the Circuit Court of Appeals in favor of the Government (191 Fed., 786), and the same points raised by the appellants herein were squarely presented to the Supreme Court in the assignments of error and briefs, the following language appearing in defendants' brief:

* * * If under the uniform construction placed upon the land laws by the Land Office, and the rules and regulations prescribed as to proof, the lands in question were never enterable as coal lands, but were, on the contrary, properly enterable under the homestead laws, then it must be conceded that no fraud was practiced upon the Land Department. We submit that a review of the Land Department decisions will show that the established practice of that office, which should be regarded as a rule of property, has been to deny entries of lands as coal lands or mineral lands unless the same were shown to contain within their limits developed and opened mines or deposits of coal of commercial value, or other minerals in quantity sufficient to justify the development and exploitation of the land, and to render it more valuable for mineral than for other purposes; and it has been the uniform practice to require evidence of the existence of coal or other mineral deposits upon the land itself. The fact that the land was surrounded by land containing coal or other mineral, or that it was adjacent to mineral lodes or coal veins, or even that the land itself contained small quantities of mineral or surface croppings of coal undeveloped, has always been held insufficient, and where the character of the land as mineral or coal lands was not established by such proof and evidence of mineral value the land has always been held properly enterable under the homestead and other nonmineral acts.

There followed references to various decisions of the Land Department, including *Dughi v. Harkins* (2 L. D., 721); *Commissioners of Kings County v. Alexander et al.* (5 L. D., 126); *John E. Williams* (11 L. D., 462); *Frees et al v. State of Colorado* (22 L. D., 510); etc.

The answer of the court is unmistakable. It said (pages 238, 239, 248):

* * * the decisive issues in the case were, first, whether the lands were known to be valuable for coal when the applications for the entries were made, and, second, if they were, whether the coal company was a *bona fide* purchaser from the patentees.

* * * * *
 3: To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus

known to be valuable for mineral, subsequent discoveries will not affect the patent. * * *

* * * The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands. These conditions were open to common observation, and were such as would appeal to practical men and be relied upon by them in making investments for coal mining. * * *

* * * There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when the question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

The case of *Colorado Coal and Iron Co., v. United States*, 123 U. S., 307, relied upon by the coal company, is essentially different from this in that there the court was dealing with a statute excepting from entry lands on which there were "mines" at the time, a matter particularly noticed in the opinion (p. 328), while here the exception is of "mineral lands" and "lands valuable for minerals." Rev. Stat., sections 2302, 2318.

The appellants contend that the decision is not applicable here for the reason that the case involved the question of fraud, and the rule of property is an equitable rule and is not applied where fraud exists. The argument loses sight of the true situation. The decisive issue as stated by the court itself was whether the lands were known to be valuable for coal when the applications were made. The fraud consisted in procuring known coal lands by means of false representations as to their character. Whether the representations were false depended upon the known character of the lands. Conceding for the sake of argument that the rule of the Land Department for the determination of whether lands were coal-lands was as appellants contend there could have been no fraud for under that rule the lands would not have been recognized as coal lands. It is obvious that if a rule is of the character entitled to recognition as a rule of property a court would not refuse to apply it for the reason that acts done in reliance upon it would, had it not existed, have been fraudulent. On the contrary there would seem to be a greater reason for its application in such a case, for the presumption is always against fraud, and the courts are loath to impute it. The principle of the rule of property is a familiar one, and it has been frequently recognized by the Department, as is shown in the cases cited, but no case is cited and none is found where the Department has applied the principle after the Supreme Court of the United States has construed the law and applied a contrary rule to a similar case. It needs no citation of authority to establish that the decisions of the Supreme Court in the construction of the public land laws are final, and that the Land Department is bound to follow its con-

struction. It construed the law and applied it in the Diamond Coal and Coke Company case, in which the decisive issue was the same as that involved in the case under consideration, namely the known coal character of lands on dates long prior to the claimed change in departmental practice in 1905.

The court said that when the question arises "in cases such as this," any evidence logically relevant to the issue is admissible, etc. What it meant by "in cases such as this" is answered in the succeeding paragraph of the decision, which has been quoted, wherein it distinguishes cases arising under a statute excepting lands on which there were "mines," and cases where the exception is of "mineral lands" and "lands valuable for minerals," under sections 2302 and 2318 of the Revised Statutes. The exception applicable to the Utah school grant is that of "lands valuable for minerals," under section 2318, Revised Statutes (*United States v. Sweet, supra*), and the language of the court has direct application herein.

In the case of *Milner et al. v. United States* (228 Fed., 431), title to lands certified to the State of Utah in 1901, 1903, and 1904 was attacked on the ground that the lands were not coal lands because coal was not exposed on each subdivision, and the Circuit Court of Appeals disposed of the contention by citing and following the Diamond Coal and Coke Company decision.

The Department is of opinion that in this case the law as construed in *Diamond Coal and Coke Co. v. United States*, must be followed; that in order to except lands from the grant to the State it must appear that at the date the grant presumptively attached the known conditions were such as to engender the belief that the land contained coal of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end; that the character of the lands may be deduced from evidence of adjacent disclosures and other surrounding or external conditions and that proof of their character is not limited to actual discoveries within their boundaries.

The Commissioner reviewed the testimony in detail, making extensive quotations from it, and found that the lands were known to be valuable for coal prior to statehood. The testimony is voluminous, much of it is not directed to the main issue, and it is difficult to segregate that which is directed to the conditions as they existed at and prior to January 4, 1896. Inasmuch as the Department is not finally disposing of the case at this time only a brief statement of the established facts will be given.

The land in controversy is located about two and one-half miles northeast of Castlegate, and about the same distance north of the Book Cliffs, which extend along the north and east borders of the

Price River valley from the Green River to Castlegate. West of Castlegate the same formation continues, the escarpment extending in a southerly and westerly direction through Emery and Sevier Counties. The plateau lying north of the cliffs is cut by Price River. Willow Creek runs diagonally through section 31 from the northeast to the southwest corner and enters the Price River about one-half mile below Castlegate. The main line of the Denver and Rio Grande Railroad passes Castlegate and traverses the valley.

The geological formation is now designated as the Mesaverde of the upper Cretaceous period, comprising three distinct members, the lowest a sandstone of massive character at the top of which is a distinctive white sandstone. Overlying it is a second sandstone member of from 500 to 600 feet in thickness, associated with shales and coal beds, the coals occurring in the lower portion. Next above is a heavily bedded massive sandstone member. The Castlegate floor sandstone can be traced easily by outcrop exposures from Castlegate up Price River and Willow Creek Canyons to approximately the south line of Sec. 31, and then south and east around the escarpment to the Milburn mine in Sec. 11, T. 13 S., R. 10 E., and beyond. The upper sandstone can also be traced continuously from the vicinity of Castlegate, up Willow Creek and into Sec. 32, and then on with the lower sandstone beyond the Milburn mine. The sandstone formation dips uniformly at from four and one-half to six degrees to the north, and the coal floor sandstone is estimated to underlie the highest portions of the SE. $\frac{1}{4}$, Sec. 32 at a depth of not to exceed 1800 feet.

The Castlegate No. 1 mine of the Utah Fuel Company near Castlegate, on the west side of Price River, was opened in 1889, and produced from 150,000 to 205,000 tons annually from 1892 to 1896. A seam of coal varying from 4 to 10 or 12 feet and termed the Castlegate seam, lying directly on the sandstone floor, was the only seam mined prior to about 1911. The outcrop was from 4 to 5 feet in thickness. At what is described as the Anderson opening in the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 6, T. 13 S., R. 10 E., there is an outcrop of from 5 to 6 feet of coal, 150 to 180 feet above the Castlegate sandstone. An opening was made into this vein prior to 1890, and the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ NW. $\frac{1}{4}$ were sold under the coal land laws in that year. At the Kenilworth mine, opened in about 1905, in Sec. 16, T. 13 S., R. 10 E., $2\frac{1}{2}$ miles south of Sec. 32, there was an outcrop of an 8 foot vein, and also a lower vein of about 20 feet, the latter lying on the sandstone floor. At the Aberdeen mine, $2\frac{1}{2}$ miles to the southeast, coal was being mined for local use in Price prior to 1896, on a vein 18 to 20 feet thick, on the Castlegate floor, about 12 to 15 feet being exposed on the outcrop. The Milburn mine, about

3 miles to the southeast, was opened between 1890 and 1894, and coal mined for local use on a vein 10 to 12 feet. There were also exposures of a lower vein of 4 or 5 feet. These veins are both higher than the Castlegate seam. There were outcrops and evidences of coal burning in Willow Creek Canyon, and along practically the entire coal horizon from Castlegate to the Milburn mine there were unmistakable evidences of burned outcrop, where coal itself was not exposed. The coal seams described dip in conformity with the associated sandstones northward in the direction of the land involved, and there is no evidence of faulting in the formation. The coal in the Castlegate region is a good grade of bituminous coal, with a heating efficiency of about 13,000 B. T. U. Section 32 is rough, mountainous land, with abrupt cliffs, contains only small areas of cultivable land, and other than its coal value, has but a small value for grazing purposes.

On the basis of the geological conditions and coal exposures as they existed in 1896, the three geologists appearing on behalf of the coal applicant, two of whom had made no examinations in the vicinity until long after that date, testified that in their opinion the land was in 1896 chiefly valuable for coal, and that it is so situated that it would be practicable and commercially profitable to mine it.

From a careful consideration of the evidence, the Department finds that the coal applicant has established *prima facie* that the land was known coal land on January 4, 1896; that the Commissioner's finding in this respect was correct; and that the register and receiver erred in sustaining the motion to dismiss.

The appellants assign as error the failure of the Commissioner, upon reversing the decision of the local officers, to remand the case for the submission of their testimony. As has been stated, at the conclusion of the coal applicant's testimony the appellants moved to dismiss, the motion being equivalent to the demurrer to the evidence provided by the Rules of Practice (48 L. D., 246, 253). Rule 40 provides:

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.

The rules do not make provision for a case where the local officers sustain the demurrer, and their action is reversed on appeal, but the Department in a number of decisions has held that the Commissioner must remand the case for the submission of testimony by the defendant. *Dahlquist v. Cotter* (34 L. D., 397), *Bradford v. Aleshire* (18 L. D., 78), *Lien v. Botton* (13 L. D., 40). *Braffet* contends that the defendants waived their right, relying on the following proceedings at the hearing (transcript p. 982; printed record, vol. 3, p. 282):

Register: The record will show that on December 1st, a motion was made by the intervener in this case to dismiss. This motion was argued pro and con until Thursday the 4th. It was then taken under advisement by the register and receiver of this office until Monday, December 8th, at 10.00 o'clock. From what was said at the close of the argument, it is the opinion of the office that whatever action we take, that is, whether we deny the motion or allow the motion, it will settle the case, so far as this office is concerned, and that being the case, as the receiver has heard very little of the testimony, and would be compelled to read most of the testimony over before having an intelligent knowledge of the testimony given, it is thought advisable on the part of this office to take further time to consider the case, and the case will be continued until the 20th of January, at 10.00 o'clock.

I will ask Mr. Senior if he proposes to introduce any more testimony in this case.

Mr. Senior: I will say this, that my mind was fully made up that we intended to rest on the decision of the register and receiver regarding our motion.

Counsel for the intervener contends that he was not required at this juncture to disclose what course he would pursue subsequently to the register's ruling on the motion; that his reply to the register's question was only a respectful way of saying that he declined to decide or to announce a decision until the contingency arose requiring such a decision as to what his course should be in case the motion to dismiss were overruled. It is apparent from the register's statement that he understood that no further testimony would be submitted, and that it was upon such an understanding that a decision on the motion to dismiss was not rendered *forthwith* as required by the Rules of Practice, and it is presumed that the decision of the Commissioner was based on the same theory, as the question is not discussed in his decision. The statement of counsel afforded ample justification for the construction placed thereon. Nevertheless he did not formally rest the case and on the record as it stands, the Department is not inclined to deprive the appellants of the opportunity to present testimony in defense of their claim. The case will, therefore, be remanded to the local office for that purpose.

The right of the coal applicant to complete his application, in view of the passage of the act of February 25, 1920 (41 Stat., 437), is also questioned. The Commissioner discussed the cases of Charles L. Ostenfeldt, and the State of Utah *v.* Olson, *supra*, and concluded that neither of them should be construed to prevent the completion of Braffet's application, in the event the claim of the State is rejected. Section 37 of the act of February 25, 1920, provides—

That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, * * * 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.

In construing this section, in its relation to coal lands, the Department in the case of John B. Forrester and Robert M. Magraw (48 L. D., 188, 190), held that the phrase "a valid claim"—

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.

To this statement must of necessity be added the proviso that the land applied for was, prior to the passage of the act of February 25, 1920, *subject to entry* under the coal land laws. The Ostenfeldt case involved a coal application for land in a school section, and in passing on the question of when the rights under the application attached so as to determine the price to be paid the Government, the Department said (41 L. D., 265, 267):

However, it appears from the records of this Department that the survey of said section 16 approved by the surveyor general June 30, 1896, did not specifically return the lands here involved as coal lands, nor does it appear from the evidence before the Department that any claim thereto under the coal-land laws was at that date asserted by claimant or others. Presumptively, therefore, the title to said land passed to the State of Utah, and this presumption could be overcome only by the submission of a satisfactory showing to the contrary.

Until such showing had been submitted and a finding made upon the question involved, no application or entry could be allowed of record for the land (32 L. D., 39 and 117). An application to contest the claim or right of the State might be entertained and the application to purchase of Ostenfeldt was so treated, resulting, after answer and denial by the State, in a trial and the final holding by the Commissioner, June 6, 1911, that the lands did not pass to the State of Utah at date of approval of survey or at all, because of their known coal character. From and after this adjudication the lands became subject to application and entry under the coal-land laws but at the price then fixed under the regulations of the Department. No rights were obtained by Ostenfeldt when he tendered his application to purchase, December 13, 1909, he occupying merely the status of a would-be contestant, without the privilege, sometimes extended by statute, of a preference right of entry in event of success. Even in those instances the successful contestant is only accorded a right to enter subject to the conditions existing at the time the right becomes available. After the records had been cleared of the claim of the State he, if the first qualified applicant, might enter the land if subject to disposition, but at the price, and subject to the conditions, then fixed.

This decision was cited in *State of Utah v. Olson*, *supra*, where in discussing a similar application it was said (page 60):

* * * it is clear that rights under Olson's coal application can not arise or attach until the *prima facie* claim of the State has been eliminated by a final decision in the Land Department.

While the question decided in the *Ostenfeldt* case was one of payment, the underlying principle thereof is applicable to and decisive of the question here presented. The presumptive title to the land has been at all times during statehood and still is in the State and its transferees, and until that presumption is set aside, and the title finally determined to be in the United States, no valid application of any character can be made therefor, and no rights can be acquired under an application of the character filed by Braffet. His application amounts to nothing more than an application to contest the right of the State, and it is not a valid claim within the saving clause of section 37 of the leasing act. In the event the contest is decided adversely to the State, unless the transferee of the State is held to have a preference right thereto under its claim for equitable consideration, or under any future legislation that may be enacted, the land will be subject to disposition under the general provisions of the leasing act, and no preference right can accrue to Braffet by virtue of his application or contest.

In the appeal from the decision of the register and receiver, the coal applicant assigned as error the exclusion of evidence sought to be introduced with respect to the acquisition of coal lands in Utah by the Pleasant Valley Coal Company, and the Utah Fuel Company, which owns all of its stock, through the medium of State selections in the names of various officials, and employees, etc. The Commissioner held that in view of the fact that the intervener claimed equitable consideration, such evidence was material, and further that whether or not it was material was a matter for his consideration; that its exclusion was erroneous, and that the intervener should have met and refuted the charges made by the opposite side.

Rule 38 of the Rules of Practice provides:

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.

While little, if any, of the testimony offered appears relevant to the main issue, the known character of the land in 1896, under the plea for equitable consideration interposed by the intervener it should have been received by the local officers, for it was not obviously irrelevant. The offer to show the description of the lands involved in the *Milner* case, and the questions to H. G. Williams with respect to his indictment for conspiracy, were obviously irrelevant and properly excluded. With these exceptions the coal applicant will be allowed to submit the excluded testimony.

Until the question of the character of the land is determined, it is not necessary for the Department to consider the claim for equitable consideration, and it will not attempt at this time to specify what

will form the basis of a determination upon that claim, except to call attention to the first proviso of section 2 of the leasing act, as follows:

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.

In conformity with the views expressed, Braffet's coal application will be formally rejected, and he will be treated hereafter as a mere contestant. The case will be remanded to the local office for the submission of further testimony, and by reason of the fact that the contestant can acquire no preferred right to the coal deposits and for the purpose of adequately protecting its interests the Government will formally intervene, and be represented by an officer of the field service. In the event that the contestant does not proceed with the contest it will be prosecuted by the Government.

The case is remanded for action as indicated.

**STATE OF UTAH, PLEASANT VALLEY COAL COMPANY, INTER-
VENER v. BRAFFET.¹**

Motion for rehearing of departmental decision of July 31, 1922, 49 L. D., 212, denied by First Assistant Secretary Finney, October 31, 1922.

COTNER ET AL. v. ISGRIG ET AL.

Decided August 10, 1922.

**OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—WITHDRAWAL—
SECTION 19, ACT OF FEBRUARY 25, 1920.**

Section 19 of the act of February 25, 1920, does not contemplate that an applicant for a prospecting permit thereunder must have complied with the conditions imposed by the first proviso to section 2 of the act of June 25, 1910, but an oil placer location is to be deemed valid within the purview of the former section if the claimant thereof had, prior to a petroleum withdrawal, outstanding at the date of the enactment of the leasing act, in good faith fulfilled all of the requirements under then existing laws necessary to valid locations except those relating to the prosecution of work leading to discovery.

**OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—PATENT—SECTION
19, ACT OF FEBRUARY 25, 1920.**

It is not necessary that the expenditures relied upon by a placer mining claimant as a basis for an oil and gas prospecting permit under section 19 of the leasing act, if otherwise sufficient to meet the requirements of that section, should have been made with the intention of securing a patent under the mining laws.

¹Petition for exercise of supervisory authority denied by First Assistant Secretary Finney, December 28, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—SECTION 19, ACT OF FEBRUARY 25, 1920.

Expenditures relied upon as a basis for a permit under section 19 of the leasing act, made by a lessee pursuant to an agreement contained in an oil and gas lease of a group of placer claims, which provides unconditionally for the drilling of but one well, the drilling of other wells being contingent upon the production of oil in commercial quantities from the well first to be drilled, can be accredited only to the single claim upon which that well was proposed to be drilled, where no other expenditures were made with specific reference to any of the remaining claims.

FINNEY, *First Assistant Secretary*:

August 24, 1920, A. A. Isgrig, on behalf of himself and Alice Thompson, Nellie McGannon, C. B. Otteson, B. F. Eyer, T. W. Reid, B. A. Dick, J. L. Baird, L. D. Welch, C. L. Thompson, and the Ohio Oil Company, filed application 012590, under section 19 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon the S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 15, E. $\frac{1}{2}$, Sec. 22, all Sec. 23, W. $\frac{1}{2}$, Sec. 24, NW. $\frac{1}{4}$, Sec. 25, and N. $\frac{1}{2}$, Sec. 26, T. 44 N., R. 95 W., 6th P. M., embracing 1,920 acres, Lander land district, Wyoming.

With the exception of the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22, and the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 26, the area described was, by Executive order of December 11, 1914, under and pursuant to the act of June 25, 1910 (36 Stat., 847); 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 placed in Petroleum Reserve No. 34.

The application is based upon twelve asserted oil placer mining locations, each embracing 160 acres, alleged to have been made from and including June 24 to June 26, 1914, and prior to the above-mentioned withdrawal by the said Isgrig, McGannon, and Dick, together with Frank Ressler, R. W. Hale, Morris Flavin, William McGannon, Fred Mudd, Nettie Mudd, and John Otey, the interests of the seven locators last named having passed to certain of the applicants, except Baird and the Ohio Oil Company, who claim as assignees under a lease made by the record owners of the claims to C. L. Thompson.

Prior to the filing of said application, and between and including February 25 and May 18, 1920, prospecting permit applications, under section 13 of the above-mentioned act, were filed for various portions of the above-described area by the following named persons: 011749, William C. Hinterman; 011750, John M. Wallace; 011754, Victor Cotner; 011755, John M. Snyder; 011771, William T. Bivin; 011777, Roxana Petroleum Corporation; 011780, M. L. Marquard; 011787, Lelia L. Jackson; 011788, Ira Sherard; 011799, Minal E. Young; 011893, the Holdrege Oil Company; 011944, Frank S.

Mitchell; 011946, Douglas E. Roller; 011965, M. Katherine Byers; 011988, R. C. Mathews; 011990, E. B. Schwartz; 011991, S. W. Sheley; 011994, I. W. Bennett; 011995, R. C. Downie; 012030, J. D. Prugh; 012041, Harrison Nesbit; and 012252, L. C. Thomas. Thereafter, and on October 6, 1920, a similar application, 012893, was filed by William A. Barham.

Following the filing of the section 19 application, certain of the section 13 applicants filed protests against the section 19 application, whereupon the Commissioner of the General Land Office by letter of April 6, 1921, ordered a hearing on charges in substance as follows: (1) that neither Isgrig nor any other person was a *bona fide* occupant or claimant of any of the above described tracts on October 1, 1919, under the placer mining laws of the United States; (2) that neither Isgrig nor any other person for him nor his predecessor in interest had performed the necessary acts required under the laws existing prior to the passage of the leasing act to protect said locations, and that neither the said Isgrig nor his predecessor in interest, had prior to February 25, 1920, performed work or operated on or for the benefit of the lands embraced in the application for locations an amount equal to the sum of \$250 for each location, but that the only work performed upon said claims and locations in good faith prior to the act of February 25, 1920, was the erection of stakes at the corners of the locations under the then existing placer mining laws, and that after the staking and location of the claims, the lands included therein were withdrawn from location and entry, whereupon the locations were wholly abandoned; (3) that all action taken and work performed by Isgrig in the erection of substantial improvements on said locations consisted in the erection of a standard oil well drilling derrick, and that said work was not performed for the benefit of the locations but for the purpose of bringing them under the relief provisions of the then pending leasing bill.

Hearing was held on said charges commencing May 23, 1921, the record of which was forwarded to the General Land Office without action by the local officers.

Upon considering the evidence adduced at the hearing, the Commissioner of the General Land Office by decision of November 26, 1921, found that the plan for locating the lands originated with the applicant, B. A. Dick, who was following the business of prospecting and operating oil lands; that it had been agreed among the locators of the lands that each should contribute \$25 to cover the cost of locating the land and that, in addition, each should contribute an additional sum of \$75 toward "validating" the claims; that after the payment of \$25 by each of the locators toward the location of the land, Dick proceeded with the location of the land, including with

the claims here in question, 19 other claims of 160 acres each, situated in T. 44 N., Rs. 96 and 97 W.; that immediately succeeding the location of said claims, Dick located in the names of himself and others certain other claims, 28 in number, embracing in the aggregate 4,480 acres situated in Ts. 43 and 44, Rs. 95 and 97 W.; that on the land in controversy Dick and an assistant, also one of the locators, marked the corners of the claims by wooden stakes, and posted the notices; that he also had said notices recorded; that while engaged in that work, Dick and Otey camped on the land in question and at the same time dug a few holes to determine the contour of the oil structure for the purpose of selecting a proper site for a well; that that work was not intended as either assessment or validating work, and was probably obliterated in a short time; that after performing this work Dick employed two men to watch the claims and prevent persons from stealing the stakes; that the period during which said watchmen were employed is not disclosed but that it was testified that all work on the claims was completed by September 15, 1914, thus making it apparent that they were not employed after that date; that thereafter Dick and A. A. Isgrig, both of whom it appears were locators, sought to interest persons with capital in drilling the land but without success, and that nothing further was done prior to the withdrawal of December 11, 1914; that after the withdrawal no work was performed on the land until 1920, and that none of the locators were on the land except for two visits made by Dick to the land in 1915 and 1917; that no expenditures were made by the locators other than the contribution of \$25 that each had subscribed toward the cost of the locations.

The Commissioner further found that on October 27, 1919, C. L. Thompson, one of the applicants, acquired the interests of two of the locators in the lands, and that on or about the same date transfers were made by others of the locators to various persons besides Thompson; that on November 15, 1919, Thompson acquired a lease to the land from the holders of the record title, and later transferred an interest therein to J. L. Baird, one of the applicants; that on January 19, 1920, Thompson and Baird executed a lease of the land to the Ohio Oil Company, one of the applicants, wherein the company, as party of the second part, agreed to drill and complete a well free of cost to the parties of the first part, at some point to be selected and designated by the company, provided that the company should not be required to commence said well until "relief, or a permit, or a lease from the United States of America shall have been obtained with respect to said land"; that immediately after the execution of said lease the Ohio Oil Company began the construction on the land of a complete standard drilling rig, a water system, and roads leading to a public highway; that said work

was completed prior to February 25, 1920, at a total expenditure of \$20,841.77, said expenditures consisting in detail of \$4,041.37 for a rig; \$1,828.03 for a water line and what is denominated as the first reservoir; \$329.98 for road work and bridges; \$5,477 for well expense and casing; \$1,538.62 for camp buildings; \$7,000 for drilling tools, boilers, and engines; that the expenditures for the camp, roads, reservoir, water line, and drilling rig were for the benefit of the entire group of claims, and that eliminating the expenditures for the drilling rig, tools, and casing, which were properly chargeable only to the claim upon which they are located, the amount remaining was sufficient to equal more than \$250 for each claim of the group; that no drilling has ever been done on any of the claims, and that there has been no discovery of oil thereon.

After reciting in substance the provisions of section 19 of the leasing act, so far as applicable to the present case, the Commissioner held that the facts disclosed failed to show that the applicants were *bona fide* occupants or claimants of the land on October 1, 1919, as required by said section. He held specifically that no one was in the occupancy of any portion of the land on that date and that there was no satisfactory evidence that any of the locators were then claiming the land. He found that from September 15, 1914, to January 19, 1920, no work whatever was performed on the land, and that there was nothing thereon to indicate that any one was asserting claim thereto, and that the county records were equally barren of evidence to show the asserting of a claim; that the only evidence of the maintenance of a claim to the land by the locators is the testimony of three of the locators, Dick, Isgrig, and Hale, to the effect that they had no intention of abandoning the claims, and that Dick and Isgrig also testified that after the withdrawal, they had attempted to interest persons in drilling the land, but neither of them could remember the name of any person who had been so approached; that while the locators had agreed to contribute \$75 each for "validating" work on the claims, none of them had been called upon to make any such contribution, and that the only excuse that Dick gave for the failure to have the "validating" work performed was that the withdrawal of the land had rendered such work unnecessary; that Hale and Dick testified that the locators had not taken into consideration the cost of drilling the land themselves as they were expecting to have the drilling performed on a royalty basis by some possible lessee; that one of the locators, Mrs. Nettie Ferguson, formerly Mudd, testified that she and her late husband, also a locator, thought that their rights under the locations had been terminated by the withdrawal of the land and that, on that account, she had sold the rights of herself and her

late husband to C. L. Thompson for \$25. In conclusion the Commissioner said:

To constitute one a claimant of land, there must exist something more than a mental state which is known only to the person himself. There must be some definite action on his part toward the assertion of his claim. In the present case, there is no evidence, whatsoever, to support the testimony of Dick, Isgrig and Hale that they were claimants to the land on October 1, 1919, but on the contrary, the circumstances clearly indicate an abandonment of the claims long prior thereto. It follows, therefore, that the applicants under section 19 were not *bona fide* occupants or claimants on October 1, 1919, and their application must be rejected.

Appeal from that decision is filed by the protestees, and in connection therewith a motion for rehearing, to enable them to show by additional evidence that efforts were made by the locators at various times between the fall of 1914 and October 1, 1919, to lease the lands in question for drilling purposes to individuals whose names are given, or to secure its development by other means. In support of said motion for rehearing, there are filed the joint affidavit of Nellie E. McGannon, Frank Ressler, and R. W. Hale, and the separate affidavits of John C. Tanberg, E. F. Gallagher, Henry C. Bealor, J. O. A. Carper, Nat Levi, and A. A. Isgrig. Mrs. McGannon, Ressler, and Hale aver that during the month of April, 1915, they met at Thermopolis, Wyoming, one J. C. Tanberg, and conferred with him relative to leasing certain lands situated on Gebo Dome, and which had been located as oil placer mining claims in June, 1914, by themselves, Isgrig, Dick, Otey, Fred and Nellie Mudd, William McGannon, and Flavin; that said conference resulted in a lease of said lands to Tanberg, by an instrument dated April 29, 1915, a copy of which is annexed to the affidavit; that Tanberg was unable to commence the drilling of a well in accordance with the terms of the lease, and on June 21, 1915, conferred with the affiants with a view to securing an extension of the time within which to commence such drilling operations; that as a result of said further conference a supplemental agreement was entered into with Tanberg June 21, 1915, a copy of which is attached.

The instruments, alleged copies of which are attached to the affidavits, purport to have been signed by C. W. Ford, attorney in fact for B. A. Dick, and by John Otey, Fred Mudd, Nettie Mudd, Nellie McGannon, in her own capacity and as administrator of the estate of W. H. McGannon, Maurice Flavin, Frank Ressler, and R. W. Hale, all locators of the claims in question. The affidavit of John C. Tanberg is corroborative of that of Mrs. McGannon, Ressler and Hale, Tanberg averring that he was the person named as the party of the second part in the lease and supplemental agreement referred to in the said joint affidavit.

A. A. Isgrig avers that he is one of the locators of the claims in question and that he endeavored on several occasions to interest parties in the lands covered thereby; that in the years 1915 and 1916 he sought to get one Nat Levi, who was an oil operator and producer, then drilling wells on what is known as the Waugh anticline in the county in which the land is situated, to agree to drill a well on Gebo Dome, comprising the described lands; that Levi did agree to drill the Gebo lands after the completion of the fourth well on the Waugh anticline, but became financially unable to undertake said work; that affiant is acquainted with one J. O. A. Carper, who is by profession a mining engineer; that in the years 1917, 1918, and 1919, Carper was frequently in the Big Horn Basin country, Wyoming, engaged in exploring for oil and gas; that during said years and on frequent occasions affiant sought to have him lease the lands on Gebo Dome and agree to drill a well thereon; that affiant is acquainted with one Henry Bealor, a geologist and mining engineer; that in the spring of 1917 affiant was employed by said Bealor while he was making an examination of lands in the vicinity of Gebo Dome, and at that time affiant informed Bealor of his interest in said lands and endeavored to interest him in accepting an oil and gas lease for the purpose of drilling upon said lands; that affiant is acquainted with one E. F. Gallagher, who is assistant treasurer of the Mutual Oil Company; that during the year 1917 witness met Gallagher in Greybull, Montana, and endeavored to induce him to accept an oil and gas lease upon lands located by affiant and his associates upon Gebo Dome, which are the same lands as those described in the application; that in the year 1918 affiant met Gallagher a second time at Thermopolis and endeavored to interest him in accepting an oil and gas lease for said lands; that affiant also endeavored to have Gallagher negotiate with the people that he represented and who were at that time engaged in exploring and developing oil lands, for the purpose of interesting them in drilling said lands.

E. F. Gallagher avers that he is assistant treasurer of the Mutual Oil Company and is acquainted with A. A. Isgrig; that during the year 1917 Isgrig came to affiant and stated that he and his associates had located, under the mining laws, lands generally known as Gebo Dome; that affiant was familiar with said lands; that Isgrig at that time endeavored to induce the affiant to take an oil and gas lease for said lands, and to agree to drill a well thereon to determine whether or not the lands were oil bearing; that Isgrig, at that time, also sought to get the affiant to negotiate with people with whom he was acquainted, to see if they would agree to drill a well on said lands; that affiant met Isgrig again during the year

1918, at which time Isgrig again offered said lands to affiant under an oil and gas lease.

Henry C. Bealor avers that he is acquainted with A. A. Isgrig; that in the spring of 1917 affiant was working in the Big Horn Basin country, Wyoming, and there met Isgrig, who talked with affiant about certain oil lands known as Gebo Dome, which he represented had been located by him and his associates; that Isgrig then offered to lease said lands to affiant for the purpose of drilling thereon to determine whether or not they were oil bearing; that said negotiations took place in the vicinity of Gebo Dome, where Isgrig was assisting affiant in certain work at that time.

J. O. A. Carper avers that he is acquainted with A. A. Isgrig, and is familiar with the property known as Gebo Dome; that in March or April, 1917, affiant visited that section in company with Isgrig; that Isgrig mentioned Gebo Dome and pointed the same out as being property located by himself and others prior to the withdrawal, and offered to lease said property to affiant or those whom the affiant represented; that frequently thereafter, and during the years 1918 and 1919, the affiant was in that section, and at that time the property was offered to the affiant on several occasions.

Nat Levi avers that he is acquainted with B. A. Dick and Art Isgrig; that affiant had a conversation with Dick and Isgrig relative to drilling Gebo structure for them during the year 1915; that in the same year affiant went to Isgrig and was shown the boundaries of the land contained in Gebo structure; that affiant agreed with Dick and Isgrig in 1915 to drill said lands as soon as he had finished certain drilling work in Cottonwood, where affiant then was engaged in drilling; that it was the affiant's intention at that time to drill said lands as agreed but that the war conditions as to finance made it impossible for affiant to comply with said agreement, and that he so notified Isgrig in 1916.

As the Commissioner correctly finds, three of the locators, Isgrig, Dick, and Hale, the first two being among the section 19 permit applicants, testified that they had never had any intention of abandoning the claims. Dick also testified that from time to time efforts were made to secure a lease of the land with a view to drilling and developing it for oil, on a royalty basis, but that prior to the lease of November 15, 1919, to Thomson he had been unsuccessful. Isgrig testified that he, too, had made efforts at different times to interest people in the operation of the land and to secure a lessee therefor, but that until the lease to Thomson he had not succeeded in securing a lessee. Asked to state the number of times, from the dates of the locations until 1919 they sought to secure some one to develop the lands, he said, "At different times I tried to interest people, who were in that line of business, of

looking for locations for developing oil lands, and I talked to a number of different people; I can not recall all of them."

While it is testified by several of the claimants, as above stated, that they had no intention of abandoning the claims, mere verbal evidence of lack of intention to abandon can not be accepted by the Department as sufficient to establish a continued assertion of claim to oil placer mining locations between the date of a withdrawal of the land and October 1, 1919, with a view to showing the existence of the claims as of that date. Here, however, two of the locators testified at the hearing that they had at various times after the withdrawal sought to interest others in the development of the lands in question, by lease or otherwise. It is true that the locators who so testified were unable at the time of the hearing to name the persons they had so approached, but the details of the negotiations to that end are now furnished in the affidavits hereinabove referred to accompanying the appeal, and the Department is of opinion that under all the circumstances the allegations contained in said affidavits may be accepted as true, unless they shall be denied by the protestants and a further hearing applied for. In the absence, therefore, of such denial and application for hearing, the Department will accept the same as showing an assertion or claim to the land by the locators on October 1, 1919.

It is urged by the protestants that, in any event, in view of the provisions of the act of June 25, 1910 (36 Stat., 847), popularly known as the Pickett Act, and of the withdrawal thereunder of the lands here in question by the order of December 11, 1914, the claims are not appropriate bases for a permit under section 19 of the leasing act, because at the time of the withdrawal and for a period of more than five years thereafter, there had been a total want of diligence in the prosecution of work thereon looking to the discovery of oil or gas; that the provisions of said section 19 should be read and construed in the light of the first proviso to section 2 of the Pickett Act, and that if so read and construed, it requires that a claim, to be available thereunder, must be one upon which there had been at all times, from and after the date of the withdrawal covering the land, continuous and diligent prosecution of work looking to the discovery of oil or gas; that if such work was not being prosecuted upon a claim at the date of the withdrawal, or, if then so prosecuted, it was not thereafter diligently continued, the withdrawal attached, thus extinguishing whatever rights the claimant of the location may otherwise have had, and rendering the location absolutely null and void, for all purposes.

The Department is not impressed with the soundness of that contention. It is true that the said proviso to section 2 of the Pickett Act excepts, from the operation of withdrawal made thereunder,

only those lands included in oil and gas locations wanting in discovery upon which, at the date of the withdrawal, the claimant was engaged in the diligent prosecution of work leading to the discovery of oil or gas, and only so long as the claimant should continue in the diligent prosecution of such work. It is also true that a claim to be entitled to recognition under section 19 of the leasing act, must be one initiated while the land included therein was not withdrawn from oil and gas location, and with respect to which the claimant had "previously performed all acts under then existing laws necessary to valid locations thereof, except to make discovery, and upon which discovery had not been made prior to the passage of this act." Notwithstanding, however, the said proviso to the Pickett Act and the employment in section 19 of the word "valid" in defining locations lacking discovery that were intended to be made available as bases for permits thereunder, the said section, in express terms, requires an expenditure of not more than \$250 upon or for the benefit of the location to entitle it to such recognition, and yet provides in effect that the claim must have been initiated not later than October 1, 1919, a point of time 147 days prior to the approval of the leasing act. The cost of diligently prosecuting work looking to the discovery of oil or gas upon a claim even for that limited period, to say nothing of the period covered by withdrawals of vast areas of the public domain, wherein unperfected oil and gas locations are situated, would manifestly far exceed the amount of expenditure prescribed by the section, and that fact affords conclusive proof to the Department that Congress did not contemplate that, to entitle a claim to be deemed valid within the meaning of the section, it should be one upon which there had been a diligent prosecution of work looking to the discovery of oil or gas from the date of a petroleum withdrawal covering the land to the date of the leasing act. The Department is of opinion, therefore, that the terms of the first proviso to section 2 of the Pickett Act have no application to claims sought to be made the bases for prospecting permits under section 19 of the leasing act, but that such locations are entitled to be deemed valid for the purpose of said section if, all other requirements having been fulfilled, the claimants thereof had, prior to any petroleum withdrawal covering the land, and outstanding at the date of the approval of the leasing act, in good faith performed all acts with respect thereto necessary to the matter of a valid location except discovery work.

It is also urged by the protestants that the expenditures relied upon by the section 19 applicants are not available as a basis for a permit because made apparently without any reference to the satisfaction of the requirements of the mining laws, but solely with a view to complying with the terms of the then pending bill, which having

at that time passed one of the Houses of Congress, shortly thereafter became with some slight modifications, the leasing act. The Department, however, finds nothing in the provisions of said section 19 that requires or contemplates that such expenditures should have been made for the purpose of securing a patent under the mining laws, section 19 prescribing merely that any person who, having complied with other terms thereof, and who, prior to the passage of the act, "has performed work or expended on or for the benefit of such locations an amount equal in the aggregate of \$250 for each location if application therefor shall be made within six months from the passage of this act shall be entitled to prospecting permits thereon." The Department is of opinion, therefore, that the last-mentioned contention of the protestant is without force.

While the cost of improvements so made may be accredited toward the fulfillment of the requirements of said section 19 as to expenditures, and while a large sum of money is shown to have been expended by the Ohio Oil Company upon the land, said expenditures appear to have been made in pursuance of an agreement dated January 19, 1920, by and between C. L. Thompson, the lessee of the claimants, and J. L. Baird, an assignee of an interest in the lease to Thompson, as parties of the first part and the Ohio Oil Company, as party of the second part, wherein it is stipulated in part as follows:

SECOND: the party of the second part hereby agrees to drill and complete a well free of any cost and expense to the parties of the first part at some point to be selected and designated by the party of the second part upon the above described lands, provided, however, that the party of the second part shall not be required to commence said well until relief, or a permit, or a lease from the United States of America shall have been obtained with respect to said lands.

THIRD: in the event that the above-described well, when completed, shall be a commercial oil well, the party of the second part agrees to diligently continue the work of developing and operating said lands for oil and gas purposes as fully and as rapidly as is consistent with good business management.

The said agreement thus provides unconditionally for the drilling of but one well upon the area included in the claims here in question, the drilling of other wells upon the property being contingent upon the production of oil in commercial quantities from the well to be first drilled. The company selected a point in the SE. $\frac{1}{4}$ of Sec. 23 embraced in the claim known as the McGannon Oil and Gas Company placer as the site for the sinking of the well proposed to be first drilled, and in view of the fact that the company was not under unconditional obligation to drill more than that one well, the Department is clearly of opinion that the expenditures made by the company can be properly accredited only to the single claim upon which that well was proposed to be drilled. No other expenditures have been made with specific reference to any of the remaining eleven claims, and for this reason it must be held that the requirements of

section 19 of the leasing act have not been fulfilled as to them and to the extent of said claims, the application must, in any event, for that reason be rejected:

The expenditures, however, upon or for the benefit of the said McGannon Oil Company placer are clearly sufficient, and unless the allegations contained in the affidavits accompanying the appeal shall be denied and disproven at a hearing to be applied for by the protestant, the application will be allowed to the extent of the SE. $\frac{1}{4}$, Sec. 26, embraced in said claim, upon which the drilling rig erected by the company is situated. As thus modified, the decision appealed from is affirmed.

COTNER ET AL. v. ISGRIG ET AL.

Motion for rehearing of departmental decision of August 10, 1922, 49 L. D., 224, denied by First Assistant Secretary Finney, November 4, 1922.

J. B. BRADLEY.

Decided August 16, 1922.

OIL AND GAS LANDS—MINING CLAIM—LEASE—ABANDONMENT—OCCUPANT—ESTOPPEL—SECTION 19, ACT OF FEBRUARY 25, 1920.

The claim of an applicant for a lease under the relief provisions of section 19 of the act of February 25, 1920, who asserts in support thereof an inchoate right under the placer mining laws, but who during a period of several years prior to October 1, 1919, never having made a discovery of oil or gas, stood idly by and without protest permitted others to acquire apparent title, and deal with it as theirs, and as though he had no right, must be treated as an abandoned claim, not entitled to equitable consideration under that section.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Galliber v. Cadwell* (145 U. S., 368), *Moran v. Horsky* (178 U. S., 205), and *Burke et al. v. Taylor et al.* (47 L. D., 585), cited and applied.

FALL, *Secretary*:

J. B. Bradley has appealed from a decision of the General Land Office rejecting his application 026677, Douglas, Wyoming, series, for an oil and gas lease under section 19 of the act of February 25, 1920 (41 Stat., 437), embracing all of Sec. 36, T. 40 N., R. 79 W., 6th P. M.

The tract involved was included in Executive Petroleum Withdrawal of September 27, 1909, and was included in Petroleum Reserve No. 8 of July 1, 1910. On April 2, 1920, the land was designated by the Geological Survey as being within the producing geological structure of the Salt Creek oil field.

In support of his application for lease filed August 25, 1920, Bradley alleges that on April 18, 1890, said lands were located under the placer mining laws by an association of eight persons who filed claims on each of the four quarter sections; that immediately thereafter the locators went into possession of said claims and commenced and continued to perform work and labor thereon for the protection of their claims; that prior to the withdrawal of September 27, 1909, said claimants and their successors performed each and every act necessary to perfect valid placer mining locations but had not drilled any commercial or producing well; that in the year 1890 and in many subsequent years the locators and claimants by means of excavations made by them on said mining claims had disclosed the actual existence of oil in each of said claims; that on April 18, 1890, and for many years prior thereto, the said lands were well known to be mineral in character and to contain deposits of petroleum and like mineral substances; that under the act of Congress of July 10, 1890, providing for the admission of the State of Wyoming into the Union, sections 16 and 36 of each township in said State were granted to the State for educational purposes, with the provision that mineral lands were exempted from said grant; that under the above-mentioned grant by Congress the State of Wyoming had assumed to own and control all of said section 36 above described and had attempted and pretended to lease the same from time to time for oil and gas mining purposes; that the Midwest Refining Company and various subsidiary companies, and persons, now claim to hold said section 36 and to have the right to the oil and gas products thereof under and by virtue of a pretended lease given thereon by the State of Wyoming; that said corporations and persons are now holding possession of all of said lands and have drilled and are drilling large numbers of wells thereon, and have extracted and are extracting and marketing large quantities of mineral oil from said land; that no right, title, or interest in or to said section 36 or in or to the oil therein have passed to the State of Wyoming under the above-mentioned act of Congress, and that the several corporations and persons now claiming the right to the oil, as aforesaid, have no right, title, or interest in or to the same; that the applicant, Bradley, had acquired all the rights, title, and interests of the locators and claimants of the several oil placer mining claims, and is now and for a long time has been the sole owner and claimant thereof; that commencing in the year 1890 and continuing to the present time this applicant and his predecessors in interest have expended in the aggregate approximately \$2,000 upon and for the benefit of each of said four placer mining claims.

On October 7, 1920, the State of Wyoming filed a protest against said application alleging in substance that the land was not known to be valuable for mineral on July 10, 1890; that it is not public

land of the United States, having been granted to the State of Wyoming by the act of July 10, 1890, and that the applicant, J. B. Bradley, has no interest in, title to, or claim to said land and is not entitled to a lease or permit thereon.

On November 22, 1921, the General Land Office, after an examination of Bradley's application, rejected said application as to the west half of section 36, because of the failure of the applicant to show title to the same and required as to the application generally an additional showing, first, as to the work and expenditures on the claims, second, as to the *bona fides* of Bradley's claim or occupancy of the land on October 1, 1919, and, third, as to the facts which would warrant the ordering of a hearing in an attempt to dispossess the State and its lessees.

Replying to these requirements, applicant Bradley filed a supplemental showing which was held by the General Land Office to be insufficient and on February 23, 1922, his application was rejected in its entirety. From this rejection Bradley has appealed, alleging numerous grounds of error.

As set forth in the decision of the Commissioner, Bradley has failed to show that he is the holder of the mining title to the west half of section 36, and the rejection of the application as to this tract was in accordance with the established practice of the Department. *Burke et al. v. Taylor et al.* (47 L. D., 585). There is nothing in the appeal which challenges the correctness of this portion of the Commissioner's decision.

The supplemental application of Bradley alleges that from 1890 to 1910, the annual work for the benefit of the claims in question consisted of making and maintaining wagon roads and bridges, in conjunction with other claimants, between the town of Casper, Wyoming, and the Salt Creek field, a distance of about 60 miles; that for this work applicant and his associates expended about \$100 per year for each claim; that commencing in 1889, they also excavated a number of drifts and shafts to a depth of from 10 to 15 feet on each claim, and proved the existence of oil in said lands.

It is further alleged that in 1911 or 1912, the present lessees of the State of Wyoming and their predecessors in interest kept all mining claimants off said lands and maintained a guard of armed men whose work it was to prevent all placer mining claimants from entering upon or doing any work upon said land; that applicant was told by said parties to keep off said land and the reputation of said armed guards caused applicant to remain away from said land to avoid trouble.

It is further alleged that applicant procured the advice of attorneys to the effect that after the withdrawal in 1910 there was no need to perform annual work in order to hold said claims, and appli-

cant acted largely on this advice; that applicant never had any intention of abandoning said claims and that the lessees of the State of Wyoming had often tried to procure a conveyance of the mining title from applicant.

In support of his allegations that the grant to the State did not pass, applicant alleges that he and his associates were in possession of all of said land at the date of the act of Congress, of July 10, 1890, and that they had performed all acts requisite to the perfection of valid placer mining claims including the making of the discovery on each of the claims; that he can produce much proof tending to show that said land was known to be oil land long prior to the act of July 10, 1890.

On the basis of this showing Bradley contended that a hearing should be ordered for the purpose of determining whether or not the title passed to the State under its grant, and in his appeal he contends that a hearing should have been ordered between himself and the State before any decision was made as to his rights under the present application.

With this view the Department can not agree. Even were the land unquestionably public land, subject to lease, it would be necessary for the applicant to show that he possessed all the qualifications required of a lessee, under section 19 of the leasing act. That applicant contends there is a doubt as to the Government's title renders it more necessary that the applicant should show qualifications entitling him to a lease before putting the State and its lessees to the expense of a hearing.

Considering the facts alleged in this application, is such a case presented as entitles the applicant to the relief sought—a lease under section 19 of the act?

The work which applicant performed on the land during the twenty years of his asserted possession consisted of the digging of a few shallow trenches or holes and assistance in the construction and repair of the roads and bridges leading to the claims—work which tended but slightly, if any, toward the discovery or development of mineral in this land. That there was a discovery of oil by this applicant sufficient to form the basis of an application for patent can not be accepted. It is admitted by him that no producing oil well had been drilled on the land prior to the time the lessees of the State took possession. From 1911 to August, 1920, the land was in possession of the State of Wyoming and its lessees, and during said period no attempt was made by this applicant to go upon it or to seek redress in the courts for his alleged ouster, or in any other way to assert claim therefor.

During this period a large number of wells had been drilled by the State's lessees and the value of the land for oil had been proven.

As shown by official reports of this Department, the land at the date of this application contained more than thirty producing oil wells—the first of which was completed in 1912—and the daily production therefrom amounted to several thousand barrels of oil. The present value of the land runs into millions of dollars, to which value this applicant neither contributed nor is in any way responsible.

All of this development was known to Bradley, and notwithstanding he now alleges his placer claims were valid in every respect, he made no attempt whatsoever to go upon the land nor to enforce his alleged claims. It further appears that he procured the advice of attorneys as to his rights to the lands, but nevertheless stood idly by and permitted, without a word of protest, the expenditure of thousands of dollars in the work of development. He now asks that the Department grant him a lease by which he may obtain possession of wealth which others have produced.

Was it the intention of Congress by section 19 of the leasing act, to grant rights to a claimant under such circumstances? Section 19 of the act is one of the relief sections wherein Congress endeavored to deal equitably with persons who had no rights under the then existing laws. But there is no indication in any of these sections of an intention on the part of Congress to depart from the long established principles of equity. Section 19 of that act provides that a lease or permit shall be granted to any person who on October 1, 1919, was a *bona fide* occupant or claimant and who met certain other prescribed conditions. Had this applicant attempted on October 1, 1919, to enforce in court his alleged rights against the State and its lessees, would such rights have been recognized? Clearly not.

A very similar state of facts obtained in the case of *Moran v. Horsky* (178 U. S., 205, 208), wherein one who had located a mining claim on land which was later included within a town site patent, had permitted a purchaser of lands from the town site trustee to occupy said land for a period of fourteen years and then had sought to set up his claim under the mining laws. In its decision the court said as follows:

Indeed, if the matter of laches can be recognized at all, it is difficult, independently of the question of jurisdiction, to perceive any error in the ruling of the state Supreme Court. One who, having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity. We need only refer to the many cases decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. See among others *Felix v. Patrick*, 145 U. S. 317; *Gallagher v. Cadwell*, 145 U. S. 368, and cases cited in the opinion. There always comes a time when

the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity, and the present case fully illustrates that proposition.

The court then held that the doctrine of laches was properly applicable to the facts in that case.

The facts in the above quoted case are distinguished from those in the present case chiefly in the length of time during which the right was neglected, but the length of time for which the right is neglected is not conclusive.

In the case of *Gallihier v. Cadwell* (145 U. S., 368), involving an attempt on the part of a homestead claimant whose abandoned entry had afterwards been entered by and patented to a second homesteader, to set up a claim to the land after three years, and after the land had become very valuable as an addition to the City of Tacoma, Washington, the court said (page 371) :

"But it is unnecessary to rest our decision upon these matters. The laches of the appellant is such as to defeat any rights which she might have had, even if these prior questions were determined in her favor; and in this respect it is worthy of notice that there has been in a few years a rapid and vast change in the value of the property in question. It is now an addition to the city of Tacoma. The census of 1880 showed that to be a mere village, the population being only 1,098. The census of 1890 discloses a city, the population being 36,006. Of course such a rapid increase during this decade implies an equally rapid and enormous increase in the value of property so situated as to be an addition to the city. And the question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defence has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

That Congress did not intend to abrogate the settled principle set forth in the above decisions is clearly indicated in the debates preceding the enactment of the act of February 25, 1920, appearing in the Congressional Record of August 25, 1919, at pages 4274 and 4275, Vol. 58, Part 5.

This debate indicates clearly that Congress had no intention, in the enactment of its relief legislation, of setting aside the principle of law above cited and of encouraging litigation that would have been unsuccessful under the then existing laws.

It is clear therefore that upon the recognized principle announced in the decisions above quoted and in many others by the Supreme Court of the United States, the present applicant can not, in equity and good conscience, be considered a *bona fide* claimant either on October 1, 1919, or at the present time, for the lands embraced in his application.

The decision of the Commissioner is therefore affirmed, and the application rejected in its entirety.

POWERS v. SPECHT.

Decided August 16, 1922.

CONTEST—CONTESTANT—HOMESTEAD—ABANDONMENT—EVIDENCE.

In a contest against a homestead entry predicated upon a charge of abandonment it is incumbent upon the contestant, if he would maintain the contest, to show that the absence was not under conditions recognized by law, inasmuch as such absence does not constitute abandonment.

CONTEST—HOMESTEAD—FARM LABOR—NOTICE—ABANDONMENT—EVIDENCE.

While an entryman who absents himself from his entry to perform farm labor elsewhere subjects himself to a contest on the ground of abandonment by his failure to file the notice and written statements required by the act of December 20, 1917, yet he is not precluded, if a contest be instituted, from showing in defense thereof that his absence was under conditions authorized by that act.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *McCraney v. Heirs of Hayes* (33 L. D., 21), *Phillips v. Gray* (41 L. D., 603), and *Alice O. Reeder* (43 L. D., 196), cited and applied.

FINNEY, *First Assistant Secretary*:

Fieldon Powers has appealed from the decision of the Commissioner of the General Land Office dated March 29, 1922, wherein the Commissioner dismissed his contest against the homestead entry of Arthur Specht, embracing the N. $\frac{1}{2}$, Sec. 34, T. 4 S., R. 55 W., 6th P. M., within the Sterling, Colorado, land district.

It appears from the record that said township was withdrawn for resurvey on September 30, 1915, and that the plat of resurvey was filed in the local office on June 14, 1918. On July 20, 1917, Specht filed notice of taking leave from his settlement claim, and on December 19, 1917, he filed notice of return.

On May 25, 1918, he filed notice that he was leaving the land to enter military service, and on August 9, 1918, he filed his homestead application which was executed before the commanding officer at Camp Cody, New Mexico. Entry was allowed the same date. On October 3, 1919, he filed notice of leave from September 29, 1919, and on March 8, 1920, he filed notice of return on the first day of

that month. On April 25, 1921, he filed notice of leave beginning April 20, for the purpose of performing farm labor.

On June 27, 1921, Fieldon Powers filed application to contest said entry, charging—

That said entryman had wholly failed to establish and maintain a residence on said land since the date of entry; that he has wholly failed to maintain residence on said land for more than six months prior to the date hereof and for more than six months prior to April 25, 1921; that said entryman has wholly failed to improve and cultivate said land since date of entry in the manner required by law; that all of said failures exist at the present time and that none of said failures are due to the entryman being in the Army, Navy, or Marine Corps of the United States, or on duty in any military force of the United States.

Service of notice of said charges was made upon entryman, who filed answer alleging as a defense that he established residence upon said lands in 1917, and maintained same thereon until he was inducted into the United States Army, and that upon his discharge from the Army, he engaged in farm labor and has been so engaged constantly since said discharge, which he claims as constructive residence upon the land; that he has about twenty-five acres plowed, a house, and one-half mile of fence upon the land.

A hearing was duly ordered and had before the local officers who rendered their decision, recommending cancellation of the entry. Upon appeal, their action was reversed by the Commissioner who dismissed the contest in the decision from which this appeal is prosecuted.

It appears from the testimony that Specht purchased the relinquishment of a former homestead entryman in the spring of 1917, and established residence on the land in May, 1917, and lived there two or three weeks; that he thereafter returned to his brother's home, about thirty-five miles from the homestead, where he had been staying; that entryman was a single man and would work elsewhere than on his claim in order to earn a livelihood but would return thereto and sleep thereon from time to time until his induction in the Army in May, 1918; that he was honorably discharged from the Army in August, 1919, and, being without funds, he engaged in farm labor upon his brother's place, and by reason thereof he contends that he is entitled to the benefits of the act of December 20, 1917 (40 Stat., 430). During this time entryman admits that he did not reside upon the land but returned thereto from time to time in order to superintend the breaking thereof. At the date of the hearing he had from forty to forty-five acres of the land broken.

Testimony on behalf of contestant is to the effect that entryman's residence upon the land prior to his induction in the Army was in the nature of visits; that he stated to the man who did his breaking

that he did not expect to reside upon the land and that the house was uninhabitable. This testimony is denied by the entryman and witnesses in his behalf. Such testimony becomes immaterial to a disposition of the present case in view of the provisions of the act of July 28, 1917 (40 Stat., 248), which provides that service in the Army during the late war was the legal equivalent to the establishment and maintenance of residence.

Entryman's statement that he had been engaged in farm labor since return from the Army was not disputed by contestant, but it is contended that entryman is not entitled to the benefits of said act, *supra*, in view of the fact that it appears he did not file the notice and written statements under oath required by said act, and cancellation of the entry is demanded by reason thereof.

In the unreported case of *Goodrich v. Horeth*, D-38826, decided by the Department on June 11, 1920, and cited by the Commissioner of the General Land Office in his decision herein, a charge of abandonment was made which entryman defended on the ground that he was entitled to the benefits of said farm labor act, though he had not filed the notice and affidavits required by same. In its decision in said case, the Department held—

It is not seriously disputed by contestant that entryman would have been entitled to constructive residence during his absence from the land had he filed the affidavits required by the act of December 20, 1917, *supra*. The showing made by entryman is sufficient to prove that he was actually engaged in farm labor, but the contestant demands the cancellation of the entry on the ground that entryman failed to file the affidavits required by the act quoted above. The Department is unwilling, under the circumstances here disclosed, to inflict such a penalty. Congress doubtless had in mind the protection of entrymen from contest when it required the filing of the notices and written statements under oath, and where, as in this case, a contestant in effect admits that the entryman was actually engaged in farm labor elsewhere, the entry will not be canceled so long as the law is otherwise complied with.

It is not believed that Congress intended to deprive an entryman of the benefits of the act merely because, through ignorance or misinformation, he failed to file the notices and affidavits required thereby, in a case where, but for such neglect, he would be entitled to same. Certainly said act does not provide for cancellation or forfeiture of the entry because of failure to file such notices and affidavits, and a failure to file same does not assist a contestant's case in which abandonment is charged. The question of abandonment is one of fact which must be established by contestant in order to maintain his contest, and absence under conditions recognized by law is not abandonment. The failure of contestee to file such notice and affidavits is a matter between himself and the Government; by such failure, an entryman subjects himself to a contest for abandonment, which otherwise would not lie, but he can still defend the con-

test by showing as a matter of fact that he was engaged in farm labor elsewhere than upon his entry during the time he was alleged to have abandoned the land. The contestant acquires no vested right to the land by his mere application to contest same, and the filing of a contest in which the contestant alleges no claim to the land but seeks merely a preference right of entry, would not defeat the right of a contestee to show, in defense of a contest charging abandonment, that he had been engaged in farm labor elsewhere than upon his claim, although he had not filed the notice and affidavits required by said act (*McCraney v. Heirs of Hayes*, 33 L. D., 21).

Such an interpretation of the act finds support in the uniform construction and interpretation by the Department of similar statutes. In the case of *Alice O. Reder* (43 L. D., 196), in construing the provisions of the act of June 6, 1912 (37 Stat., 123), allowing twelve months from the making of an entry within which to establish residence on account of climatic reasons, sickness, or other unavoidable cause, the Department held that failure to apply for such extension of time would not forfeit the right of an entryman to show, in case of contest, the existence of conditions which might have been made the basis for such an application. Likewise in its interpretation of the act of March 28, 1908 (35 Stat., 52), the Department has held that a pending contest against a desert-land entry will not prevent the allowance of an application for extension of time under said act, where the application is based upon facts which bring the case within the provisions of said act. See *Phillips v. Gray* (41 L. D., 603).

The rule herein announced is in line with departmental practice and interpretation of the act of March 2, 1889 (25 Stat., 854), which grants leave of absence under certain conditions. See Circular No. 541, par. 35 (48 L. D., 389, 402).

The decision appealed from is affirmed.

JACOB NORDEN.

Decided August 17, 1922.

ENLARGED HOMESTEAD—STOCK-RAISING HOMESTEAD—RESIDENCE—ENTRY—CONTIGUITY.

An entry under section 7 of the enlarged homestead act, upon which residence is required, is an original entry within the meaning of section 4 of the stock-raising homestead act, and one holding such an entry is qualified to make an additional entry under the latter section for such an area of designated land as, when added to the area embraced in former entries, will not exceed 640 acres; and the fact that two of its subdivisions are contiguous to the original entry is immaterial.

STOCK-RAISING HOMESTEAD—OCCUPANCY—CONTIGUITY—PREFERENCE RIGHT—PATENT.

The purpose of section 8 of the stock-raising homestead act was to confer upon those who occupy their homesteads a preference right to contiguous land, regardless of whether patent had or had not issued, and it becomes necessary to look to sections 4 and 5 of the act to determine the nature of the occupation required.

STOCK-RAISING HOMESTEAD—FINAL PROOF—WORDS AND PHRASES.

The terms "existing entry," and "original entry," as used in section 4 of the stock-raising homestead act, mean one and the same thing, that is, an entry upon which final proof has not been submitted.

CONFLICTING DECISION OVERRULED—DEPARTMENTAL REGULATION VACATED—DEPARTMENTAL DECISION CITED AND EXTENDED.

Case of *Romero v. Widow of William T. Knox* (48 L. D., 32), overruled so far as in conflict; paragraph 2 of instructions of March 2, 1921 (48 L. D., 28), vacated; case of *Charles Makela* (46 L. D., 509), cited and extended.

FINNEY, *First Assistant Secretary*:

At the Havre, Montana, land office on October 20, 1916, Jacob Norden made entry under section 7 of the enlarged homestead act for (as amended February 14, 1918) SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 26, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 35, T. 27 N., R. 17 E., M. M., stating that he had disposed of the land embraced in his original entry—N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26, said township.

On October 24, 1919, Norden made an additional entry under the stock-raising homestead act for SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 35, said township, and by application filed February 9, 1920, sought to amend the latter entry by adding thereto 160 acres—NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 26, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 28, said township.

By decision dated June 24, 1920, the Commissioner of the General Land Office, after stating that the records of his office showed that there is no unappropriated land contiguous to the original entry other than that which entryman applied for, held that unless entryman could show that at the time he applied to make entry under the stock-raising homestead act and also on February 9, 1920 (the date of his application to amend), he owned and resided upon a part of his original entry, the stock-raising entry would be canceled as to SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, said Sec. 35, and the application for amendment would be rejected. Norden has appealed.

The section under which the entry of October 20, 1916, was made was added to the enlarged homestead act by the act of July 3, 1916 (39 Stat., 344), and reads as follows:

SEC. 7. That any person who has made or shall make homestead entry of less than three hundred and twenty acres of lands of the character herein

¹ See instructions of September 9, 1922, Circular No. 846 (49 L. D., 266), amending Circular No. 523 (48 L. D., 485), which contained instructions of March 2, 1921.

described, and who shall have submitted final proof thereon, shall have the right to enter public lands subject to the provisions of this Act, not contiguous to his first entry, which shall not with the original entry exceed three hundred and twenty acres: *Provided*, That the land originally entered and that covered by the additional entry shall first have been designated as subject to this Act as provided by section one thereof: *Provided further*, That in no case shall patent issue for the land covered by such additional entry until the person making same shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise complied with such laws, except that where the land embraced in the additional entry is located not exceeding twenty miles from the land embraced in the original entry no residence shall be required on such additional entry if the entryman is residing on his former entry: *And provided further*, That this section shall not be construed as affecting any rights as to location of soldiers' additional homesteads under section twenty-three hundred and six of the Revised Statutes.

The act quoted makes provision for two classes of entries—one for land within twenty miles of the original entry, which can be perfected by residence upon the original entry, provided entryman is still residing thereon, and the other for land more than twenty miles from the original entry. The latter class is burdened with all the requirements as to residence, cultivation, and improvements of an original entry under the enlarged homestead act, and an entry under said section made by one who no longer owns the land embraced in his original entry, although within twenty miles of the land entered, belongs to this class.

In *Krauss v. Pribble* (48 L. D., 118), the Department held that an entry under section 6 of the act of March 2, 1889 (25 Stat., 854), is an original entry within the meaning of section 4 of the stock-raising homestead act, and that one holding such an entry was qualified to make an additional entry under the stock-raising homestead act, and was entitled to assert a preferential claim to designated land contiguous thereto.

Entries under section 6 of the act of March 2, 1889, *supra*, are of the same class as those entries under section 7 of the enlarged homestead act which require residence, cultivation, and the erection of a habitable house—both entries being to all intents and purposes original entries.

The case of *Charles Makela* (46 L. D., 509) involved an application to make a stock-raising additional entry for land contiguous to an entry under section 7 of the enlarged homestead act, and the Department held that the entry could be changed in character to an original entry under the stock-raising act and amended to embrace contiguous land.

In *Romero v. Widow of William T. Knox* (48 L. D., 32) it was held that 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. Said decision further held, as did paragraph 2 of the instructions of March 2, 1921 (48 L. D., 28), that a preferred right under section 8 of the stock-raising act can not be predicated on an entry under section 7 of the enlarged homestead act, and that such preferred right is limited to lands contiguous to original entries. The latter holdings were based upon the theory that to hold otherwise would grant a preferential right to land adjoining two separate bodies of land.

The stock-raising homestead act makes three provisions for additional entries—in the provisos to section 3, and in sections 4 and 5. The provisos to section 3, as amended by the act of October 25, 1918 (40 Stat., 1016), control only in those cases where the entryman does not own and reside upon his original entry. Section 4, as amended by the act of September 29, 1919 (41 Stat., 287), provides:

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.

Section 5 grants the right of additional entry to one who has perfected an entry, whether original or additional, of stock-raising land, and who owns and resides on the land so acquired.

In determining the right of a person to make an additional entry for contiguous land it is necessary to consider the provisions of section 8 in connection with sections 4 and 5, as the preferential right granted by section 8 is coextensive with the right of additional entry, and if an applicant is entitled to a right to make entry for contiguous land, such right is a preferential right. Unless the patentee of a homestead entry owns and resides on the land so acquired, he can not assert under section 5 the right to make an entry additional thereto. Such an entryman, having made an entry under section 7 of the enlarged homestead act upon which final proof has not been submitted, and upon which he must necessarily reside, is qualified to make an additional entry under section 4, in which section, it will be noted, the expression "existing entry" is used twice, and "original entry" is also used twice. Mature consideration has convinced the Department that these several references mean one and the same thing, viz, an entry upon which final proof has not been submitted.

The obvious purpose of section 8 was to confer upon those who *occupied* their homesteads a preference right to contiguous land, regardless of whether patent had or had not issued, the language used being "contiguous to those entered or owned and occupied." We must look to sections 4 and 5 to determine the nature of the occupation required. In section 5 is found the expression "own and reside." Hence, the occupation of the land by those claiming under section 5 must be by residence. The clause "entered * * * and occupied" relates to persons claiming under the provisions of section 4, and the occupation of such lands must also be that of residence, unless it be assumed that the statute was intended to impose upon those holding unperfected entries a condition different from that which it applied to those who had fully complied with the law and earned patent. It can not be seriously contended that such was the intent of Congress.

The right of entry under section 4 being thus limited to those who are residing on their unperfected entries, it follows that the theory of the rule announced in *Romero v. Widow of William T. Knox* and paragraph 2 of the instructions of March 2, 1921, was erroneous.

The Department therefore is of opinion that one holding an entry under section 7 of the enlarged homestead act upon which residence is required is qualified to make an additional entry under section 4 of the stock-raising homestead act for such an area of designated land as when added to the area embraced in former entries will not exceed 640 acres; that Norden's stock-raising entry is governed by said section 4, and that he may enlarge it to include approximately 320 acres of designated land. The fact that two of its subdivisions are contiguous to the original entry is immaterial.

The decisions and instructions referred to, in so far as they conflict with the views herein expressed, are hereby overruled.¹

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

HERYFORD v. BROWN.

Decided August 22, 1922.

OIL AND GAS LANDS—PROSPECTING PERMIT—DESERT LAND—PREFERENCE RIGHT—APPLICATION—FEES—RELINQUISHMENT.

The preference right granted by section 20 of the act of February 25, 1920, to one who had *bona fide* made an agricultural entry of lands not withdrawn or classified as mineral, to prospect for oil and gas attaches upon the filing of a completed application for a permit, accompanied by the required fees, and such right is not thereafter forfeited by the subsequent relinquishment of the basic entry prior to the actual issuance of the permit.

¹ See Circular No. 846, approved September 9, 1922 (49 L. D., 266).

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—ENTRY—RELATION.

The rule that an application to enter public land subject to entry, when accompanied by the requisite showing and fees, is equivalent to entry, applies with equal force to proper applications filed by qualified persons for permits to prospect for oil and gas on lands subject to exploration under section 20 of the act of February 25, 1920.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of Charles C. Conrad (39 L. D., 432), *Rippy v. Snowden* (47 L. D., 321), Louise E. Johnson (48 L. D., 349), cited and applied.

FINNEY, *First Assistant Secretary*:

Albert D. Heryford has appealed from the decision of the Commissioner of the General Land Office dated June 19, 1922, holding for rejection his prospecting permit application 09976 under section 13 of the act of February 25, 1920 (41 Stat., 437), filed October 13, 1921, for the SW. $\frac{1}{4}$, Sec. 29, T. 15 S., R. 13 E., M. D. M., Visalia land district, California, because of conflict with similar application 09932 filed September 12, 1921, by M. Brown.

Heryford made desert-land entry 07692 for said land on November 26, 1918, without reservation of oil and gas, the land being unwithdrawn. On October 13, 1921, he filed his prospecting permit application, claiming a preference right under section 20 of the leasing act. On October 20, 1921, he filed his consent to the reservation of the oil and gas content of the land to the United States under the act of July 17, 1914 (38 Stat., 509), and on November 25, 1921, he relinquished the entry. The Commissioner held that he forfeited his preference right when he relinquished his entry, and that Brown was entitled to a permit by reason of the priority of his application.

Section 20 of the leasing act provides that in case of lands "bona fide entered as agricultural and not withdrawn or classified at the time of entry" the entryman shall be entitled to a preference right to a permit. It appears from the record that Heryford's application was complete in all respects when filed, that he possessed the requisite qualifications, and that the prescribed fees were paid. Upon the filing of the oil and gas waiver on October 20, 1921, those deposits became subject to disposal under the leasing act, and under the provisions of section 20 the entryman's preference right to a permit attached. Had his application received immediate consideration he would have been granted a permit, and to deny it now would be to penalize him because of the administrative delay in action on his application, for which he is in no way responsible.

The Department has held in many cases that an application to enter, when accompanied by the required showing and payment, is equivalent to entry, if the land is subject thereto. Charles C. Conrad (39 L. D., 432); *Rippy v. Snowden* (47 L. D., 321);

Louise E. Johnson (48 L. D., 349). In the instructions of April 23, 1921 (48 L. D., 98), the principle upon which those decisions was based was applied to prospecting permit applications under the leasing act, and it was held that qualified persons who filed proper applications for oil and gas prospecting permits can not and should not be deprived of their rights, if, because of delay in action upon an application so filed, there intervenes a designation by the Department of the lands as being within the geological structure of a producing oil or gas field, occasioned by the discovery of oil or gas subsequent to the filing of the application in the local land office.

The same principle is applicable to preference rights to permits under section 20 of the leasing act, and where a completed application is filed for deposits subject thereto by one entitled to a preference right under section 20, and the proper fees paid thereon, the preference right to a permit attaches and is not forfeited by the subsequent relinquishment of the basic entry prior to the actual issuance of the permit.

The decision of the Commissioner is reversed, and the application of Brown will be rejected to the extent of the land in conflict.

UNITED STATES *v.* CENTRAL PACIFIC RAILWAY COMPANY.

Decided August 30, 1922.

RAILROAD LAND—SELECTION—MINERAL LANDS—SURVEY.

A forty-acre tract or a fractional lot, being the smallest regular subdivision established by the Government survey, constitutes the unit of the public lands for the purpose of determining their classification under the agricultural or the mineral land laws.

RAILROAD LAND—SELECTION—MINERAL LANDS—SURVEY—EVIDENCE.

A regular forty-acre subdivision, as established by official survey, must be treated in land-grant or other public-land claims as an entirety as to its mineral or nonmineral classification, and an admission in an answer to a charge in a proceeding against a railroad selection, alleging the existence of mineral, that such a tract contains mineral impresses the entire subdivision with that character.

RAILROAD LAND—SELECTION—MINERAL LANDS—EVIDENCE—HEARING.

An answer, which by its failure to deny, impliedly admits that a part of a regular forty-acre tract of public land, involved in a railroad selection, is mineral in character, must be held as an admission that the entire tract is mineral, and such conclusion thereafter leaves no issue requiring the submission of evidence at a hearing to prove that the tract is or is not of that character.

LAND DEPARTMENT—COMMISSIONER OF THE GENERAL LAND OFFICE—PRACTICE.

The Department will take cognizance of only the legal sufficiency of the adjudication of decisions brought before it for review, and it will not concern

itself with the technical perfection of decisions rendered by the Commissioner of the General Land Office which do not expressly contain the findings involved in the issues, but from the contents of which such findings are to be implied.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

Case of Central Pacific Railway Company (46 L. D., 435), distinguished.

FINNEY, *First Assistant Secretary*:

This is an appeal by the Central Pacific Railway Company from the decision of the Commissioner of the General Land Office, of January 26, 1922, holding for cancellation from List No. 72, filed by said railway company as a claim for lands falling within its land grant, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29, T. 24 N., R. 27 E., M. D. M., Carson City, Nevada, land district.

Pursuant to instructions of June 3, 1918, from the General Land Office, the register and receiver preferred a charge that said tracts are mineral in character containing valuable deposits of gold and silver. The railway company answered denying said charge as to N. $\frac{1}{2}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$ SW. $\frac{1}{4}$. Hearing was ordered and held, but at said hearing no evidence was offered on either side of the issue joined; and on December 5, 1920, the local officers rendered their decision setting forth that the defendant company having admitted that a portion of said land was mineral in character, they recommended that the title to said land remain in the Government.

On appeal to the Commissioner, his decision affirmed that of the local officers, holding that the admission of the railway company that S. $\frac{1}{2}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ were mineral in character impressed such character on the whole of each forty, which, being the smallest legal subdivision, must be treated as a whole.

From this decision the railway company has appealed to the Department, and in its brief it both criticizes said decision under appeal as containing no holding that the land involved is mineral in character but merely affirming the local officers' decision, and contends that under the circular of February 26, 1916 (44 L. D., 572), governing the proceedings in contests on charges reported by a special agent, it was for the Government to introduce its testimony to prove mineral character of that part of the land as to which said charge was made, which was not admitted by the railway company's answer to the charge, to be mineral in character, and that, under the decision in Central Pacific Railway Company (46 L. D., 435), the railway company was not required to introduce its evidence in advance of such a showing by the Government in support of its charge.

The contention last stated is sound in itself (said clause in the circular of February 26, 1916, *supra*, being a relaxation, although not a revocation, of the previously declared rule that the burden of

proof of nonmineral character of lands claimed as granted rests upon the claimant), but its applicability to the case in hand depends upon the size of the unit to which admissions or denials of mineral character relate. The unit of the public lands, so far as concerns their classification as falling under one or another of the laws regulating their disposal, e. g., under the general or under the mineral land laws, is a smallest regular subdivision, forty acres or a fractional lot as established and marked by the official surveys, either generally or for the special determination of the limits of a parcel embraced in ground patented or a claim of located mineral ground, and the designation as lots of the remaining area of a regular subdivision. Those smallest regular subdivisions, of forty acres each, can not be treated, in claims of land-grant areas or in any other proceeding, as partly mineral and partly nonmineral, any more than can the areas embraced in patented tracts or in mineral locations, or the areas of the remainders of a subdivision designated as fractional lots by supplemental surveys. Every mineral location, lode or placer, contains some ground nonmineral in character in and of itself, but that ground takes on the character of the ground associated with it in the location and which justifies the location, and it can not be cut out of the located area by claiming it under land grant or otherwise. Similar must be the treatment, under land-grant claims, of the areas, whether fractional or of forty-acre subdivisions, that are not embraced within adverse mineral locations. To hold otherwise, to permit the units above defined to be split up into little pieces for the purpose of land-grant claims, would plunge the public-land administration into great confusion, entangling its official survey work with unofficial attempts to separate areas falling within the scope of the land-grant acts from those excepted from their operation.

This has so long been the settled rule of the General Land Office in its administration of the land laws, and the Department has so recently affirmed its approval of that rule in *United States v. Central Pacific Railway Company* (unreported—decided March 14, 1922), that it is useless for the Central Pacific Railway Company to persist in the opposite contention, as in many of its recent appeals. Its answer to the charge in this case, then, implying, by failure to deny, an admission of mineral character of part of each of the forty-acre subdivisions involved in the charge, admitted the charge as to the whole of each of those subdivisions, and left no issue for evidence at the hearing to operate upon. The Government, therefore, was not under the necessity to prove, by evidence, mineral character of any part of either of said forties; nor had the railway company the right to prove, by evidence offered either before or after the Government rested its case upon the admission, nonmineral char-

acter of any part of either forty, in the face of its own admission which stamped mineral character upon the whole of each thereof. An admission in a pleading, even though an implied one, bars evidence contradictory and dispenses with evidence confirmatory of it.

The concurring decisions of the register and receiver and of the Commissioner are both of them informal in not expressly finding the tracts involved to be mineral in character; but each decision implies in its contents such a finding, since no other could be drawn from the admission in the record and no other could support the local officers' recommendation or the Commissioner's judgment. The Department is not concerned with the technical perfection of decisions brought before it for review, but only with the legal sufficiency of their adjudications.

The decision of the Commissioner is affirmed.

UNITED STATES v. CENTRAL PACIFIC RAILWAY COMPANY.

Motion for rehearing of departmental decision of August 30, 1922, 49 L. D., 250, denied by First Assistant Secretary Finney, November 15, 1922.

WHITTEN ET AL. v. READ.

Decided August 30, 1922.

RES JUDICATA—ENTRY—PATENT—ADVERSE CLAIM—ACCRETION—RIPARIAN RIGHTS—SURVEY.

The Department will apply the doctrine of *res adjudicata* and refuse to reopen a case in which there has been a final determination by it that a patent, issued on an entry in accordance with the official plat of survey existing at date of entry, conveyed title to adjoining lands added by accretion, where another subsequently attempts to set up a claim to a part of the land involved with the view to defeating the title asserted by purchasers who relied upon the validity of the patent.

PURCHASER—PATENT—ADVERSE CLAIM—OCCUPANCY—FOREST LIEU SELECTION—ACCRETION—RIPARIAN RIGHTS—SURVEY.

A purchaser relying upon a Government patent issued in accordance with the official plat of survey at date of entry and a departmental ruling which held that the patent carried title to lands added to the original survey by accretion, is such holder under color of title, although not in actual occupancy of the land, as to possess equities creating a claim which affords an obstacle to the allowance of a forest lieu selection, if the lands are indeed public lands.

LAND DEPARTMENT—JURISDICTION—OCCUPANCY—PREFERENCE RIGHT.

The Land Department has jurisdiction over the public lands to afford justice to claimants and to protect equities and it may award a preference right upon a ground other than that of physical occupancy, unless the claim is asserted under a law requiring settlement,

FINNEY, *First Assistant Secretary*:

This case involves certain lots in fractional Sec. 19, T. 53 S., R. 42 E., T. M., in the State of Florida. The plat of that section, which was approved in 1845, shows that it was composed of two lots containing 79.62 and 85.22 acres, respectively, a total of 164.84 acres. Biscayne Bay was shown as the eastern boundary. A resurvey was made, the plat of which was approved February 1, 1875, showing the said fractional section as composed of lots 1 to 7, inclusive, with Biscayne Bay as the eastern boundary. Lots 3, 4, 6, and 7 of this latter plat correspond roughly with lots 1 and 2 of the earlier plat, but aggregate 192.58 acres. The seven lots have a combined area of 337.76 acres. Copies of these plats are shown in the decision of the Supreme Court in the case of *Gleason v. White* (199 U. S., 54).

April 4, 1870, W. H. Gleason made homestead entry for lots 1 and 2 according to the then existing plat approved in 1845. He made final proof on January 12, 1877, and patent issued June 24, 1878, for lots 1 and 2, said section, reciting that it was according to the official plat of the survey of the land returned to the General Land Office by the surveyor general and approved in 1845.

January 31, 1884, the State filed swamp-land selection for lots 3, 4, 5, 6, and 7 (survey of 1875), which was finally rejected August 2, 1885, as to all except lot 5 because found to be nonswamp in character, and patent was issued as to lot 5, May 4, 1885. The latter tract was the subject of suit decided in the case of *Gleason v. White, supra*.

June 4, 1884, the State filed its swamp-land selection for lots 1 and 2 (survey of 1875), which was finally rejected April 15, 1887, for the reason that—

The survey of said section made in 1845 shows that said lots were at that time covered by the waters of Biscayne Bay, and had no real existence except as the bottom of said bay. It is, therefore, held that they were not swamp lands on the 28th day of September, 1850, and were not, therefore, subject to the operation of the swamp grant of that date.

January 18, 1890, Edward C. Pent applied to make homestead entry for lot 2, which was rejected by the local officers for conflict with the Gleason entry and patent. That action was reversed by the Commissioner under date of June 11, 1890. The entry was made and on January 26, 1891, cash certificate was issued on his commutation proof for lot 2, containing 40.50 acres, the acreage given for said lot in the 1875 survey.

February 25, 1891, W. H. H. Gleason claiming said lot 2 as purchaser under the aforesaid patent of W. H. Gleason, appealed from the action allowing Pent's entry. That case was decided by the Department April 12, 1892 (*Gleason v. Pent*, 14 L. D., 375), wherein it was held that Gleason had title to said lot, and directions were

given for the cancellation of Pent's entry. A motion for review was denied September 12, 1892 (15 L. D., 286). The reasons given for that action will be stated at a later place in this decision.

In pursuance of the said decisions by the Department Pent's entry was canceled, and it does not appear that any portion of the purchase money has been returned to him.

Lot 1 of this section of the survey of 1875 was the subject of a decision by the Department March 31, 1894, in the case of Lewis W. Pierce (18 L. D., 328), wherein the application of Pierce to enter the same was denied on the ground, as held in the case of Gleason v. Pent, that the title to said lot passed with the Gleason patent.

In 1898 a purchaser under the Gleason patent commenced a series of actions in the circuit court for Dade County, Florida, to recover possession of lot 5 or a part thereof, and also other lands including lot 1 of said section. The circuit court found against the plaintiff as to lot 5 (which, as above stated, had been patented to the State in 1885). That action was affirmed by the Supreme Court of the State (39 So., 1031) and ultimately by the Supreme Court of the United States (199 U. S., 54) in the one case carried up.

June 19, 1920, Henry T. Read filed forest lieu selection under the provisions of the act of June 4, 1897 (30 Stat., 11, 36), for certain lands including lots 1 and 2 of said section according to the plat of 1875.

September 20, 1920, the State of Florida through its selecting agent filed indemnity school-land selection for said lots 1 and 2, and also a protest against the forest lieu selection on the ground of non-compliance with the regulations.

January 4, 1921, Francis S. Whitten filed a protest against the said forest lieu selection as to lots 1 and 2, alleging failure of compliance with the regulations and also that the protestant was a *bona fide* purchaser for value of a portion of the land, title being asserted through mesne conveyances under the Gleason patent.

August 2, 1921, Britton and Gray, attorneys of this city, filed a petition for reinstatement of the old swamp-land State selection, which had been theretofore rejected, as above recited. The State of Florida by its selecting agent protested against reinstatement of the said swamp-land selection, contending that the State had acquiesced in the former adjudication more than 30 years ago rejecting the selection, and that said rejection became *res adjudicata* and should not be reopened.

By decision of December 12, 1921, the Commissioner of the General Land Office denied the application for reinstatement of the old swamp-land selection and rejected the forest lieu selection as to these lots and the indemnity school-land selection. That action was predicated on the adjudications by the Department above referred to,

holding that the title to this land passed with the Gleason patent, and on the Supreme Court's decision in the case of *Gleason v. White*, *supra*, which was construed as supporting the action of the Department in refusing to make further disposition of said tracts.

Appeals from the Commissioner's decision have been filed by Read and by Britton and Gray, the latter acting¹ in the name of the State of Florida and in the interest of Charles Deering who claims the S. $\frac{1}{2}$ of lot 1. The Department has heard oral argument in the case and has considered the various briefs, motions, and exhibits composing the record.

It is understood that Whitten is claiming lot 2 and the N. $\frac{1}{2}$ of lot 1 by mesne conveyances under the Gleason patent, and that Deering is claiming the S. $\frac{1}{2}$ of lot 1 under that patent. It does not clearly appear just what right Deering expects to establish with reference to the said rejected swamp selection which he is asking to have reinstated. His attorney stated in oral argument that it was desired to have his title established beyond question, and he wanted greater assurance than that given by the decisions in respect to the scope of the Gleason patent. It appears that Deering has made very valuable improvements on the southern portion of lot 1, and in view of his equities Read has given him a deed to the S. $\frac{1}{2}$ of that lot which would protect him in case the forest lieu selection be allowed. Therefore, Read is not claiming adversely to Deering. Whitten also claims equities as well as legal title, having purchased lot 2 and the N. $\frac{1}{2}$ of lot 1 at the price of \$75,000. He also claims to have spent \$35,000 in improvements.

Read does not deny the fact of purchase alleged by Whitten, but does deny that there were any improvements on the land when the forest lieu selection was filed. He also disputes the claim that the Gleason patent carried title to the said lots 1 and 2 of the survey of 1875.

The perplexing questions thus presented in connection with the various conflicting claims have resulted from lack of a consistent attitude by the Department in respect to the added area shown by the plat of 1875. The history of this case can not be ignored. A number of the issues raised can not be adjudicated *de novo*. They have been decided and must remain at rest, otherwise title to valuable property acquired in good faith and in reliance upon prior adjudications would be unsettled. The principle of *res adjudicata* applies with great force in this controversy, which, stripped to its essence, is between Read, the forest lieu selector, on the one side, and Whitten on the other. Deering would be protected by the deed already given him by the forest lieu selector even if the selection be allowed. The

¹ Verbiage as amended in the decision on rehearing, October 26, 1922.

swamp-land claim of the State was long ago rejected, finally disposed of, and the case closed. This feature of the case does not require discussion. It should not be reopened. Honey Lake Valley Company *et al.* (48 L. D., 192), and cases there cited.

Likewise the State indemnity school selection may be summarily eliminated irrespective of the disposal of the contention between the forest lieu selector and the purchasers under the Gleason patent. The prior forest lieu selection until disposed of segregated the land so that it was not subject to subsequent selection. *Porter v. Landrum* (31 L. D., 352), and *Youngblood v. State of New Mexico*, on rehearing (46 L. D., 109). This leaves the conflict between the forest lieu selector and the adverse claimant under the Gleason patent. It becomes necessary to consider the nature of the claim of the purchaser. The following excerpts are taken from the departmental decision in the case of *Gleason v. Pent* (14 L. D., 375, 376) involving lot 2, a portion of this land:

It is, I think, manifest from an inspection of the official copies of said surveys filed by counsel, that the enlargement of said section 19, is the result of gradual and imperceptible tidal action during the period of almost thirty years that elapsed between the approval of the survey of 1845 and that of 1875. * * *

The public surveys are the official description by which the public lands are disposed of by the government. When, therefore, the patentee made his original entry, the then official survey of 1845 was as claimed by counsel, an "assurance of the proprietor that a riparian estate was for sale."

Such entry was a segregation and a disposal of the land in accordance with that survey, and rights thereby acquired, could not be impaired by the subsequent survey of 1875.

The patent under which the appellant claims being based upon such original entry, took effect as of its date and conveyed the riparian estate described by the first survey.

That riparian owners are entitled to such accretion as that now under consideration, is too well settled for serious discussion. In the case of *Jefferis v. The Land Co.*, *supra*, it was held that—

"Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by its number conveys the land up to such shifting water line; so that, in the view of accretion, the water line, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line."

As heretofore stated the patent through which the appellant claims, conveyed the whole of said fractional section as described in said first survey, whereby the boundary was shown to be the water line referred to. It follows under the authority cited, that it must convey the land embraced within such boundary as extended by the second survey.

I must, accordingly find that the appellant W. H. H. Gleason as owner of the patent hereinbefore mentioned, is entitled to the lot in question, as accretion to the land described in said patent.

Your decision of June 11, 1890, allowing Pent's application to enter is reversed, and you are accordingly, directed to cancel his cash entry for the said lot 2.

That opinion was adhered to in 15 L. D., 286.

The case of Lewis W. Pierce (18 L. D., 328), involved lot 1 of said Sec. 19. The respective surveys are reproduced therein, and the following is taken from that decision—

In the case of W. H. Gleason *v.* Pent (14 L. D., 375), it was held, referring to the entry now in question: "When, therefore, the patentee made his original entry, the then official survey of 1845 was as claimed by counsel an assurance of the proprietor that a riparian estate was for sale."

In that case the right to make entry of lot No. 2, under the survey of 1875 was involved, and it was held to have been an accretion since the survey of 1845.

That case is decisive of the one here in question for, if lot No. 2 is an accretion since the survey of 1845, surely lot No. 1, must be, as it lies between lot No. 2 and Biscayne Bay, which forms the eastern boundary of this section.

In the appeal under consideration, however, it is claimed that the land in question cannot be an accretion, as timber is growing thereon more than one hundred years old; that there must have been a mistake in the original survey, and to ascertain the facts a hearing is desired.

To admit that there was a mistake in the survey could not, to my mind, alter the case, for it is not claimed that, even if a mistake had been made, Gleason was in anywise responsible for it, or that it was made through his connivance.

He made entry fifteen years after the survey of 1845, and his contract with the government was based upon the recognized plat then on file. This assured him a water front and undoubtedly this fact influenced his selection of the land. This being so, no subsequent survey can deprive him of his frontage on the water.

Whatever view is therefore taken of the matter, your decision must be, and is accordingly hereby affirmed.

It is contended upon behalf of Read that the more recent decision in the case of Gleason *v.* White, *supra*, nullifies the aforesaid rulings of the Department. It is not believed, however, that it has that effect. Said decision involved lot 5, not the land here in question. That lot had been patented to the State, as above recited. The court was confronted with two conflicting patents, and disposed of the case according to its views of the equities. In the course of the decision, the court said—

It is undoubtedly true that the official surveys of the public lands of the United States are controlling. *Stoneroad v. Stoneroad*, 158 U. S. 240; *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253; *United States v. Montana Lumber and Manufacturing Co.*, 196 U. S. 573; *Whitaker v. McBride*, 197 U. S. 510. Here we have two conflicting official surveys and plats, and, by mistake of the Land Department, two patents have been issued, which, in a certain aspect of the surveys and plats, also conflict. It is one of those unfortunate mistakes which sometimes occur, and which necessarily throw confusion and doubt upon titles. Since it was discovered the Land Department has wisely refused to extend the confusion by further patents under the survey of 1875.

This clearly commends the action of the Department in refusing to make further disposals under the plat of 1875. Therefore, if any further disposals of that area are to be made, there should be a new survey.

Counsel for Read urges as a matter of great importance that notation of the Supreme Court decision in the case of Gleason *v.* White was made on the records of the General Land Office, as indicating an interpretation that Gleason was restricted to the area embraced in his original entry and not allowed additional land under the survey of 1875. With reference to the notation, the Commissioner in transmitting the record states—

The most diligent search has failed to reveal any authority for the placing of this notation on the tract book, and it is assumed that it was put there by some clerk acting on his own initiative and without authority.

Certainly, such notation could not have the effect of overruling the prior departmental decisions as to the effect of the Gleason patent, nor could the purport of the court decision be enlarged thereby. The notation could serve no other proper purpose than to merely call attention to the said decision. But it is said, as against Whitten, that he was bound by notice of the said Supreme Court decision and the Land Department records; that he took a void deed and is not protected on the ground that it was acquired upon advice of counsel; that his alleged occupancy of the land occurred after date of the Read selection, and that he has no sufficient basis for assertion of equities as a *bona fide* holder under color of title.

In answer to this, it may be said that the selector must likewise be held to notice of the Land Office records, showing the former claims for these tracts and the rejection of same because of conflict with the Gleason patent. The Department can not agree that the filing of the Read selection is sufficient to prevent the granting of a preferred right of entry to Deering and Whitten, as contended, in case it be held that the area in question should be disposed of as public land. In view of the rulings of the Department in respect to the scope of the Gleason patent, the purchasers thereunder are entitled to consideration as holders under color of title. It is such a claim, at least, as would afford an obstacle to allowance of the forest lieu selection adverse thereto.

The selector undertakes to make a distinction as between Deering and Whitten in this regard. He proposes to protect Deering on the ground that the latter had valuable improvements on the S. $\frac{1}{2}$ of lot 1 when the selection was filed. He denies the right of Whitten to such protection because, it is alleged, the latter had not at the time of the selection improved the land and was not a settler thereon. It is not denied, however, that Whitten had purchased

DEERING
Corrected
by Dept.
letter of
Jan. 14,
1930

the land (lot 2 and N. $\frac{1}{2}$ lot 1) for \$75,000, and had paid in cash \$25,000 on the purchase price, acting upon the advice of counsel that the title was good. Under the circumstances stated, it is believed that both Whitten and ^{DEERING} Read have such equities as would entitle them at least to the privilege of protecting their titles, if held to be defective.

The fact of physical occupancy is not important except as it may serve to give notice of a claim. If actual knowledge be had of the fact of an equitable claim, it serves the same purpose as actual physical possession of land, except as to claims under the public settlement laws which are not involved in this case. Mere possession without right or equity would not call for relief. The law is concerned with the condition and not with each particular element contributing to the condition. It is a mistaken position to assume that occupancy affords the only ground for an equitable claim which the Department may satisfy by award of preference right of entry. If this be public land, the Department has jurisdiction over it to do justice and protect equities. But it is believed that the question whether this land was disposed of by the issuance of the Gleason patent should not be reopened. That was settled many years ago by the three decisions above referred to, and is *res adjudicata*. *J. C. Lea* (10 L. D., 652); *Hyde et al. v. Warren et al.*, on review (15 L. D., 415); *Mee v. Hughart et al.* (23 L. D., 455); *Lacey v. Grondorf et al.* (38 L. D., 553); *Nelson Gunn et al.* (44 L. D., 486).

Accordingly, the decision appealed from is affirmed.

WHITTEN ET AL. v. READ.

Motion for rehearing of departmental decision of August 30, 1922, 49 L. D., 253, denied by First Assistant Secretary Finney, October 26, 1922.

PURVIS v. WITT.

Decided August 31, 1922.

CONTEST—OIL AND GAS LANDS—PROSPECTING PERMIT—RECORDS.

The rule enunciated in *Tieck v. McNeil* (48 L. D., 158), to the effect that an oil and gas prospecting permit is not subject to contest by a third party, did not intend to bar a contest based upon matters affecting the legality or validity of the claim not disclosed by the records or known to the Department.

CONTEST—OIL AND GAS LANDS—NOTICE—HEARING.

The provisions contained in section 13 of the act of February 25, 1920, requiring an applicant for a prospecting permit thereunder to monument the ground and post notice, being mandatory, a contest or protest sufficiently alleging failure to comply therewith should be received and, if found proper, affords a basis of an order for a hearing.

CONTEST—OIL AND GAS LANDS—PROSPECTING PERMIT—JURISDICTION—COMMISSIONER OF THE GENERAL LAND OFFICE.

Primary jurisdiction over protests or contests against oil and gas prospecting permits is vested in the Commissioner of the General Land Office.

DEPARTMENTAL DECISION MODIFIED.

Case of *Treck v. McNeil* (48 L. D., 158), modified.

FINNEY, *First Assistant Secretary*:

March 11, 1921, the Department granted to Albert Witt under section 13 of the act of February 25, 1920 (41 Stat., 437), a permit, 025356, to prospect for oil and gas upon the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$, Sec. 17, T. 45 N., R. 63. W., Newcastle land district, Wyoming.

March 15, 1922, Witt applied for an extension of time for a period of three years within which "to fully comply with the terms of the permit," alleging that within ninety days from the date of the permit he distinctly marked each corner of the land embraced in the permit by placing thereat a substantial monument so that the boundaries of the land could be readily traced upon the ground, and also posted on the land at a conspicuous place a notice that said permit had been granted, and a full description of the lands embraced therein; that he entered into an agreement with one Arthur C Sloan looking to a compliance with the requirements of the permit with respect to the oil and gas development of the land, and it had been impossible since November, 1921, to get machinery upon or supplies to the land. Upon considering said request the Commissioner of the General Land Office on April 19, 1922, pursuant to the provisions of the act of January 11, 1922 (42 Stat., 356), extended the time for the commencement of development work upon the land to November 30, 1922.

June 21, 1922, John D. Purvis, whose section 13 prospecting permit application covering the land herein above described had been rejected by the Commissioner's decision of May 5, 1922, for conflict with the permit of Witt, filed a protest against said permit alleging—

That he has caused the said land to be carefully examined, and that it is evident from the appearance of the said land that the said Witt has never at any time complied with the law requiring same to be properly marked and each legal subdivision thereof staked, and in substantiation of this protest he submits herewith the affidavit of Benjamin H. Thoëming, Louis C. Thoëming, and Bernard Howell:

In the affidavit referred to in the protest it was averred in substance that the affiants are familiar with the land covered by the said permit of Witt; that on June 5, 1922, each of the affiants went upon the land and very carefully examined the same; that there is no stake of any kind or character upon any legal subdivision of the land or upon any of the section corners, and no evidence of any stake

having been placed on the ground at any time; that there are no holes where any stakes could have been driven on any of the corners of the section, and no stakes lying upon the ground that would indicate that the permittee had ever at any time complied with the law by staking the land.

By section 13 of the leasing act, it is provided 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.

and all permits under said section are expressly made subject to compliance with said requirement.

The protest, however, does not charge a failure on the part of the permittee to have complied with the requirements of the provisions quoted, but alleges merely in substance and effect that on June 5, 1922, when the corroborating affiants respecting the protest visited the land, which was approximately one year after the ground should have been monumented, no stakes were found thereon or any indications that monuments had ever been established at any of the corners. Inasmuch as the permittee has alleged under oath that he made timely compliance with the requirements of the law in the matters of monumenting the ground and posting notice thereon, and of the further fact that the protest contains no positive allegation that such monuments had not been erected and notice posted, the Department is clearly of opinion that the protest affords no ground for a hearing, and the same is for that reason dismissed.

In thus considering the protest, the Department is not unmindful of the decision of the Commissioner of June 30, 1921, in *Tieck v. McNeil* (48 L. D., 158), which received the approval of the Department, wherein it is held that an oil and gas prospecting permit is not subject to a contest by a third party, and that application therefor can not be allowed. That decision, however, overlooks the distinction between a contest or protest which sets out material allegations of fact not disclosed by the records or known to the Department and a contest or protest which sets up matters which are disclosed by the records, known to the Department, or which involves some matter not required to be performed by the law or regulations.

It is the general rule and practice of the Department to avail itself of the assistance of citizens in its disposal of the public lands, where the protest or contest alleges sufficient cause affecting the legality or validity of the claim not shown by the records or known to the Department.

As stated hereinbefore the monumenting of the ground embraced within an approved permit and the posting of notice is a mandatory

statutory requirement, and whether that has been complied with or not is ordinarily not a matter of record or actually known to the Department. Therefore, a duly corroborated protest or contest sufficiently alleging failure to comply with the law in these respects should be received, and if found proper and sufficient, may form the basis of an order for a hearing, at which all parties may be heard, and the Department secure such information as may enable it to dispose of the question at issue.

Inasmuch as such permits are passed upon and issued by the Commissioner of the General Land Office, with the approval of the Department, protests or contests thereagainst should be received and forwarded by the register and receiver to the Commissioner for appropriate consideration and action.

The said decision of *Tieck v. McNeil* is, therefore, modified to accord with this view.

MILTON L. HINDS (ON RECONSIDERATION).

Decided September 5, 1922.

ENLARGED HOMESTEAD—ADDITIONAL—NATIONAL FORESTS—STATUTES.

The act of February 20, 1917, extended the right to make an additional entry under the enlarged homestead acts to one who has obtained title under the general provisions of the homestead law to less than one quarter section of undesignable land, and one who has acquired title to a quarter section, certain subdivisions of which are within a national forest and, therefore, undesignable, while the remainder is of the character contemplated by the enlarged homestead acts, is entitled to its benefits.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *George M. Ingebo* (46 L. D., 431), and *Charles Makela* (46 L. D., 509), cited and applied.

FINNEY, *First Assistant Secretary*:

By decision of March 9, 1921, the Department held that, under the circumstances disclosed in the appeal under consideration, Milton L. Hinds was qualified to make an original entry under the stock-raising homestead act for as much as 480 acres, provided that the portion of his original entry which is outside of a national forest is designated under said act.

Attention having been directed to certain facts not before the Department when the appeal was considered, the record as now made up has been reexamined.

It appears that on February 12, 1916, at The Dalles, Oregon, land office, said Hinds made entry under section 2289, Revised Statutes, for SE. $\frac{1}{4}$, Sec. 30, T. 19 S., R. 14 E., W. M. The E. $\frac{1}{2}$ SW. $\frac{1}{4}$, said Sec. 30, within a national forest, having been listed under the act of June 11, 1906 (34 Stat., 233), said entry was, on May 22, 1919,

amended to describe E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, said Sec. 30. Final proof was submitted May 13, 1921, and patent followed.

On December 29, 1919, Hinds applied to make an additional entry under the enlarged homestead act for E. $\frac{1}{2}$ SE. $\frac{1}{4}$, said Sec. 30, which application was suspended to await action on a petition for the designation of the E. $\frac{1}{2}$ SW. $\frac{1}{4}$. Prior to the date of said application, to wit, on October 2, 1919, Hinds applied to make an additional entry under the stock-raising homestead act for W. $\frac{1}{2}$ SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 29, said township, accompanied by a petition for designation. The latter application was rejected as to all the land applied for except W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29, for conflict with prior entries, and as to the latter tract because the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 30, being within a national forest, is not subject to designation under the stock-raising homestead act. Hinds appealed, whereupon the departmental decision of March 9, 1921, herein above referred to, was rendered.

It now appears that on December 13, 1920, Archie D. Pepin applied to make entry under the stock-raising homestead act for W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 29, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 30, and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 32, said township, as additional to his entry under the enlarged homestead act for W. $\frac{1}{2}$, Sec. 32, said township.

The SE. $\frac{1}{4}$, said Sec. 30, was designated under the enlarged homestead act on March 6, 1914. All the land herein described except E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 30, was designated under the stock-raising homestead act on August 9, 1921, effective August 25, 1921.

By decision dated April 15, 1922, the Commissioner of the General Land Office directed that Pepin be notified that he would be allowed thirty days from notice within which to show that he owned and resided on the land embraced in his original entry on August 25, 1921, when the designation of the land applied for by him became effective, failing in which, and in the absence of an appeal, his application would be rejected as to W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 30, for conflict with the prior applications of Hinds. Pepin was duly notified on April 24, 1922, but according to the report of the local officers, dated June 6, 1922, no action had been taken.

When Hinds applied to amend his original entry by eliminating 80 acres and including 80 acres within the limits of a national forest, he should have been advised that the amendment could not be allowed, as lands within a national forest are governed by the act of June 11, 1906, *supra*, and can not properly be included in an entry under Section 2289, Revised Statutes. Under the showing made, he should have been allowed to relinquish the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, and to make entry under the act of June 11, 1906, *supra*, and the act of April 28, 1904 (33 Stat., 527), for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, the portion within a

national forest. Had the proper practice been followed, there would have arisen no question of Hinds's rights under the enlarged homestead act and the stock-raising homestead act.

In the case of George M. Ingebo (46 L. D., 431), Ingebo had perfected a homestead entry for 40 acres in South Dakota which could not be designated under the enlarged homestead act, and had thereafter made an additional entry under section 6 of the act of March 2, 1889 (25 Stat., 854), for 120 acres in the Lewistown, Montana, land district, which he perfected, and later applied to make an additional entry under the enlarged homestead act for 40 acres adjoining the land embraced in said additional entry. The Department held, after quoting the provisions of the act of February 20, 1917 (39 Stat., 925) :

Congress unquestionably intended to grant additional rights to those who, like Ingebo, had obtained title under the general provisions of the homestead law to less than a quarter section of land, and did not intend to debar those who had made an additional entry under the act of 1889, *supra*, from obtaining the benefits thereof, even though such additional entry had been perfected, as in the case under consideration. Accordingly, it is held that Ingebo is qualified to make entry under the act of February 20, 1917, *supra*, for such an area of designated land as when added to the 120 acres embraced in the additional entry will not exceed 240 acres, the entry being allowed as in the nature of an amendment of the additional entry.

To the same effect was the departmental decision of August 23, 1922, unreported, in the case of John Plementos (Pueblo 042734).

The soundness of the decision in the cases cited depends, in the last analysis, upon the interpretation to be placed upon said act of February 20, 1917, which, omitting the proviso, reads as follows:

That any person otherwise qualified who has obtained title under the homestead laws to less than one quarter section of land may make entry and obtain title under the provisions of the Act entitled "An Act to provide for enlarged homesteads," approved February nineteenth, nineteen hundred and nine, and an act of June seventeenth, nineteen hundred and ten, entitled "An Act to provide for an enlarged homestead," for such an area of public land as will, when one-half of such area is added to the area of the lands to which he has already obtained title, not exceed one quarter section.

Like many other public-land statutes, this law can not be understood and construed without an understanding of the law of which it is an amendment and the conditions sought to be remedied by such amendment.

Prior to the passage of the act of 1917, *supra*, the following propositions were settled law:

1. The entry under the general provisions of the homestead law (section 2289, Revised Statutes) of 160 acres *or less* of land designated or designable under the enlarged homestead act did not affect the right of additional entry conferred by the last-named act.

2. The inclusion in an entry under section 2289, Revised Statutes, of any area of undesignable land destroyed the right of additional entry under the enlarged homestead law.

It was the purpose of the act of 1917 to remedy the conditions resulting from proposition "2" above. It has never been doubted, since 1917, that proposition "1" is the law, as it was before that time. This construction of the act of 1917 would be impossible were it not held that said act referred to the obtaining title to less than 160 acres of *undesignable* land. As to *designable* land, as stated, there was nothing to be remedied, and the law of 1917 did not refer to it. Such, in essence, was the holding of the Department in the cases of Ingebo and Plementos.

In the case now before the Department, Hinds had entered 80 acres under section 2289, Revised Statutes, and in effect had later made an additional entry for 80 acres under the act of June 11, 1906, *supra*, and the act of April 28, 1904, *supra*. The 80 acres in his original entry having been designated under the enlarged homestead act, he was qualified to make an additional entry thereunder. Being thus qualified, he could claim the benefits of the rule announced in the case of Charles Makela (46 L. D., 509).

However, inasmuch as all the land except the 80 acres acquired under the act of June 11, 1906, *supra*, has been designated under the stock-raising homestead act, no reason is apparent why the application to make an additional entry under the stock-raising homestead act for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29, should not be amended by adding thereto the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 30, and allowed, the application of Pepin having been disposed of to the extent of the conflict. It is so ordered. The departmental decision of March 9, 1921, is modified to agree with the views herein expressed and the case remanded for the action indicated.

REGULATIONS UNDER THE STOCK-RAISING HOMESTEAD ACT— CIRCULAR NO. 523, AMENDED.

[Circular No. 846.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 9, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

By departmental decision of July 28, 1922 (49 L. D., 191), on the appeal of Garfield A. Paltenghe, it was held that two or more contiguous tracts of designated land within a radius of 20 miles may be included in an original entry under the stock raising homestead act

or an additional entry under the proviso to section 3 thereof, but the entry, when made, must be in a reasonably compact form.

By decision of August 17, 1922 (49 L. D. 244), in the case of Jacob Norden, the department held that one holding an entry under section 7 of the enlarged homestead act upon which residence is required is qualified to make an additional entry under section 4 of the stock-raising homestead act for such an area of designated land as when added to the area embraced in former entries will not exceed 640 acres.

Pursuant to said decisions, paragraphs 4, 5, 6, 8, 9, and 13 of the regulations (Circular No. 523) under the stock raising homestead act are hereby amended to read as follows, and a new paragraph, numbered 20, added:

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 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 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. If there is not sufficient land available in one tract, two or more incontiguous stock-raising tracts within a radius of 20 miles may be entered, but the rule as to compactness in paragraph 5 hereof must be complied with.

(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 is 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 additional entry may not include an incontiguous tract if there is vacant unreserved land of the proper character available contiguous to the original tract. If there is not sufficient land thus available, two or more in-contiguous tracts of designated land within a radius of 20 miles may be entered if in reasonably compact form, but an applicant will not be permitted to include a third tract in his entry while leaving unentered any part of a second, nor a fourth while leaving unentered any part of a third, etc. In other words, an original or an additional entry may embrace two or more in-contiguous tracts, but not more than one of the tracts may have adjoining it vacant land of the character contemplated by the stock raising act, and this tract must be the one farthest removed from the original entry or the main tract of the additional entry. 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 all facts upon which that allegation is based should be fully set forth therein.

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 desig-

nated 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 the 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.

If he applies for land which is inconspicuous 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 as specified in paragraph 5 hereof. It is immaterial whether a person applying for additional entry under this provision of the law resides upon or owns the land first entered.

An application for additional entry not supported by an original entry or by an application for original entry allowable in whole or in part at the time of filing will be rejected unless the original application is for second entry and is accompanied by a second entry showing, in which case action in the matter will be suspended pending determination of the applicant's second entry qualifications. If the original second entry application is allowed in whole or in part, the additional application will be considered, otherwise it will be rejected.

A married woman may make an additional entry under section 3 of the stock-raising act provided her husband is not holding an unperfected entry requiring residence. In order to perfect such additional entry, three years' actual residence thereon, together with the required improvements and use of the land for raising stock and forage crops for not less than three years, must be shown.

One who makes an original entry (not a stock-raising entry) and an additional stock-raising entry at the same time for land designated under the stock-raising law will not be granted a reduction in the requirements of cultivation in connection with the origi-

nal 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 par. 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.

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 the rule of compactness specified in paragraph 5 hereof must be complied with.

One holding an entry under section 7 of the enlarged homestead act upon which residence is required, or an additional entry under section 6 of the act of March 2, 1889 (25 Stat. 854), may make an additional entry under this section for such an area of designated land as when added to the area in the former entries will not exceed 640 acres, regardless of whether or not the land in the original perfected entry may be designated under the stock-raising act.

(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 or 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 entries, as provided by the act of April 6, 1914 (38 Stat. 312), as amended by act of March 1, 1921 (41 Stat. 1193), 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 in contiguous to the original claim, in whole or in part, under the same rules set forth in paragraph 5 hereof.

One who perfected an entry, by residence thereon, under section 7 of the enlarged homestead act or section 6 of the act of March 2, 1889 (25 Stat. 854), and who owns and resides on the land thus acquired, may make an additional entry hereunder for such an area of designated land as when added to the area in the former entries will not exceed 640 acres, regardless of whether or not the land in the entry first perfected may be designated under the stock-raising act. However, the entry last perfected must be so designated.

If the applicant does not own his last entry perfected by residence thereon 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.

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 division 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)¹ 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.

(i) The preferential right granted by section 8 of this act is superior to the preferential right granted to ex-service men of the war with Germany by Public Resolution No. 36, approved January 21, 1922, which amended joint resolution of February 14, 1920 (41 Stat. 434).

(j) A person holding an additional entry under section 6 of the act of March 2, 1889 (25 Stat. 854), or an additional entry under section 7 of the enlarged homestead act, on which additional entry claimant is residing, or who owns and resides on land acquired under such entries, is entitled to a preferential right to enter stock-raising land adjoining such entries regardless of whether or not the land in the original entry under the general homestead laws may be designated under the stock-raising act.

20. Where a person made an additional entry under section 6 of the act of March 2, 1889 (25 Stat. 854), for lands stock raising in character, it may be used as a basis for an additional entry under the stock-raising act for the difference in area between the area in the former homestead entries and 640 acres, even though the land in such section 6 entry be more than 20 miles from the land in the original entry, but the land in the additional stock-raising entry

¹ In adopting this rule on Aug. 29, 1921, the department directed that it was to be effective only from Sept. 1, 1921.

must be within 20 miles of the land in such section 6 entry; and it is immaterial as to whether or not the land in the first or original entry is stock raising in character.

A section 7 additional entry under the enlarged homestead act on which residence is being maintained may likewise be the basis for an additional entry under the stock-raising act, regardless of whether or not the land in the original entry may be designated under the stock-raising act and whether or not the land in the section 7 entry is more than 20 miles from that in the original entry.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

COST OF CERTIFIED COPIES OF RECORDS AND PAPERS.

[Circular No. 504.]

Reprint, as amended, of Circular No. 504, approved September 22, 1916 (45 L. D., 485).

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 12, 1922.

1. Under existing laws the following is a schedule of fees for the preparation and delivery of certified copies of records and papers by the General Land Office. Circular No. 504 (45 L. D., 485), is amended to read as follows:

- (a) For written copies, 15 cents for each 100 words.
- (b) For photographic copies, 15 cents for each sheet not exceeding 11½ by 15 inches; for larger sizes a proportionate cost, not to exceed 40 cents per sheet.
- (c) For photolithographic copies of township plats, 50 cents each.
- (d) For tracings or blue prints, a sum equal to the cost of preparing the same.
- (e) For certifying a copy and affixing thereto the seal of the officer certifying, 25 cents.
- (f) For each certified copy of any printed order or regulation intended for gratuitous distribution, 25 cents.

2. The cost of a certified photographic copy of a patent is ordinarily 40 cents and of a typewritten copy 85 cents.

3. A separate certificate and seal must be attached to each certified copy of a patent, as well as to each certified copy of a township plat; but where there have been two or more surveys of a township and a copy of each plat of survey is desired, all of such related plats may be certified under one certificate and seal.

4. All fees for certified copies must be paid in advance. In any case where the amount remitted is insufficient, the remitter will be promptly advised concerning the deficiency.

5. Remittances may be effected by means of New York exchange, certified check, cashier's check, or post-office money order, and should be made payable to the Commissioner of the General Land Office.°

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

SMALL HOLDING CLAIMS IN NEW MEXICO—ACT OF JUNE 15, 1922.

INSTRUCTIONS.

[Circular No. 849.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 13, 1922.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES, AND SURVEYOR GENERAL FOR THE STATE OF NEW MEXICO:

Your attention is called to the act approved by Congress June 15, 1922 (42 Stat., 650), which provides:

That in township surveys hereafter to be made in the State of New Mexico, if it shall be made to appear to the satisfaction of the deputy surveyor making such survey that any person has, through himself, his ancestors, grantors, or their lawful successors in title or possession, been in the continuous adverse actual bona fide possession, residing thereon as his home, of any tract of land or in connection therewith of other lands, all together not exceeding one hundred and sixty acres, in such township for twenty years next preceding the time of making such survey, the deputy surveyor shall recognize and establish the lines of such possession and make the subdivision of the adjoining lands in accordance therewith. Such possession shall be accurately defined in the field notes of the survey and delineated on the township plat, with the boundaries and area of the tract as a separate legal subdivision. The deputy surveyor shall return with his survey the name or names of all persons so found to be in possession, with a proper description of the tract in the possession of each as shown by the survey, and the proofs furnished to him of such possession.

Upon receipt of such survey and proofs the Commissioner of the General Land Office shall cause careful investigation to be made in such manner as he shall deem necessary for the ascertainment of the truth in respect of such claim and occupation, and if satisfied upon such investigation that the claimant comes within the provisions of this section, he shall cause patents to be issued to the parties so found to be in possession for the tracts respectively claimed

by them: *Provided, however,* That no person shall be entitled to confirmation of, or to patent for, more than one hundred and sixty acres in his own right by virtue of this section.

All claims arising under this act shall be filed with the surveyor general of New Mexico within two years next after the passage of this Act, and no claim not so filed shall be valid. No tract of such land shall be subject to entry under the land laws of the United States: *And provided further,* That this act shall not apply to any city lot, town lot, village lot, farm lot, or pasture lot held under a grant from any corporation or town the claim to which may fall within the provision of this act.

It will be observed that the act is practically a re-enactment of sections 16 and 18 of the act of March 3, 1891 (26 Stat., 854), as originally passed, restricted in its application to the State of New Mexico. The words "residing thereon as his home," which were stricken out of section 16 of the act of March 3, 1891, by the act of February 21, 1893 (27 Stat., 470), are retained in the said act.

This act applies only to townships surveyed after its passage.

All claims arising under the said act must be filed with the surveyor general of New Mexico within two years after June 15, 1922, and any claim not so filed must be rejected.

The act is restricted in its application to natural persons and the possession required by the act must be maintained during the required period by individuals, and a claim by an individual based, in whole or in part, upon possession maintained by his grantor or predecessor in interest who was a corporation or a town, is invalid.

To the end that the claims which will arise under the said act may be efficiently and expeditiously adjudicated, you are directed to be guided by the following instructions:

1. The surveyor general shall assign a number to all claims filed under the provisions of the said act and require such proof to be made in support thereof as he shall deem satisfactory following the method heretofore adopted in claims which have arisen under sections 16, 17, and 18 of the act of March 3, 1891 (26 Stat., 854).

2. After an application for such claims shall have been filed and proof shall have been made before the surveyor general in support thereof, the surveyor general shall immediately forward to the register and receiver of the land district in which the claim is situated, a copy of the application so filed and proof made.

3. The deputy surveyor when surveying a township containing such claims, applications for which shall have been filed, shall before such claims are segregated satisfy himself that such claims shall have been resided upon as homes.

4. As soon as a township containing such claims shall have been surveyed and a copy of said plat of survey shall have been approved and filed in the district land office, the register and receiver of such office shall ascertain whether or not the surveyor

general has forwarded a copy of the applications and proof as required by paragraph two of these instructions and in the event it is found that they have not been forwarded the register and receiver shall immediately request the surveyor general to forward the same.

5. When this information shall have been received the register and receiver shall serve notice upon each of such claimants that 90 days from receipt of notice will be allowed within which to begin the publication of notice of intention to submit final proof, as hereafter required, and in the event the said publication is not begun within the time allowed and final proof finally submitted in due course the said claim will be canceled and finally closed.

6. The register and receiver shall require each of such claimants to publish notice of intention to submit final proof of his occupation and possession under the same terms and restrictions as govern publication in homestead cases following the same form with the necessary alterations as will indicate the nature of the claim and of the proof to be submitted. In all cases in which the claims are situated in sections that have been granted to the State for school purposes the claimants shall be required to serve notice of intention to submit final proof upon the proper State authorities, either personally or by registered mail, and to furnish evidence of such notice at the time of making final proof.

7. In making final proof the claimant will be required to make affidavit setting forth the name of the original settler and the date of the original settlement; the names of all mesne possessors of such claim, if any, and the periods held by each, giving the exact dates, and how each such possessor acquired possession of such claim; the date the then present claimant took possession of such claim, how he acquired possession thereof; and the manner in which each such possessor has maintained possession of such claim. If documentary evidence of title of such claimants is in existence such documents or duly authenticated copies thereof, must be produced and filed with the proof. Every material fact stated in the claimant's affidavit, or necessary to the validity of his claim, not established by competent documentary evidence, must be substantiated by the affidavits of not less than two disinterested persons having a personal knowledge of the facts.

8. When such proof has been made the register and receiver will examine the same in each case, and if satisfied that the provisions of the said act have been complied with, issue final certificate thereon in duplicate, on the usual form with such modifications as shall be necessary to show the act under which the claim arose, and transmit the duplicate to the claimant and the original, together with all the records in the case, to this office for final action. If, after consider-

ing the said proof the register and receiver should be of the opinion that it does not meet the requirements of the said act the register and receiver will reject the same allowing an appeal to this office.

9. If, after serving the notice required by paragraph 5 of these instructions and the expiration of the time allowed, no action having been taken by such claimants, the register and receiver will transmit all the records in such cases, together with evidence of such notice having been given, to this office for further action.

10. The proof required by these instructions must be made before the register or the receiver or one of the officers authorized to take proof in homestead cases.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

SEA-COAST PACKING COMPANY.

Decided September 16, 1922.

SOLDIERS' ADDITIONAL—TOWN SITE—OCCUPANCY—NATIONAL FORESTS—WITHDRAWAL—RESTORATION.

The restoration of a tract of public land eliminated from a national forest for town site purposes does not preclude the making of a soldiers' additional entry therefor by an occupant whose right of occupancy was not extinguished by the Executive order which established the forest reserve.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Lewis P. Hunt (41 L. D., 477), cited and applied.

FINNEY, *First Assistant Secretary:*

The Sea-Coast Packing Company, a corporation organized under the laws of the State of Washington, has appealed from a decision of the Commissioner of the General Land Office dated June 3, 1922, rejecting its application to make soldiers' additional homestead entry for—

that certain tract on the west coast of Prince of Wales Island, in the Territory of Alaska, included in an area about the village of Craig recently eliminated from the Tongass National Forest, which tract is now and for many years has been in the use and exclusive possession of the applicant, held until such recent elimination under a forest use permit issued by the Forest Supervisor at Ketchikan, Alaska, and may be more particularly described by reference to an unofficial plat of Fish Egg (now Craig) Townsite, made from a survey by E. H. Hoffman in March, 1911, and now available at the office of the Forest Supervisor at Ketchikan, as all that portion of the proposed townsite lying between mean high tide line on the north and west, Main Street on the south, and Third Street on the east, which last described area hereby sought covers about

but not to exceed six and one-half acres, and includes within its limits the original area of 600 x 300 feet for which said Forest Service permit issued February 4, 1908.

The Commissioner held that the tract described was not subject to entry under sections 2306 or 2307, Revised Statutes, citing the Proclamation by which it was eliminated from the Tongass National Forest.

The Proclamation referred to, dated February 8, 1922, recites:

Whereas, it appears that the public good will be promoted by excluding from the Tongass National Forest, in Alaska, several tracts of land occupied for townsite purposes in order that the public lands therein may be disposed of under the applicable townsite laws. * * *

Now, therefore, I, Warren G. Harding, President of the United States of America, by virtue of the power in me vested by the act of Congress, approved June fourth, eighteen hundred and ninety-seven (30 Stat., 11, at 34 and 36), entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," do proclaim that the lands lying with the following described boundaries are hereby excluded from the Tongass National Forest.

Craig Townsite. [Here follows a description by courses and distances of 57.61 acres, more or less.]

The Sea-Coast Packing Company, it appears, is the successor of the J. Lindenger Company, as to which the Forest Service advised this Department under date of June 17, 1914, as follows:

Several years ago the Forest Service, acting under the regulations of the Department [of Agriculture], authorized the J. Lindenger Company of Seattle, Washington, to occupy a certain tract of land within the Tongass National Forest at a place now called Craig, Alaska. The company has constructed a fish cannery and necessary appurtenant buildings on this tract at an expense of approximately \$300,000. A similar permit was issued to the West-Coast Mill Company for a sawmill site. After these companies commenced operations a number of persons congregated near their buildings, and for the purpose of orderly administration the Forest Supervisor found it advisable to lay out an adjoining tract in lots and blocks. A number of these lots are now being occupied under special use permits.

* * * * *

The Forest Service would be glad to recommend the elimination of this tract from the forest but, of course, does not wish to do so unless the real parties in interest would be fully able to protect themselves against other claimants.

During the negotiations with the Department of Agriculture relative to the elimination from the forest of "Craig town site," the Forest Service advised the General Land Office on October 8, 1920, as follows:

The Forest Service has no recommendation to make with respect to the wishes of the Columbia Salmon Company [predecessor of the Sea-Coast Packing Company] of Seattle, Washington, that the tract on which its buildings are located be not included in the proposed town site at Craig. In view of the expenditures the company has made for its cannery, it apparently should be

allowed to acquire title to the land it is occupying, but the manner in which such title should be acquired can best be determined by your office.

In transmitting a copy of the proclamation to the register of the Juneau land office, by letter of February 15, 1922, the Commissioner of the General Land Office stated that the tract embraced in the settlement at Craig had been eliminated from the forest in order that it might become subject to entry under the town site laws. The register was directed by letter of March 4, 1922, to note the elimination of the land from the forest, and to post a copy of the proclamation in his office. The soldiers' additional application here in question was filed April 6, 1922.

On April 5, 1922, there was filed in the office of the surveyor general for Alaska a petition for the survey of the tract eliminated as Craig town site, and under date of April 24, 1922, proposed instructions for the survey were submitted by the surveyor general. The instructions were approved by the General Land Office on May 6, 1922. The Department has been informally advised that the survey in the field was completed in June, 1922.

The proclamation of February 8, 1922, indicated that the purpose of the elimination from the forest of the 57.61 acres designated as Craig town site was to allow the disposition of the area under the town site law applicable to Alaska—section 11 of the act of March 3, 1891 (26 Stat., 1095), which provides that "lands in Alaska may be entered for town site purposes, for the several use and benefit of the occupants of such town sites," such entries to be made under the provisions of section 2387, Revised Statutes, "as near as may be."

It can not, therefore, be seriously contended that the President intended that the Sea-Coast Packing Company, the occupant of the land under consideration, should be deprived of a right, growing out of such occupancy, to purchase the tract under section 10 of the act of May 14, 1898 (30 Stat., 409).

In the case of Lewis P. Hunt (41 L. D., 477), wherein the provisions of said section 10 were considered, the Department held that if the land then under consideration was occupied by Hunt or his predecessors in interest for purposes of trade, manufacture, or other productive industry at the date of the withdrawal of the land for inclusion within the exterior limits of a national forest, and there had been no unnecessary delay in the assertion of the claim before the Land Department, the withdrawal for forestry purposes did not attach, and that Hunt might, at his option, acquire title through a soldiers' additional entry rather than by the payment of \$2.50 per acre, as provided by said section 10.

If the right of an occupant of a tract of land is not extinguished by an Executive forest withdrawal, the restoration of a tract from a forest withdrawal can not be held to have that effect, especially

where, as here, the restoration is for the benefit of the occupants of the land.

The records of the Land Department contain data which establish beyond controversy the occupancy of the tract applied for by the appellant company, and the allowance of its application will be in harmony with the expressed purpose of the elimination of the tract from the forest.

The decision appealed from is accordingly reversed, and the Commissioner of the General Land Office will, before accepting the recent survey, eliminate from the proposed town site the tract applied for by the Sea-Coast Packing Company, and will, in directing the issuance of final certificate under the soldiers' additional application, furnish a technical description of the tract, using the field notes of said survey.

EXCHANGE OF LANDS IN SAN JUAN, MCKINLEY AND VALENCIA COUNTIES, NEW MEXICO—ACT OF MARCH 3, 1921.

INSTRUCTIONS.

[Circular No. 850.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 19, 1922.

REGISTER AND RECEIVER, SANTA FE, NEW MEXICO; SUPERINTENDENT, PUEBLO BONITO AGENCY, CROWN POINT, NEW MEXICO; SUPERINTENDENT OF THE ZUNI SCHOOL, BLACK ROCK, NEW MEXICO:

The following regulations are issued for your guidance under the act of March 3, 1921 (41 Stat., 1225, 1239), authorizing reconveyances and relinquishments of lands, and lieu selections therefor, in San Juan, McKinley, and Valencia Counties.

The act mentioned contains this provision:

"The Secretary of the Interior is hereby authorized in his discretion, under rules and regulations to be prescribed by him, to accept reconveyances to the Government of privately owned and State school lands, and relinquishments of valid homestead entries or other filings, including Indian allotment selections, within any township of the public domain in San Juan, McKinley, and Valencia Counties, New Mexico, and to permit lieu selections by those surrendering their rights so that the holdings of any claimant within any township wherein such reconveyances or relinquishments are made may be consolidated and held in solid areas: *Provided*, that the title or claim of any person who refuses to reconvey to the Government shall not be hereby affected."

As the "exchanges" permitted under the act for the purpose of consolidations can be made only with the mutual consent of all per-

sons interested, and be brought to the point where approvals may be had of the Secretary of the Interior, there should be full preliminary cooperation as a preventive of adverse action and as a means of aiding prompt and favorable action by the Government. It would, therefore, be appropriate that you suggest to all prospective applicants that before any applications are actually filed in the local land office, they go over the matter, as between themselves, with the view to arriving at some tentative agreement as to what lands they wish to relinquish and take in exchange.

The question of whether the land wanted by each interest is vacant public domain or railroad land, whether it is State land or within Indian allotments patented or selected therefor, or whether leased, etc., should first be ascertained by such persons as nearly as may be possible; also, some understanding should be had between all the interests indicating their attitude. There are many small details connected with propositions of this character which must necessarily be worked out first by the applicants themselves, and that can be done promptly and satisfactorily by personal conferences among themselves, rather than to have applications filed indiscriminately with the expectation that the field force of this Department will attempt to reconcile all the differences that will no doubt be found to exist.

A person or corporation, or the State of New Mexico, desiring to reconvey and select lieu lands should file in duplicate an application with the local land officers at Santa Fe definitely describing by government surveys the lands wanted and the lands offered in exchange; and notice of such application must be given in compliance with the circular of February 21, 1908 (36 L. D., 278), with the exception, that instead of beginning publication within twenty days of filing of selection, the selector will begin such publication within thirty days from date of service of notice by the register and receiver that the application has been placed of record.

In all cases where the application involves land occupied, claimed, or owned by an Indian, the register and receiver will forward a copy of the application to the proper Indian superintendent; and in all such cases will furnish the superintendent with the serial number of the application, which serial number together with the name of the land office must be indorsed thereon as a means of identification and referred to in all correspondence concerning said application. Copies of applications covering lands occupied, claimed, or owned by Indians in San Juan and McKinley Counties will be filed with the Indian superintendent at Crown Point; and copies of applications covering such lands in Valencia County will be filed with the superintendent at Black Rock. It will be the duty of these officials to

examine the land proposed to be relinquished or reconveyed by all Indian applicants, and the land proposed to be acquired by Indian applicants, and to submit reports of such examinations involving lands in their respective jurisdictions, to the Commissioner of Indian Affairs with appropriate recommendation as to the allowance or disallowance of the application, a copy of which report must be forwarded to the register and receiver at Santa Fe.

The register and receiver will forward to the Commissioner of the General Land Office with their monthly returns all applications filed in their office for exchanges under the said act of March 3, 1921, *supra*, after noting the same on their records in the usual manner. The application will be noted "suspended" by the register and receiver, and unless disallowed by the Secretary of the Interior, the lands applied for in exchange will not be subject to application or filing by any other applicant.

The Commissioner of the General Land Office, acting through the field service thereof, will cause to be made such investigations and examinations of the lands and claims described and set forth in applications for exchange as will enable the Secretary of the Interior properly to act in the premises. Applicants should specifically state in their applications that the same are made pursuant to the authority contained in the said act of March 3, 1921, and these instructions.

An affidavit showing that the land asked for in exchange is non-mineral in character and not adversely claimed should accompany each application; except that in cases where the land is covered by an allotment, homestead, or desert entry, a statement may be incorporated in the affidavit to the effect that the claimant to such land has filed an application to relinquish or reconvey the land to the United States under the provisions of the act of March 3, 1921, *supra*, if such be the fact. Where applications are submitted involving the reconveyance or relinquishment of lands selected by or patented to individual Indians, such applications may be considered jointly and not necessarily as separate applications; provided, in such cases, the lands to be acquired in exchange will consolidate the holdings of such Indians.

The lands selected must, in conjunction with other property owned by the party conveying, be in a compact body, as near as may be possible, regardless of township lines; but no application will be considered involving lieu lands in any township wherein the selector owns no land, and where the approval of such application will not effect a consolidation of the holdings of the applicant in such township or townships. Nonmineral, surveyed, unappropriated, and unreserved land, except as provided by the preceding paragraph, can be selected.

There should also accompany the application a warranty deed duly executed according to the laws of New Mexico by the proponent conveying to the United States the land to be given in exchange, but such deed need not be recorded. An abstract of title brought down to show good title in the proponent, free from all incumbrances, must also be filed. Such abstract of title must be authenticated by the proper State and Federal officers and show that the land is free from all judgment, claims, or liens, including taxes, or such abstract may be authenticated by an abstractor or abstract company as provided by General Land Office Circular No. 726 of October 13, 1920 (unpublished). If the exchange is authorized the deed will be returned for recording and the abstract to be brought down to show such recordation, whereupon patent will be issued in the regular order of business.

Where the land relinquished is covered by an unperfected bona fide claim for which no certificate for patent is outstanding, there must be filed with the selection a certificate by the recorder of deeds or official custodian of the records of transfers of real estate in the proper county that no instrument purporting to convey or in any way to encumber the title to the land or any part thereof is on file or of record in his office; or if any such instrument or instruments be on file or of record therein, the certificate must show the facts. A selection in lieu of an unperfected claim not covered by patent certificate must in all respects conform to the law under which such unperfected claim is held, and will be subject to the payment of such fees and commissions as would be required under the statutes to complete the unperfected claim in lieu of which the selection is made.

If the land relinquished is covered by an unperfected claim—such as a homestead or desert entry—for which certificate for patent has not been issued and the law under which the claim was initiated requires that land taken thereunder must be in one body, the same requirements must be observed in making the lieu selection irrespective of lands otherwise owned or claimed. If the land relinquished is covered by an Indian allotment for which a trust patent has been issued, that trust patent should accompany the application for exchange and on the reverse side of the patent should be indorsed the relinquishment of the patentee witnessed by two persons or before a notary public or other official with a seal. If the trust patent has been lost or destroyed or for any reason can not be located, the relinquishment and application for exchange may be combined, including a sworn statement as to the loss of the patent, or reason given why it can not be furnished. In cases of this character no deed will be necessary, but the selector must make affidavit that he has not sold, assigned, mortgaged, or contracted to sell, assign, or mortgage the land covered by the unperfected claim or relinquished allotment.

A selection of land in lieu of an unperfected entry under the settlement laws if credit for residence on the unperfected claim be desired, must in addition to other proofs be accompanied by the affidavit of the selector, corroborated by two witnesses, showing when residence was established on the unperfected claim and the duration of such residence. In such a case, unless the selector has resided upon, cultivated, and improved the relinquished unperfected claim for the full period required by law to earn a patent thereto, he must establish and maintain a residence on the land selected and cultivate and improve the same for the full period required by law to earn a patent, less the time spent upon the relinquished unperfected claim.

If the relinquished unperfected claim be not one held under the settlement laws, the affidavit as to the residence required by the preceding paragraph need not be furnished; but in either case the selector must make affidavit that he has not sold, assigned, mortgaged, or contracted to sell the land covered by the relinquished unperfected claim. No patent shall be issued for any lieu land selection until all parties in interest and involved in the exchange of their holdings with each other and with the Government shall have completed their selections and thereby and otherwise in accordance with applicable law and the regulations thereunder earned equitable title to the land involved therein.

The law makes no provision for reimbursing any persons for improvements on land relinquished or reconveyed. However, when any applicant receives notice that an exchange applied for has been authorized, he may, if he so desires, remove any buildings, fencing, or other movable improvements owned or erected by him on the land relinquished or conveyed; Provided, that such removal is accomplished within ninety days from receipt by him of said notice. Any land relinquished to the United States under these regulations, which tracts would ordinarily become subject to entry under the public land laws, shall be withheld from all forms of disposal until further specific action is taken thereon to make the said lands subject to settlement or entry, or to any form of disposal; and until otherwise directed the local land officers will not allow any entry or application for such lands.

WILLIAM SPRY,
Commissioner.

CHAS. H. BURKE,
Commissioner of Indian Affairs.

Approved:

E. C. FINNEY,
First Assistant Secretary.

EARL A. MANN.

Decided September 20, 1922.

ADDITIONAL HOMESTEAD — STOCK-RAISING HOMESTEAD — OCCUPANCY — KINKAID ACT.

One who is qualified to make an additional entry under the proviso to section 2 of the so-called Kinkaid Act of April 28, 1904, as amended by the act of May 29, 1908, by reason of his ownership and occupation of the land originally entered, is qualified to make an original entry under the stock-raising homestead act for such an area of designated land as, when added to the area originally entered, will aggregate approximately 640 acres.

HOMESTEAD—STOCK-RAISING HOMESTEAD—KINKAID ACT.

One who made a homestead entry for any area of land in the territory affected by the so-called Kinkaid Act after the date of the amendatory act of May 29, 1908, is not qualified to make an original entry under the stock-raising homestead act.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

Case of Charles Makela (46 L. D., 509), cited and distinguished.

FINNEY, *First Assistant Secretary*:

At the Alliance, Nebraska, land office on February 14, 1916, Earl A. Mann made homestead entry for NE. $\frac{1}{4}$, Sec. 17, T. 23 N., R. 54 W., 6th P. M. After patent under said entry had issued, Mann applied at the Cheyenne, Wyoming, land office on September 26, 1921, to make an additional entry under the stock-raising homestead act for lot 4, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 7, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$, Sec. 8, T. 26 N., R. 63 W., 6th P. M. (478.85 acres).

By decision dated May 6, 1922, the Commissioner of the General Land Office rejected the application because the land applied for is not within a radius of twenty miles of the original entry. Mann has appealed, and with the appeal has filed an application to make an original entry under the stock-raising homestead act for the land desired. He contends that he is qualified to enter approximately 480 acres under the stock-raising homestead act, and cites the unreported departmental decision of May 22, 1920, in the case of Frank Tinkham.

In the case cited, Tinkham had on October 31, 1894, perfected a homestead entry for 160 acres within the area wherein the so-called Kinkaid Act of April 28, 1904 (33 Stat., 547), is operative, and he was allowed to make an original entry under the stock-raising homestead act for 480 acres in the Douglas, Wyoming, land district.

The Kinkaid Act provides, in section 2 as amended by the act of May 29, 1908 (35 Stat., 465, 466-467), that entrymen under the homestead laws of the United States within the territory described in section 1 who own and occupy the lands *theretofore* entered by

them may enter other lands contiguous to their homestead entry, which shall not, with the land so already entered, owned, and occupied, exceed in the aggregate 640 acres, and residence continued and improvements made upon the original homestead, subsequently to the making of the additional entry, shall be accepted as equivalent to actual residence and improvements made on the additional land so entered.

The first proviso to section 3 of the act follows:

That a former homestead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed 640 acres.

The provisions of said section 2 had the effect of making Tinkham qualified to make an additional entry for 480 acres of land contiguous to his original homestead, which entry he could perfect by continuing to reside upon and improve his original entry; or he could, under the proviso to section 3, make an independent entry for 480 acres. These qualifications (under section 2) were held sufficient to entitle him to the rule announced in the case of Charles Makela (46 L. D., 509):

One qualified to make entry under other homestead laws for approximately 40 acres is qualified to make an original entry under the provisions of section 1 of the stock-raising homestead act of December 29, 1916, for such an area of land designated thereunder as when added to the area of the prior perfected entry or entries will not exceed 640 acres, even though the latter area be not designated.

The case of Mann presents an entirely different state of facts. Whether his entry for 160 acres was made under section 2289, Revised Statutes, or under the provisions of the Kinkaid Act is immaterial. It was for a tract within the territory affected by said act and, unlike the entry of Tinkham, having been made *after* its approval, exhausted his rights thereunder, except that, if contiguous lands thereafter became vacant, he could amend his entry to embrace such lands to the limit of 640 acres. Having exhausted his right under the Kinkaid Act, and not being qualified to make an original or an additional homestead entry under other laws for as much as approximately 40 acres; he is not qualified to make an original stock-raising entry, and as the land applied for is more than twenty miles from his perfected entry, he is not qualified to make an additional entry therefor under the stock-raising homestead act.

The decision appealed from is affirmed.

REGULATIONS UNDER TIMBER AND STONE LAW.

[Circular No. 851.]

[Revision of the regulations approved November 30, 1908 (37 L.D., 289), as revised January 2, 1914 (43 L.D., 37), and reprinted with amendments (Circular No. 289), March 1, 1916.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 20, 1922.

**REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:**

The regulations under the act of June 3, 1878 (20 Stat., 89), and amendatory acts, commonly known as the timber and stone law, which regulations were revised January 2, 1914 (43 L. D., 37), and reprinted with amendments on March 1, 1916, are hereby revised and modified, as follows:¹

PROVISION FOR APPRAISEMENT.

1. Any land subject to sale under the foregoing acts may, under the direction of the Commissioner of the General Land Office, upon application or otherwise, be appraised by smallest legal subdivisions, at their reasonable value, but at not less than \$2.50 per acre; and hereafter no sales shall be made under said acts except as provided in these regulations.

CHARACTER OF LANDS SUBJECT TO ENTRY.

2. All unreserved, unappropriated, nonmineral, surveyed public lands within the public-land States, which are valuable chiefly for the timber or stone thereon and unfit for cultivation at the date of sale, may be sold under this act at their appraised value, but in no case at less than \$2.50 per acre, in contiguous legal subdivisions upon which there is no existing mining claim or the improvements of any bona fide settler claiming under the public land laws. The act specifically prohibits the making of entries thereunder for land containing valuable deposits of gold, silver, cinnabar, copper, or coal, but entries thereunder may be allowed under the act of July 17, 1914 (38 Stat., 509), for land withdrawn or classified as valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which

¹ The principal changes consist of the elimination of the provision relating to the rights of applicants if the land applied for is not appraised within nine months from the date of filing of the application, and of inserting a provision to the effect that lands within the known geologic structures of producing oil or gas fields, or embraced in applications for oil and gas prospecting permits, or in permits or leases granted, are not subject to entry under the timber and stone law until and unless the Secretary of the Interior shall determine that the surface of the lands may be disposed of without detriment to the public interest. For changes made, see paragraphs 2, 8, 14, 23, and 27.

are valuable for those deposits, provided the applicant files his consent, witnessed by two persons or acknowledged before an officer having an official seal, to have the entry stand subject to the provisions and limitations of said act. However, lands within the known geologic structures of producing oil or gas fields, or embraced in applications for oil and gas prospecting permits, or in permits or leases granted, are not subject to entry hereunder until and unless the Secretary of the Interior shall determine that the surface of the lands may be disposed of without detriment to the public interest. The terms used in this paragraph may be defined substantially as follows for the purpose of construing and applying this law:

(a) *Unreserved and unappropriated lands* are lands which are not included within any military, Indian, or other reservation, or in a national forest, or in a withdrawal by the Government for reclamation or other purposes, or which are not covered or embraced in any entry, location, selection, or filing which withdraws them from the public domain.

(b) *Unoccupied lands* are lands belonging to the United States upon which there are no improvements belonging to any person who has initiated and is properly maintaining a valid mining or other claim to such lands under the public-land laws. Abandoned and unused mines, shafts, tunnels, or buildings occupied by mere trespassers not seeking title under any law of the United States do not prevent timber and stone entries if the land is otherwise capable of being so entered.

(c) *Nonmineral lands* are such lands as are not known to contain any substance recognized and classed by standard authorities as mineral, in such quantities and of such qualities as would, with reasonable prospects of success in developing a paying mine thereon, induce a person of ordinary prudence to expend the time and money necessary to such development.

(d) *Timber* is defined as trees of such kind and quantity, regardless of size, as may be used in constructing buildings, irrigation works, railroads, telegraph and telephone lines, tramways, canals, or fences, or in timbering shafts and tunnels or in manufacturing, but does not include trees suitable for fuel only.

(e) *Lands valuable chiefly for timber*, but unfit for cultivation, are lands which are more valuable for timber than they are for cultivation in the condition in which they exist at the date of the application to purchase, and therefore include lands which could be made more valuable for cultivation by cutting and clearing them of timber. The relative values for timber or cultivation must be determined from conditions of the land existing at the date of the application to purchase.

3. Lands may be entered under the timber and stone acts, except as denied by special laws, in all of the public-land States; but such entries may not be made in Alaska.

BY WHOM ENTRIES MAY BE MADE.

4. One timber and stone entry may be made for not more than 160 acres (*a*) by any person who is a citizen of the United States, or who has declared his intention to become such citizen, if he is not under 21 years of age, and has not already exhausted his right by reason of a former application for an entry of that kind, or has not already acquired title to or is not claiming under the homestead or desert land laws through settlement or entry made since August 30, 1890, any other lands which, with the land he applies for, would aggregate more than 320 acres; or (*b*) by an association of such persons; or (*c*) by a corporation each of whose stockholders is so qualified.

5. A married woman may make entry if the laws of the State in which she applies permit married women to purchase and hold for themselves real estate, but she must make the entry for her own benefit and not in the interest of her husband or any other person.

METHOD OF OBTAINING TITLE.

6. Any qualified person may obtain title under the timber and stone law by performing the following acts: (*a*) Personally examining the land desired; (*b*) presenting an application and sworn statement, accompanied by a filing fee of \$10; (*c*) depositing with the receiver the appraised price of the land; (*d*) publishing notice of his application and proof; (*e*) making final proof.

7. Examination of the land must be made by the applicant in person not more than 30 days before the date of his application in order that he may knowingly swear to its character and condition.

APPLICATION AND SWORN STATEMENT: DEPOSIT.

8. The application and sworn statement (Form 4-522) must contain the applicant's estimate of the timber, based on examination, and his valuation of the land and the timber thereon, by separate items. It must be executed in duplicate after having been read to or by the applicant, in the presence of the officer administering the oath, and sworn to, by him before such officer, and may be either the register or the receiver of the land district in which the land is located, a United States commissioner, a judge or a clerk of a court of record in the county or parish in which the land is situated, or one of these officers outside of that county or parish, if he is nearer and more accessible to the land than any other qualified officer and has his office or place of business within the land district in which the

land is located. Each applicant must, at the time he presents his application and sworn statement, deposit with the receiver a filing fee of \$10. The application must be filed in the district land office or deposited in the mails within 10 days after its execution.

9. Applications by associations or corporations must, in addition to the facts recited in the foregoing statement, show that each person forming the association or holding stock in the corporation is qualified to make entry in his own right and that he is not a member of any other association or a stockholder in any other corporation which has filed an application or sworn statement for other lands under the timber and stone laws.

DISPOSITION OF APPLICATION.

10. After application and deposit have been filed in proper form, as required by these regulations, the register and receiver will at once forward one copy of the application to the chief of field division having jurisdiction of the land described, who, if he finds legal objection to the allowance of the application, will return it to them with report thereon. The register and receiver will, if they concur in an adverse recommendation of the chief of field division, dismiss or deny the application, subject to the applicant's right of appeal; but if they disagree with his recommendation they will forward the record to the Commissioner of the General Land Office, with their report and opinion thereon, for such action as he may deem advisable.

If the chief of field division finds no such legal objection to the application, he shall cause the lands applied for to be appraised by an officer or employee of the Government, using Form 4-526:

APPRAISEMENT: METHOD.

11. The officer or employee designated to make the appraisement must personally visit the lands to be appraised and thoroughly examine every legal subdivision thereof, and the timber thereon, and appraise separately the several kinds of timber at their stumpage value, and the land independent of the timber at its value at the time of appraisement, but the total appraisement of both land and timber must not be less than \$2.50 per acre. He must, in making his report, consider the quantity, quality, accessibility, and any other elements of the value of the land and the timber thereon. The appraisement must be made by smallest legal subdivisions, or the report must show that the valuation of the land and the estimate of the timber apply to each and every subdivision appraised.

APPRAISEMENT: MANNER OF RETURN: APPROVAL.

12. The completed appraisement must be mailed or delivered personally to the chief of field division under whose supervision it was

made, and not to the applicant. Each appraisalment upon which an entry is to be allowed must be approved, respectively or conjointly, as provided in these regulations, by the chief of field division under whose supervision it was made, by the register and receiver who allow the entry, or by the Commissioner of the General Land Office.

APPRAISEMENT: DISAGREEMENT BETWEEN APPRAISING AND APPROVING OFFICERS: HOW DETERMINED.

13. The chief of field division will return to the appraiser, with his objections, an appraisalment which he deems materially low or high, and the appraiser shall within 20 days from the receipt thereof resubmit the papers, with such modifications or explanations as he may deem advisable or proper, upon receipt of which the chief of field division will either approve the schedule as then submitted or forward the papers to the register or receiver with his memorandum of objection. The register and receiver will thereupon consider the case. If they approve the appraisalment, they will sign the certificate appended thereto and advise the chief of field division thereof. If the register and receiver approve the objection of the chief of field division, they will so indicate, and if the appraising officer is an employee of the Interior Department, under the supervision of the chief of field division, they will return the papers to the chief of field division, who will thereupon order a new appraisalment by a different officer. If, however, the register and receiver approve the objection of the chief of field division, when the appraiser is an officer of another bureau of this department or of another department, they will forward the record of the case to the Commissioner of the General Land Office, who will then determine the controversy.

APPRAISEMENT: NOTATION AND EFFECT THEREOF.

14. When the appraisalment is completed, the register and receiver will note the price on their records, and for one year after the date of the appraisal the land may be sold at such price. After the lapse of one year an application under the act will be referred to the chief of field division for report and recommendation as to whether the conditions then existing demand a new appraisal.

NOTICE OF APPRAISEMENT: PAYMENT OR PROTEST.

15. If the appraisalment shows the land, or any subdivision thereof, to be subject to entry, the register and receiver will note its appraised price on their records, and will immediately inform the applicant (using Form 4-524) that he must, within 30 days from service of notice, deposit with the receiver, either in lawful money, in post-

office money orders payable to the receiver, in certified checks drawn in favor of the receiver which can be cashed without cost to the Government, or as provided in paragraph 34 hereof, the appraised price of the land, or of said part, and the timber thereon, or within said time file his protest against the appraisement, depositing with the receiver a sum sufficient to defray the expenses of a reappraisement (which sum, not less than \$100, must be fixed by the register and receiver and specified in the notice to the applicant), together with his application for reappraisement at his own expense.

16. If the register and receiver reject the application as to part or all of the land, upon the ground that the appraisement shows it not to be subject to timber and stone entry, applicant may within 30 days submit a showing by affidavit, corroborated by at least two witnesses having actual knowledge of the character of the land, setting forth facts which tend to disprove the appraisement and that it is chiefly valuable for the timber and stone thereon, and if a prima facie showing is made, thereupon a hearing shall be ordered to determine the facts, after a date has been fixed for the same by agreement between the chief of field division and the register and receiver. Notice must be given by registered letter and the envelope should be marked for return if not delivered within 30 days. If notice be returned after being held in the post office for 30 days, such proceedings will constitute constructive notice for 30 days. After 30 days' notice has been had, if no deposit of the price has been made, or protest against the appraisement has been filed as to lands found subject to entry, and no application for hearing or appeal has been filed as to lands found not subject to entry, the register and receiver shall close the case on their records, all rights under the application being terminated without notice.

**OBJECTION TO APPRAISEMENT: APPLICATION FOR
REAPPRAISEMENT.**

17. Any applicant filing his protest against an appraisement, and his application for reappraisement, must support it by his affidavit, corroborated by two competent, credible, and disinterested persons, in which he must set forth specifically his objections to the appraisement. He must indicate his consent that the amount deposited by him for reappraisement, or such part thereof as is necessary, may be expended therefor, without any claim on his part for a refund or return of the money thus expended.

REAPPRAISEMENT.

18. Upon the receipt of a protest against appraisement and application for reappraisement conforming to the regulations herein, the register and receiver will transmit such protest and application to

the chief of field division, who will cause the reappraisalment to be made by some officer other than the one making the original appraisalment. The procedure provided herein for appraisalment will be followed for reappraisalment, except the latter, if differing from the former, must, to give it effect, be approved both by the chief of field division and the register and receiver, or, in case of disagreement between them, by the Commissioner of the General Land Office.

NOTICE OF APPRAISEMENT.

19. When a reappraisalment is finally effected, the register and receiver will note the reappraised price on their records, and at once notify the applicant (using Form 4-525) that he must, within 30 days from the date of notice, deposit with the receiver the amount fixed by such reappraisalment for the sale of the land, or thereafter, and without notice, forfeit all rights under his application.

COST OF MAKING REAPPRAISEMENT.

20. The officer or employee of the United States making the reappraisalment shall be paid from the amount deposited with the receiver by the applicant therefor, the salary, per diem, and other expenses to which he would have been entitled from the Government, in the case of an original appraisalment, for his services for the time he was engaged in making and returning the reappraisalment. The receiver will, out of the money deposited by the applicant, pay such compensation including reasonable expenses for subsistence, transportation, and necessary assistants; and the officer will deduct from his expense account with the Government the amount which he has received from the receiver for such services. The receiver will return to the applicant the amount, if any, remaining on deposit with him after paying the expenses of said reappraisalment.

FINAL PROOF.

21. After the appraisalment or reappraisalment and deposit of purchase money and fee have been made the register will fix a time and place for the offering of final proof, and name the officer before whom it shall be offered and post a notice (Form 4-348e) thereof in the land office and deliver a copy of the notice (Form 4-348f) to the applicant, to be by him and at his expense published in the newspaper of accredited standing and general circulation published nearest the land applied for. This notice must be continuously published in the paper for 60 days prior to the date named therein as the day upon which final proof must be offered.

TIME, PLACE, AND METHOD OF MAKING FINAL PROOF.

22. Final proof (using Form 4-370a) should be made at the time and place mentioned in the notice, and, as a part thereof, evidence of publication, as required by the previous paragraph, should also be filed. If final proof is not made on that day or within 10 days thereafter, the applicant may lose his right to complete entry of the land. Upon satisfactory showing, however, explaining the cause of his failure to make the proof as above required, and in the absence of adverse claim, the Commissioner of the General Land Office may authorize him to readvertise and complete entry under his previous application.

23. If an applicant dies after the filing of an allowable application hereunder, his heirs will be permitted to make proof and payment, but patent will issue to the heirs of the applicant.

FINAL ENTRY.

24. After an appraisement or reappraisement has been approved, the payments made, and satisfactory proof submitted in any case as required by these regulations, the register and receiver will, if no protest or contest is pending, allow a final entry.

GENERAL PROVISIONS.**CONTESTS AND PROTESTS.**

25. Protest may be filed at any time before an entry is allowed, and contest may be filed at any time before patent issues, by any person who will furnish the register and receiver with a corroborated affidavit alleging facts sufficient to cause the cancellation of the entry, and will pay the cost of contest.

FALSE SWEARING—FORFEITURE.

26. If an applicant swear falsely in his application or sworn statement, he will be liable to indictment and punishment for perjury; and if he be guilty of false swearing or attempted fraud in connection with his efforts to obtain title, his application and entry will be disallowed and all moneys paid by him will be forfeited to the Government, and his rights under the timber and stone acts will be exhausted.

EFFECT OF APPLICATION TO PURCHASE.

27. The filing of an application hereunder, for land subject thereto, and to the completion of which the Government interposes no obstacle, exhausts the right of the applicant under the act.

28. After an application has been presented hereunder no other person will be permitted to file on the land embraced therein under

any public-land law until such application shall have been finally disposed of adverse to the applicant.

29. Lands appraised or reappraised hereunder, but not sold, may, upon the final disallowance of the application, be entered by any qualified person, under the provisions of the timber and stone laws, at its appraised or reappraised value, if subject thereto.

30. Lands applied for but not appraised and not entered under these regulations may, when the rights of the applicant are finally terminated, be disposed of as though such application had not been filed.

31. Any lands which have not been reappraised may be reappraised upon the request of an applicant therefor under these regulations who complies with the requirements of section 17 hereof.

32. An applicant securing a reappraisal under these regulations shall acquire thereby no right or privilege except that of purchasing the lands at their reappraised value, if he is qualified, and if the lands are subject to sale under his application; and he must otherwise comply with these regulations, but shall not, in any event, be entitled to the return of any money deposited by him and expended in such reappraisal.

33. The Commissioner of the General Land Office may at any time direct the reappraisal of any tract or tracts of public lands, when, in his opinion, the conditions warrant such action.

34. Unsatisfied military bounty land warrants under any act of Congress and unsatisfied indemnity certificates of location under the act of Congress approved June 2, 1858, properly assigned to the applicant, shall be receivable as cash in payment or part payment for lands purchased hereunder at the rate of \$1.25 per acre.

35. The forms mentioned herein shall be a part of these regulations.

ENTRY OF STONE LANDS.

36. The foregoing regulations apply to entries of lands chiefly valuable for stone, and the forms herein prescribed can be modified in such manner as may be necessary to the making of entries of stone lands.

FORMER REGULATIONS REVOKED.

37. All former regulations, decisions, and practices in conflict with these regulations are hereby revoked.

WILLIAM SPRY,

Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

APPENDIX.

Acts relating to Timber and Stone Entries.

AN ACT For the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided,* That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further,* That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or con-

tract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnebar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

* * * * *
SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved, June 3, 1878. (20 Stat., 89.)

AN ACT To authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided,* That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

SEC. 2. That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory," where the same occur in the second and third lines of said act, and insert in lieu thereof the words "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

Approved August 4, 1892. (27 Stat., 348.)

AN ACT To provide for the location and satisfaction of outstanding military bounty land warrants and certificates of location under section three of the act approved June second, eighteen hundred and fifty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the benefits now given thereto by law, all unsatisfied military bounty land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of \$1.25 per acre in payment or part payment for any lands entered under the desert-land law of March third, eighteen hundred and eighty- [seventy-] seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," and the amendments thereto, the timber-culture law of March third, eighteen hundred and seventy-three, entitled "An act to encourage the growth of timber on the Western prairies," and the amendments thereto; the timber and stone law of June third, eighteen hundred and seventy-eight, entitled "An act for the sale of timber lands in the States of California, Oregon, Ne-

braska [*Nevada*], and Washington Territory," and the amendment thereto, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

Approved, December 13, 1894. (28 Stat., 594.)

AN ACT To abolish the distinction between offered and unoffered lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in cases arising from and after the passage of this act the distinction now obtaining in the statutes between offered and unoffered lands shall no longer be made in passing upon subsisting preemption claims, in disposing of the public lands under the homestead laws, and under the timber and stone law of June third, eighteen hundred and seventy-eight, as extended by the act of August fourth, eighteen hundred and ninety-two, but in all such cases hereafter arising the land in question shall be treated as unoffered, without regard to whether it may have actually been at some time offered or not.

* * * * *

Approved, May 18, 1898. (30 Stat., 418.)

AN ACT Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act: *Provided,* That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

Approved, August 30, 1890. (26 Stat., 391.)

AN ACT To repeal the timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs; and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands, and not include lands entered or sought to be entered under mineral-land laws.

Approved, March 3, 1891. (26 Stat., 1095.)

The 320-acre limitation provided by the above acts of August 30, 1890 (26 Stat., 391), and March 3, 1891 (26 Stat., 1095), applies to timber and stone entries. (33 L. D., 539, 605.)

LOWER YELLOWSTONE IRRIGATION DISTRICTS NOS. 1 AND 2.

Decided September 21, 1922.

RECLAMATION—SETTLERS—WATER RIGHT—PAYMENT—ACT OF MARCH 31, 1922—STATUTES.

The provisions of the act of March 31, 1922, which affords relief to settlers on reclamation projects with reference to operation and maintenance charges, simply relaxes the requirements of section 6 of the act of August 13, 1914, by permitting the Secretary of the Interior, in his discretion, to furnish irrigation water, during the time specified therein, to landowners or entrymen who are in arrears for more than one calendar year, and nothing contained therein authorizes the extension of time for the payment of such charges.

FINNEY, *First Assistant Secretary*:

Irrigation Districts Nos. 1 and 2, Lower Yellowstone Project, acting through their presidents, have appealed from the action of the

Director of the Reclamation Service declining to grant their request for extension of time for the payment of operation and maintenance charges.

By an agreement dated December 10, 1920, between the Secretary of the Interior and Irrigation District No. 1 and the Lower Yellowstone Water Users' Association, it was provided that the said water users' association was released from its obligations under a prior contract and said irrigation district was substituted as the cooperating instrumentality through which reclamation charges were to be collected. By section 11 of that contract the district agreed to pay on March 1, 1922, and annually thereafter, its proportionate part of the cost of operation and maintenance of the project for 1921 and also any deficit for operation and maintenance for the calendar years 1919 and 1920. The payment of construction charges was to begin March 1, 1924.

A similar contract was made with Irrigation District No. 2, dated March 9, 1921, except that one-half of the operation and maintenance charges was to be paid on April 1, 1922, and the remaining one-half on November 15, 1922, and on corresponding dates thereafter for the preceding year, and also the deficit in operation and maintenance charges for the years 1919 and 1920. The construction charges were to be paid one-half on April 1 and November 15 each year, commencing in 1924.

This request does not involve the deferment of construction payments but relates to the operation and maintenance charges due in 1922. It is represented that the said districts are unable to meet these dues because of adverse conditions including low prices for farm produce, hailstorm and grasshopper damages.

In pursuance of pleas for relief of settlers on reclamation projects, Congress passed the act of March 31, 1922 (42 Stat., 489), section 1 of which authorized the Secretary under certain conditions to grant extension of time for payment of construction charges for a period not to exceed one year from December 31, 1922.

Section 2 of the act provides as follows:

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.

It will be observed that no extension of time for payment of operation and maintenance charges is provided for but the Secretary is authorized in his discretion to furnish water during the season of 1922, notwithstanding arrears of payment in reclamation charges for more than one year. This afforded relief from the requirements of section 6 of the act of August 13, 1914 (38 Stat., 686), which provided 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.

Congress having thus fixed the form of relief in such cases, the Department has no authority to provide another and different form of relief.

The action appealed from is accordingly affirmed.

UNITED STATES v. CENTRAL PACIFIC RAILWAY COMPANY.

Decided September 21, 1922.

SELECTION—RAILROAD. LAND—MINING CLAIM—MINERAL LANDS—SURVEY—EVIDENCE.

Where, in a proceeding against a railroad selection alleging the existence of mineral, all the evidence as to the character of the land relates only to that portion of the tract which is included within the limits of a lode location, the located area, if found to be mineral in character, should be separated by segregation survey, the remainder of the subdivision lotted, and the selection sustained against the charge to the extent of the nonmineral lands outside of the location.

FINNEY, First Assistant Secretary:

This is an appeal by the Central Pacific Railway Company from so much of the decision of the Commissioner of the General Land Office, of February 7, 1922, as holds that the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 13, T. 34 N., R. 40 E., M. D. M., in the Elko, Nevada, land district, are mineral in character.

On March 23, 1917, said railway company filed its List No. 4 of lands claimed to be included in its land grant, specifying therein, among other tracts, SW. $\frac{1}{4}$, and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, said Sec. 13. On April 8, 1918, under direction from the General Land Office, adverse proceedings were instituted against said subdivisions and others, upon the charge that said tracts are "mineral in character, containing valuable deposits of gold, silver, copper and molybdenum." The railway company's answer to the charge, filed May 16, 1918, denied the mineral character of said tracts and others; and upon the issue thus joined a hearing was set down to be held before a notary public at Golconda, Nevada, on April 10, 1919, but was subsequently adjourned and held on June 17, 1919.

On January 8, 1921, the register and receiver rendered their joint decision, in a letter of that date to the Commissioner, by which, after summarizing the evidence as to the several tracts involved, they recommended that the railway company's said list be canceled to the extent of W. $\frac{1}{2}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, said Sec. 13, and another tract involved, and that the remainder of the lands in controversy be clearlisted.

On appeal by the railway company to the Commissioner from so much of the decision of the local officers as was adverse to it, the Commissioner's decision pointed out that the former decision split certain 40-acre tracts, finding half mineral and half nonmineral, and pronounced this to be contrary to the departmental instructions of July 3, 1913, in Carson City 01610, wherein it is said that in the case of lode ground and in the absence of a segregation survey, a 40-acre tract, being the least legal subdivision, must be treated as a whole, so that all of the legal subdivisions should be found to be either mineral or nonmineral. The latter decision sustained the charge as to NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, said Sec. 13, and held the list for cancellation as to said tracts, but found that the evidence did not sustain the charge and dismissed the proceedings as to the balance of the tracts involved.

From said Commissioner's decision the railway company's appeal is taken to the Department, alleging error in that the decision is not supported by either the evidence or the law, and in its holding that in the absence of a segregation survey a 40-acre tract, being the least legal subdivision, must be treated as a whole.

Upon full reexamination of the evidence, the Department concurs with the Commissioner's decision in so far as it is itself in concurrence with that of the register and receiver.

But neither the register and receiver's decision nor that of the Commissioner is correct as to the division of a tract where part of it is embraced within a lode location. Where, as in this case, all the evidence relative to mineral or nonmineral character bears reference only to so much of such tract as is included within the limits of the lode location, so that there is no basis for finding those parts of the tract outside of the located area to be mineral in character and thus excepted from the railroad land grant, and where the evidence shows that part of the tract within the located area to be mineral in character, a segregation survey, separating such nonmineral area from such mineral and located area, and lotting the former, should be directed and the railway company's list should be amended and sustained against the charge to the extent of such nonmineral lot or lots. Recent departmental decisions have sustained and established this practice.

The decision of the Commissioner is accordingly modified so as to sustain the charge as to SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, said Sec. 13, and as to so much of E. $\frac{1}{2}$ NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and of W. $\frac{1}{2}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, said Sec. 13, as lies within the limits of lode locations of claims embracing parts of said tracts respectively; and so as to provide for an official segregation survey separating the remaining parts of said NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and of said NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, severally, from the parts thereof embraced within the limits of such located lode claims, and designating such remaining parts as fractional lots, and so as to allow said railway company thereupon to amend its said list by substituting such fractional lots therein in place of said NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and said NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and dismissing said charge as against such substituted tracts and clearlisting the same.

ALFRED O. LENDE.

Decided September 27, 1922.

SETTLEMENT—PREFERENCE RIGHT—HOMESTEAD—ENTRY—ACT OF MAY 14, 1880.

The preference right of entry accorded to a settler upon public land was not conferred by the act of May 14, 1880, but that act merely placed a limitation as to the time within which a homestead settler must apply to enter the land in order to protect his right against a later settler.

SETTLEMENT—ENLARGED HOMESTEAD—RELATION.

The character of the land governs the area that may be embraced in a settlement claim and, if the land be subsequently designated under the enlarged homestead act, all rights thereunder relate back to the date of the settlement.

SETTLEMENT—SCHOOL LAND—ENLARGED HOMESTEAD—SURVEY—APPLICATION.

Section 2275, Revised Statutes, as amended by the act of February 28, 1891, excepts from the grant to a State lands in a specified school section embraced within a valid settlement claim made prior to the survey of the lands in the field; and a settler upon such unsurveyed land subsequently designated under the enlarged homestead act is, upon the filing of the plat of survey, entitled to enter as much as 320 acres, notwithstanding that the designation was not made until after the application to enter had been filed.

DEPARTMENTAL DECISIONS CITED, DISTINGUISHED, AND APPLIED.

Case of Fannie Lipscomb (44 L. D., 414), cited and distinguished; cases of Northern Pacific Railway Company v. Morton (43 L. D., 60), Moore v. Northern Pacific Railway Company *et al.* (43 L. D., 173), and Ganus v. State of Alabama (46 L. D., 263), cited and applied.

FINNEY, *First Assistant Secretary:*

The survey of that portion of T. 3 S., R. 61 E., M. M., Montana, which embraces section 16, was commenced October 3, 1914, and was completed fourteen days later. The plat of survey was filed in the Miles City land office on September 12, 1919, on which date Alfred O.

Lende applied to make entry under the enlarged homestead act for the S. $\frac{1}{2}$, said Sec. 16, filing therewith a petition for the designation of the land. Settlement in May, 1914, followed by actual residence since June, 1914, was also shown. The tract was designated under the enlarged homestead act on August 6, 1920, effective September 10, 1920. Lende's application was allowed December 28, 1921.

On October 18, 1921, the State of Montana filed an indemnity school land selection list (Helena 022943) in which the S. $\frac{1}{2}$, said Sec. 16, was assigned as base.

By decision dated March 18, 1922, the Commissioner of the General Land Office held that Lende's settlement prior to designation of the land could not embrace more than 160 acres, and the entryman was required to elect which contiguous legal subdivisions aggregating 160 acres, including those on which his improvements are located, he desired to retain, and relinquish the remainder, or suffer the cancellation of his entry. Entryman has appealed.

The Commissioner appears to have proceeded on the theory that the right to initiate a claim by settlement on public lands originated in the act of May 14, 1880 (21 Stat., 140), and now exists only under that act as amended by the act of August 9, 1912 (37 Stat., 267), but that theory can not be sustained.

The act of 1880 did no more than place a limitation on the time within which a homestead settler must apply to enter the land in order to protect his right against a later settler—a limitation of the preference right of the first settler which originated in section 5 of the act of March 3, 1843 (5 Stat., 619). The act of 1912 merely extended the provisions of the act of 1880 to settlers upon lands which had been designated under the enlarged homestead act, by providing that such settlers who had plainly marked the exterior boundaries of the lands claimed could defeat later settlers by asserting their claims within three months after it became possible to make their claims of record.

In *Moore v. Northern Pacific Railway Company et al.* (43 L. D., 173, 175), it was said:

While a settler may lose his preference, over other settlers, by failing to comply with the requirements of the act of May 14, 1880, *supra*, his right to the land, acquired by settlement thereon, was not created by that act but has been recognized by this Department and the courts from the beginning of the Government. Our whole public-land system is based upon the fundamental consideration that the settler is to be preferred over claimants who seek to assert scrip or other rights to the public domain. Lands settled upon and claimed under the homestead law do not fall within the designation of public lands open to sale or other disposition under general laws other than those relating to settlement. This Department is not robbed of its jurisdiction and duty to give equitable consideration to asserted settlement claims by the tender of a scrip application for the land by one having no claim to equitable consideration.

Again, it was held, with numerous citation of authorities, in *Ganus v. State of Alabama* (46 L. D., 263), that (syllabus)—

The provision in section 3 of the act of May 14, 1880 (21 Stat., 140), limiting the time within which a settler must assert his claim to three months from the date of settlement when on surveyed land, was intended solely for the protection of the rights of settlers *as among themselves*, and is without application to conflicting claims of a settler and a State under its school grant.

The only statute bearing upon the question of the respective rights of the State and Lende is found in section 2275, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), excepting lands in sections 16 and 36 from the grant to the State if covered by settlements "made before the survey of the lands in the field." This provision was intended only for the benefit of an actual, good faith settler, duly qualified, upon lands of the character contemplated by the law under which he claims. The question of the validity of the claim, whether as against the Government, the State, or other settlers, can only be determined after it has been placed of record, and when the Department has determined that the claimant has proceeded in good faith, that he is qualified, and that the land is of proper character, that determination relates back, not to the date of his application to enter, but, under a familiar rule, to the date of settlement.

In the case of *Fannie Lipscomb* (44 L. D. 414), cited in the decision appealed from, the claimant had attempted to extend her settlement onto lands in section 16 after the survey of the land in the field, while Lende's settlement was made before the survey and is protected by section 2275, Revised Statutes.

The contention that Lende's settlement could have extended to only one quarter section is in conflict with the decision in *Northern Pacific Railway Company v. Morton* (43 L. D., 60), where it was specifically held that a settlement entitles the settler to make entry of the land embraced in his settlement claim to the full area of 320 acres permitted by the enlarged homestead act, for the reason that the right of settlement is coextensive with the right of entry.

So well recognized is the rule that the right of settlement is coextensive with the right of entry that Congress deemed it necessary to provide in the stock-raising homestead act of December 29, 1916 (39 Stat., 862), that no right under that law could be acquired prior to designation by settlement upon a tract sought as a stock-raising homestead.

The fact that the designation of the land was made after the plat of survey was filed is immaterial. The actual character of the land governs, and the designation thereof was, in effect, a determination that a settlement right thereon, initiated prior to the survey of the

lands in the field, thereafter maintained, and timely asserted, could embrace as much as 320 acres.

The State is not opposing Lende's contention that his entry should be sustained, but conceded the legality of his settlement prior to the allowance of the entry by selecting other lands in lieu of the entire tract.

For the reasons stated the decision appealed from is reversed.

INSTRUCTIONS RELATING TO QUALIFICATIONS OF APPLICANTS TO MAKE ENTRIES UNDER THE STOCK-RAISING AND OTHER HOMESTEAD LAWS.

September 28, 1922.

STOCK-RAISING HOMESTEAD—ADDITIONAL—ENLARGED HOMESTEAD—KINKAID ACT—STATUTES.

One asserting the right to make an original entry under section 1 of the stock-raising homestead act because qualified to make an additional entry under section 2 of the Kinkaid Act by reason of having made an entry in the so-called Kinkaid territory prior to May 29, 1908, which he still owns and occupies, or because qualified to make an additional entry under sections 7 of the enlarged homestead acts or under section 6 of the act of March 2, 1889, must show that he is not the proprietor of more than 160 acres of land in the United States, acquired under other than the homestead laws.

ADDITIONAL HOMESTEAD—SECOND HOMESTEAD—STATUTES.

The right to make an additional homestead entry under section 2 of the act of June 5, 1900, or under the act of February 20, 1917, or to make a second homestead entry under section 2 of the act of May 22, 1902, is subject to the qualification that the applicant must show that he is not the proprietor of more than 160 acres of land in the United States, acquired under other than the homestead laws.

DEPARTMENTAL DECISION INTERPRETED.

Rule enunciated in case of Charles Makela (46 L. D. 509) interpreted.

FINNEY, *First Assistant Secretary*:

The Department has considered your [Commissioner of the General Land Office] letter of September 18, 1922, in which you state that in adjudicating cases under the rule announced in the case of Charles Makela (46 L. D., 509)—

This office has required applicants to show the other qualifications of a homesteader, including a showing as to the ownership of more than 160 acres of land in any State or Territory, the opinion being entertained that if the party still owned the land embraced in his former perfected entry, or any part thereof, the land so owned would be counted in determining his qualifications under the restriction as to ownership in excess of 160 acres.

The rule referred to is stated in the syllabus, as follows:

One qualified to make entry under other homestead laws for approximately 40 acres is qualified to make an original entry under the provisions of section

of the stock-raising homestead act of December 29, 1916, for such an area of land designated thereunder as when added to the area of the prior perfected entry or entries will not exceed 640 acres, even though the latter area be not designated.

The right to make an original entry under the foregoing rule must not be confused with the qualifications which must be possessed by one who has never exercised his homestead right or whose right has been restored by the act of September 5, 1914 (38 Stat., 712). Such persons are governed by the provisions of section 2289, Revised Statutes—

No person who is the proprietor of more than 160 acres of land in any State or Territory shall acquire any right under the homestead law.

The "other homestead laws" under which one can be qualified to make an original entry pursuant to the ruling in the Makela case are section 6 of the act of March 2, 1889 (25 Stat., 854), section 2 of the so-called Kinkaid Act of April 28, 1904 (33 Stat., 547), as amended by the act of May 29, 1908 (35 Stat., 465), and section 7 of the enlarged homestead acts.

One claiming the benefits of section 2 of the Kinkaid Act need show only that he owns and occupies the land embraced in his prior entry, and one who applies to make an entry under sections 7 of the enlarged homestead acts is not required by the provisions thereof to show other than that he has made the prior entry referred to therein, but one who seeks to make an entry under section 6 of the act of March 2, 1889, must show that he is not the proprietor of more than 160 acres of land in the United States (*Graham v. Hartman*, 36 L. D., 96). However, the Department has never considered that it would be justified, in testing an applicant's qualifications under the latter act, to add to the area of former homestead entries still owned by him the area of any lands he may have acquired under other than the homestead law. Otherwise, it would be necessary to hold that Congress intended the benefits of said act to extend only to those who no longer owned the land embraced in their prior entries, and the act does not so state. In this connection, see *Grove v. Bone-wits* (35 L. D., 167).

The Department is therefore of opinion that the practice you have followed, as set forth in your letter, is erroneous. The correct rule may be stated as follows:

One seeking the benefits of the rule announced in the case of Charles Makela, *supra*, because qualified to make an additional entry under section 2 of the Kinkaid Act by reason of having made an entry in the so-called Kinkaid territory prior to May 29, 1908, which he still owns and occupies, or because qualified to make an additional entry under section 7 of the enlarged homestead acts or under section 6 of the act of March 2, 1889, must show that he is

not the proprietor of more than 160 acres of land in the United States *acquired under other than the homestead laws.*

The foregoing rule should be applied to those seeking the benefits of section 2 of the act of June 5, 1900 (31 Stat., 267), section 2 of the act of May 22, 1902 (32 Stat., 203), or the act of February 20, 1917 (39 Stat., 925).

ARTHUR W. BENHART.

Decided September 29, 1922.

STOCK-RAISING HOMESTEAD—OIL AND GAS LANDS—APPLICATION—ENTRY.

The status of land at the time its designation under the stock-raising homestead act becomes effective is the test of the right of an applicant to make entry thereof under that act and, if, prior to that time, the land is found to be within the known geologic structure of a producing oil field, it is not subject to any form of entry.

FINNEY, First Assistant Secretary:

At the Sundance, Wyoming, land office on May 19, 1919, Arthur W. Benhart applied to make entry under the stock-raising homestead act for E. $\frac{1}{2}$, Sec. 32, T. 46 N., R. 63 W., 6th P. M., as additional to his entry under the enlarged homestead act, made that day, for W. $\frac{1}{2}$, Sec. 33, said township. The land was designated on Benhart's petition August 25, 1920, effective September 17, 1920.

On August 25, 1920, the Director of the Geological Survey defined the limits of the geologic structure of the Osage Oil Field, and the N. $\frac{1}{2}$, said Sec. 32, is within the limits thereof.

By decision dated June 18, 1921, the Commissioner of the General Land Office rejected Benhart's application as to NE. $\frac{1}{4}$ because within the limits of the structure of the Osage Oil Field, and the applicant has appealed, contending that his application should have been allowed when the designation became effective because filed before the passage of the oil leasing bill and before the defining of the limits of the geologic structure of said oil field.

It now appears that on July 29, 1921, a permit to prospect for oil and gas upon the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, said Sec. 32, was granted to C. Elliott *et al.* under section 19 of the act of February 25, 1920 (41 Stat., 437).

The status of the land at the date of the filing of an application under the stock-raising homestead act for an undesignated tract is not the test of the right of the applicant to make entry thereof. If, upon the designation's becoming effective, the land is otherwise subject to entry, his application will be allowed, whereupon, for the first time, he is entitled to enter upon and take possession of the tract.

Prior to the date when the designation of the land applied for by Benhart became effective, the NE. $\frac{1}{4}$ was found to be within the known geologic structure of a producing oil field, and the act of February 25, 1920, *supra*, and the regulations thereunder, rendered it subject to disposition only as provided therein. In other words, lands can be "appropriated" under a stock-raising homestead application only when an entry thereunder may be lawfully allowed, and this may not be done in the face of a statute and appropriate regulations providing otherwise.

The decision appealed from must be and is hereby affirmed.

LARSON v. PARRISH AND WOODRING.

Decided October 6, 1922.

HOMESTEAD ENTRY—APPLICATION—ENTRY—PAYMENT—RELATION—MARRIAGE.

A homestead application, accompanied by the required payment, filed by a single woman, for lands subject to entry, which has been suspended to await the determination of her qualifications, is, to all intents and purposes, an entry upon ascertainment that at the time of filing the application she was qualified under the law, and her marriage subsequently to such filing does not affect any of her rights under the application.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Hamilton v. Harris et al.*, on review (18 L. D., 45), *Rippy v. Snowden* (47 L. D., 321), and *Harris v. Miller* (47 L. D., 406), cited and applied.

FINNEY, *First Assistant Secretary*:

Sarah Larson has appealed from a decision of the Commissioner of the General Land Office dated May 17, 1921, holding that the application of Luella C. Parrish to make homestead entry for SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, T. 4 N., R. 12 E., W. M., Vancouver, Washington, land district, was properly allowed on August 31, 1920; that the application of appellant was properly rejected; and that the homestead entry of Emory G. Woodring, made when the entry of Parrish was canceled on relinquishment would remain intact.

By decision of June 4, 1920 (47 L. D., 401), the Department held that the application of Luella C. Parrish, filed on May 19, 1917, should be allowed if she showed herself qualified, and that her right to enter the land was not affected by the subsequent application of Mrs. Larson.

The appeal contends, among other things, that Luella C. Parrish was disqualified to make entry for the tract because of her marriage to one Wonder in June, 1919.

The history of appellant's application is set forth in the decision of June 4, 1920, *supra*. It having been determined that the land was

subject to entry when the application of Luella C. Parrish was filed, and she having made the required payment and shown that she was qualified at that date, her subsequent marriage did not affect her rights under the application.

In *Hamilton v. Harris et al.*, on review (18 L. D., 45), it was held (syllabus):

An application to make homestead entry, by a single woman duly qualified under the homestead law, and erroneously rejected, may be thereafter allowed on appeal as of the date of the application, notwithstanding the fact of the applicant's subsequent marriage.

It is true that the decision of June 4, 1920, stated: "The question whether Luella C. Parrish is so qualified is one for the further consideration of the Commissioner of the General Land Office," but her application disclosed that she was qualified to make the entry applied for, and her testimony at the hearing on January 23, 1919, disclosed that she had made an examination of the land in May, 1917, before purchasing the improvements thereon.

There was, therefore, no further showing that could have been required of the applicant, and her suspended application was, to all intents and purposes, an entry (*Rippy v. Snowden*, 47 L. D., 321). See also *Harris v. Miller*, 47 L. D., 406.

The decision appealed from is affirmed.

OSCAR R. LINGO.

Decided October 6, 1922.

STOCK-RAISING HOMESTEAD—OIL AND GAS LANDS—LEASE—SURFACE RIGHTS.

The departmental instructions of October 6, 1920, directing the rejection of all applications to enter, file upon, or select under nonmineral land laws, lands which have been or shall be designated as within the known geologic structure of a producing oil or gas field, extend to lands not so designated, but which are embraced within a lease granted under the act of February 25, 1920, until it shall be determined what portion of the surface will be needed in carrying out the terms of the lease.

FINNEY, First Assistant Secretary:

At the Los Angeles, California, land office on January 28, 1918, Oscar R. Lingo applied to make entry under the stock-raising homestead act for S. $\frac{1}{2}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 27, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 28, T. 11 N., R. 23 W., S. B. M., as additional to his homestead entry and additional entry under the enlarged homestead act embracing N. $\frac{1}{2}$, Sec. 22, said township.

Because the land applied for is embraced in a lease granted to the Western Minerals Company on February 18, 1921, under section

18a of the act of February 25, 1920 (41 Stat., 437), the Commissioner of the General Land Office has submitted the application to the Department.

It appears that all of said Secs. 27 and 28 were withdrawn and included in Petroleum Reserve No. 2 by Executive order of July 2, 1910, and that said sections were designated under the stock-raising homestead act on May 15, 1920, effective June 14, 1920.

When Lingo's application was filed, there were pending before the Department on appeal nine applications for mineral patent by the Western Minerals Company, covering an aggregate area of 2180 acres situated in said township. One of the nine applications was the Confidence No. 25 placer oil mining claim, embracing, with other lands, the tract applied for by Lingo.

The Western Minerals Company having offered under section 18a of the leasing act to release and relinquish all claims under its patent applications in consideration of a lease at the rate of royalty provided for other leases granted under section 14 of the leasing act, the President on February 18, 1921, authorized the Department to accept the proposed compromise. A lease for all the land claimed by said company, excepting 320 acres not here involved, was accordingly granted.

The instructions of October 6, 1920 (47 L. D., 474) direct local officers to reject all applications to enter, file upon, or select under the nonmineral land laws, lands which have been or shall be designated by the Department as being within the known geologic structures of producing oil or gas fields—

pending consideration by the Department of the agricultural character and value of such lands and a determination as to whether the surface of the land is of agricultural character and value and may be disposed of without detriment to the public interest.

The land applied for by Lingo has not been designated by the Department as within the geologic structure of a producing oil or gas field, but a lease, based on a claim initiated many years prior to the date of Lingo's application, has been granted, which requires the lessee—

To maintain in a state of production wells equal in number to the number of the now existing producing wells on the leased land until the oil deposits are exhausted or until the proven territory has been drilled, and in case such existing wells are less than the number of 40-acre tracts or lots embraced in the lease, to proceed with reasonable diligence within three months of delivery hereof to install on the leased land a standard or other efficient drilling outfit and equipment and to commence drilling at least one well and to continue such drilling with reasonable diligence to production or to a point where the well is demonstrated unsuccessful, and thereafter to continue drilling with reasonable diligence at least one well at a time until the lessee shall have drilled producing wells which, with any producing wells now on the land,

equal in number the number of 40-acre tracts or lots embraced in the leased premises, unless the lessor shall for any reason deemed sufficient consent in writing to the drilling of a less number of wells.

Said lease reserved to the United States the right to lease, sell, or otherwise dispose of the surface of the land—

in so far as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein.

At the present stage of the activities of the oil lessee it can not be determined what portion of the surface will be needed by it in carrying out the terms of the lease, and the lessee can not be expected to make an estimate of its needs. The Department is, therefore, of the opinion that the instructions of October 6, 1920, *supra*, relative to entry or selection of lands within the known geologic structure of producing oil or gas fields, should be extended to lands which are embraced in leases under the leasing act.

The application of Lingo is accordingly rejected.

STATE OF NEW MEXICO.

Decided October 10, 1922.

SCHOOL LAND—INDEMNITY—RESERVATION—SURVEY—SECRETARY OF THE INTERIOR.

Section 2275, Revised Statutes, as amended, which imposes upon the Secretary of the Interior, in the adjustment of the school land grants of the several States, the duty 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, has reference only to lands in place, and no authority is conferred thereby to determine by protractions alleged losses of school lands within such reservations occasioned by reason of natural deficiency or loss.

DEPARTMENTAL DECISION CITED.

Case of State of Colorado (48 L. D., 138); cited.

FINNEY, *First Assistant Secretary*:

The State of New Mexico has appealed from the decision of the General Land Office of May 25, 1922, which held for cancellation, in part, because of invalid base, its indemnity school land list 012722, embracing lots 1, 2 and NE. $\frac{1}{4}$, Sec. 18, T. 25 S., R. 10 W., Las Cruces land district, based upon part of the N. $\frac{1}{2}$, Sec. 2, T. 24 N., R. 16 W. (198.99 acres), and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, said Sec. 2, the designated cause of loss being its inclusion within the Navajo Indian Reservation.

It appears from the record that it has been determined by protraction that upon the survey of T. 24 N., R. 16 W., N. M. P. M.,

the entire north half of Sec. 2 thereof (a school section in New Mexico) would be wanting.

In the school land indemnity selection list tendered by the State, 198.99 acres in the north half of said Sec. 2 was included as base for indemnity land, and to this extent the selection list was rejected as invalid, and the State called upon to substitute other and valid base in lieu thereof, the General Land Office holding that the State's right of lieu selection was limited to the acreage of the school lands in place, whether ascertained by protraction or otherwise.

In its appeal to the Department, it is claimed by the State that, under sections 2275 and 2276 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), credit as base should be given for the north half of the section, and in support of this claim, the following language from section 2275 of the Revised Statutes, as amended, is cited as authority:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be 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 reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations.

It is also contended, in the brief filed on appeal, that the Department's decision in the case of State of Colorado (48 L. D., 138) supports the claim made in the present case, and in this connection the following statement is made:

The case of State of Colorado (48 L. D., 138), cited by the Commissioner in support of his ruling, is clearly authority for the position taken by the State herein. In that case the State attempted to make an indemnity selection on account of loss due to fractional condition of an unsurveyed township, *but such unsurveyed township was not within a reservation*. The Secretary holds that no authority for adjustment by protraction is conferred upon the Department in such a case. 'The authority for protractions contained in Section 2275, Revised Statutes, is limited to lands of the classes therein specified'; plainly in the case under consideration the lands are of the class specified in said Section 2275.

In the opinion of the Department, the action of the General Land Office, in declining to give credit as base for any part of the north half of section 2 above mentioned, is supported by the law and the facts. As stated in the case of State of Colorado, *supra*:

The authority for protractions contained in Section 2275, Revised Statutes, is limited to lands of the classes therein specified and in these instances protract-

tions 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.

Section 2275 of the Revised Statutes permits, as to lands within reservations, a departure from the usual method of ascertaining what lands fall within the place limits of school sections, namely, ascertainment "by protraction or otherwise," instead of the usual surveys in the field. In the selection of indemnity lands the section provides, merely, that "the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of sections sixteen and thirty-six therein." In the opinion of the Department, the language quoted supplies no warrant for a departure from the method or measure of selecting indemnity lands obtaining in the Land Department, namely, selection of "lands of equal acreage" to those lost in place. Such standard was observed by the General Land Office in this case.

The circumstances that in the case of the State of Colorado, *supra*, the lands involved were in a township not within the limits of a reservation, while in the instant case the land is within such limits, is without significance in determining the question here involved. It might have controlling significance were the validity of survey by protraction, or the acreage disclosed by such method of measurement, challenged.

The decision appealed from is found correct, and is accordingly affirmed.

CITIZENSHIP OF MARRIED WOMEN.

INSTRUCTIONS.

[Circular No. 857.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 11, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Your attention is directed to the act of Congress approved September 22, 1922 (42 Stat., 1021), entitled "An Act Relative to the naturalization and citizenship of married women," a copy of which is appended.

In all cases of applications for entry of public land, or proofs in support of such entries, by married women otherwise duly qualified to make such entry or proof, you will require a showing of such

facts concerning marital status and citizenship as may be rendered necessary by the provisions of said act.

The act makes no change in the existing requirements with respect to a female citizen of the United States who, after initiating a claim to public land, marries an alien, as set forth in paragraph 2, Circular No. 361 (43 L. D., 444), and she must show that her husband is entitled to become a citizen of the United States.

Office Circular No. 44, of August 17, 1911, is revoked.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

(Public—No. 346—42 Stat., 1021.)

(H. R. 12022.)

An Act Relative to the naturalization and citizenship of married women.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.

Sec. 2. That any woman who marries a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(a) No declaration of intention shall be required;

(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition.

Sec. 3. That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: *Provided*, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside of the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under the second paragraph of section 2 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907. Nothing herein shall be construed to repeal or amend

the provisions of Revised Statutes 1909 or of section 2 of the Expatriation Act of 1907 with reference to expatriation.

SEC. 4. That a woman who, before the passage of this Act, has lost her United States citizenship by reason of her marriage, to an alien eligible for citizenship, may be naturalized as provided by section 2 of this Act: *Provided*, That no certificate of arrival shall be required to be filed with her petition if during the continuance of the marital status she shall have resided within the United States. After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this Act.

SEC. 5. That no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status.

SEC. 6. That section 1994 of the Revised Statutes and section 4 of the Expatriation Act of 1907 are repealed. Such repeal shall not terminate citizenship acquired or retained under either of such sections nor restore citizenship lost under section 4 of the Expatriation Act of 1907.

SEC. 7. That section 3 of the Expatriation Act of 1907 is repealed. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section. A woman who has resumed under such section citizenship lost by marriage shall, upon the passage of this Act, have for all purposes the same citizenship status as immediately preceding her marriage.

Approved, September 22, 1922.

BELL v. STRAIN.

Decided October 12, 1922.

HEARING—WITNESSES—LAND DEPARTMENT—PRACTICE—STATUTES.

Section 858, Revised Statutes, which contains among others the provision that in any civil action no witness shall be excluded because he is a party to or interested in the issue tried, is applicable to hearings involving public-land matters to the same extent as to actions before the courts.

PRACTICE—SUBPENA—WITNESSES—HEARING—JURISDICTION—LAND DEPARTMENT.

The office of the subpoena, the provision for the issuance and service of which is made by the act of January 31, 1903, is to secure the attendance of witnesses and compel them to testify at hearings involving public-land matters, but where a party to the proceedings is present at such a hearing, he is under the jurisdiction of the tribunal in charge thereof, and can not properly refuse to testify, if called upon, notwithstanding that he had not been subpoenaed as a witness.

HOMESTEAD ENTRY—MILITARY SERVICE—ACT OF JULY 28, 1917.

Only entries initiated prior to military or naval service during time of war are protected by the act of July 28, 1917.

CONTEST—HOMESTEAD ENTRY—ABANDONMENT—MILITARY SERVICE—HEARING—RECORDS.

In a contest against a homestead entry alleging abandonment, the presumption arises that the abandonment was not due to military service, and the Department will resort to the records of the War Department for the purpose of substantiating such presumption, where the entry was made after the military forces of the United States, mobilized during the war with Germany, had demobilized, the entryman was present at the hearing and refused to testify, and the evidence failed to disclose any military or naval service on his part since the date of the entry.

FINNEY, *First Assistant Secretary:*

On May 4, 1920, Arthur W. Strain made homestead entry 051733, Great Falls land district, Montana, for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 9, T. 23 N., R. 5 W., M. M., containing 160 acres.

On November 6, 1920, William E. Bell, filed contest against said entry alleging—

That said entryman has entirely failed to establish residence on said land within the period of six (6) months after the filing and allowance of his entry therefor; that said entryman has not erected or constructed any improvements on said land whatsoever; that there is no dwelling or shack on said land and that said entryman has never at any time established residence thereon nor resided thereon; that entryman's failure to establish residence on said land and failure to erect improvements thereon was not due to his employment in the Army, Navy, Marine Corps, or other organization connected with the Navy or military services of the United States.

Notice was issued and served on the entryman who filed motion to dismiss on the ground that the contest affidavit was not properly corroborated. He also filed answer denying each and every allegation. The motion to dismiss was denied and the case went to hearing on April 11, 1921, before a notary public at Choteau, Montana, at which both parties appeared with counsel. The register and receiver upon consideration of the case by decision of May 28, 1921, found that the contestant had not proven that the entryman's absence from the land was not due to military or naval service and recommended dismissal of the contest. The contestant filed motion for new trial which was denied. The contestant appealed. The Commissioner of the General Land Office upon consideration of the record by decision of March 11, 1922, held that the motion to dismiss and the motion for new trial were properly denied and that the contestant had not proven his nonmilitary averment and accordingly dismissed the contest. The contestant has appealed.

The contestant's witnesses lived on lands adjacent to those of the entry here involved. They testified that the entryman had not resided on nor improved the land. The contestant then called the entryman as a witness but his attorney refused to permit him to testify because he had not been subpoenaed. The contestant also called a Mr. Prescott who was present but had not been subpoenaed, who refused to testify. The contestant's attorney stated that he expected the entryman and Mr. Prescott to be present so did not ask for subpoenas and that he expected to prove by their testimony that the entryman had not been in military or naval service during the period of alleged absence. He then recalled Mr. E. L. Bell, who stated that he did not know the entryman nor know his whereabouts since date of entry, but that from inquiry he had been unable to learn that the entryman had been in military or naval service since date

of entry. The contestant then rested his case. The entryman's attorney thereupon moved to dismiss the contest because of the contestant's failure to prove that the alleged defaults were not due to military or naval service.

The act of January 31, 1903 (32 Stat., 790), and the regulations thereunder (32 L. D., 132) provide means of securing the attendance of witnesses and of compelling them to testify at hearings in public-land matters. The contestant did not avail himself of these means. However, Strain and Prescott were present at the hearing. The office of a subpoena is to secure attendance and those in attendance are under the jurisdiction of the tribunal and such persons being present and called as witnesses should have taken the stand. The entryman can not properly refuse to testify. Section 858, Revised Statutes, removes such privileges from parties to suits. See *Texas v. Chiles* (21 Wallace—88 U. S.—488). Furthermore, it is not necessary to employ the circuitous process of summons or subpoena to compel a person who is in court to take the stand and testify. See *United States v. Green* (Fed. Cas., 15256; 3 Mason, 482); also *United States v. Coolidge* (Fed. Cas., 14858; 2 Gall., 264).

One witness testified that he had made inquiry and had been unable to learn that the entryman had been in military or naval service since date of entry. It is difficult to obtain definite information in any community as to whether or not a person is or was in military or naval service during a certain period of time. It is largely a matter of rumor. However, the testimony submitted at the hearing in this case casts a doubt upon any military or naval service by the entryman since date of entry. The contestant in his appeal states that the entryman was in military service but that the termination thereof is not known to him whereas it is known to the Government because it is a public record of the War Department. This Department usually verifies showings of military service filed in the Department by referring to War Department records.

The act of July 28, 1917 (40 Stat., 248), provides for the protection of entries initiated prior to military or naval service during war. The fact that the entry was made in 1920, after the military forces had demobilized, coupled with the facts that the entryman was present at the hearing and that inquiry had failed to disclose any military or naval service since date of entry leads to the conclusion that the entryman had not been in such service since date of entry. This conclusion was verified by referring to War Department records. It appears that Arthur W. Strain enlisted at Seattle, Washington, November 26, 1917, and that prior to his honorable discharge of December 17, 1918, he was attached to the 9th Company, Central Officers' Training School, Camp Hancock, Georgia. No military service is shown since date of entry.

The fact that the entryman failed to establish residence on the land within six months of date of entry is established by the testimony of the contestant's witnesses. The entryman did not see fit to offer testimony in defense but chose to rest his case upon a demurrer to the evidence claiming that the contestant had failed to prove that the default was not due to military or naval service.

The contest affidavit alleged that the defaults charged were not due to such service. The entryman denied each and every allegation. The entryman by his contumacy at the hearing refused to give any definite information as to his military service and stood his ground without right. It now appears that his sworn answer to the contest affidavit was false and that he had been discharged from the Army more than sixteen months prior to the date of entry. The entry was not made prior to military service and is not of the class protected by the act of July 28, 1917, *supra*. Nonmilitary averments are required in all contests alleging defaults in the nature of abandonment during war but only those entries initiated prior to military service are protected against contests charging abandonment during such service.

The default has been proven. The entry should be canceled.

The Commissioner's decision is reversed.

ALBERT C. EMERSON, SR.

Decided October 14, 1922.

HOMESTEAD ENTRY—ADDITIONAL—SOLDIERS AND SAILORS—WIDOW; HEIRS; DEVISEE.

The act of July 28, 1917, did not make an exception to the general rule previously enunciated by the Department to the effect that the right to make an additional homestead entry, until exercised, is intangible, and nothing contained in the act authorizes a construction that the widow, heir, or devisee of a deceased soldier entryman acquires a right by reason of the original entry to make an additional entry of a tract of land for which the soldier had not initiated any claim.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Timothy Sullivan, Guardian of Juanita Eisenpeter (46 L. D., 110), cited and applied.

FINNEY, First Assistant Secretary:

At the Boise, Idaho, land office on January 17, 1917, Albert C. Emerson, jr., applied to make a second entry under the act of September 5, 1914 (38 Stat., 712), and the stock-raising homestead act for 480 acres in Secs. 13 and 24, T. 5 N., R. 2 E., B. M. A supple-

mental application was filed April 13, 1917, describing SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 24, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 25, said township, which was allowed April 7, 1921, after the designation of the land had become effective.

According to a report by the Adjutant General, War Department, entryman enlisted June 24, 1918, and was killed in action October 4, 1918.

On June 4, 1921, entryman's father, as heir, applied to make an additional entry under the enlarged homestead act for SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 25, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26, said township. The local officers rejected the application, and, on appeal, their action was affirmed by the Commissioner of the General Land Office by decision dated May 2, 1922. The applicant has appealed to the Department.

The question whether an additional entry could be made by the widow, heir, or devisee of a homestead entryman was discussed at length in the departmental decision of May 8, 1917, in the case of Timothy Sullivan, Guardian of Juanita Eisenpeter (46 L. D., 110), and the conclusion was reached that the right to make an additional homestead entry, until exercised, is intangible, and that none of the additional entry acts mentioned—section 6 of the act of March 2, 1889 (25 Stat., 854), section 2 of the act of April 28, 1904 (33 Stat., 527), and section 3 of the enlarged homestead act—warrants the conclusion that any right to make an additional entry, based upon the original of another, passed to or is conferred by law upon the widow, heir, or devisee.

By circular of August 4, 1917 (46 L. D., 255), the rule announced in the case of Timothy Sullivan, *supra*, was extended to applications under the stock-raising homestead act.

It is contended by appellant that the act of July 28, 1917 (40 Stat., 248), warrants the allowance of the application. The Department is unable to find in said act any provision which can be construed as authorizing an heir of a soldier to make an additional entry for a tract of land for which the soldier made no claim. The debate in the House of Representatives when the bill was pending there, quoted in the brief, does not indicate that the Representatives who took part in the discussion were of opinion that the pending measure failed to express the intention of the committee which recommended its enactment.

The decision appealed from is affirmed.

BOARD OF EQUITABLE ADJUDICATION—ACT OF SEPTEMBER 20, 1922, AMENDING SECTIONS 2450, 2451 AND 2456, AND REPEALING SECTIONS 2453 AND 2454, REVISED STATUTES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 17, 1922.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

By the act approved September 20, 1922 (42 Stat., 857), sections 2453 and 2454, Revised Statutes, were repealed, and sections 2450, 2451, and 2456, Revised Statutes, were amended to read as follows:

SEC. 2450. That the Commissioner of the General Land Office is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be approved by the Secretary of the Interior, consistently with such principles, all cases of suspended entries of public lands and of suspended preemption land claims, and to adjudge in what cases patents shall issue upon the same.

SEC. 2451. That every such adjudication shall be approved by the Secretary of the Interior and shall operate only to divest the United States of the title to the land embraced thereby, without prejudice to the rights of conflicting claimants.

SEC. 2456. That where patents have been already issued on entries which are approved by the Secretary of the Interior, the Commissioner of the General Land Office, upon the canceling of the outstanding patent, is authorized to issue a new patent, on such approval, to the person who made the entry, his heirs or assigns.

The effect of said act is to eliminate the Attorney General from membership on the Board of Equitable Adjudication.

All rules which have heretofore been adopted governing the submission of cases to said Board are hereby revoked, and the jurisdiction of the Board is defined as covering the following:

All classes of entries in connection with which the law has been substantially complied with and legal notice given, but the necessary citizenship status not acquired, sufficient proof not submitted, or full compliance with law not effected within the period authorized by law, or where the final proof testimony, or affidavits of the entryman or claimant were executed before an officer duly authorized to administer oaths but outside the county or land district in which the land is situated, and special cases deemed proper by the Commissioner of the General Land Office for submission to the Board, where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith, there being no lawful adverse claim.

The form in which claims approved by you as being within the scope of the foregoing may be submitted to the Secretary of the Interior for approval will be the subject of a conference with you at an early date.

E. C. FINNEY,
First Assistant Secretary.

LEO O. LA FLAME.

Decided October 20, 1922.

HOMESTEAD ENTRY—OIL AND GAS LANDS—FINAL PROOF—RESERVATION—SURFACE RIGHTS—BURDEN OF PROOF.

Where land within a homestead entry upon which final proof has been submitted, but suspended to await the fulfillment of some further requirement, is discovered to be within the limits of a producing oil field prior to the completion of the proof, the entryman must consent to a reservation of the oil and gas content to the United States as prescribed by the act of July 17, 1914, or assume the burden of showing the non-mineral character of the land.

HOMESTEAD ENTRY—OIL AND GAS LANDS—PROSPECTING PERMIT—RESERVATION—SURFACE RIGHTS—PREFERENCE RIGHT.

A permit for the prospecting of land covered by an agricultural entry made without a reservation of the oil and gas content to the United States, can not be granted while the entry subsists without such reservation, even though the applicant be the entryman himself claiming under a preference right.

HOMESTEAD ENTRY—OIL AND GAS LANDS—PROSPECTING PERMIT—RESERVATION—SURFACE RIGHTS—PREFERENCE RIGHT.

Where a homestead entryman is required to consent to a mineral reservation as a condition precedent to the issuance of a patent, the status of his qualifications with respect to his right to be preferred in the award of a permit to prospect the entered land for oil and gas under section 20 of the act of February 25, 1920, is to be determined as of the date that he files his consent.

FINNEY, *First Assistant Secretary:*

November 8, 1917, Leo O. La Flame made homestead entry 039020 Miles City, Montana, series, under the act of February 19, 1909 (35 Stat., 639), covering the S. $\frac{1}{2}$ S $\frac{1}{2}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, T. 10 N., R. 39 E., M. P. M. On June 16, 1920, he submitted final proof which was suspended for evidence of his citizenship.

On May 6, 1921, Walter B. Dean, jr., filed application 050885 under section 13 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas on the same land. This application was rejected by the General Land Office on October 10, 1921, whereupon the applicant appealed to the Department alleging

that the homestead claimant was not a citizen of the United States and that his petition for citizenship had been rejected.

The Department in a decision dated March 20, 1922, found that in 1917 the homestead claimant had filed his declaration of intention to become a citizen; that in his final proof he had stated that his naturalization papers would be procured in September, 1920; and that his final proof had been held without action awaiting proof of his citizenship. It was also found that the Director of the Geological Survey had reported that the land was on Porcupine Dome, a structure reported to be producing oil on June 27, 1921. On the basis of these facts it was held that since final proof had not then been completed the entryman would be required to consent to a reservation of the oil and gas content of the land to the United States under the act of July 17, 1914, or to apply for a hearing at which he would have the burden of showing the nonmineral character of the land. He was also required to file an affidavit showing the status of the naturalization proceedings and if necessary apply for an extension of time within which to complete his citizenship. Dean's conflicting application for prospecting permit was suspended pending action under these requirements.

On May 15, 1922, La Flame having been called upon by the General Land Office to comply with the foregoing requirements filed a copy of his final certificate of naturalization dated May 11, 1922, and at the same time applied for an unrestricted patent for his homestead entry.

By decision of July 11, 1922, the Commissioner of the General Land Office denied the application for unrestricted patent and required La Flame to consent to the reservation of the oil and gas content of his land or to show cause why such reservation should not be made. The Commissioner also held that inasmuch as La Flame was not a citizen of the United States at the time of Dean's application for permit he was not entitled to a preference right to a prospecting permit.

From this decision La Flame has appealed urging that an unrestricted patent for his homestead entry be issued or in lieu thereof that he be granted a preference right to a prospecting permit.

Entryman had not completed his final proof when the land was classified as valuable for oil and he is not, therefore, entitled to an unrestricted patent. However, he will be entitled, upon filing his consent to the reservation of the oil and gas to the Government, to a preference right to a prospecting permit under section 20 of the leasing act. It is settled law that land covered by an agricultural entry without a reservation of the oil and gas to the Government can not be included in a prospecting permit, even to the entryman

himself, so long as the entry subsists without such reservation. Since the entryman's consent to a mineral reservation must be given before he can exercise his preference right to a permit his qualifications must be determined as of the date that he files such consent (*Allee v. La. Flame*, unreported, decided March 31, 1922). This entryman has not yet filed his consent to a mineral reservation nor attempted to exercise his preference right but as he is now a citizen there appears to be no reason why the preference right should not be granted him.

La. Flame will, therefore, be required to take either of the following proceedings: (1) To file his consent to a reservation to the Government of the oil and gas content of the land and to exercise his preference right to a prospecting permit; or (2) to apply for a hearing at which he will have the burden of showing the nonmineral character of the land. In the event of his failure to take either course his entry will be subject to cancellation.

The decision of the Commissioner is modified accordingly and the case remanded for further proceedings hereunder.

HOURS FOR TRANSACTION OF OFFICIAL BUSINESS BY UNITED STATES LAND OFFICES.

Instructions, October 25, 1922.

OFFICERS—REGISTER AND RECEIVER—LAND DEPARTMENT.

The hours for the transaction of official business by United States land offices are from 9.00 a. m. to 4.30 p. m., and all such business should be transacted at the proper local land office and during office hours only.

FINNEY, *First Assistant Secretary:*

Your [General Land] office, in letter 1060916 "A" GRW, has requested instructions in regard to the following inquiry submitted by the receiver of the Las Cruces land office:

In order that this office may follow the proper procedure, will you please advise whether an adverse (claim) against a mineral entry could be accepted after the closing hour of 4.30 o'clock, but before 12 o'clock midnight of the sixtieth day of the publication period?

The local land offices are required to be kept open for the transaction of business from 9.00 a. m. to 4.30 p. m. The general circular of January 25, 1904,¹ on page 109, contained the following:

Applications to make entry can not be received by the register or receiver out of office hours, nor elsewhere than at their office, nor can affidavits or proofs be taken by either of them except in the regular and public discharge of their ordinary duties.

¹ A compilation of circulars and laws relating to the public lands, published in book form.

On September 4, 1884, Commissioner McFarland, in instructions (3 L. D., 108), addressed to Inspector Hobbs, said:

The duties of local officers are to be discharged in their respective offices, and during the hours devoted to public business.

* * * * *

Registers and receivers have no authority to administer oaths and affirmations generally, nor are they authorized to do public business privately or in chambers. Their place of business is the land office, and their business with the public must be conducted openly, publicly, and regularly, and not privately or in secret or otherwise irregularly.

The practice referred to by you may sometimes be a matter of accommodation, but it is liable to result in abuses and the securing of preference rights of entry by favored persons over those who present themselves at the land office in the proper manner and at the proper time.

In the case of *Giroux v. Scheurman* (23 L. D., 546), decided on December 23, 1896, the Department held as follows (syllabus):

The local officers are not required to transact business out of office hours, and may therefore properly refuse to accept and file an adverse claim tendered out of office hours on the sixtieth day of publication; but if such claim, so tendered, is accepted and filed it must be regarded as filed in time.

In *Lindley on Mines*, Third Edition, page 1801, is found the following:

By analogy, adverse claims should be delivered to the local officers at their office, and during office hours, although the department has heretofore held that a delivery to either of the land officers outside of business hours and on a Sunday, and at a place other than the land office itself, was sufficient when the officers received it and it was acted upon.

Such officers are not expected to transact business out of office hours, nor on Sundays, and a tender to them of an adverse claim and their refusal to accept under such circumstances would not be considered equivalent to a filing.

From the foregoing it is apparent that all local land office business should be transacted at the land office and during office hours only. If applications or adverse claims, or other papers, are received or accepted by the local officers outside of the office or after office hours, an opportunity is presented for the exercise of favoritism and partiality which might lead to much mischief and afford grounds for questioning the integrity of the service.

You [Commissioner of the General Land Office] are directed, therefore, to advise the receiver at Las Cruces, New Mexico, that an adverse claim against a mineral application, presented for filing after 4.30 p. m., even upon the sixtieth day of the publication period, should not be received or accepted.

**IRRIGATION OF ARID LANDS IN NEVADA—ACTS OF OCTOBER 22,
1919, AND SEPTEMBER 22, 1922.****REGULATIONS.**[Circular No. 666.]¹*Washington, D. C., October 25, 1922.*

GENERAL LAND OFFICE,

*Washington, D. C., October 25, 1922.***REGISTERS AND RECEIVERS,****UNITED STATES LAND OFFICES IN NEVADA:**

The following instructions are issued under the provisions of the act of Congress approved October 22, 1919 (41 Stat., 293), entitled "An act to encourage the reclamation of certain arid lands in the State of Nevada, and for other purposes," as amended by the act of September 22, 1922 (42 Stat., 1012).

BENEFICIARIES UNDER THE ACT.

1. The act, as the title indicates, is limited in its operation to lands in the State of Nevada and is designed to encourage the development and utilization of subterranean waters for irrigation purposes. It confers upon the Secretary of the Interior authority to grant permits to citizens of the United States, or associations of such citizens, giving the exclusive right to explore not to exceed 2,560 acres of land selected by them.

The only qualifications provided in the act for persons receiving the benefits thereof are that the applicant, or each member of an association of applicants, shall be a citizen of the United States; that he shall not be a beneficiary under any other application or permit under this act for land situated within an area of 40 miles square, and that he has not been a permittee under any other permit under this act, which has been canceled for failure to comply with its terms.

Married women, if their interest is actual and bona fide, have the same privileges as unmarried persons. A corporation is not considered as an association of persons, within the meaning and purpose of the act.

A permit under the act is not assignable, but the interest of a deceased permittee will pass to his legal representative.

The 40-mile square limitation is construed to mean an area of that extent in which the lands covered by a permit theretofore granted are in the approximate center; to avoid possible violation of this provision of the act, applicants for more than one permit are ad-

¹ Revision of the regulations approved January 12, 1920, Circular No. 666 (47 L. D., 310).

vised not to include in their applications for additional permits any lands within less than 20 miles of *any boundary* of the lands included in any other application or permit in which the applicant is interested.

LANDS SUBJECT TO THE ACT.

2. Lands to be designated and made subject to disposition under this act are those public lands which are unreserved, unappropriated, nonmineral, nontimbered, and not known to be susceptible of successful irrigation from any known source of water supply at a reasonable cost. Lists will be furnished the registers and receivers of the different local land offices from time to time and they will be advised of the dates when the designations become effective.

APPLICATION.

3. Any qualified applicant desiring to explore for water under the terms of this act should file with the register and receiver of the land office of the district in which the land is situated, an application for permit, together with a corroborated affidavit as to the character of the land, and pay the filing fee of 1 cent an acre for each acre of land involved.

No blank forms will be furnished, but the application and affidavit may be combined substantially as in Form A, printed at the end of these regulations. Same should be filed in duplicate and cover the following points:

(a) *Name* and *post office* address of the applicant or each member of an association of applicants.

(b) *Citizenship*.—If the applicant or each member of the association of applicants is a native-born citizen of the United States, the application and affidavit must so state. If a naturalized citizen, the application should state the fact, and be accompanied by a certified copy (special form for land cases) of certificate of naturalization. It should be noted that, unlike most public-land laws, no rights may be initiated under this act by an alien who has only filed a declaration of intention to become a citizen.

(c) *Special requirements*.—In accordance with the specific requirements found in sections 1, 2, and 3 of the act, the application should include an averment that neither the applicant nor any member of an association of applicants has filed an application under this act for lands within an area of 40 miles square embracing the lands in the present application; that no permit heretofore granted to him, or to any association of which he was a member, has ever been canceled for noncompliance with the terms and conditions of such permit; that the application is honestly and in good faith made for the purpose of reclamation and cultivation, and not for the benefit of any other

person or corporation, and that he is not acting as agent for any person, corporation, or syndicate, to give them the benefit of the land applied for, or any part thereof, and that he will faithfully and honestly endeavor to comply with all the requirements of the act.

(d) *Description of land applied for.*—If the land is *surveyed*, it should be described by legal subdivisions. If the land is *unsurveyed*, it should be described with reference to locality, natural objects, and permanent monuments as fully and carefully as possible, with such detail and precision that the boundaries and location of the land may be readily traced and ascertained; if the land is situated within a reasonable distance from a known corner of the public land survey, the course and distance should be given from such Government corner to a described point on the boundary of the land applied for; also, where practicable, the land should be described, as nearly as can be ascertained, in accordance with the legal subdivisions of the regular extension of the Government survey over the land. In this connection, all applicants for unsurveyed lands are urged to make a complete metes and bounds survey of the land applied for, with an accurate tie-line by course and distance to a Government corner, otherwise, with the large areas that may be embraced in applications under this act, it will be impossible to prevent conflicts and consequent controversy and litigation. If impracticable to make such a survey prior to filing the application, it may be made later, and the descriptions in the application and permit, if granted, may be amended accordingly. All corners of unsurveyed land selected should be marked with substantial post or rock monuments.

All land applied for must be contiguous and situated in reasonably compact form; in the absence of special or unusual conditions, an application for land extending more than 4 miles in any one direction will not be considered acceptable.

A map should accompany each application, showing by legal subdivisions the land selected, if surveyed; if the land is unsurveyed, then it should be shown by legal subdivisions as nearly as possible in accordance with the regular extension of the Government survey.

(e) *Character of the land.*—This showing should not only allege that the land applied for is “unreserved, unappropriated, nonmineral, nontimbered public land 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,” but should also include such a complete statement of pertinent specific facts as will afford an adequate basis for classification and designation, such as (1) the lay of the land, slope; (2) whether timber, sagebrush, or grassland; (3) kind of soil; (4) altitude; (5) length of growing

season; (6) rainfall and distribution thereof through the year; (7) location with respect to any surface water supply for irrigation; (8) what is known as to underground water supply on the land or in the vicinity; (9) whether land will mature crops by dry-farming methods; together with any additional facts having a direct or indirect bearing on the question of whether the land may properly be designated, the chances of successful development, and the good faith of the applicant.

(f) *Corroboration.*—If, at the time of filing application, the land has *not* been designated as subject to the act, all that portion of the combined application and affidavit (Form A) relative to the character of the land *must be corroborated by two disinterested witnesses*, having personal knowledge of the facts, substantially in the manner shown in Form B; or by a separate and independent affidavit containing an affirmative statement of the facts; but, if the land is already designated at time of filing application, no corroborating witnesses are required.

(g) *Verification.*—The application and corroborating affidavits, if required, may be subscribed and sworn to before any officer authorized to administer oaths and having an official seal.

ACTION ON APPLICATION.

4. Upon receipt of the papers, the register and receiver will carefully examine the same and if found regular transmit them to the General Land Office for appropriate action. In case the land has not been designated, the application will be suspended by the General Land Office until such time as it shall have been designated, or until it shall have been determined that it is not of the character contemplated by the act. If the land shall subsequently be designated under the act, the application will then be approved and a permit issued, if no good and sufficient reason for disapproval be then apparent; otherwise it will be rejected, subject to the right of appeal. During the term of suspension the land will not be subject to disposal in any way.

CONDITIONS OF PERMITS.

5. Permits will be granted only upon condition that active operations be begun for the development of underground water within six months from date of approval and continued diligently in good faith until water has been developed in quantity sufficient for the practicable irrigation of not less than 20 acres, or until the date of expiration of the permit; and if the permittee shall not continue such operations in good faith and with reasonable diligence, or if he shall violate any of the terms of the permit, upon presentation of satis-

factory proof thereof, the permit will be forthwith canceled and he will not again be granted a permit under the act. (See, however, par. 9.)

PROGRESS REPORTS.

6. At or near the end of the six months' period, beginning with the date of the permit, and again at the end of the first year of the life of the permit, if final proof of water development and reclamation has not been submitted, the permittee, or at least one member of an association of permittees, must file in the proper local land office a properly executed affidavit, corroborated by at least two disinterested witnesses, having knowledge of the facts, showing when the work of exploration was begun, in what manner and to what extent it has been prosecuted, and what results have been obtained. This affidavit may be made before any officer authorized to administer an oath. (See, however, par. 9.)

CONDITIONS FOR PATENT.

7. (a) Unless granted an extension of time (see par. 9) the permittee is allowed two years from the date of his permit in which to complete the work of exploration, and whenever he shall within that time satisfactorily establish that sufficient water has been discovered, developed, and made permanently available to produce a profitable agricultural crop other than native grasses, upon not less than 20 acres of the land described in the permit, he will be entitled to patent for one-fourth of the land embraced in the permit. No mere perfunctory or questionable compliance with the law will be accepted. The best, and only conclusive evidence of a sufficient permanent water supply to produce a profitable agricultural crop is to produce it; hence, no patent will be granted until the full 20 acres have been cleared, leveled, ditched, plowed, fenced, and an agricultural crop actually planted and raised by irrigation, all in accordance with good farming practice. The wells, pumps, or other works and equipment for the development and supplying of water must be of a permanent and dependable character, suitable for use year after year. A detailed statement of costs of irrigation and production of crops from such water supply will be required; to this end, accurate account should be kept of such costs. No patent can be granted under the act if the cost of irrigation from the developed water supply is practically prohibitive; the act requires a successful development and demonstration of the use of subterranean water, as the principal condition precedent for patent.

(b) *The land selected for patent shall be in compact form according to legal subdivisions of the public-land surveys, if the land be surveyed. If the land be unsurveyed, the permittee may, at any*

time during the life of his permit, apply to the United States surveyor general for the State of Nevada, for a survey of the land for which he intends to make application for patent. The surveyor general will thereupon make an estimate of the cost and call on the permittee for a deposit of the amount of the estimate. If the deposit made should prove insufficient, an additional deposit will be called for. If the applicant has not taken steps to procure a survey before submitting final proof, after final proof has been submitted and examined, if same is found satisfactory and acceptable, and in the meantime the public-land system of surveys has not been extended over the lands in question, call will be made on the permittee to make the necessary deposit with the United States surveyor general for Nevada to cover the cost of survey, in which case the issuance of patent will be suspended until the survey is made and accepted. Wherever practicable, such official survey will be an extension of the regular system of township surveys, in which case the selection for patent must be conformed to the legal subdivisions of such survey.

(c) The act provides that all entries made and patents issued under its provisions shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands entered and patented, together with the right to prospect for, mine, and remove the same.

(d) On the issuance of patent, the remaining area within the limits of the land embraced in the permit will thereafter be subject to entry and disposal only under the act of May 20, 1862 (sec. 2289, U. S. Rev. Stat.), entitled "An act to secure homesteads to actual settlers on the public domain," and amendments thereto, in areas not exceeding 160 acres.

FINAL PROOF.

8. (a) Final proof of the discovery, development, and availability of sufficient water to justify patent, may be made by the permittee, or in case of his death, by his heirs, executors, or administrators, or in case the permittee is an association of individuals, by any member of such association at any time after such discovery and development as hereinbefore defined, but must be made within two years after the date of the permit; but an additional period, not to exceed one year, may, upon proper showing, be allowed within which to make the required proof of actual irrigation and cultivation.

(b) When a permittee has reclaimed the land and is ready to make final proof, he should apply to the register and receiver for a notice of intention to make such proof. This notice must contain a complete description of the land selected by him for patent and give

the serial number of the permit and name of the claimant. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in the notice, two of whom must be used in making proof. Care should be exercised to select as witnesses persons who are familiar, from personal observation, with the land in question and with what has been done by the claimant toward reclaiming and improving it. Care should also be taken to ascertain definitely the names and addresses of the proposed witnesses, so that they may correctly appear in the notice.

(c) This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the land, and it must also be posted in a conspicuous place in the local land office for the same period of time. The permittee must pay the cost of the publication, but it is the duty of registers to procure the publication of proper final-proof notice, and registers should accordingly exercise the utmost care in that behalf. The date fixed for the taking of the proof must be at least 30 days after the date of first publication. Proof of publication must be made by the affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local office.

(d) On the day set in the notice (or, in the case of accident or unavoidable delay, within 10 days thereafter) and at the place and before the officer designated, the claimant will appear with two of the witnesses named in the notice and make proof of the reclamation of the land. The testimony of each claimant should be taken separately and apart from and not within the hearing of either of his witnesses, and the testimony of each witness should be taken separately and apart from and not within the hearing of either the applicant or of any other witness, and both the applicant and each of the witnesses should be required to state, in and as part of the final-proof testimony given by them, that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others.

(e) Final proof may be made before the register and receiver of the land district in which the land is located, or before a United States commissioner, or a judge or clerk of a court of record in the county or land district in which the land is situated. The only condition permitting the taking of such evidence outside the proper land district is where the county in which the land is situated lies partly in two or more land districts, in which case such evidence may be taken anywhere in the county. In case the proof be taken outside the county wherein the land lies, then, unless it was taken before the proper register or receiver, the applicant or entryman must show by

his affidavit that the qualified officer employed was the one whose place of business, *in the land district*, is nearest to or most accessible from the land in question. Forms of final proofs will be furnished in due time.

EXTENSIONS OF TIME.

The act of September 22, 1922 (42 Stat., 1012), authorizes the allowance under certain conditions of an extension of time for a period not exceeding two years for the beginning, recommencement, or completion of the work of water development and the submission of final proof of reclamation. This does not mean that the extension will be granted as a matter of course, and applications for extension will not be granted unless it be clearly shown that the failure to complete the work of exploration and water development or of reclamation, as the case may be, within the required period was due to no fault on the part of the permittee but to some unavoidable delay for which he was not responsible and could not have readily foreseen.

A permittee who desires to make application for extension of time should file with the register and receiver an affidavit setting forth fully the facts, showing how and why he has been prevented from beginning or completing the work of water development and making final proof within the regular period. This affidavit may be subscribed and sworn to before any officer authorized to administer oaths and having an official seal, and must be corroborated by at least two witnesses who have personal knowledge of the facts. The register and receiver after carefully considering all the facts will forward the application to the General Land Office with appropriate recommendation.

The register and receiver are required to suspend any application for extension of time if they consider the affidavits defective in form or substance and to allow the applicant 30 days to make such amendments therein as may be deemed necessary to remove the defects or to file exceptions to the requirements made, advising him that upon his failure to take any action within the time specified appropriate recommendation will be made. After the expiration of the time thus granted the original application and the amended affidavits or exceptions, as the case may be, together with the proper report and recommendations, will be transmitted to the General Land Office for consideration.

CONTESTS AND PROTESTS.

10. Contests and protests may be made against applications, permits, and final proofs under this act, the same as other entries or selections under the public land laws, and same will be disposed of

application and the issuance of a permit, and to conduct such operations in good faith and with reasonable diligence until water has been developed in quantity sufficient for the practical irrigation of not less than twenty acres of said land, or until the date of expiration of the permit, unless it shall be sooner satisfactorily demonstrated that the development of subterranean water for irrigation of said land is impracticable; that I will honestly endeavor to comply with all other requirements of the act under which this application is filed and with the terms and conditions of the permit if issued; that the facts herein stated are based on my personal knowledge of the conditions obtaining with respect to the land herein described; and to the best of my knowledge and belief said land is unreserved, unappropriated, nonmineral, nontimbered public land of the United States, not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply; that it is -----

(Here state character of the land and other data required by par. 3e.)

Subscribed and sworn to before me at my office at -----
 in ----- County, within the ----- land district, this ---- day of -----, 19--

 (Official designation.)

FORM B.

CORROBORATING AFFIDAVIT.

(Required only in cases where land applied for has not been designated.)

STATE OF -----,
 County of -----, ss:

The undersigned citizens of -----, County of -----, State of Nevada, being duly sworn under oath according to law each for himself and not one for the other, deposes and says that he has personally examined the land described in the within application of ----- for a permit under the act of October 22, 1919 (41 Stat. 243), to explore for subterranean waters on said land; that he has read the foregoing application and affidavit and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

(41 Stat., 293—5.)

[S. 9.]

AN ACT To encourage the reclamation of certain arid lands in the State of Nevada, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to grant to any citizen of the United States, or to any association of such citizens, 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: *Provided, however,* That not more than one such permit shall be issued to the same citizen or the same association of citizens within an area of forty miles square: *And provided further,* That said land shall not be fenced or otherwise exclusively used by the permittee except as herein provided: *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.

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate the lands subject to disposal under the provisions of this act: *Provided, however,* That where any person or association qualified to receive a permit under the provisions of this act shall make application for such permit upon land which has not been designated as subject to disposal under the provisions of this 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 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 land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal.

SEC. 3. That any qualified applicant for a permit under section 1 of this act shall file with the register or receiver of the land district in which said land is located the application for such permit and shall make and subscribe before the proper officer and file with said register or receiver an affidavit that such application is honestly and

in good faith made for the purpose of reclamation and cultivation and not for the benefit of any other person or corporation, and that the applicant is not acting as agent for any person, corporation, or syndicate in making such application, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land applied for or any part thereof, and that the applicant will faithfully and honestly endeavor to comply with all of the requirements of this act, and shall pay to said register and receiver a filing fee of 1 cent per acre for each acre of land embraced in said application, and such applicant shall then be entitled to receive such permit after the lands embraced therein are designated as provided in section 2 of this act:

SEC. 4. That such a permit shall be upon condition that the permittee shall begin operations for the development of underground waters within six months from the date of the permit and continue such operations with reasonable diligence until water has been discovered in the quantity hereinafter described, or until the date of the expiration of the permit. Upon the presentation at any time of proof satisfactory to the Secretary of the Interior that any permittee is not conducting such operations in good faith and with reasonable diligence, or has violated any of the terms of the permit, the Secretary shall forthwith cancel such permit, and such permittee shall not again be granted a permit under this act.

SEC. 5. That on establishing at any time within two years from the date of the permit to the satisfaction of the Secretary of the Interior that underground waters in sufficient quantity to produce at a profit agricultural crops other than native grasses upon not less than twenty acres of land has been discovered and developed and rendered available for such use within the limits of the land embraced in any permit the said permittee shall be entitled to a patent for one-fourth of the land embraced in the permit, such area to be selected by the permittee in compact form according to the legal subdivisions of the public land surveys if the land be surveyed, or to be surveyed at his expense under rules and regulations established by the Secretary of the Interior if located on unsurveyed land.

SEC. 6. That the remaining area within the limits of the land embraced in any such permit shall thereafter be subject to entry and disposal only under "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and amendments thereto, known as the one-hundred-and-sixty-acre homestead act.

SEC. 7. That the receipts obtained from the sale of lands under the provisions of section 6 hereof shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress approved June 17, 1902, known as the reclamation act.

SEC. 8. 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 valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable 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 or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining 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 surface of the land.

SEC. 9. That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any

and all things necessary to carry out and accomplish the purposes of this act.

Approved, October 22, 1919.

[42 Stat., 1012.]

[S. 2983.]

AN ACT To authorize the Secretary of the Interior to grant extensions of time under permits for the development of underground waters within the State of Nevada, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may, if he shall find that any permittee has been unable, with the exercise of diligence, to begin or continue operations for the development of underground waters within the time prescribed by sections 4 and 5 of the act of Congress approved October 22, 1919 (Forty-first Statutes, page 295), extend the time for the beginning, recommencement, or completion of the said operations described in said sections for such time, not exceeding two years, and upon such conditions as he shall prescribe.

Approved, September 22, 1922.

STATE OF COLORADO (ON REHEARING).

Decided November 4, 1922.

SCHOOL LAND—SURVEY—VESTED RIGHTS—COMMISSIONER OF THE GENERAL LAND OFFICE—SURVEYOR GENERAL.

The question whether or not the title to designated school sections upon survey thereof vests in a State, is to be determined as of the date of the acceptance of the plat by the Commissioner of the General Land Office, and not the date of its approval by the surveyor general.

SCHOOL LAND—INDEMNITY—SELECTION—PATENT—ESTOPPEL.

The designation by a State of lands within a specific school section as the basis of its selection of other lands as indemnity, and its failure to oppose the entry and patenting of the lands so assigned estops it from subsequently asserting title to the base lands.

COURT DECISION CITED AND APPLIED.

Case of United States *v.* Morrison (240 U. S., 192), cited and applied.

FINNEY, *First Assistant Secretary:*

By the act of March 3, 1875 (18 Stat., 474), the undisposed of non-mineral lands in all sections 16 and 36 in the State of Colorado were granted to that State in aid of its public schools, and it was given the

further right to select and take title to lands in other sections in lieu of such tracts in sections 16 and 36 as had been disposed of or were mineral in character. The State's title to such of these lands as were unsurveyed at the date of its admission into the Union did not, however, vest in it until after they had been later surveyed, and not then until the plat of their survey had been approved. See *F. A. Hyde and Company* (48 L. D., 132.).

The lands now embraced in Sec. 16, T. 4 N., R. 86 W., 6th P. M., here involved, were while unsurveyed, embraced in the Ute Indian Reservation from November 22, 1875, to August 4, 1882, when they were eliminated from the reservation and restored to the public domain.

The plat of the survey of that section was approved by the surveyor general on March 23, 1905, accepted by the Commissioner of the General Land Office November 1, 1906, and filed in the local office February 6, 1907; and on July 26, 1906, the section was embraced in a temporary coal-land withdrawal which was made permanent by the Executive order issued July 7, 1910, under the act of June 25, 1910 (36 Stat., 847), and it is still so withdrawn.

All these lands in question are now embraced in entries and patents made and issued as follows: a desert-land entry, Glenwood 01206, made by one Sutherlin in 1905, which was later patented; a homestead entry, 06467; a desert-land entry, 06505; and an isolated tract purchase, 09656; were all made by Hans Flaatten, the first two on July 16 and 29, 1912, and the other September 29, 1916. A patent issued under the isolated tract entry in 1917, a final certificate under the homestead entry in 1918, and the present status of the desert entry of Flaatten will be referred to later on in this decision. The parts of this section not included in the entries already mentioned are now embraced in the homestead entry 07273 patented in 1919, and in pending homestead entries 011157 and 017160 made in 1918 and 1919, respectively, by other persons.

All the legal subdivisions in this section were assigned as bases in lieu of a like number of tracts embraced in the State of Colorado's school land indemnity selection list No. 3, serialized as Leadville 01917, filed June 21, 1917, in which the base tracts were represented as being embraced in "settlements"; and by its decision of August 27, 1921, the General Land Office in effect held that Flaatten's desert entry should be canceled and the selection rejected for the reason that the title to this section vested in the State upon the approval of the plat of survey on March 23, 1905, and before any of the entries mentioned were applied for or allowed. On Flaatten's appeal from

that action this Department, by its decision of July 26, 1922, directed that the State be notified that if it failed to timely show cause to the contrary, its selection would be approved and Flaatten's entry sustained on the ground that the facts recited in that decision showed that the base land was so far mineral in character as to exclude it from the grant to the State.

After receiving notice of the decision, the State's representatives filed an amendment of its selection list by substituting other lands as bases in place of the lands in the section 16 here involved, asserted title to the whole of that section 16, and demanded the immediate cancellation of all the patents and entries mentioned above. This demand was treated by the General Land Office as a motion for a rehearing and forwarded to this Department for its consideration as such.

This contention can not be sustained for the reason that this land was withdrawn on July 26, 1906, before the title to it could have vested in the State by the acceptance of the plat by the Commissioner of the General Land Office on November 1, 1906, and the land was, therefore, assignable as the bases of indemnity school land selections at the time it was so assigned, under the doctrine announced in the kindred case, *United States v. Morrison* (240 U. S., 192), where it was held that the State of Oregon's title to similar lands did not vest in it until the acceptance of the plat by the Commissioner.

For the reason given, the motion for rehearing is denied.

Moreover, by its assignment of these tracts as bases of the selections claimed in its list and by its failure to oppose the claims of the several entrymen, the State not only admitted the validity of the entries then existing, but induced the claimants then upon the land to continue compliance with the requirements of the law, caused the Land Department to issue patents upon some of said entries, and induced the later allowance of other entries. This is not only apparent from what has already been stated herein, but is shown in communications with the record, in which the State Land Commissioner, speaking through its register and engineer, said in effect that it asserted no interest in the land and urged early action looking to the patenting of Flaatten's entry, and the approval of the State selection list. See, in this connection, cases of *Michael Dermody*, on review (11 L. D., 504); *Gregg et al. v. State of Colorado* (16 L. D., 55); *Rice v. State of California* (24 L. D., 14); *Gates v. Robertson* (30 L. D., 83), and *Cyrus G. Lowry* (44 L. D., 348).

JOHN J. KOTKIN.

Decided November 8, 1922.

REPAYMENT—OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—STATUTES.

An application for an oil and gas prospecting permit under the act of February 25, 1920, is a filing of the character contemplated as within the scope of the provisions of the repayment act of March 26, 1908.

REPAYMENT—OIL AND GAS LANDS—PROSPECTING PERMIT—FEES—STATUTES.

The rule, long and consistently adhered to by the Department, that where an application or filing under the public land laws is held for rejection for partial conflict, or other reason, except fraud, the applicant is privileged, prior to allowance of the claim, to withdraw the application *in toto* without prejudicing his right under the act of March 26, 1908, to repayment of all fees and commissions tendered in connection therewith, is applicable with equal force and effect to applications for oil prospecting permits under the act of February 25, 1920.

REPAYMENT—OIL AND GAS LANDS—PROSPECTING PERMIT—FEES—STATUTES.

The act of February 25, 1920, made no provision for forfeiture of moneys paid in connection with prospecting permit applications, nor did it directly or indirectly repeal or modify any provisions of the general repayment statutes then in force and effect.

ACCOUNTS—OIL AND GAS LANDS—PROSPECTING PERMIT—FEES.

Paragraph 31 of the oil and gas regulations of March 11, 1920, promulgated pursuant to the authority contained in section 38 of the act of February 25, 1920, was merely intended for the administrative purpose of directing proper disposition of and accounting for moneys paid in connection with applications for oil and gas prospecting permits, and in that respect is to be deemed as merely supplemental to paragraph 85 of the general accounting circular of August 9, 1918.

REPAYMENT—OIL AND GAS LANDS—PROSPECTING PERMIT—FEES.

The word "earned" as used in paragraph 31 of the oil and gas regulations, approved March 11, 1920, is not to be construed as barring the right to repayment under the general repayment laws, of fees and commissions paid in connection with applications for oil and gas prospecting permits under the act of February 25, 1920.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of H. Stella Samuelson (46 L. D., 60), cited and applied.

FINNEY, *First Assistant Secretary:*

John J. Kotkin has appealed from a decision of the Commissioner of the General Land Office rendered February 9, 1922, denying his application for repayment of the fee (\$32) paid in connection with his application for permit to prospect for oil and gas, filed October 16, 1920, under the act of February 25, 1920 (41 Stat., 437).

For the purposes of this decision, without setting forth in detail the various legal subdivisions involved, it suffices to state that the application for permit as originally filed embraced 2563.45 acres.

The application for permit was held for rejection for conflict to the extent of approximately 1438 acres, which were embraced in various entries carrying mineral rights to which the agricultural claimants had a preferred right of appropriation under the leasing act. Further objections were interposed upon the grounds that Kotkin failed to file certificate of naturalization and that the application for permit, as originally filed, included lands in excess of 2560 acres. Thereafter Kotkin tendered a copy of his certificate of naturalization, and on November 4, 1920, filed a formal withdrawal of the application for permit in so far as the tracts in conflict were concerned.

Thereafter, prior to the allowance, or approval, of the permit for the lesser area, Kotkin filed in the local land office, November 16, 1921, a formal withdrawal of his application for permit in its entirety, accompanied by the application for repayment here involved.

The Department has uniformly held that where an application, or filing under the public land laws, is held for rejection for partial conflict, or other reason, except fraud, the applicant may, prior to allowance of the application, withdraw the application *in toto*, without prejudicing his right to repayment under the act of March 26, 1908 (35 Stat., 48), of all fees and commissions tendered in connection therewith. Respecting this particular feature of the case, no good and sufficient reason appears that would warrant a deviation from this principle, long and consistently followed, notwithstanding that the filing here involved is an application for permit, as distinguished from a filing, or application for entry, under any of the agricultural or other public land laws.

The main issue raised by the appeal is whether fees paid in connection with applications for permits under the act of February 25, 1920, *supra*, are repayable under the general repayment laws in the event that the claim presented otherwise comes within the provisions of said laws, or whether as held by the decision below, paragraph 31 of the oil and gas regulations, hereinafter referred to, operates as a bar to the adjudication of the claim under the general repayment laws.

Section 38 of the act of February 25, 1920, *supra*, provides—

That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid to the registers and receivers of the United States land offices on account of business transacted under the provisions of this act.

Pursuant to that statute, the Department by regulations approved March 11, 1920 (47 L. D., 437, 461), prescribed the amount of fees to be paid in connection with applications for permit and the man-

ner of disposition thereof, said regulations (Paragraph 31) providing that—

(a) For receiving and acting on each application for a permit, lease, or other right filed in the district land office in accordance with these regulations, there shall be paid a fee of \$2 for each 160 acres, or fraction thereof, in such application, but such fee in no case to be less than \$10, the same to be paid by the applicant and considered as earned when paid, and to be credited in equal parts on the compensation of the register and receiver within the limitations provided by law.

The Commissioner in denying the instant claim construed paragraph 31 of the regulations cited as an absolute bar to any right of repayment under the general repayment statutes, the decision holding in effect that the fees when tendered with an application for permit, were "earned" by the local officers for receiving and acting upon the application, irrespective of whether the application for permit was proper for allowance or, without fault on the part of the applicant, had been rejected, the word "earned" in the regulations having been construed to mean "not repayable." The Department can not concur in this construction. In the event that it were otherwise, the Department might designate by regulations that fees or other moneys paid under any of the public land laws were to be considered as "earned" within the meaning of that word as construed by the decision below, thus nullifying or rendering inoperative the relief provisions of the general repayment statutes.

The repayment act of March 26, 1908 (35 Stat., 48), provides—

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

SEC. 2. That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

An application for permit is a filing of the character included within the provisions of the act of March 26, 1908, *supra*. It follows that the right to the return of the fees paid in connection therewith, after they have been covered into the Treasury of the United States, as in the instant case, is governed by the provisions of the repayment statute referred to.

The act of February 25, 1920, *supra*, made no provision for forfeiture of any or all moneys paid in connection with applications for permit filed thereunder, nor did it directly or indirectly repeal or modify any provisions of the general repayment statutes then in force and effect. Section 38 of the act of February 25, 1920, *supra*, merely authorized the Secretary of the Interior, until otherwise provided, to prescribe the fees and commissions to be paid to the registers and receivers. It follows that the Department acted within the scope of its authority in fixing the amount of the fees to be paid by applicants, and for administrative purposes directing by such regulation the manner in which the receiver of public moneys was to account for the same to the Government, whether to be carried by him in his "Unearned Account," or as "earned" and covered into the Treasury of the United States. It is clear that if moneys are "earned" in the technical sense of the regulation cited, and as construed by the Commissioner, no application for repayment could be allowed, as such applications deal solely with moneys covered into the Treasury and, therefore, "earned" within the meaning of that regulation.

In this connection it may be stated that paragraph 31 of the regulations cited is in a measure supplemental to the general accounting circular prescribing "Methods of keeping records and accounts relating to the public lands" (Circular No. 616, 46 L. D., 513, 533), and relates to moneys disposition of which does not come within the provisions of paragraph 85 of the general accounting circular, which latter paragraph specifies the classes of moneys that may be held by receivers in their "Unearned Accounts," as distinguished from other moneys which, as otherwise directed by said general accounting circular (No. 616) were to be treated as "earned" when received and deposited to the credit of the Treasurer of the United States.

The Department has on numerous occasions construed section 2 of the act of March 26, 1908, *supra*, as applicable to repayment of fees. In the case of H. Stella Samuelson (46 L. D., 60), without referring to numerous other decisions *seriatim*, the Department citing the case of John Ard (45 L. D., 323) held:

* * * it was determined by the Department that fees as well as purchase money and commissions were repayable under the provisions of said act, where the tract selected and intended to be entered was not subject to appropriation. In such cases the entire payment must be regarded as in excess of legal requirements, and thus within the terms of the second section of the act.

It follows that the application for repayment of fees tendered in connection with the application for permit to prospect for oil and gas should have been considered under the general repayment act of March 26, 1908, *supra*, and appropriate action taken thereupon

in accordance with the facts disclosed by the record and in the light of the various decisions heretofore rendered construing said act. The ruling of the Commissioner to the effect that paragraph 31 of the regulations of March 11, 1920, *supra*, barred any and all right to repayment under the general repayment laws is reversed and the case remanded for readjudication in accordance with the views herein expressed.

TAXABILITY AND ALIENABILITY OF ALLOTTED CHEROKEE INDIAN LANDS.

Opinion, November 13, 1922.

INDIAN LANDS—CHEROKEE LANDS—ALIENATION—ALLOTMENT.

Restrictions against alienation on land allotted to Indians are more in the nature of personal disabilities imposed on the allottee than covenants running with the land; a matter of personal privilege which Congress may enlarge or restrict as and when it sees fit.

INDIAN LANDS—CHEROKEE LANDS—ALIENATION—ALLOTMENT.

In the absence of specific legislation by Congress to the contrary, lands allotted in severalty to Indians are nontaxable prior to the removal of restrictions against alienation, even though the statutory period of exemption originally provided for may have expired.

INDIAN LANDS—CHEROKEE LANDS—ALIENATION—ALLOTMENT—VESTED RIGHTS.

While Congress may lengthen or shorten the period of restrictions against alienation as and when it may see fit so to do, yet the exemption from taxation for the prescribed period is a definite and fixed property right, which having once vested in the allottee, Congress can not thereafter alter or take away.

INDIAN LANDS—FIVE CIVILIZED TRIBES—ALIENATION—ALLOTMENT—INDIAN HOMESTEAD—ACT OF MAY 27, 1908.

While sections 1 and 4 of the act of May 27, 1908, which provided for the allotment of lands to the Five Civilized Tribes, removed all restrictions from all lands, including homesteads, allotted to intermarried whites, freedmen and mixed-bloods having less than one-half Indian blood, and directed that all lands from which the restrictions shall have been removed should be subject to taxation, yet the homesteads held by the original allottees are not subject to taxation prior to the expiration of the statutory period of exemption, and by the proviso to section 9 of the act the restrictions are continued during that period as long as the title to such lands remains in the hands of the full-blood Indian heirs of such allottees.

BOOTH, *Solicitor*:

On the recommendation of the Commissioner of Indian Affairs you have referred to me for consideration a communication in the nature of a petition and brief from one R. J. Scott, a Cherokee Indian residing at 508½ North 11th Street, Muskogee, Oklahoma, involving mainly the question of taxability and alienability of lands allotted

to members of the Cherokee Tribe. The Indian Office requests advice as to what action, if any, should be taken in the matter.

The issues here involved turn primarily on several lengthy statutes, the pertinent provisions of which will shortly be considered as briefly as possible; but before doing so, it may be well to first dispose of one suggestion by Mr. Scott wherein he urges the Secretary of the Interior, under section 65 of the act of July 1, 1902 (32 Stat., 716, 725), to—

issue a restraining order to enjoin and perpetually restrain the State and County officials of the State of Oklahoma from assessing or collecting any taxes on any allotted lands either homesteads or the surplus lands, and to quiet title to all tax deeds to all land that has been sold for State and County taxes, and against all other encumbrances, made either voluntarily or involuntarily, while the title remained in the original allottee.

But the section of the statute referred to vests no such authority or powers in the Secretary of this Department. That section reads simply:

SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

Nor have such comprehensive powers as those referred to by Mr. Scott been conferred on the Secretary of the Interior elsewhere in the act of July 1, 1902, or in any other statute, whether relating to the Indians or otherwise. The relief sought, therefore, if to be had at all, must come through the courts, but whether with or without the aid of the Department of Justice rests in the sound discretion of the administrative officers in charge.

As to the merits of the issue, the lands belonging to the Cherokee Tribe have been allotted in severalty, pursuant to an agreement with these Indians, as found in the act of July 1, 1902, *supra*. Under it each member received an allotment of land equal in value to 110 acres of the average allottable land of the Cherokee Nation. (Sec. 11.) That act further provides:

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

The remainder of each individual allotment, over and above the homestead, is commonly referred to as surplus, or surplus lands. By invoking that provision in section 13, *supra*, which directs that during the time the homestead is held by the allottee it shall be nontaxable and not liable for any debt contracted by the allottee, and the one from section 14 which declares that "lands allotted to citizens shall not in any manner or at any time be encumbered, taken or sold," etc., Mr. Scott now urges that all lands, both homestead and surplus, are exempt from taxation, alienation or encumbrance.

We are not justified, however, in thus selecting isolated clauses from the act in utter disregard of other clauses of equal weight and import, so as to thereby reach a conclusion at variance with the plain intentment of the law. The statute must be construed as a whole (48 U. S., 611, 622), and in the light of its obvious policy (241 U. S., 432). Viewed thus, the intent of the above legislation becomes plain. The homestead remains inalienable and nontaxable during the lifetime of the allottee, not exceeding, however, twenty-one years from the date of allotment. The surplus is likewise inalienable and nontaxable for a period of five years from the date of patent in each case. Inalienable, as therein used, of course, prohibits both voluntary and involuntary alienation and hence these lands while restricted are not subject to levy, sale or execution for debts, whether for taxes or otherwise. Before even the five-year restricted period as to the surplus lands expired, however, Congress made further provision with respect to the Five Civilized Tribes, and in section 19 of the act of April 26, 1906 (34 Stat., 137, 144), we find:

"SEC. 19. That no *full-blood* Indian of the Choctaw, Chickasaw, *Cherokee*, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner *any* of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; * * * That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee." [Italics supplied.]

It will be observed of course that the foregoing applies only to full-bloods. The situation remained thus, legislatively, but a comparatively short time only when the act of May 27, 1908 (35 Stat., 312), came into being, and from which we read—

"That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood

including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act."

Two brief provisions found in other sections of the same act will encompass the legislation germane to the subject matter here:

"SEC. 6. * * * *Provided*, That no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.

* * * * *
 "SEC. 9. * * * That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

These later statutes, had since the original agreement with the Cherokees under which their lands were allotted in severalty, manifestly a clear intent on the part of Congress in so far as it rested in the power of that body so to do, to make alienability and taxability coexistent factors, and for a long time the view prevailed, rather generally, that these two factors always went hand in hand, that is, removal of restrictions against alienation also removed the exemption from taxation. The latter condition, however, does not always follow even though Congress may have specifically so directed. See *Choate v. Trapp* (224 U. S., 665, 673), wherein the Supreme Court said:

"But the exemption [from taxation] and nonalienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years it might remain nontaxable for 16 years longer, if the Indian retained title during that length of time. Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years and all except homestead after five years. The period of exemption was not co-incident with this five-year limitation. On the contrary the privilege of non-taxibility might last for 21 years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. The right to remove the restriction was in pursuance

of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma."

To the same effect are the decisions by the same court in *Gleason v. Wood* and in *English v. Richardson* (224 U. S., 679, and 680). These all relate to the Five Civilized Tribes, and the same view has also been upheld as to lands allotted to Indians of other tribes. See *Morrow v. United States* (243 Fed., 854, 858), wherein it was said, "There is no question that the Government may, in its dealings with the Indians, create property rights which, once vested, even it can not alter." This gives us a clearer understanding of the true situation. When deduced to its final analysis, it means simply that restrictions against alienation on land allotted to Indians are more in the nature of personal disabilities imposed on the Indians rather than covenants running with the land; a matter of personal privilege so to speak; one which Congress may enlarge or restrict as and when it sees fit so to do. *Tiger v. Western Investment Company* (221 U. S., 286), and *Choate v. Trapp, supra*. Congress can impose restrictions even after they have once expired. *Brader v. James* (246 U. S., 88). But with these we are not here concerned.

Removal of the restrictions, in itself, does not deprive the Indians of any right of property in his land. He is not compelled thereby to encumber or alienate his allotment, as action of this kind simply enlarges his personal privileges and enables him to deal with his property as he may feel disposed. Of such action he can not be heard to complain. But when we attempt to couple removal of restrictions with the right of the State to tax, we may or may not thereby invade a property right vested in the Indian at the time he received his allotment. Herein lies the true criterion of the right of the State to tax. Speaking generally, if the statutory period of exemption has expired when the restrictions are removed, then the right to tax arises. If such period has not expired, then the lands are not taxable while in the hands of the original allottee, and sometimes even in the hands of his heirs. Further, until the restrictions are removed the lands are not taxable even though the statutory period of exemption originally provided for may have expired. Otherwise, involuntary alienation would soon deprive the Indian of his property in spite of the restrictions.

With these things in mind we return to the present situation with respect to the Cherokees. The tribal patents or deeds for the lands allotted in severalty bear varying dates of issue. Without at least the dates of these patents in individual cases it is impossible of course to state definitely just when the statutory period of disability

as to alienation or taxation begins. The five year period as to the surplus of each allotment has long since expired. Upon removal of the restrictions, therefore, as to such lands, they then became taxable. As to homesteads in the hands of original allottees, these are still nontaxable during the twenty-one years from the date of allotment even though the restrictions may have since been removed. Whether the restrictions have been removed or not depends largely on the degree of Indian blood in each case, and to some extent also on the age of the allottee; that is, whether an adult or a minor. Thus, as to full-bloods, by section 19 of the act of April 26, 1906, *supra*, Congress continued the restrictions on all of their allotted lands both homestead and surplus for twenty-five years from the date of that act; that is, until April 26, 1931. The act of May 27, 1908, *supra*, reiterates this as to full-bloods and also imposes a like restriction as to enrolled mixed-bloods of three-quarters or more of Indian blood, including minors. The proviso to section 6 of the latter act, *supra*, carries out this intent with respect to minors.

Section 1 of the act of May 27, 1908, *supra*, removed all restrictions from all lands including homesteads allotted to intermarried whites, freedmen, and mixed-bloods having less than one-half Indian blood, and section 4 of the same act directs that all land from which the restrictions have been removed shall be subject to taxation, yet, from the doctrine as laid down by the Supreme Court in the Trapp case, the homesteads while held by the original allottees are not subject to taxation until the statutory period of exemption has expired. Again, while section 9 of the act of May 27, 1908, declares that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions against alienation of said allottee's land, yet the proviso immediately following that declaration continues the restrictions in the hands of full-blood Indian heirs, thereby rendering such lands exempt from taxation. *Parker v. Richards* (250 U. S., 235, 239).

Manifestly it would be useless here to attempt to point out all the instances in which lands allotted to members of this tribe are taxable or nontaxable, as the case may be. Such can best be determined from the facts connected with each particular case as and when presented. Sufficient general fundamental principles have been pointed out, however, to enable the law to be applied to each individual case, thus rendering it comparatively easy to determine whether the particular lands involved are taxable or not. If concrete cases in which it is believed that the State is unlawfully taxing lands allotted to these people are brought to the attention of the Indian

Office, even though the restrictions against alienation have been removed, then that Bureau should consider the advisability of recommending that the Department of Justice aid such allottees in the protection of their rights.

For his information in connection with this matter, a copy of this communication will be forwarded to Mr. Scott at Muskogee.

Approved:

F. M. GOODWIN,
Assistant Secretary.

WILLIAM C. BRAASCH.

Decided November 16, 1922.

INDIAN LANDS—FORT BERTHOLD LANDS—COAL LANDS—NORTH DAKOTA—STATUTES.

The lands in that portion of the Fort Berthold Indian Reservation, North Dakota, which was opened to disposition by the act of June 1, 1910, are neither public lands nor ceded Indian lands, but are exclusively owned by the Indians, and consequently the coal deposits therein would not, except by virtue of the provisions of section 2 of the act of August 3, 1914, have been disposable under the general coal land laws or the leasing act of February 25, 1920.

COAL LANDS—INDIAN LANDS—FORT BERTHOLD LANDS—PATENT—STATUTES.

The provision contained in section 37 of the act of February 25, 1920, excepting from the operation of the leasing act valid claims existent at date of passage of the act, relates only to claims initiated prior to its enactment, and no authority exists for the patenting of coal lands on equitable grounds under a claim initiated after the passage of the act.

COAL LANDS—LEASE—PREFERENCE RIGHT—ENTRY—SECRETARY OF THE INTERIOR.

The Secretary of the Interior may, upon considerations of equity, accord a preference right to lease coal lands under the act of February 25, 1920, to one who was erroneously permitted to make coal entry and in reliance thereupon in good faith made large expenditures of money, notwithstanding that no claim was initiated prior to the passage of the act, and the coal deposits were not disposable under the general coal land laws at the time that the entry was allowed.

DEPARTMENTAL DECISION ADHERED TO.

Previous departmental decision in case of William C. Braasch (48 L. D., 448), cited and adhered to.

FINNEY, *First Assistant Secretary:*

This is an appeal by William C. Braasch from the decision of the Commissioner of the General Land Office of May 18, 1922, wherein, following the departmental instructions of February 16, 1922 (48 L. D., 448), he canceled the coal-land entry 016204 of

Braasch and Christ C. Prange allowed January 14, 1921, upon application filed November 20, 1920, for the coal deposits in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 30, T. 149 N., R. 87 W., 5th P. M., Minot land district, North Dakota, for the reason that the said deposits were not disposable under the provisions of the coal-land laws.

The land, it appears, is in the former Fort Berthold Indian Reservation and was held in said departmental instructions of February 26, 1922, to be subject to disposition only under the provisions of the leasing act of February 25, 1920 (41 Stat., 437), by virtue of the provisions of section 2 of the act of August 3, 1914 (38 Stat., 681), opening the coal lands in said former reservation to limited disposition.

It is urged in the appeal that the provisions of the leasing act do not apply for the reason that said act has reference only to deposits of coal and certain other minerals and lands containing such deposits owned by the United States, and the Department having held in the instructions herein above mentioned that said lands are the property of the Indians and not the United States, coal deposits in such lands are disposable only under the provisions of the coal-land laws. The same argument, however, might be urged against the operation of the general coal-land laws to that land for the provisions thereof apply only to vacant coal lands of the United States. As a matter of fact neither the general coal-land laws nor the leasing act apply of their own terms to lands occupying the status of that here in question and it was only by virtue of the provisions of the act of August 3, 1914, *supra*, that the coal deposits in said lands would be subject to disposition at all, it being provided by section 2 of the act last cited—

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.]

Attention is directed in the appeal to the provisions of the regulations concerning coal mining leases, permits and licenses under the act of February 25, 1920, which regulations were approved April 1, 1920 (47 L. D., 489), in section 2 of which it is declared that the leasing act does not include "ceded or restored Indian lands, the proceeds from the disposition of which are credited to the Indians," it being contended by the appellant that the entry was properly allowed under said regulations. The land, however, is neither ceded

nor restored Indian land but land owned exclusively by the Indians as held by the departmental instructions herein above referred to, to be disposed of under the laws of the United States, applicable to coal lands in force at the time of disposal as prescribed by said act of 1914. The citation, therefore, from the regulations affords no departmental warrant for the allowance of the entry.

It is further urged on behalf of the appellant who, it appears, has succeeded to the rights of his coentryman, Prange, with respect to the land that the entry should be held intact and patented on equitable grounds, it being alleged in connection with and in support of that contention that the entrymen in good faith went upon the land and made valuable improvements to the amount of \$2,500. The entrymen's claim to the land, however, so far as anything to the contrary is shown or asserted, having been initiated after the passage of the leasing act, section 37 whereof provides that deposits of coal in lands valuable therefor "shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at the date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated," it is clear that the Department is without authority of law to pass the entry to patent on equitable grounds having no relation to a claim initiated prior to the passage of the act however meritorious the case might otherwise seem to be. But the Department undoubtedly has jurisdiction upon considerations of equity to accord to one who has been erroneously permitted to make coal entry of land to which no claim was asserted prior to the passage of the act and who in reliance upon such entry which remained unchallenged of record for a year or more has in good faith made large expenditures upon the land, a preference right to lease the land under the provisions of the leasing act.

The claimant, therefore, will be afforded thirty days from the date hereof within which to make a showing under oath as to improvements placed upon the land by himself and his coentryman and to file the same accompanied by a petition for a leasing unit with respect to the land, as set forth in section 9 of the coal-land leasing regulations (47 L. D., 489, 492), and if such showing and petition be satisfactory and be followed by a compliance with the other requirements of the act and the regulations thereunder, he will be accorded the right as against any other applicant, all else being regular, to lease the land.

The decision of the Commissioner as thus modified is accordingly affirmed.

RIGHTS OF WIDOWS AND MINOR CHILDREN OF WIDOWS OF DECEASED SOLDIERS AND SAILORS OF THE WAR WITH GERMANY AND THE MEXICAN BORDER OPERATIONS.

INSTRUCTIONS.

[Circular No. 865.]

**DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 23, 1922.**

**REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:**

The act of September 21, 1922 (42 Stat., 990), provides as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the case of the death of any person who would be entitled to a homestead under the provisions of the Act of Congress approved February 25, 1919 (Fortieth Statutes at Large, page 1161), entitled "An Act to extend the provisions of the homestead laws touching credit for period of enlistment to the soldiers, nurses, and officers of the Army and the seamen, marines, nurses, and officers of the Navy and Marine Corps of the United States, who have served or will have served with the Mexican border operations or during the war between the United States and Germany and her allies," his widow, if unmarried and otherwise qualified, may have entry of public lands under the provisions of the homestead laws of the United States and shall be entitled to all the benefits enumerated in said act subject to the provisions and requirements as to settlement, residence, and improvement therein contained: *Provided*, That in the event of the death of such homestead entrywoman prior to perfection of title, leaving only a minor child or children, patent shall issue to said minor child or children upon proof of death; and of the minority of the child or children, without further showing or compliance with law.*

Paragraph 9 of Circular No. 302 (49 L. D., 118, 120), relative to soldiers' and sailors' homestead rights, is hereby amended to read as follows:

9. The special privileges accorded soldiers or sailors, as above indicated, are not subject to sale or transfer, and can only be exercised by the soldier or sailor himself; but the unmarried widow of a soldier or sailor of the Mexican border operations or of the war with Germany, or the unmarried widow or minor orphan children of a veteran of the Civil War, the Spanish-American War, or the Philippine Insurrection, is entitled to the same privileges, under the homestead laws, as the deceased soldier or sailor if he died possessed of a homestead right. The adult child of a soldier has no special privileges in

connection with the homestead laws on account of his father's military service.

Paragraph 10 of Circular No. 302 (49 L. D., 118, 120), is also amended by the addition of a subsection, 10(d), to read as follows:

10(d). In the case of the death of any person who would be entitled to a homestead under the provisions of the act of February 25, 1919 (40 Stat., 1161), because of service in the war with Germany or during the Mexican border operations, but who died prior to having initiated a claim thereunder, pursuant to the provisions of the act of September 21, 1922 (42 Stat., 990), his widow, if unmarried and otherwise qualified, may make entry of public lands under the provisions of the homestead laws of the United States and shall be entitled to all the benefits enumerated in the said act of February 25, 1919, subject to the provisions and requirements as to settlement, residence, and improvement contained in the said act. In such case, the whole term of service will be deducted from the time otherwise required to perfect title to the same extent as may have been allowed the soldier.

Where a homestead entry is made under the act of September 21, 1922, by the widow of a deceased soldier or sailor of the war with Germany or the Mexican border operations, compliance with law, both as to residence and improvements, is required to be shown to the same extent as would have been required of the soldier or sailor in making entry under the act of February 25, 1919.

In the case of such entry, the widow must furnish the prescribed evidence of military service of the husband, with affidavit of widowhood, giving the date of her husband's death, and that she is still unmarried.

Where the widow of a deceased soldier or sailor makes entry pursuant to the act of September 21, 1922, and dies prior to perfection of title, leaving only a minor child or children, patent shall issue to the said minor child or children, upon proof of her death and of the minority of the child or children, without further showing of compliance with the law. The proof may consist merely of affidavits setting forth the facts and duly corroborated. The usual publication and posting of notice of intention to make proof is required in such case.

If the widow of a deceased soldier or sailor makes and perfects the entry pursuant to the foregoing, the final certificate will issue to her, by name, as widow of the deceased soldier or sailor. If the entry is made by the widow and perfected by the minor orphan children as above set forth, the final certificate will issue to such

child or children, by name, as minor orphan child or children, of (giving the name of the widow), widow of (name of deceased soldier or sailor).

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

MARTIN, ASSIGNEE OF KING.¹

Decided May 16, 1922.

SOLDIERS' ADDITIONAL—HOMESTEAD ENTRY.

The cancellation of an original homestead entry on the ground of invalidity does not exhaust the entryman's homestead right, and such an entry is not, therefore, a sufficient basis upon which to predicate a soldiers' additional right under section 2306, Revised Statutes.

SOLDIERS' ADDITIONAL—HOMESTEAD ENTRY—RES JUDICATA.

The Department will apply the doctrine of *res adjudicata* to a case involving a soldiers' additional right under section 2306, Revised Statutes, based upon a homestead entry which was canceled in accordance with the construction of the law then in force, although by subsequent departmental rulings the entry would have been allowed.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

Case of Andrew Fergus (29 L. D., 536), cited and followed.

FINNEY, *First Assistant Secretary:*

The Commissioner of the General Land Office has submitted for consideration the soldiers' additional application of Ethel T. Martin filed in the local land office at Boise, Idaho, July 28, 1921, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 15, T. 5 N., R. 44 E., B. M., based on the assignment of the alleged additional right of Jonathan S. King, for 80 acres, under section 2306, Revised Statutes.

This alleged additional right was offered many years ago by Ricard L. Powell as base for 80 acres of land applied for in the Las Cruces, New Mexico, land district. That application was rejected by the General Land Office, and the case came before the Department on appeal. By decision (unreported) of January 7, 1901, the Department affirmed the action below. The facts in the case and the reason for rejection of the claim were set forth in that decision as follows:

On December 22, 1865, David C. Hillis made homestead entry of N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 9, T. 25 N., R. 32 W., Springfield land office, Missouri, which entry was

¹ See decision on rehearing, page 361.

canceled November 7, 1870, for abandonment and said King made homestead entry of the same tract July 12, 1871. By decision of your office of September 21, 1875, it was held that as Hillis never resided upon or improved said tract his claim thereto was invalid and upon the cancellation of his entry the land covered thereby inured to the benefit of the grant to the Atlantic and Pacific Railroad Company, made by act of Congress of July 27, 1866 (14 Stat., 292), which grant became effective December 17, 1866, and within the limits whereof the said tract was situated; therefore it was decided the subsequent entry of King was illegal and it was held for cancellation. King did not appeal from that decision, though notified thereof and his entry was finally canceled April 19, 1876, and the case closed.

It is stated in your decision of August 16, 1899, that the railroad company, subsequently, in effect relinquished all claim to said tract by applying for repayment of fees and its selection was canceled. Afterwards, one James W. Cook made homestead entry of the tract and it was patented to him October 21, 1891.

In your said decision it is stated, in substance, that the original entry of King having been canceled because made on land not subject to entry under the then rulings of the Department, "no rights are recognized as vested because of such entry, and therefore no additional right exists, and for this reason said application (of Powell) is rejected."

This case in its essential features is like that of Andrew Fergus (29 L. D., 536), and must be controlled by the ruling therein.

In that case, as in this, the original entry of the soldier was made of land which, under the rulings then in force, it was held was not subject to entry because of the railroad grant and no appeal was taken from the decision of cancellation; and it was ruled, the Department citing and affirming your office decision to that effect, that, the original entry being invalid, the soldier "neither gained nor lost any rights" thereunder and, of course, did not exhaust his homestead rights. "The transaction," it was said, "amounted merely to a nugatory attempt to make an entry, and left Youngblood (the soldier-entryman) in the same position he would have been in had he never attempted to make the homestead entry."

So in this case, there can be no doubt that if King had, after the cancellation of his entry, applied to make another he would unquestionably have been permitted to do so, notwithstanding that the decision of cancellation may have been predicated upon an erroneous theory and would have been reversed upon appeal.

The present application resubmits the alleged additional right of King for readjudication in view of the unreported decision of the Department in the case of Alanson Barber (D-37208) dated May 12, 1919, which involved similar facts respecting the cancellation of the original entry.

It must be admitted that the decision in the Barber case can not be harmonized with the former decision of January 7, 1901, involving the claim of King, upon which Powell based his application. Neither is there dispute that under present interpretation of law the entry of King was improperly canceled because of supposed conflict

with the railroad grant. But the cancellation of the entry was in accord with the construction of law then in force. The new rule was announced and applied by the Department February 7, 1877, in the case of *Thomas v. Saint Joseph and Denver City R. R. Co.* (3 C. L. O., 197), wherein it was held that a homestead entry subsisting of record within railroad limits when the granting act became effective as to adjacent unappropriated land, excepted the tract embraced in such entry from the operation of the grant, and upon subsequent cancellation of such entry the land reverted to the United States subject to disposal under the public land laws, free from the railroad grant. However, the Commissioner of the General Land Office was further specifically directed therein as follows:

In adjudicating cases that may arise in the future, you will be governed by the rule herein announced, but in no case will it have a retroactive effect. An adjudication under the rules of your office, heretofore in force, will be final.

The application of the doctrine of *res adjudicata* thus declared as to prior cancellation of entries was followed in the *Fergus* case, *supra*, which held that such cancellation for invalidity restored the full homestead right and left the entryman in the same position as if such entry had never been made.

In the *Barber* case, referred to above, the question of validity of the original entry there involved was considered *de novo* and a purported distinction was drawn between that case and the *Fergus* case. But the essential facts of the two cases are substantially the same because the land involved in the *Fergus* case had been entered and different parts thereof were fully embraced in subsisting entries at the date of the definite location of the railroad.

Upon mature consideration of the question involved the Department adheres to the ruling made in the *Fergus* case and the former decision in this case. The decision of May 12, 1919, in the case of *Barber* is hereby overruled.

The application of *Martin* is accordingly rejected.

MARTIN, ASSIGNEE OF KING (ON REHEARING).

Decided September 30, 1922.

SOLDIERS' ADDITIONAL—HOMESTEAD ENTRY—VESTED RIGHTS.

The fact that an original homestead entry upon which a soldiers' additional right under section 2306, Revised Statutes, is based, having been canceled upon an erroneous theory, would have been allowed in accordance with subsequent rulings of the Department, will not support the "rule of property doctrine" in favor of one claiming under an assignment of such right.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED—DEPARTMENTAL DECISION ADHERED TO.

Case of Charles P. Maginnis (33 L. D., 78), cited and distinguished; case of Andrew Fergus (29 L. D., 536), cited and adhered to.

FINNEY, First Assistant Secretary:

By decision of May 16, 1922 (49 L. D., 359), the Department rejected the application of Ethel T. Martin to enter, under the provisions of section 2306, Revised Statutes, the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 15, T. 5 N., R. 44 E., B. M., Idaho, based on an assignment of the alleged additional right of Jonathan S. King for 80 acres by virtue of his service in the Army of the United States during the Civil War and as additional to the soldiers' original homestead entry for the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 9, T. 25 N., R. 32 W., made July 12, 1871, at the Springfield, Missouri, land office, and canceled April 19, 1876, for conflict with the grant to the Atlantic and Pacific Railroad Company.

A motion for rehearing has been filed by the applicant. The question of the validity of the said additional claim arose on a former application and was the subject of a decision by the Department January 7, 1901, wherein it was held that no additional right in the soldier could be recognized because the original entry was canceled for invalidity. That decision was predicated on the rule announced in the case of Andrew Fergus (29 L. D., 536), to the effect that no additional right exists where the soldier retains the right to make entry for the full area of 160 acres.

The recent decision of May 16, 1922, in this case followed the rule thus stated and which was formerly applied in the prior decision of January 7, 1901. The motion calls to the attention of the Department the fact that the claim of Youngblood, which was the right involved in the Fergus case, was subsequently recognized by the Department on the ground that the original entry was in fact valid and was erroneously canceled for alleged conflict with a railroad grant. The entry was within the primary limits of the railroad grant and was made after definite location of the road, but at the time of definite location the land was embraced in a former entry which served to prevent the grant from attaching as to that particular tract. Consequently, when the former entry was canceled the land again became subject to entry without conflict with the right of the railroad company. The former view was that the grant attached upon cancellation of the interfering entry. The new rule was announced and applied by the Department February 7, 1877 (3 C. L. O., 197), wherein it was held that a homestead entry subsisting of record within railroad limits when the granting act became effective as to adjacent unappropriated land, excepted the tract embraced in such entry from the operation of the grant.

In the former decision in this case it was recognized that under present interpretation of law, the entry of King was improperly canceled because of supposed conflict with the railroad grant. But as the cancellation was in accord with the construction of law then in force, and in view of the said decision of 1901, in respect to the validity of this identical claim of additional right and the published decision in the Fergus case, the Department declined to disturb the former action.

It now appears that by an unpublished decision of December 8, 1905, the published decisions in the Fergus case was in effect overruled, as the identical additional right involved in that case was recognized as valid. The Fergus case as published does not fully disclose the facts, as it is not recited therein that the land was embraced in subsisting entries at the time of the location of the railroad. But the essential facts in that case and in this are substantially the same.

The motion also cites the unpublished decision of the Department dated June 30, 1902, in the case of Dr. Morgan Berry, the published decision of June 30, 1904 (33 L. D., 78), in the case of Charles P. Maginnis, and unpublished decision of May 12, 1919, in the case of Alanson Barber, all of which are characterized as being contrary to the doctrine announced in the said Fergus case and applied in the early decision of 1901 rejecting the additional claim of King. It is urged that the King claim was purchased on the faith of these later decisions by the Department in similar cases which, it is contended, have become a rule of property, and that the applicant is entitled to protection under that doctrine.

It is conceded that the principle applied in the unpublished decisions above referred to would, if applied to the facts in this case, result in acknowledgment of the claim of the additional right contended for. But it can hardly be conceded, as contended, that—

The decisions in the Berry case, *supra*, followed by that in the Maginnis case, 33 L. D., 78, *supra*, were adopted by the Department as the correct construction of the law and have been followed by the General Land Office ever since.

The brief in support of the motion demonstrates that the General Land Office did not in the Barber case follow what is here termed a settled practice long before that decision was rendered, because, as stated in the brief, and as shown by the records, the Commissioner rejected the application in that case on substantially the same reasoning as was applied by the Department in this case in its decision of May 16, 1922, namely, that the entry was properly canceled according to the practice then in force, and the action taken became the law of the case. Evidently the General Land Office did not consider

that there was at that time a well-settled practice thoroughly established contrary to its action in the Barber case. Again, a study of the Maginnis case, *supra*, will show that the principle applied therein is the same as that applied by the Department in this case, and except as to some of the discussion employed, supports the position taken by the Department in the Fergus case, *supra*, and in the present case. The gist of that decision is that the Department would not be warranted in reversing its action in respect to the cancellation of a portion of the original entry. While in fact the entry was valid as to the whole 80 acres embraced in it, yet, inasmuch as the entry had been canceled as to 40 acres, for supposed invalidity, the soldier had a right to insist upon the effect of that adjudication and was entitled to an additional entry for 120 acres instead of 80 acres, as had been held by the General Land Office. It would seem to follow logically that if the Government is bound by its former adjudication in respect to the cancellation of a former homestead entry, the entryman by the same token is likewise bound thereby. One principle at least is well settled, namely, that if no part of an entryman's homestead right was exhausted by the making of a former entry, then he has no right to an additional entry because his full original right of entry remains unimpaired. Such is the case when the original entry is canceled for invalidity, and it is not deemed essentially important that he be expressly and formally advised at the time of cancellation that his right of entry is restored, for such is the legal effect of the cancellation.

As pointed out in the former decision, the change made in the practice in 1877 was specifically declared not to be retroactive in effect, and former adjudications were to be considered final. Notwithstanding some unpublished decisions to the contrary, the Department is convinced of the soundness of the rule stated in the former decisions in this case, and the doctrine of rule of property invoked by the applicant can not be admitted, especially in view of the fact that it had been expressly decided in this particular case that the claim was invalid. Therefore, the doctrine of the law of the case would seem to be more appropriately applied than the alleged rule of property here invoked.

The motion is accordingly denied.

MARTIN, ASSIGNEE OF KING.

Petition for exercise of supervisory authority of departmental decisions of May 16, 1922, and September 30, 1922 (49 L. D., 359 and 361), denied by First Assistant Secretary Finney, November 25, 1922.

CONSOLIDATION OF NATIONAL FORESTS—EXCHANGE OF LANDS
AND TIMBER—ACT OF MARCH 20, 1922.

INSTRUCTIONS.

[Circular No. 863.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 28, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

1. The act of March 20, 1922 (42 Stat., 465), entitled "An Act To consolidate national forest lands," reads as follows:

That, when the public interests will be benefited thereby, the Secretary of the Interior be, and hereby is, authorized in his discretion to accept on behalf of the United States title to any lands within exterior boundaries of the national forests which, in the opinion of the Secretary of Agriculture, are chiefly valuable for national forest purposes, and in exchange therefor may patent not to exceed an equal value of such national forest land, in the same State, surveyed and nonmineral in character, or the Secretary of Agriculture may authorize the grantor to cut and remove an equal value of timber within the national forests of the same State; the values in each case to be determined by the Secretary of Agriculture: *Provided*, That before any such exchange is effected notice of the contemplated exchange reciting the lands involved shall be published once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in some like newspaper published in any county in which may be situated any lands or timber to be given in such exchange. Timber given in such exchange shall be cut and removed under the laws and regulations relating to the national forests, and under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands conveyed to the United States under this Act shall, upon acceptance of title, become parts of the national forest within whose exterior boundaries they are located.

2. *Initial Application to Forest Officers.*—All preliminary negotiations relating to an exchange under the act are to be conducted with the local representatives of the Forest Service, and any owner of land subject to exchange who desires to take advantage of the privileges conferred by this act must file with the local national forest officers an informal application describing the land to be conveyed as well as that to be selected, or, if timber is desired in exchange, the land on which such timber is located. The land must be specifically described according to Government subdivisions, and nothing less than a legal subdivision may be surrendered or selected. The selected land or timber must be entirely within national forest boundaries and in the same State in which the relinquished lands are located.

The applicant must show by affidavit, or other evidence satisfactory to the Forest Service, that he is the owner of the land to be con-

veyed, and that the land relinquished and the land or timber selected are equal in value.

3. *Approval of the Exchange.*—When a tentative agreement has been reached between the applicant and the local national forest officer, the case will be submitted to the district forester and if approved by him to the Forester at Washington, D. C., for consideration.

If the Forester finds the exchange to be in the public interest and that an equality of values exists, he will request the Secretary of Agriculture to advise the Secretary of the Interior that the acceptance of the certain described lands offered under the act and the granting in lieu thereof of other certain described lands, or of stumpage upon other described lands, meets with the approval of the Department of Agriculture; that the base lands are chiefly valuable for national forest purposes, and that the value of the offered and selected lands is approximately equal.

The Secretary of the Interior, upon receipt of such letter from the Secretary of Agriculture, unless he has reasons to do otherwise, will approve the exchange, subject to the submission of acceptable title to the lands tendered and to full compliance by the applicant with these regulations, and subject to any protests or other valid objections which may appear.

4. *Formal Application to District Land Officers.*—The General Land Office will notify the district land officers of the district in which the land or timber to be selected is located of the approval of the exchange, and such district land officers will in turn notify the person desiring to make such exchange of the approval thereof, and that he is allowed 60 days from receipt of notice within which to file his formal application specifically describing the land selected, or the land on which timber selected is located, and the land to be relinquished. The application must be accompanied by the necessary affidavits and fees.

No fixed forms of application for selection under this act and accompanying affidavits as to the relinquished and selected lands have been prepared, but these instructions should be followed as nearly as possible.

Each application will be given a serial number and have the hour and date of filing stamped thereon. You will note on your records against the land, "Selected under act of March 20, 1922, Public No. 173, by _____ (date) _____ Serial No. _____ pending."

5. *Affidavits Required.*—The applicant will be required to show by affidavit that he is 21 years of age, and otherwise legally capable of carrying through the transaction; that he is the owner of the land relinquished, and that said land is not the basis of another selection or

exchange. He must also furnish his own affidavit or the affidavit of some creditable person possessed of the requisite personal knowledge, showing that the land selected is nonmineral in character; that it contains no salt springs or deposits of salt in any form sufficient to render it chiefly valuable therefor; that it is not in any manner occupied or claimed adversely to the selector.

These affidavits may be executed before any officer qualified to administer oaths.

6. *Fees.*—Fees must be paid by the applicant at the time of filing his application in the local land office at the rate of \$1 each to the register and receiver for each 160 acres or fraction thereof included in his application.

7. *Publication and Posting.*—Within thirty days from the filing of his application to select land or timber the applicant will begin publication of notice thereof, at his own expense, in a newspaper or newspapers having general circulation in the county or counties in which the land relinquished and the land or timber selected are situated, the newspapers to be designated by the register. Such notice must be published once each week for four successive weeks during which time a similar notice of the application must be posted in the local land office and upon each and every noncontiguous tract included in the application. The notice should describe the land or timber applied for as well as the land to be given in exchange and give the date of filing the application and state that the purpose thereof is to allow all persons claiming the land selected or having *bona fide* objections to such application an opportunity to file their protests with the local officers of the land district in which the land selected is situated.

Proof of publication shall consist of an affidavit of the publisher or of the foreman or other proper employee of the newspaper in which the notice was published, with a copy of the published notice attached. Proof of posting upon the land and that such notices remained posted during the entire period required must be made by the applicant or some credible person having personal knowledge of the facts. The register shall certify to the posting in his office. The dates of such publication and posting must, in all cases, be given.

8. *Action by District Land Officers.*—Should a protest be filed all the papers should be transmitted to the General Land Office for consideration; but should no protest be filed against the allowance of the selection within thirty days from the date of the first publication of notice, and no objection appear on your records, you will notify the selector that he is allowed sixty days from receipt of notice within which to file the relinquishments or reconveyance, and abstract of title, as prescribed in paragraphs numbered 9, 10, and 11.

The proof papers necessary to complete a selection should be filed at the same time. However, if additional time is necessary to complete the abstract, the same will be granted upon a proper showing.

After the filing of the required relinquishment, abstract of title and other proof, the register will certify the condition of the record on the application and will promptly transmit the original application and accompanying papers to this office by special letter.

9. *Relinquishment or Reconveyance.*—The deed or relinquishment or reconveyance of the land tendered as a basis of exchange must be executed and acknowledged in the same manner as a conveyance of real property is required to be executed and acknowledged by the laws of the State in which the land is situated. The deed should also be duly recorded.

Where the relinquishment or reconveyance is made by an individual it must show whether the person relinquishing is married or single, and if married the wife or husband of such person, as the case may be, must join in the execution of the relinquishment or reconveyance in such a manner as to effectually bar any right of curtesy or dower, or any claim whatsoever to the land relinquished, or it must be fully shown that under the laws of the State in which the relinquished land is situated such wife or husband has no interest whatsoever, present or prospective, which makes her or his joining in the relinquishment or reconveyance necessary.

Where the relinquishment or reconveyance is by a corporation, it should be recited in the instrument of transfer that it was executed pursuant to an order or by the direction of the board of directors or other governing body, a copy of which order or direction should accompany such instrument of transfer, and should bear the impression of the corporate seal.

10. *Abstracts of Title.*—Each relinquishment or reconveyance must be accompanied by a duly authenticated abstract of title, showing that at the time the reconveyance was recorded the title was in the party making the conveyance, and that the land was free from conflicting record claims, tax liabilities, judgment or mortgage liens, pending suits or other incumbrances.

The certificate of authentication of the abstract must be signed by the recorder of deeds or other proper official, under his official seal, and must show that the title memoranda is a full, true, and complete abstract of all matters of record or on file in his office, including all conveyances, mortgages, or other incumbrances, judgments against the various grantors, mechanics' liens, *lis pendens*, or other instruments which are required by law to be filed with the recording officers, affecting in any manner whatsoever the title to the described land. The authenticity of the tax records must be certified showing that all taxes levied or assessed against the land, or that could operate

thereon as a lien, have been fully paid; or whether there is a tax lien although such tax is not assessed, due or payable; that there are no unredeemed tax sales and no tax deeds outstanding as shown by the records of his office. The absence of judgment liens or pending suits against the various grantors which might affect the title of the land relinquished or reconveyed must be shown by the official certificate of the clerks of the courts of record, whose judgments, under the laws of the United States or the State in which the land is situated, would be a lien on the land reconveyed or relinquished. If it is preferred the abstract may be authenticated by an abstractor or by an abstract company, approved by the General Land Office, in accordance with section 42 of the Mining Regulations of April 11, 1922 (49 L. D., 15, 69).

11. *Application for Timber.*—If timber is desired in exchange for the land to be conveyed to the United States, proof that notice has been published and posted will be all the evidence necessary to be filed in regard to the timber, but all the proof required in connection with the land offered as a basis for the exchange must be filed.

12. *Action by the General Land Office.*—The application and accompanying proof will, upon receipt by the General Land Office, be examined at as early a date as practicable and if found defective, opportunity will be given the parties in interest to cure the defects, if possible. If the selection appears regular and in conformity with the law and these regulations, the selection will, in the absence of objections, if for land only, be formally approved for patent by letter to the district land office, but if timber is taken in exchange the Secretary of Agriculture will, upon advice of the Secretary of the Interior that the regulations have been fully complied with, issue proper permit or certificate for timber.

13. *Practice and Procedure.*—Notice of additional or further requirements, rejections, or other adverse actions of registers and receivers, the Commissioner or the Secretary, will be given and the right of appeal, review, or rehearing recognized in the manner now prescribed by the Rules of Practice (48 L. D., 246), except as otherwise herein provided. A protest or other objection against the selection or the application to select must be filed in the district land office to be forwarded to the General Land Office for consideration and disposal. Application to enter filed subsequently to any conflicting application to select will be rejected, except where the subsequent application to enter is supported by allegations of prior right, in which event it will be transmitted to the General Land Office with appropriate recommendation. Applications presented under these regulations not in substantial conformity with the requirements herein made, not accompanied by the prescribed proof,

or where land offered as basis of exchange or the land selected is not situated within the boundaries prescribed by the act will be rejected, subject to appeal or curing of the defect where possible.

14. *Right Reserved to Reject Any and All Applications.*—Applications to select either land or timber under the provisions of the act will not defeat the right of the United States to withdraw or reserve the land for such purposes or uses as may be proper prior to the filing in the district land office of an application complete in all particulars.

15. *Other Forest Exchanges.*—Other acts provide for exchanges of lands in national forests. Special regulations governing these acts have not been prepared, but exchanges thereunder must be made under the foregoing regulations, modified, however, to meet the limitations, conditions, and provisions of the acts mentioned. The acts referred to are as follows: January 9, 1903 (32 Stat., 765); February 28, 1911 (36 Stat., 960); March 4, 1911 (36 Stat., 1357); July 25, 1912 (37 Stat., 200); July 31, 1912 (37 Stat., 241); August 22, 1912 (37 Stat., 323); June 24, 1914 (38 Stat., 387); July 3, 1916 (39 Stat., 344); September 8, 1916 (39 Stat., 846); September 8, 1916 (39 Stat., 852); June 5, 1920 (41 Stat., 980); February 27, 1921 (41 Stat., 1148); March 4, 1921 (41 Stat., 1364); March 4, 1921 (41 Stat., 1366); February 2, 1922 (42 Stat., 362), and other similar acts.

WILLIAM SPRY,

Approved: *Commissioner, General Land Office.*

EDWARD C. FINNEY,

Acting Secretary of the Interior.

HENRY C. WALLACE,

Secretary of Agriculture.

WIND RIVER RESERVATION—REPAYMENT OF IRRIGATION CONSTRUCTION COSTS.

Opinion, December 15, 1922.

INDIAN LANDS—WIND RIVER RESERVATION—WYOMING—ALLOTMENT—PURCHASER—PATENT—PAYMENT—RECLAMATION—SECRETARY OF THE INTERIOR.

There is no authority whereunder the Secretary of the Interior can require the purchasers, or their assignees, of lands allotted in severalty to Indians on the Wind River Reservation, Wyoming, to whom patents in fee had previously been issued, to contribute toward defraying the construction costs of the irrigation system upon that reservation.

COURT DECISIONS CITED AND APPLIED:

Cases of *Francis v. Francis* (203 U. S., 233), and *Burke v. Southern Pacific Railroad Company* (234 U. S., 689), cited and applied.

BOOTH, *Solicitor:*

You request my opinion with reference to the liability of present owners of irrigable land on the Wind River Reservation, Wyoming,

for repayment of irrigation construction costs where the land involved was purchased direct from former Indian allottees, to whom patents in fee had previously been issued.

The gist of this matter will the better be appreciated after a brief recourse to certain pertinent legislation and other data. The Wind River Reservation was established originally by treaty dated July 3, 1868, with the Shoshone and Bannock Tribes (15 Stat., 673). Several reductions in the original area were made by subsequent understandings and agreements with the Indians, of no particular import here (18 Stat., 291, and 30 Stat., 62, 93). A still later agreement, however, of April 21, 1904, as amended and ratified by the act of March 3, 1905 (33 Stat., 1016), demands more extended discussion. By its terms the Indians ceded and relinquished to the United States that considerable part of their then reservation lying north and east of the Big Wind River, retaining the right, however, for individual Indians desiring so to do to select allotments within the territory ceded. The United States agreed to act as trustee in the disposal of these lands for the Indians and to pay over or expend the proceeds for their benefit. Article IV of this agreement, in part, being of primary importance here, is reproduced below:

It is further agreed that of the moneys derived from the sale of said lands the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, shall be expended under the direction of the Secretary of the Interior for the construction and extension of an irrigation system within the diminished reservation for the irrigation of the lands of said Indians.

Subsequent Indian appropriation acts, beginning with that of June 21, 1906 (34 Stat., 325, 384), down to and inclusive of the act of February 14, 1920 (41 Stat., 408, 433), each carried an annual appropriation for continuing the construction of an irrigation system for the benefit of the Indians of the Wind River Reservation, reimbursement of which was to be had out of the proceeds derived from the sales of surplus tribal lands in accordance with the act of March 3, 1905, *supra*. The aggregate of the advancements so made by Congress for this work exceeds one million dollars. Had the matter rested here no doubt would remain as to the source from which reimbursement of the cost of this work is to be obtained. The difficulty in the situation now at hand arises thus:

In addition to specific appropriations for sundry irrigation projects on designated Indian reservations, such as the Wind River and others, the Indian appropriation acts for a long time past have also annually carried a "lump sum" appropriation for similar work elsewhere among the Indians without reference to any particular point of use other than to direct that no part of the latter appropriation should be used on any irrigation system or reclamation project for

which a specific appropriation is made or for which public funds are available under any other act of Congress. Illustrative of this see the act of August 24, 1912 (37 Stat., 518). Down to August 1, 1914, these lump sum appropriations were purely gratuitous; no reimbursement being required. The act of the latter date (38 Stat., 582-583) after appropriating some \$335,000 for such work among the Indians contains the further provisions quoted below:

That all moneys expended *heretofore or hereafter* under this provision shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe: *Provided further*, That the Secretary of the Interior is hereby authorized and directed to apportion the cost of *any* irrigation project constructed for Indians and made reimbursable out of tribal funds of said Indians, in accordance with the benefits received by each individual Indian so far as practicable from said irrigation project, said cost to be apportioned against such (each) individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe. (Italics and parenthetical data supplied.)

Into the history of the latter legislation we need not now go other than to observe the manifest intent on the part of Congress to shift the burden of the cost of such work from the tribal funds to the shoulders of the individual Indians benefited, under such rules and regulations as the Secretary of the Interior might prescribe. Obviously the most equitable method of assessing costs of this character is on a per acre basis against the lands irrigated through each respective system. Manifestly also there is some conflict between that provision in the general law relating to such projects (which requires reimbursement from the individual Indians benefited) and those specific appropriations for the Wind River and other designated projects wherein reimbursement is to be from tribal funds. My predecessor had occasion to consider this very conflict with reference to the Indians of the Wind River Reservation and in an opinion (unpublished) under date of May 25, 1920, it was held, in effect, that this reservation or project does come within the purview of the general law, thus altering the method of reimbursement by shifting it to the shoulders of the individual Indians benefited by the construction of such works. Without here questioning the soundness of that view the issue now before me will be approached from a somewhat different angle.

The Indians of the Wind River Reservation were granted allotments in severalty pursuant to the general allotment act of February 8, 1887 (24 Stat., 388), and for the allotments so made trust patents were issued in accordance with section 5 of that act with the declaration that:

The United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made; or, in case of his decease, of his heirs 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.* (Italics supplied.)

From time to time patents in fee simple have since been issued to individual allottees of this reservation deemed to be capable of managing their own affairs under the general authority so to do conferred on the Secretary of the Interior by the act of May 8, 1906 (34 Stat., 182). These latter patents recite no lien specific or otherwise for repayment of the irrigation charges and in the absence of statutory authority for the insertion of such a lien in patents of this kind it is not well seen how such action could be had. See *Francis v. Francis* (203 U. S., 233) and *Burke v. Southern Pacific Railroad Company* (234 U. S., 669, 670). Legislative authority is at hand for the insertion of liens of this kind in patents for irrigable land on a few of our Indian reservations as to which see the acts of March 3, 1911 (36 Stat., 1058, 1063), August 24, 1912 (37 Stat., 518, 522), May 18, 1916 (39 Stat., 123, 140, 154, 156), and June 4, 1920 (41 Stat., 751, 754), but no such statutory authority is found with respect to the Wind River Reservation.

In the absence of contractual obligations, therefore, between the United States and the purchasers of these allotted Indian lands, which I understand are not extant, I am unable to see how the purchasers of such lands, or their assignees, can be held liable for repayment of the cost of constructing the irrigation system at Wind River. Aside from the acts of Congress specifically relating to this project, all of which, substantially direct reimbursement for the cost of this work out of tribal funds, the only other applicable statute is that provision in the act of August 1, 1914 (38 Stat., 582), which places the obligation to repay against the individual Indians benefited, but not necessarily against the lands allotted to such Indians, by way of a lien or otherwise. I am of the opinion, therefore, that the purchasers or present owners of these lands, other than the Indians themselves can not be held accountable for repayment of a proportionate part of the cost of constructing the irrigation system on the reservation referred to.

Approved:

F. M. GOODWIN,

Assistant Secretary.

CONDAS v. HEASTON.*Decided December 22, 1922.***CONTEST—STOCK-RAISING HOMESTEAD—APPLICATION—NOTICE—APPEAL.**

An entryman does not become a party to contest proceedings prior to the allowance of a contest and service of notice thereof upon him, and where an appeal is taken from an order of dismissal of an application of contest, service of notice of the appeal upon the entryman is not required.

STOCK-RAISING HOMESTEAD—APPLICATION—ENTRY—RELATION—WITHDRAWAL—OCCUPANCY.

When land is designated as of the character contemplated by the stock-raising homestead act upon a petition accompanying an application to make entry thereof, the application assumes, in the absence of an intervening withdrawal, the status of an entry and the rights of the applicant relate back to the date of the filing of the application, despite the fact that the act itself precludes occupancy of the land prior to the time that the designation becomes effective.

DEPARTMENTAL DECISIONS CITED AND APPLIED—DEPARTMENTAL DECISION OVERRULED.

Cases of *Harris v. Miller* (47 L. D., 406) and *Larson v. Parrish and Woodring* (49 L. D., 311) cited and applied; case of *Wright et al. v. Smith* (44 L. D., 226) overruled.

FINNEY, First Assistant Secretary:

At the Salt Lake City, Utah, land office on January 26, 1917, Mona G. Heaston applied to make entry under section 1 of the stock-raising homestead act for W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 11, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 10, NE. $\frac{1}{4}$, Sec. 15, and N. $\frac{1}{2}$, Sec. 14, exclusive of certain mineral claims, T. 3 S., R. 3 W., S. L. M., filing therewith a petition for designation. The designation of the land became effective January 31, 1922, and plat of mineral segregation survey has been filed. The application to make entry has not been allowed.

On March 16, 1922, John G. Condas filed an application to contest the application, and on March 31, 1922, filed an amended affidavit, charging that—

Mona G. Heaston is a married woman, and now living with her husband, Archibald Douglass Clark, in the State of Oklahoma. That she married said Clark October 15, 1919, and, therefore, now is disqualified to make homestead entry. That she never established settlement or residence on, occupied, improved (or caused same to be) any part of said land, or otherwise brought herself within the purview of the act of June 6, 1900 (31 Stat. 683). And her marriage, failure to establish settlement, residence, etc., and her absence from said land was not due, nor is it now due, to employment in the United States Army, Navy or Marine Corps, or other military or maritime organization.

The local officers rejected the application to contest, and later denied a motion for rehearing. Contestant appealed, and by decision dated May 22, 1922, the Commissioner of the General Land Office affirmed the action of the local officers. Within the time allowed by

the Rules of Practice, an appeal to the Department was filed, whereupon the Commissioner required appellant to show that the appeal had been served on "the adverse party" or suffer the dismissal of his appeal. Appellant "demurred" to the said requirement, and the record has been forwarded to the Department.

Appellant's objection to making service of his appeal on Mrs. Clark is well taken. She is at present not a party to the proceedings, and will not become a party until and unless the application to contest is accepted and she is served with notice thereof.

It is contended that applicant's marriage prior to the designation of the land, no claim of settlement being involved, terminated her rights under her application. It is not alleged that Mrs. Clark was not qualified to make a homestead entry at the date of her application. She deposited the necessary fee and commissions, but action on the petition for designation was delayed, due to the necessity of making a field investigation. Her application and petition for designation were filed under the proviso to section 2 of the stock-raising homestead act, which reads as follows:

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.

It is true that on January 12, 1921 (47 L. D., 629), the Department instructed the Commissioner of the General Land Office to the effect that there can be no appropriation, either under section 2 or section 8 of the stock-raising law, prior to designation of the land. But the question there involved was whether, during the pendency of an application and petition for designation, a withdrawal for forestry purposes defeated the application, and the Department held that, under the terms of the proclamation making the withdrawal, the pending stock-raising application was not excepted.

In *Wright et al. v. Smith* (44 L. D., 226, 228), cited by appellant, it was stated:

The entrywoman first filed her application, on April 16, 1916, as above stated, showing her qualifications to make entry. A controversy which occurred

because of the adverse claim of McManis resulted in long delay before final decision upon the merits of the case, and, as a matter of precaution, the Department deemed it advisable to require Smith to show her qualifications at the time of perfecting entry. Such supplemental affidavit was not to be considered as the basis of or initiation of her right, but simply to show that her rights theretofore gained had not been lost by disqualification to enter. It was concluded, as above recited, that her status had not changed since filing her application, and that her entry should stand.

However, by decision of June 16, 1920, in *Harris v. Miller* (47 L. D., 406), the Department overruled certain prior rulings and held that if a *bona fide* settler possesses the necessary qualifications at the time of initiation of his homestead claim, the subsequent ownership of more than 160 acres of land prior to the date of his application does not invalidate the settlement claim.

In *Larson v. Parrish and Woodring* the Department held by decision of October 6, 1922 (49 L. D., 311), citing *Hamilton v. Harris et al.*, on review (18 L. D., 45), and *Rippy v. Snowden* (47 L. D., 321), that a homestead application, accompanied by the required payment, filed by a single woman, for lands subject to entry, and suspended to await the determination of her qualifications, is to all intents and purposes an entry, upon ascertainment that at the time of filing the application she was qualified under the law, and her subsequent marriage does not affect any of her rights under the application. The doctrine announced in said decision is applicable to the case under consideration. Upon ascertainment that the land applied for was actually of the character contemplated by the stock-raising homestead act, the rights of applicant related back to the date of her application, and she became as one who had made entry on that date, despite the fact that she gained no right to occupy the land prior to the date the designation thereof became effective. Her application could have been defeated by a withdrawal made under section 10 of the stock-raising homestead act or under the act of June 25, 1910 (36 Stat., 847), but that is a condition not here involved. There has been no withdrawal, and no reason appears why the pending application may not be allowed.

The decision appealed from is affirmed.

SCHOOL LANDS WITHIN THE CROW INDIAN RESERVATION.

Opinion, December 28, 1922.

INDIAN LANDS—CROW LANDS—MONTANA—SCHOOL LAND—ALLOTMENT.

Section 16 of the act of June 4, 1920, although purporting to be a grant *in praesenti* of certain lands within the Crow Indian Reservation to the State of Montana for school purposes, is not to be construed as a denial of the right of those Indians in certain specific classes designated by the act to select such lands for allotments.

INDIAN LANDS—CROW LANDS—SCHOOL LAND—COURTS—STATUTES.

The doctrine that congressional legislation pertaining to relations between the Indians and third parties, including the States, is to be construed in favor of the Indians has been so frequently announced by the courts that it has practically become a maxim.

SCHOOL LAND—INDEMNITY—INDIAN LANDS—CROW LANDS.

While a State is not entitled to indemnity under its school land grant because the lands in place are of an inferior quality, yet where its place lands are "hedged in," even by subsequent acts of the Federal Government, so that they become practically useless for school purposes, the right of the State to select indemnity lands elsewhere arises.

SCHOOL LAND—INDEMNITY—INDIAN LANDS—CROW LANDS—WORDS AND PHRASES—STATUTES.

The term "Indemnity" as used in the statutes granting lands to the States for school purposes implies compensation for losses actually sustained by failure to receive designated sections in place, and not a right to select lands elsewhere because those in place happen to be of inferior quality.

BOOTH, *Solicitor*:

November 24, 1922, you approved a schedule of allotments in severalty to some 358 members of the Crow Tribe of Indians in Montana made pursuant to the act of June 4, 1920 (41 Stat., 751), but excepted from such approval, pending further instructions, two allotments involving lands in certain sections 16 within that reservation—"State school lands." Some question having been raised regarding these two allotments you have since requested my opinion as to the respective rights of the Indians and of the State in the premises.

While the particular schedule referred to contains but two allotments in conflict with the grant to the State yet the information now at hand discloses that there are some 5,000 acres of other land within the Crow Reservation similarly situated and which doubtless will appear on subsequent allotment schedules to be presented here for action. Under these circumstances it is essential that the matter be considered somewhat fully.

The grant to the State turns primarily on section 16 of the act of June 4, 1920, *supra*, which reads:

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. The United States shall pay the Indians for the lands so granted \$5 per acre, and sufficient money is hereby appropriated out of the Treasury of the United States not otherwise appropri-

ated to pay for said school lands granted to the said State: *Provided*, That the mineral rights in said school lands are hereby reserved for the benefit of the Crow Tribe of Indians as herein authorized: *Provided further*, That the Crow Indian children shall be permitted to attend the public schools of said State on the same condition as the children of white citizens of said State. (Italics supplied.)

Standing alone and construed literally the expression "is hereby granted" as used above undoubtedly constitutes a grant *in praesenti*; one taking effect immediately upon the passage of the act if the lands are then surveyed, and if not surveyed then upon approval of an official survey (33 L. D., 181; 240 U. S., 192). With the latter situation, however, we are not here greatly concerned, as I understand that practically all lands within the diminished Crow Reservation have previously been surveyed. In the absence of some controlling reason to the contrary, therefore, the grant to the State became effective as of the date of that act. No affirmative action on the part of the State is necessary in order to perfect its title to its lands in place such as "an acceptance" of the terms of the act or a formal "selection" of the lands in place granted to it. We turn, therefore, to the remaining provisions of the same statute and to other relevant circumstances. It may be well, however, here to observe that under the compensating clauses of the act, Congress has seen to it that neither the Indians nor the State shall suffer substantial loss by virtue of any of the provisions of that statute, for, where any lands in place are lost to the State, whether by reason of allotment to the Indians or otherwise, then the right to indemnity instantly arises, and for all lands within their reservation ultimately passing to the State under the school land grant the Indians of the Crow Tribe are to receive \$5 per acre.

In an opinion dated December 27, 1921 (48 L. D., 512), I had occasion to discuss somewhat briefly the grant made to the State of Montana by the act of June 4, 1920, *supra*, but the question there turned mainly on the right of the State to indemnity where the lands in place were mineral or timber and whether indemnity selections by the State could be made within the diminished Indian reservation. In an earlier opinion dated November 22, 1921 (48 L. D., 479), I had occasion also to advert at some length to the matter of allotments to members of the Crow Tribe under the particular statute here in question. Without reviewing either of those opinions *in extenso* it is sufficient here to point out that in the latter opinion prospective allottees of this tribe under the act of June 4, 1920, for convenient designation, were divided into four classes, A, B, C, and D, respectively. Further, the schedule first herein referred to shows the allottees in class A; that is those who died unallotted after December 31, 1905, but prior to June 4, 1920.

Class B consists of those living heads of families as of a certain date who previously failed to receive allotments as such. The remaining classes we need not again mention here, but with this partial classification in mind it is with a better understanding of the true intent of the act when we read from section 1:

That the Secretary of the Interior be, and he hereby is, authorized and directed to cause to be allotted * * * 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 allotable 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 * * *. (Italics supplied.)

The foregoing provision not only implies a priority of allottees as among themselves but rather also unconsciously infers that the provisions of the act are to be carried out in a certain logical order. In a measure it furnishes the basis for that observation in 48 L. D., p. 482, wherein it was said:

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. (Italics supplied.)

Beyond all of that, however, rests still other pertinent considerations. Legislation anterior to June 4, 1920, provided for allotments in given areas to the Indians of the Crow Reservation, notably the act of April 11, 1882 (22 Stat., 42), which authorized an allotment of 160 acres of agricultural or 320 acres of grazing land to each head of a family, and 80 acres of agricultural or 160 acres of grazing land to each single person, including children "born prior to said allotments." Several successive efforts were made to allot the Indians of the Crow Tribe under this and subsequent acts of Congress prior to June 4, 1920. Into the history of all this we need not now go other than to observe that the earlier allotment rolls were "closed" as of December 31, 1905. After that date, of course, children born to members of the tribe were not regarded as entitled to an allotment. To this ruling the Crow Indians objected, contending in brief that the reservation was "their property" and this being so that they should be permitted to select allotments for children born to enrolled members of the tribe so long as any land suitable for allotment purposes remained within their reservation. Selections of the lands wanted in behalf of such newborn children were made and

filed at the local agency, not without some misgivings, however, on the part of the administrative officers in charge, as it was not then known what additional legislation, if any, might be had, and it was feared that the selections so made might complicate future adjustment of affairs should the needed legislation not be enacted. That issue, however, has since been put at rest by the act of June 4, 1920, *supra*, in which, in so far as class A allottees are concerned, Congress has but recognized and confirmed allotments that were previously selected for these Indians. In truth and in equity, therefore, it might well be said that the Indians on this particular schedule possess rights antedating the grant to the State.

We turn, therefore, to still other pertinent facts at hand. The State is not here demanding its lands in place. With respect to the Crow, as with so many of the other Indian reservations within her borders, the State of Montana, speaking generally, has waived all technical rights she may have to any designated lands in place and selected indemnity lands elsewhere. The real question at issue, therefore, is the legal right of the State so to do. An extended memorandum from the General Land Office under date of October 28, 1922, regarding this matter presents this angle of the situation quite forcibly. Therein the case of Michael Dermody (17 L. D., 266) is referred to. That case has been duly considered. There it was held, in brief, that a State may not *at will* waive its right to lands in place and seek indemnity elsewhere—a holding that is undoubtedly sound. If we once recognize a naked right of election on the part of a State to take either its lands in place or indemnity elsewhere as it might choose, then the matter would simply resolve itself into one of inspection in order for the State to determine whether to retain its base lands or to seek lands of a better quality elsewhere by way of “indemnity.” The latter term, within itself, negatives the existence of any such right. Rather it implies compensation for losses actually sustained by failure to receive any lands in place and not a right to select lands elsewhere because those in place happen to be of an inferior quality. Manifestly no such right ever existed in our public land States. On the other hand, a State is not always to be required to retain its base lands in place, and this is amply illustrated by the departmental holding in 28 L. D., 57. There certain lands in place had passed to the State of California under the school land grant to it and after official survey of such lands had been made in the field those lands were included within a national forest. The State insisted that it had the right to surrender its base lands and select indemnity elsewhere. At first that contention was denied (19 L. D., 585), but on reconsideration the earlier ruling was vacated, and in the later decision (28 L. D., 57, 61), it was said: “The selection (indemnity), when approved, will operate as a waiver by the

State of its right to the tract used as a basis." This ruling was referred to with approval and upheld in principle by the Supreme Court of the United States in the case of *State of California v. Deseret Water, Oil and Irrigation Company* (243 U. S., 415, 421). The true rule, therefore, seems to be that while the State may not be heard to complain because its lands in place are of an inferior quality, yet where its base lands are "hedged in" even by subsequent acts of the Federal Government then the right on the part of the State to select indemnity lands elsewhere arises.

The situation with respect to other Indian reservations in the State of Montana is not without interest here. By the act of April 23, 1904 (33 Stat., 302), Congress provided for the survey, allotment, classification, appraisement, etc., of the lands within the Flathead Indian Reservation. Section 8 of that act contains a rather positive grant *in praesenti* to the State of the lands in sections 16 and 36 within that reservation. The Flathead Indians, however, were permitted to and did select numerous allotments in sections 16 and 36, thus compelling the State to seek indemnity elsewhere. This is shown in 38 L. D., 341; particularly pages 343-344. The issue immediately there under consideration, however, was the matter of lieu selections by the State rather than a prior right of the Indians to take in allotment lands within sections 16 and 36 of their reservation. Substantially the same situation existed with respect to the Fort Peck Indian Reservation under the act of May 30, 1908 (35 Stat., 558), section 7 of which granted to the State of Montana sections 16 and 36 within that reservation, with a right of indemnity elsewhere for any lands lost to the State by reason of allotment to the Indians or otherwise. At the time of the passage of that act not a single acre within the Fort Peck Reservation had been allotted to any of the Indians of that tribe. The matter of the right of the Indians to select in allotment lands in sections 16 and 36 came before this Department in the form of instructions to the allotting agent wherein after reviewing the situation at some length that officer was directed under date of March 1, 1910, in part, as follows (unreported):

As the State of Montana, by the provisions of section 7 of the act of May 30, 1908, *supra*, is entitled to select land in lieu of that lost to it within sections 16 and 36 in the Fort Peck Reservation, by reason of allotment or other disposition, the Indians on that reservation, if they so desire, may select lands in allotment within sections 16 and 36.

The act of March 1, 1907 (34 Stat., 1015; 1035), provided for the survey, allotments to the Indians in given areas, classification, appraisement and disposal of the surplus lands within the Blackfeet Indian Reservation, Montana, which act also carried an explicit grant of the lands in sections 16 and 36 within that reservation to the State for school purposes. Provision was also made for

indemnity to the State for any lands lost by reason of allotment to the Indians or otherwise. Prior to that act no lands within this reservation had been allotted to these Indians. After the surveys and allotments called for by the act of March 1, 1907, had been completed but before the remaining requirements of that act had been fully administered Congress, by the act of June 30, 1919 (41 Stat., 3, 16), repealed so much of the act of 1907 as related to the disposal of the unallotted lands within this reservation and authorized the Secretary of the Interior to prorate the remaining unallotted lands among the Indians of the Blackfeet Tribe as shown by a tribal roll therein provided for. The latter act (1919), however, expressly provided that nothing therein contained should be construed to repeal the school land grant to the State of Montana, made by the act of March 1, 1907. That situation came before this Department in September, 1920, by way of instructions to the register and receiver at Kalispell, Montana (47 L. D., 568 *et seq.*). Possibly some of the observations made in those instructions were somewhat wider than originally intended, or at least they are susceptible of a construction broader than the situation at hand actually justified. At any rate I am happy here to observe that since those instructions were issued, on ascertaining that practically every acre within sections 16 and 36 in the Blackfeet Indian Reservation had been allotted to the Indians, the State very graciously waived any technical right it might have had to designated lands in place and selected lieu lands elsewhere. By "Montana School Indemnity Clear List No. 33" approved February 12, 1921, indemnity lands outside of the reservation were approved to the State in lieu of all school lands within the Blackfeet Reservation. For reasons herein given I see no occasion to question the propriety of the action so had in that instance.

When we seek the fundamental principle underlying transactions of this kind it is not hard to find. They but illustrate the familiar doctrine so frequently announced by the Supreme Court as to now practically constitute a maxim to the effect that legislation pertaining to the Indians must be construed in their favor. The reservation of lands for each of the Indian Tribes referred to herein was originally established by treaty with the respective tribes. While the naked legal title to such lands did remain in the United States, yet for all intents and purposes it was regarded as the property of the Indians. This Department has ever been tender in its regard of the superior right of the Indians in the premises, and especially as between the Indians and third parties, including the States. Laying aside, therefore, for the time being, the superior power of Congress over the subject matter, when we come to consider the prior rights of the Indians and of third parties, including the States, we instantly

recognize the stronger, i. e., the Indians. It would not be difficult, therefore, under eminently proper construction of statutes of this kind, supported at least in principle by the rulings of the highest judicial tribunal in this country, to hold that in matters of this character the rights of the State are subordinate to the rights of the Indians. This is particularly true in view of the indemnity clauses of legislation of this kind under which the State receives indemnity lands elsewhere "in quantity equal to the loss."

In so far as the instant situation is concerned—the one at Crow—officials of the State and employees of this Department handling the work in the field have amicably adjusted conflicting claims between the State and the Indians in the premises and are in full accord as to the adjustment of the school land grant made to the State by the act of June 4, 1920, *supra*. I see no occasion here, legally or otherwise, to question the propriety of the adjustment so made.

I am of the opinion that the two suspended allotments first herein referred to should be approved and the issuance of patents therefor ordered. As to those schedules which have not yet been presented for departmental action, if any lands thereon lie within sections 16 and 36, I see no reason why the allotments so made should not be approved provided the State of Montana has selected indemnity lands elsewhere.

Approved:

F. M. GOODWIN,

Assistant Secretary.

FOREST LIEN SELECTIONS—CERTAIN RIGHTS REVIVED—ACT OF SEPTEMBER 22, 1922.

INSTRUCTIONS.

[Circular No. 869.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., December 30, 1922.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

1. Your attention is invited to the act of Congress, approved September 22, 1922 (42 Stat., 1017), entitled "An Act For the relief of certain persons, their heirs or assigns, who heretofore relinquished lands inside national forests to the United States," which provides as follows:

That where any person or persons in good faith relinquished to the United States lands in a national forest as a basis for a lien selection under the Act of June 4, 1897 (Thirtieth Statutes at Large, pages 11, 36), and failed to get

their lieu selections of record prior to the passage of the Act of March 3, 1905 (Thirty-third Statutes at Large, page 1264), or whose lieu selections, though duly filed, are finally rejected, the Secretary of the Interior, with the approval of the Secretary of Agriculture, upon application of such person or persons, their heirs or assigns, is authorized to accept title to such of the base lands as are desirable for national-forest purposes, which lands shall thereupon become parts of the nearest national forest, and, in exchange therefor, may issue patent for not to exceed an equal value of national-forest land, unoccupied, surveyed, and nonmineral in character, or the Secretary of Agriculture may authorize the grantor to cut and remove an equal value of timber within the national forests of the same State. Where an exchange can not be agreed upon the Commissioner of the General Land Office is hereby authorized to relinquish and quitclaim to such person or persons, their heirs or assigns, all title to such lands which the respective relinquishments of such person or persons may have vested in the United States: *Provided*, That such person or persons, their heirs or assigns, shall within five years after the date of this Act, make satisfactory proof of the relinquishment of such lands to the United States by submitting to the Commissioner of the General Land Office an abstract of title to such lands showing relinquishment of the same to the United States, which abstract or abstracts shall be retained in the files of the General Land Office.

SEC. 2. That if it shall appear that any of the lands relinquished to the United States for the purpose stated in the preceding section have been disposed of or appropriated to a public use, other than the general purposes for which the forest reserve within the bounds of which they are situate was created, such lands shall not be relinquished and quitclaimed as provided therein, unless the head of the department having jurisdiction over the lands shall consent to such relinquishment; and if he shall fail to so consent, or if any of the lands so relinquished have been otherwise disposed of by the United States, other surveyed, nonmineral, unoccupied, unreserved public lands of approximately equal area and value may be selected and patented in lieu of the lands so appropriated or disposed of in the manner and subject to the terms and conditions prescribed by said Act of June 4, 1897, and the regulations issued thereunder: *Provided*, That applications to make such lieu selections must be filed in the General Land Office within three years after the date of this Act.

2. *Initial Application to Forest Officers.*—All preliminary negotiations relating to an exchange under section 1 of the act are to be conducted with the local representatives of the Forest Service. Any person or persons who in good faith relinquished to the United States lands in a national forest as a basis for a lieu selection under the act of June 4, 1897 (30 Stat., 11, 36), and failed to get their lieu selections of record prior to the passage of the repealing act of March 3, 1905 (33 Stat., 1264), or whose selections, though duly filed, are finally rejected, or the heirs or assigns of such person or persons, and who desires to take advantage of the privileges conferred by section 1 of said act, must file with the local national forest officers an informal application describing by Government subdivisions the land thus relinquished to the United States as well as the land desired to be selected. If timber is desired in exchange the land on which the timber is located must be described. The

relinquishment of less than a legal subdivision will not be accepted, nor the selection of less than a legal subdivision approved. The selected land or timber must be entirely within national forest boundaries, and where timber is applied for the land on which it is located must be in the same State as is the relinquished land.

The applicant must also show by affidavit, or other evidence satisfactory to the Forest Service, that, prior to March 3, 1905, he duly relinquished to the United States lands in a national forest as a basis for lieu selection under said act of June 4, 1897, and that he failed to get his lieu selection of record prior to the passage of said act of March 3, 1905, or that his selection, though duly filed, was finally rejected.

3. *Approval of the Exchange.*—When a tentative agreement has been reached between the applicant and the local national forest officer, the matter will be submitted to the district forester, and if approved by him will be forwarded to the Forester, Washington, D. C., for consideration.

If the Forester finds that the base lands are desirable for national forest purposes; that the value of the base lands relinquished, and the selected lands, is equal; and that the lands selected are unoccupied, surveyed, and nonmineral in character, or the timber selected is equal in value to the land relinquished; that the selected land or timber is entirely within national forest boundaries, and the lands on which the timber is located are in the same State as the relinquished lands, he will so report to the Secretary of Agriculture and will request that the Secretary of the Interior be advised that the acceptance of the title to the base lands offered under the act and the granting in lieu thereof of other described lands, or of stumpage upon other described lands, meets with the approval of the Department of Agriculture.

The Secretary of the Interior, upon receipt of such a letter from the Secretary of Agriculture, unless he has reasons to do otherwise, will approve the exchange, subject to the submission of acceptable title to the base land, and to full compliance by the applicant with these regulations, and subject to any protests or other valid objections which may appear, and will so advise the Commissioner of the General Land Office.

4. *Formal Application to District Land Officers.*—The General Land Office will notify the district land officers of the district in which the land or timber to be selected is located of the approval of the exchange, and such district land officers will in turn notify the person desiring to make such exchange of the approval thereof, and that he is allowed 60 days from receipt of notice within which to file his formal application specifically describing the land selected, or the

land on which timber selected is located, and the land to be relinquished. The application must be accompanied by the necessary affidavits, relinquishments or reconveyances, abstract of title and fees.

No fixed forms of application for selection under this act and accompanying affidavits as to the relinquished and selected lands have been prepared, but these instructions should be followed as nearly as possible.

The proof papers necessary to complete a selection should be filed at the same time. However, if additional time is necessary to complete the abstract, the same will be granted upon a proper showing filed with the application to select.

5. *Affidavits Required.*—The applicant will be required to show by affidavit that he is 21 years of age, and otherwise legally capable of carrying through the transaction; that he is the owner of the land relinquished, and that said land is not the basis of another selection or exchange. He must also furnish his own affidavit or the affidavit of some credible person possessed of the requisite personal knowledge, showing that the land selected is nonmineral in character; that it contains no salt springs or deposits of salt in any form sufficient to render it chiefly valuable therefor; that it is not in any manner occupied or claimed adversely to the selector.

These affidavits may be executed before any officer qualified to administer oaths.

6. *Relinquishment or Reconveyance.*—The original deed of relinquishment or reconveyance of the land tendered as a basis of exchange must have been executed and acknowledged in the same manner as a conveyance of real property is required to be executed and acknowledged by the laws of the State in which the land is situated. The original deed, duly recorded, should be tendered or a certified copy of the deed, as recorded on the county records.

Where the relinquishment or reconveyance is made by an individual it must show whether the person relinquishing is married or single, and if married, the wife or husband of such person, as the case may be, should have joined in the execution of the relinquishment or reconveyance in such a manner as to effectually bar any right of curtesy or dower, or any claim whatsoever to the land relinquished, or it must be fully shown that under the laws of the State in which the relinquished land is situated such wife or husband has no interest whatsoever, present or prospective, which makes her or his joining in the relinquishment or reconveyance necessary.

Where the relinquishment or reconveyance is by a corporation, it should be recited in the instrument of transfer that it was executed pursuant to an order or by the direction of the board of directors

or other governing body, a copy of which order or direction should accompany such instrument of transfer and should bear the impression of the corporate seal.

7. *Abstract of Title.*—Each relinquishment or reconveyance must be accompanied by a duly authenticated abstract of title, showing relinquishment of the base lands to the United States; that at the time the reconveyance was recorded the title was in the party making the conveyance; that at the present time, title is in the United States, and that the land is free from conflicting record claims, tax liabilities, judgment or mortgage liens, pending suits or other incumbrances.

The certificate of authentication of the abstract must be signed by the recorder of deeds or other proper official, under his official seal, and must show that the title memoranda is a full, true and complete abstract of all matters of record or on file in his office, including all conveyances, mortgages, or other incumbrances, judgments against the various grantors, mechanics' liens, lis pendens, or other instruments which are required by law to be filed with the recording officers, affecting in any manner whatsoever the title to the described land. The authenticity of the tax records must be certified by the officers having custody thereof showing that all taxes levied or assessed against the land, or that could operate thereon as a lien, have been fully paid, or whether there is a tax lien although such tax is not assessed, due or payable, that there are no unredeemed tax sales and no tax deeds outstanding as shown by the records of his office. The absence of judgment liens or pending suits against the various grantors which might affect the title of the land relinquished or reconveyed must be shown by the official certificate of the clerks of the courts of record, whose judgments, under the laws of the United States or the State in which the land is situated, would be a lien on the land reconveyed or relinquished. If it is preferred the abstract may be authenticated by an abstractor or by an abstract company, approved by the General Land Office, in accordance with section 42 of the Mining Regulations of April 11, 1922 (49 L. D., 15, 69).

8. *Applications for timber.*—If timber is desired in exchange for the land conveyed to the United States, proof that notice has been published and posted will be all the evidence necessary to be filed in regard to the timber, but all the proof required in connection with the land offered as a basis for the exchange must be filed.

9. *Fees.*—Fees must be paid by the applicant at the time of filing his application in the local land office at the rate of \$1.00 each to the register and receiver for each 160 acres or fraction thereof included in his application.

10. *Publication and Posting.*—Within thirty days from the filing of his application to select land or timber the applicant will begin publication of notice thereof, at his own expense, in a newspaper or newspapers having general circulation in the county or counties in which the land or timber selected is situated, the newspapers to be designated by the register. Such notice must be published once each week for four successive weeks during which time a similar notice of the application must be posted in the local land office and upon each and every noncontiguous tract included in the application. The notice should describe the land or timber applied for as well as the land to be given in exchange and give the date of filing the application and state that the purpose thereof is to allow all persons claiming the land selected or having *bona fide* objections to such application an opportunity to file their protests with the local officers of the land district in which the land selected is situated.

Proof of publication shall consist of an affidavit of the publisher or of the foreman or other proper employee of the newspaper in which the notice was published, with a copy of the published notice attached. Proof of posting upon the land and that such notices remained posted during the entire period required must be made by the applicant or some credible person having personal knowledge of the facts. The register shall certify to the posting in his office. The dates of such publication and posting must, in all cases, be given.

11. *Action by District Land Office.*—All applications sufficient in form, accompanied by the required proof, and fees, will be accepted, and you will note on your records against the land “Selected under the act of September 22, 1922, Public No. 339, by _____ (date) _____ Serial No. _____ pending.” Such application will be given a serial number and have the hour and date of filing stamped thereon.

The register will certify the condition of the record on the application and you will promptly transmit the original application and accompanying papers to this office by special letter, as soon as evidence of publication and posting is furnished.

12. *Action by the General Land Office.*—The application and accompanying proof will, upon receipt by the General Land Office, be examined at as early a date as practicable and if found defective, opportunity will be given the parties in interest to cure the defects, if possible. If the selection appears regular and in conformity with the law and these regulations, the selection will, in the absence of objections, if for land only, be formally approved for patent by letter to the district land office, a copy of such letter to be furnished the Forest Service, but if timber is taken in exchange the Secretary

of Agriculture will, upon advice of the Secretary of the Interior that the regulations have been fully complied with, issue proper permit or certificate for timber.

13. *Relinquishment by the General Land Office.*—Where the applicant and the forest officers can not agree upon an exchange in accordance with section 1 of said act of September 22, 1922, and where the lands relinquished have not been disposed of by the United States or appropriated to a public use other than the general purposes for which the forest reserve within the bounds of which they are situated was created, upon due proof of that fact, to consist of the letters of the forest officers and the affidavit of the applicant, accompanied by the required abstract of title showing relinquishment of the lands to the United States, under the said act of June 4, 1897, the Commissioner of the General Land Office will, in proper cases, relinquish and quitclaim to the person or persons, who thus relinquished to the United States, their heirs or assigns, all title to such lands which the respective relinquishments of such person or persons may have vested in the United States. A copy of such relinquishment and quitclaim and the abstract of title will be filed in the General Land Office.

Applications for such relinquishments or quitclaims may be filed in the district land office, for transmission by special letter, or the applications may be filed direct in the General Land Office. Such applications will not be given a serial number.

14. *Rights of Reselection Granted in Certain Cases.*—Where it appears that an exchange can not be agreed upon, and that the lands relinquished to the United States under said act of June 4, 1897, have been disposed of by the United States or appropriated to a public use, other than the general purposes for which the forest reserve within the bounds of which they are situated was created, such lands will not be relinquished and quitclaimed unless the head of the Department having jurisdiction over the lands shall consent thereto.

If such head of Department shall fail so to consent, or if any of the lands so relinquished have been otherwise disposed of by the United States, the person or persons so relinquishing, their heirs or assigns, may select other surveyed, nonmineral, unoccupied, unreserved public lands of approximately equal area and value, and the same shall be patented in lieu of the lands so appropriated or disposed of, in the manner and subject to the terms and conditions prescribed by said act of June 4, 1897, and the regulations issued thereunder. The principal circular giving instructions under this act is that of July 7, 1902 (31 L. D., 372), but this was modified by a large number of subsequent circulars and decisions. Publication is required by the circular of February 21, 1908 (36 L. D., 278).

After the right of selection under section 2 of the act of September 22, 1922, has been granted, a compliance with the regulations of this circular, found in paragraphs numbered 4, 5, 6, 7, and 10 will probably be sufficient. Before the application can be approved, a field examination will be necessary to determine if the values are approximately equal.

15. *Statute of Limitations.*—Applicants desiring to make lieu selections under section 1 of said act, or desiring a relinquishment or quitclaim where an exchange can not be agreed upon, are, under the proviso to said section 1 allowed five years from and after the date of the act within which to make satisfactory proof of the relinquishment of their lands to the United States under said act of June 4, 1897, by submitting to the Commissioner of the General Land Office an abstract of title showing relinquishment of the same to the United States.

Applications to make lieu selections under section 2 of the act must be filed in the General Land Office within three years after the date of the act.

16. *Lands to Become Part of National Forest.*—Where title to lands is accepted under section 1 of the act, the lands relinquished shall thereupon become a part of the nearest national forest.

17. *Right Reserved to Reject Any and All Applications.*—Applications to select either land or timber under the provisions of the act will not defeat the right of the United States to withdraw or reserve the land for such purposes or uses as may be proper prior to the filing in the district land office of an application complete in all particulars.

18. *Practice and Procedure.*—Notice of additional or further requirements, rejections, or other adverse actions of registers and receivers, the Commissioner or the Secretary, will be given and the right of appeal or rehearing recognized in the manner now prescribed by the Rules of Practice (48 L. D., 246), except as otherwise herein provided. A protest or other objection against the selection or the application to select must be filed in the district land office to be forwarded to the General Land Office for consideration and disposal. Application to enter filed subsequently to any conflicting application to select will be rejected except where the subsequent application to enter is supported by allegations of prior right, in which event it will be transmitted to the General Land Office with appropriate recommendation. Applications presented under these regulations not in substantial conformity with the requirements herein made or not accompanied by the prescribed proof and fees, or where land offered as basis of exchange or the land se-

lected is not situated within the boundaries prescribed by the act will be rejected, subject to appeal or curing of the defect where possible.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
Acting Secretary of the Interior.

I concur:

HENRY C. WALLACE,
Secretary of Agriculture.

NORTHERN PACIFIC RAILWAY COMPANY.

Decided December 30, 1922.

RAILROAD GRANT—INDIAN LANDS—MILLE LAC LANDS—MINNESOTA—RESERVATION—STATUTES.

The grant of July 2, 1864, to the Northern Pacific Railroad Company operated to convey the fee to the lands within the former Mille Lac Indian Reservation, Minnesota, that were ceded to the United States by the treaty of March 11, 1863, all of the Indian claims to which were extinguished by the act of January 14, 1889.

COURT DECISIONS CITED AND APPLIED—DEPARTMENTAL DECISIONS CITED AND OVERRULED.

Cases of *Buttz v. Northern Pacific Railroad* (119 U. S., 55) and *United States v. Mille Lac Chippewas* (229 U. S., 498) cited and applied; cases of *Northern Pacific Railroad Company et al. v. Walters et al.* (13 L. D., 230) and *Warren v. Northern Pacific Railroad Company* (22 L. D., 568) overruled so far as in conflict.

FINNEY, *First Assistant Secretary:*

On July 17, 1917, the Northern Pacific Railway Company filed in the General Land Office an application to have adjusted under the act of July 1, 1898 (30 Stat., 597, 620), the patented homestead entries of William Evans and thirteen others for lands in Secs. 7, 17, 19, and 29, T. 43 N., R. 27 W., 4th P. M., Minnesota, within the former Mille Lac Indian Reservation and within the place limits of the grant to the Northern Pacific Railroad (now Railway) Company by the act of July 2, 1864 (13 Stat., 365).

By decision dated August 7, 1922, the Commissioner of the General Land Office denied the application, citing *Northern Pacific R. R. Co. et al. v. Walters et al.* (13 L. D., 230), *Warren v. Northern Pacific R. R. Co.* (22 L. D., 568), and the unreported departmental decision of August 4, 1900, canceling the company's primary list (Taylors Falls No. 3), filed June 22, 1883, for the lands later embraced in the

fourteen entries referred to in the application to adjust. The company has appealed.

The treaty of February 22, 1855, proclaimed April 7, 1855 (10 Stat., 1165), in the second clause of Article II, reserved certain tracts of land as permanent homes for the Mississippi bands of Chippewa Indians—

The first to embrace the following fractional townships, viz: Forty-two north, of range twenty-five west; forty-two north, of range twenty-six west; and forty-two and forty-three north, of range twenty-seven west; and, also, the three islands in the southern part of Mille Lac.

The tracts reserved in the second clause of the second article of the treaty of 1855 were the subject of two treaties, the first being made March 11, 1863, and proclaimed, after amendment by the Senate, on March 19, 1863 (12 Stat., 1249), and the second made on May 7, 1864, and proclaimed, after amendment, on March 20, 1865 (13 Stat., 693).

Article I of the treaty of 1863 provided—

The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the 22d February, 1855, are hereby ceded to the United States, excepting one-half section of land, including the mission buildings at Gull Lake, which is hereby granted in fee simple to the Reverend John Johnson, missionary.

Article 2 of the second treaty provided:

The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the twenty-second of February, 1855, are hereby ceded to the United States, excepting one-half section of land, including the mission buildings at Gull Lake, which is hereby granted in fee simple to the Reverend John Johnson, missionary, and one section of land, to be located by the Secretary of the Interior, on the southeast side of Gull Lake, and which is hereby granted in fee simple to the chief Hole-in-the-day, and a section to chief Mis-qua-dace, at Sandy Lake, in like manner, and one section to chief Shaw-vosh-kung, at Mille Lac in like manner.

In the second article of both treaties was described the lands in the new reservation, the metes and bounds description in the second treaty differing slightly from the description of the first treaty.

Articles III, IV, V, and VI of the treaties, wherein was set forth what the United States agreed to do in consideration of the cession made in Article I, differed slightly, while the remaining articles were practically identical, except that to Article XIV of the second treaty there was added, "and that this treaty is in lieu of the treaty made by the same tribes, approved March 11, 1863."

Article XII of both treaties provided:

It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations, until the United States shall have first complied

with the stipulations of Articles IV and VI of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: *Provided*, That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

By the act of July 4, 1884 (23 Stat., 76, 89), Congress directed:

That the lands acquired from the White Oak Point and Mille Lac bands of Chippewa Indians on the White Earth reservation, in Minnesota, by the treaty proclaimed March twentieth, eighteen hundred and sixty-five, shall not be patented or disposed of in any manner until further legislation by Congress.

The act of January 14, 1889 (25 Stat., 642), entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," provided, in section 1, for the appointment of a commissioner to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations. Sections 4, 5, and 6 made provision for the survey and disposal of the ceded lands; the second proviso to section 6 reading as follows:

That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, preemption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon.

By the act of February 15, 1909 (35 Stat., 619), the Court of Claims was given jurisdiction to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac band against the United States on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation to public settlement under the general land laws of the United States. A suit was begun, and the Court of Claims gave judgment against the United States in the sum of \$827,580.72. (47 Ct. Cl., 415.) The judgment was rendered on the theory that the lands were set apart and reserved for the occupancy and use of the Mille Lac band by the treaties of February 22, 1855, March 11, 1863, and May 7, 1864, and were subsequently relinquished to the United States pursuant to the act of January 14, 1889, *supra*, upon certain trusts therein named, and that in violation of those treaties and that act they were opened to settlement and disposal under the general land laws of the United States, and were disposed of thereunder, to the great loss and damage of the Mille Lac band. On appeal, the

Supreme Court of the United States (229 U. S., 498), reversed the judgment, stating (page 510) :

The Court of Claims gave no effect to the proviso to section 6, and the findings afford no basis for separating the damages rightly recoverable from those erroneously assessed on account of lands disposed of under preemption and homestead entries allowed prior to the act of 1889.

Mr. Justice Van Devanter delivered the opinion of the court, and referred to the various treaties as follows :

By the treaty of 1863, *supra*, the lands in the six reservations, the one occupied by the Mille Lacs being in terms included, were expressly ceded to the United States. * * *

* * * * *
The treaty of 1864, *supra*, superseded that of 1863, and in so far as their provisions are material here they were identical, so we shall speak only of the later one. In addition to the creation of the single large reservation, provision was made for the payment of large annuities to the Indians in consideration for the cession of the six original reservations, and it is not questioned that these annuities were duly paid to all the bands, including the Mille Lacs, nor that there was a full compliance with Articles IV and VI.

* * * * *
A controversy soon arose over the meaning and effect of the proviso to Article XII of the treaty of 1864 declaring "that, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove (from the old reservation to the new one) so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." On the part of the executive and administrative officers it was insisted—not, however, without some differences among themselves—that the proviso did not invest the Mille Lacs with any right in the old reservation expressly ceded by Article I of the treaty, but merely permitted them to remain thereon as a matter of favor; that one purpose of the cession was to enable the Government to survey the lands and open them to settlement, and that it was not intended that the permission to remain should interfere with this. But the Mille Lacs maintained that the proviso operated to reserve the lands for their occupancy and use indefinitely, and that the lands could not be opened to settlement while they remained and conducted themselves properly towards the whites in that vicinity. The survey was made, the lands were declared open to settlement and entry, and entries in considerable numbers were allowed from time to time; but the Mille Lacs persisted in their claim and refused to move, although repeatedly entreated to do so. This continued to be the situation until the act of 1889 was passed by Congress and accepted by the Mille Lacs and other Chippewas of Minnesota. In the meantime an order was issued by one Secretary of the Interior suspending the allowance of further entries, as also further action upon those already allowed, and this order was recalled by a succeeding Secretary. Congress then passed the act of July 4, 1884, 23 Stat., 76, 89, c. 180, directing that the lands should not "be patented or disposed of in any manner until further legislation." The entries allowed up to that time covered about 55,000 acres, or approximately nine-tenths of the lands, and some were under investigation upon charges that they were fraudulent. After the passage of the act of 1884, all further action was suspended awaiting further legislation. * * *

That legislation came in the act of 1889.

* * * * *

Whatever might be said of its merits, it is apparent that there was a real controversy between the Mille Lacs and the Government in respect of the rights of the former under Article XII of the treaty of 1864, and that the controversy was still subsisting when the act of 1889 was passed by Congress and assented to by the Indians. And we think it also is apparent that this controversy was intended to be and was thereby adjusted and composed. A manifest purpose of the act was to bring about the removal to the White Earth Reservation of all the scattered bands, residing elsewhere than on the Red Lake Reservation, the Mille Lacs as well as the others; and this was to be accomplished, not through the exertion of the plenary power of Congress, but through negotiations with and the assent of the Indians. The provision in section 6 for perfecting subsisting preemption and homestead entries, if found regular and valid, pointed most persuasively to a purpose to extend the negotiations to the Mille Lac Reservation. The commission, the Secretary of the Interior, and the President, in seeking, obtaining, and approving the relinquishment of that reservation, all treated it as within the purview of the act, and the Mille Lacs did the same. Then, too, Congress recognized by the act of 1890, shortly following the approval of the agreement, that the Indians had come to have an interest in the disposal of the lands in that reservation.

But while the Government thus waived its earlier position respecting the status of the reservation and consented to recognize the contention of the Indians, this was done upon the express condition, stated in the proviso to section 6. * * * In other words, the controversy was intended to be and was adjusted and composed by concessions on both sides, whereby the lands in the Mille Lac Reservation were put in the same category, and were to be disposed of for the benefit of the Indians in the same manner, as the lands in the other reservations relinquished under the act, but subject to the condition and qualification that all subsisting *bona fide* preemption and homestead entries should be carried to completion and patent under the regulations and decisions in force at the time of their allowance.

* * * * *

On behalf of the Indians it also is said that the proviso was limited to "regular and valid" preemption and homestead entries, and that no entry of lands within an Indian reservation could come within that limitation. But this assumes the existence of the Mille Lac Reservation at the time of the entries, which was the very matter in dispute. * * * It meant, as its terms plainly show, that entries made in accordance with existing regulations and decisions could, if *bona fide*, be carried to completion and patent in the usual way; and the phrase "if found regular and valid" was evidently used with special reference to the charge that some of the entries were fraudulent and with the purpose of eliminating such as were of that character.

We are accordingly of opinion that the act of 1889, to which the Indians fully assented, contemplated and authorized the completion, and the issuing of patents on, all existing preemption and homestead entries in the Mille Lac tract which in the course of proceedings in the Land Department should be found to be within the terms of the proviso to section 6, and therefore that no rights of the Indians were infringed in so disposing of lands embraced in such entries. And we think the evident purpose of the proviso requires that it be held to include entries of that class theretofore passed to patent, of which there were some instances during the early period of the controversy.

It having been thus determined that the treaty of 1863 actually ceded to the United States the lands referred to in the application

to adjust, it follows that the subsequent grant to the railroad company operated to convey the fee to the company, subject to the right of occupancy by the Indians (*Buttz v. Northern Pacific Railroad*, 119 U. S., 55), and it became incumbent on the United States to extinguish all claims of the Indians, pursuant to the second section of the granting act—

The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill.

As stated by the Supreme Court in the *Buttz* case, *supra*, the Indians had merely a right of occupancy—a right to use the land subject to the dominion and control of the Government—and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the Government. The act of 1889 provided a method of extinguishing the claims of the Mille Lac band to the lands within the reservation created by the treaty of 1855 and ceded by the treaty of 1863, but in the meantime the United States had allowed entries for approximately 55,000 of the little more than 61,000 acres, among them the entries of Evans and the thirteen others, embracing lands within the place limits of the grant to the railroad company. As said entries were made prior to July 1, 1898, the application for adjustment under the act of that date must be allowed.

The decision appealed from is reversed, and the decisions referred to in the second paragraph hereof are overruled in so far as they conflict with the views herein expressed.

CONDEMNATION OF LANDS ALLOTTED IN SEVERALTY TO INDIANS.

Opinion, January 2, 1923.

INDIAN LANDS—ALLOTMENT—RIGHT OF WAY—STATUTES.

The act of March 3, 1901, which authorizes condemnation for public purposes pursuant to State or Territorial laws of lands allotted in severalty to Indians did not, either expressly or by implication, repeal any prior act, nor was it repealed by subsequent acts of Congress relating to the acquisition of rights of way across Indian lands; that act and the various Federal rights of way statutes are to be construed conjointly or, if need be, independently of each other.

INDIAN LANDS—RIGHT OF WAY—WORDS AND PHRASES.

In the ordinary sense the terms "public purpose" and "public use" are to be construed interchangeably.

INDIAN LANDS—RIGHT OF WAY—ALLOTMENT—WORDS AND PHRASES.

The term "public purpose," as used in the act of March 3, 1901, is to be construed to mean any purpose which would be deemed a public purpose under the laws of the State or Territory within which the allotted Indian lands are sought to be condemned.

Booth, *Solicitor*:

At the suggestion of the Commissioner of Indian affairs you request my opinion on several questions involving that provision in the act of March 3, 1901 (31 Stat., 1058, 1084), which reads:

That lands allotted in severalty to Indians may be condemned for any *public purpose* under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee. (Italics supplied.)

After inviting attention to a number of Federal statutes relating to the acquisition of public and Indian lands, or rights of way thereover for various purposes, some of which acts are hereinafter specifically referred to, the Commissioner of Indian Affairs presents questions which, for the time being, may be consolidated thus:

(1) What constitutes a "public purpose" within the meaning of the act of March 3, 1901, *supra*?

(2) Did the act of that date repeal any of the prior acts relating to the acquisition of rights of way across Indian land?

(3) Was the provision in the act mentioned repealed by any subsequent act of Congress under which Indian lands or rights of way thereover could be acquired for designated purposes?

The other statutes referred to, in the main, are:

Act of March 3, 1891 (26 Stat., 1095, 1101), sections 18 to 21, inclusive.

Act of March 2, 1899 (30 Stat., 990).

Act of February 15, 1901 (31 Stat., 790).

Act of June 21, 1906 (34 Stat., 325, 330).

Act of March 3, 1909 (35 Stat., 781).

Act of May 6, 1910 (36 Stat., 349).

Act of March 4, 1911 (36 Stat., 1235, 1253-54).

Act of May 18, 1916 (39 Stat., 123, 157).

It will not be necessary here to analyze separately or even discuss extensively the provisions of each of these measures; it being sufficient to point out that with the exception of the last-mentioned act they are all of general application, in that they do not relate to any particular reservation or tribe of Indians. Further, that under these statutes and possibly others, title to or a right of way over Indian lands, either tribal or allotted, may be acquired for various purposes, such as for railroads, station grounds, pipe lines, reservoirs, ditches, flumes, telephone, telegraph, power transmission

lines, etc. Applicants under these acts must conform to certain requirements some of which are statutory and others by way of regulation, as in all matters of this kind the applications are subject to approval by the Secretary of the Interior. Compensation to the Indians interested—whether individual allottees or the tribe as a whole—is usually had by way of “damages” assessed prior to final action. For illustrative purposes as to such matters but without particular regard to the latter point see 14 L. D., 265; 20 L. D., 154; 26 L. D., 381; 27 L. D., 421; 30 L. D., 599; 32 L. D., 178; 33 L. D., 389 and 563; 35 L. D., 550; 36 L. D., 135; 39 L. D., 44; 40 L. D., 470; 42 L. D., 562; 44 L. D., 511; and 45 L. D., 563. These by no means constitute even all of the published departmental rulings relating to such matters but they are ample for our present purposes.

Taking up the specific questions reproduced above, discussing these inversely and considering the last two jointly, it may be said that none of the statutes listed nor any other act of Congress, in express terms, repeals that provision in the act of March 3, 1901, *supra*. It will also be observed that that provision does not, in terms, repeal any other statute. As repeals by implication are not to be favored (235 U. S., 422), unless these several statutes are so repugnant to the provisions of the act of 1901 referred to, or present such an irreconcilable conflict therewith that effect can not be given to each then it must be held that the provisions of the one act are not repealed by the other. I do not find that the true situation here impels a repeal by implication. Hence, these several measures are to be considered together, or if need be, independently of each other. This clarifies the matter considerably.

Applicants desiring needed Indian lands, or rights of way thereover, for various public purposes have frequently found that the rights sought could the more readily be acquired by proper negotiation through this Department rather than through the courts. Uniformly this Department has seen to it that the interests of the Indians were fully protected. In some cases the “damages” assessed by way of compensation to the Indian may have appeared somewhat excessive, as ordinarily viewed, but the Indian has always received the benefit of the doubt. In given instances applicants for such rights may have realized this and in some cases even protested against the damages levied but in the end they also realized that the saving in time, court costs, attorneys’ fees, etc., frequently more than offset the difference in cost to themselves had they proceeded by condemnation through the courts. The fact remains, however, that allotted Indian lands can still be condemned for public purposes where necessary under the provisions of the act of March 3, 1901, *supra*. In other words, the remedy resting there is simply an alternative one rather than a concurrent or an exclusive procedure. Even

prior to the act of March 3, 1901, this Department held that a State could condemn allotted Indian lands for public purposes. See 19 L. D., 24. Again, the provisions of that act came before this Department in 1905 and in an opinion dated May 11, 1905 (unreported) the then Assistant Attorney General for this Department held that under the provisions of that act and of certain statutes of the State of Utah, lands allotted to the Indians within the Uintah Reservation could be condemned in favor of persons or corporations desiring to acquire rights of way for canals, ditches, etc. In concluding that opinion it was said:

These quotations from the law of Congress and the laws of the State answer the inquiry and leave no room for discussion or argument. Indian allotments are subject to be condemned for public purposes under the laws of the State or Territory where located, before the issue of final patent, to the same extent as if the allottee held the fee to the land. The use of the land for right of way for irrigating ditches is declared by the law of Utah to be a public use in support of which the right of eminent domain may be exercised.

Departmental decisions reported subsequently to the foregoing are not entirely silent in the matter. Thus, in 35 L. D., 648, it was said (syllabus):

A decree of condemnation by a court of competent jurisdiction, in proceedings under the act of March 3, 1901, which provides for condemnation for public purposes of lands allotted in severalty to Indians, has the effect to vest title in fee, and the issuance of patent to the Indian allottee for the land covered by the decree is not necessary.

The ruling had in the latter case is substantially dealt with also in 42 L. D., 4, as the same parties in interest and the same subject matter were involved. The fact that the power company there concerned also submitted to and did receive from Congress by the act of May 5, 1908 (35 Stat., 100), a confirmation of its title to the lands so acquired in no way detracts from the fact that the condemnation proceedings had in the first instance were perfectly legal, sufficient, and proper. The additional legislation by Congress simply "made assurance doubly sure." When analyzed the last mentioned act merely released and confirmed unto the power company the interests of the United States in and to the lands therein described. Those lands having previously been Indian "trust allotments," with the legal title remaining in the United States, doubtless the power company preferred to have of record some authenticated extinguishment of the latter title also.

After mature consideration of the entire subject matter I am of the opinion that the provisions of the act of March 3, 1901, are still in effect and that allotted Indian lands may still be condemned for public purposes. This brings us to a consideration of the question first presented, as to what constitutes "public purposes."

No clear-cut general rule concisely defining a public purpose can well be given. Necessarily this must rest to a large extent on the circumstances surrounding each particular transaction. Under the right of eminent domain inherent in every sovereign power, lands or other private property needed for public purposes can be condemned (15 Cyc., 557). This right may also be delegated to others and the legislative body may designate the public purposes to which such property can be applied (Id., 565-566). State statutes in most instances outline in part at least the purposes for which private property may be condemned, but it would be useless here to attempt to cite or even classify these numerous statutes. Regard must be had, of course, to the particular State in mind and the purposes desired to be accomplished. Again, where statutes sufficiently broad or of a general nature are lacking usually special enactments are resorted to. At times and under given conditions there may be some technical difference between and sufficient legal authority for distinguishing a "public purpose" from a "public use" but ordinarily these two terms are interchangeable. Some text writers even regard them as synonymous. Thus, in Cyc., Vol. 15, page 581, we find:

If the special benefit to be derived from the lands sought to be appropriated is wholly for private persons, the use is a private one, and is not made a public use by the fact that the public has a theoretical right to use it, or that the public will receive an incidental or prospective benefit therefrom. And on the other hand if the use is in fact a public one its character is not changed by the fact that the control of the property sought to be taken will be vested in private persons or private corporations who are actuated solely by motives of private gain, and that the private purposes will be thereby incidentally served. So a use is not rendered a private one by the mere fact that a part or even the whole of the cost of constructing the improvement is paid by individuals, although such individuals are the persons most benefited by the improvement.

While the foregoing employs the terms "private use" and "public use," yet if we substitute for those terms "private purposes" and "public purposes" the inevitable conclusion reached will be the same.

In his presentation of this matter the Commissioner of Indian Affairs refers to two particular local issues, one in the State of Oklahoma and the other in Wisconsin. The former refers to powerhouse sites and rights of way for electric transmission lines on and across lands allotted to Indians of the Kickapoo Tribe, although the particular areas desired are not described. It is further stated that the statutes of Oklahoma declare the furnishing of electricity to be a public purpose and that a grant of the power of eminent domain has also been had. This being true, I see no reason why condemnation proceedings, pursuant to the act of March 3, 1901, *supra*, would not lie as to the lands allotted to the Kickapoos.

With reference to the Wisconsin matter that involves also the act of May 18, 1916 (39 Stat., 123, 157), *supra*, which provides in part:

With the consent of the Indians of the Lac Court Oreilles Tribe, to be obtained in such manner as the Secretary of the Interior may require, flowage rights on the unallotted tribal lands, and with the consent of the allottee or of the heirs, of any deceased allottee and under such rules and regulations as the Secretary of the Interior may prescribe, flowage rights on any allotted lands in the Lac Court Oreilles Reservation, in the State of Wisconsin, *may be leased or granted* for storage-reservoir purposes. The tribe, as a condition to giving its consent to the granting or leasing of flowage rights on tribal lands, and any allottee or the heirs of any deceased allottee, as a condition to giving his or their consent to the leasing or granting of flowage rights on their respective allotments, may determine, subject to the approval of the Secretary of the Interior, what consideration or rental shall be received for such flowage rights, and in what manner and for what purposes such consideration or rental shall be paid or expended; and the consideration or rental shall be paid or expended under such rules and regulations as the Secretary of the Interior may prescribe. (Italics supplied.)

The Wisconsin-Minnesota Light and Power Company is now negotiating for the purchase of allotted Indian lands within the Lac Court Oreilles Indian Reservation pursuant to the foregoing statute, it being intimated that if the rights desired are not so acquired the company will be compelled to resort to condemnation proceedings under the earlier statute of March 3, 1901. It will be observed, of course, that the act of May 18, 1916, deals with both tribal and allotted lands while the act of 1901 applies only to "lands allotted in severalty to Indians." Further, that the act of 1916 is discretionary to the extent that the lands *may be leased or granted*. In other words, with the consent of the parties in interest the object sought to be accomplished can be attained, if desired, by way of leases rather than an outright purchase or by the more arbitrary method of condemnation. Should the Indians here concerned, or any one of them, refuse to grant the rights sought across lands allotted in severalty I would then be loath to hold as a matter of law that the power company could not resort to the act of March 3, 1901, and by condemnation acquire the lands needed to serve a manifest public purpose. Frankly, I am of the opinion that such a proceeding could be had as I do not see wherein the provisions of the act of May 18, 1916, operate as a repeal by way of implication or otherwise of the provisions of the act of March 3, 1901, *supra*.

As to the tribal lands involved, I find no act of Congress subjecting lands of this character to the operation of State statutes relating to condemnation. Hence, should the Lac Court Oreille Indians, as a tribe, refuse to consent to the use of tribal lands for the purposes indicated in the act of May 18, 1916, then it would seem that the

power company must seek relief by way of additional legislation through Congress. This particular angle of the matter not being directly in controversy here is one which I deem it unnecessary to exhaustively consider.

Approved:

F. M. GOODWIN,
Assistant Secretary.

THOMAS D. COONS.

Decided January 5, 1923.

MILITARY SERVICE—HOMESTEAD ENTRY—FINAL PROOF—SECTION 2305, REVISED STATUTES.

The period of service for which credit may be claimed upon the submission of final proof under section 2305, Revised Statutes, by a member of the Naval Reserve Force or of the Federalized National Guard, who was called into active service during the Mexican border operations or during the war with Germany, terminates upon the date of his discharge, and not upon the date that he was ordered to inactive duty.

FINNEY, *First Assistant Secretary:*

At the Billings, Montana, land office on June 23, 1917, Thomas D. Coons made a special homestead entry under the proclamation of September 28, 1914 (38 Stat., 2029), and the act of April 27, 1904 (33 Stat., 352), for all of Sec. 19, T. 1 N., R. 37 E., M. M. (639.80 acres), and on June 16, 1922, submitted final proof.

By decision dated September 28, 1922, the Commissioner of the General Land Office held that it would be necessary for entryman to show that he had resided on the land for at least four months since date of proof. Entryman has appealed.

According to the final-proof testimony, residence was established on the land on May 1, 1920, and was continuously maintained until August 1, 1921. The use of the land and the improvements thereon are satisfactory.

According to a certified copy of entryman's discharge from the United States Naval Reserve Force, he was enrolled January 25, 1918, and was honorably discharged September 30, 1921. A notation on the margin is to the effect entryman performed active duty from June 25, 1918, to February 1, 1919.

In his appeal, entryman contends that his active duty began January 25, 1918, and ended February 1, 1919. The Commissioner held that he was entitled to credit for the period of his active service only.

The regulations of May 26, 1922, Circular No. 302 (49 L. D., 118), provide (paragraph 5):

In computing the period of service of a soldier "who has served in the Army of the United States," within the meaning of that phrase as used in section

2304 of the Revised Statutes, the entrance of the soldier into the Army will be considered as dating from the time of voluntary entrance of privates into the Army, Navy, or Marine Corps, or appointment of officers (including those appointed from the Officers' Training Corps); in the case of a person enlisted in the Naval Reserve, from the time he was called into active service; in the case of a drafted man, from the time he was mustered into the service; in the case of members of the Federalized National Guard, from the time they were mustered into the United States service.

An entryman having enlisted and served 90 days during any one of the wars above mentioned is entitled under section 2305 of the Revised Statutes as amended to credit for the full term of his service under that enlistment, although such term did not expire until after the war ceased.

Under the quoted provisions of the regulations, it is immaterial whether entryman's active duty began on June 25 or January 25, 1918. Although he was ordered to inactive duty, effective on February 1, 1919, and directed to proceed to his home, he was not discharged until September 30, 1921. He is therefore entitled to claim credit for two years' service.

A member of the Naval Reserve Force or of the Federalized National Guard who was not called into active service during the operations along the Mexican border or during the war with Germany can not be allowed any credit in submitting final proof on a homestead entry, but if he were called into active service, and at least ninety days elapsed between the date he entered on active service and the date of his discharge, he is entitled to the credit provided for by section 2305, Revised Statutes. In other words, the date of his discharge, and not the date he was ordered to inactive duty, marks the ending of the period for which he is entitled to credit.

The final proof being acceptable, the decision appealed from is reversed.

OIL AND GAS PERMITS UNDER SECTION 13, ACT OF FEBRUARY 25, 1920—EXTENSION OF TIME FOR BEGINNING DRILLING OPERATIONS.

INSTRUCTIONS.

[Circular No. 801.]¹

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 12, 1923.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

By act of Congress approved January 11, 1922 (42 Stat., 356), the Secretary of the Interior was authorized to grant an extension of time under oil and gas permits granted pursuant to the act of

¹ Amending Circular No. 801, approved January 16, 1922, as amended to May 12, 1922 (48 L. D., 110).

February 25, 1920 (41 Stat., 437). This act applies to the Territory of Alaska.

The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may, if he shall find that any oil or gas permittee has been unable, with the exercise of diligence, to begin drilling operations or to drill wells of the depth and within the time prescribed by section 13 of the act of Congress approved February 25, 1920 (Forty-first Statutes, page 437), extend the time for beginning such drilling or completing it, to the amount specified in the act for such time, not exceeding three years, and upon such conditions as he shall prescribe.

Accordingly, a permittee who has been unable with the exercise of due diligence to comply with the terms of the permit issued under any section of the act of February 25, 1920, may, if the facts warrant, be granted an extension of time upon filing an application therefor, accompanied by his own affidavit setting forth what efforts, if any, he has made to comply with the terms of his permit and the reasons for delay in the full compliance therewith, and such showing to be accompanied by a corroborating affidavit of at least one disinterested person having actual knowledge of the facts.

The affidavit by the applicant must also show the time when he proposes to commence or resume his operations and any arrangements he has made for complying with the terms of the permit.

An extension of time to perform one of the acts required by the permit necessarily extends for the same period the time for the performance of all subsequent requirements, and as the bond is expressly limited by its terms to the period for which the permit was granted, the permittee must furnish a properly executed assent by the surety to the extension of his bond to cover the life of the permit as it will be extended if an extension is granted.

The application may be filed in the General Land Office or in the local land office having jurisdiction over the land involved by the permit. In the latter event proper applications will be promptly forwarded to this office by the local officers. In cases where applications for extensions, filed in the local offices, are not in affidavit form and duly corroborated or are not accompanied by the required assent by the sureties on the bonds the local officers will require the permittees to remedy these defects within 15 days from receipt of notice and will transmit the applications with evidence of service and a report of action taken at the expiration of the time allowed.

You will give the widest publicity to the above regulations that may be possible without expense to the United States.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

NORTHERN PACIFIC RAILWAY COMPANY v. JOSLIN.

Decided January 13, 1923.

STOCK-RAISING HOMESTEAD — APPLICATION — PREFERENCE RIGHT — ADVERSE CLAIM — SELECTION — INDEMNITY.

The proviso to section 2 of the stock-raising homestead act confers a preference right of entry upon an applicant pursuant to whose accompanying petition the land applied for is designated as subject to the provisions of that act, and the fact that the allowance of the application is contingent upon the designation of the land will not permit the initiation of an intervening adverse claim to defeat the right.

FINNEY, First Assistant Secretary:

This is an appeal by the Northern Pacific Railway Company from the decision of the General Land Office of September 13, 1922, which affirmed the action of the Helena, Montana, local office in accepting the stock-raising homestead application of Frank A. Joslin, and rejecting the said company's application to make indemnity selection, the land involved being the E. $\frac{1}{2}$ E. $\frac{1}{2}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, and W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 35, T. 18 N., R. 7 W., Helena, Montana, land district. Joslin's application was filed October 9, 1919, and was accompanied by a petition for designation of the land under the stock-raising act. Said land was so designated on June 13, 1922.

The rejection of the railway company's selection was upon the ground that, under the existing rules governing the disposition of tendered applications, filings and selections (see 43 L. D., 254), following the filing of a plat of survey, Joslin's application was entitled to priority in the drawing, which was held on October 22, 1919. The railway company appealed, and the General Land Office, in the decision above referred to, sustained the action of the local office. A further appeal brings the case before the Department.

In its appeal, the railway company claims that—

its right under the indemnity selection, regularly proffered in pursuance of the granting act, takes precedence over the application by Joslin for the reason that the land was not at the time of the filing of Joslin's application subject thereto, it being a condition precedent to the allowance of such a homestead application that the land should have been designated as of the character subject to entry under said act, and that this designation did not occur until long after the filing of the Joslin application.

The proviso to section 2 of the stock-raising homestead act confers a preference right of entry upon the person pursuant to whose petition land has been designated as subject to the provisions of the act, if such person is otherwise qualified to make entry. The right is initiated upon the filing of the application to make entry accompanied by petition for designation, subject to be defeated by an authoritative determination that the land sought is not of the character made enterable under the act. Such right is a present right, and

the fact that entry—fruition of the right—is made contingent upon an additional factor nowise affects this.

The decision appealed from is found correct, and is accordingly affirmed.

STAHL v. STIFFLER.

Decided January 16, 1923.

OIL AND GAS LANDS—PROSPECTING PERMIT—CONTEST—CONTESTANT—PREFERENCE RIGHT.

The provision contained in section 2 of the act of May 14, 1880, as amended by the act of July 26, 1892, which grants a preference right of entry to a successful contestant, has no application to contests against permits to prospect for oil and gas issued pursuant to the act of February 25, 1920, nor does the leasing act itself confer any such right as a reward for the procuring of the cancellation of permits through contest.

OIL AND GAS LANDS—PROSPECTING PERMIT—RECORDS—APPLICATION—PREFERENCE RIGHT.

A permit to prospect for oil and gas issued pursuant to the act of February 25, 1920, has a segregative effect until canceled and notation of the cancellation made on the records of the local land office, and no special or preferred right to appropriate the deposits covered by it can be acquired under an application which is accompanied by a protest that ultimately results in its cancellation.

DEPARTMENTAL DECISIONS CITED AND CONSTRUED.

Cases of Martin Judge (49 L. D., 171) and Purvis v. Witt (49 L. D., 260) cited and construed.

FINNEY, *First Assistant Secretary:*

On January 16, 1922, prospecting permit 09443 issued to Matthew Stiffler under section 13 of the act of February 25, 1920 (41 Stat., 437), for an unsurveyed tract of land described by metes and bounds in T. 41, N., R. 17 W., N. M. P. M., Durango land district, Colorado. On August 23, 1922, Albert J. Stahl filed permit application 010216 under the same section for said land, and subsequently he filed protests, under oath, alleging that Stiffler had failed to comply with the terms of the permit as to monumenting and posting of notice and as to the installation of drilling machinery and the beginning of drilling operations.

The Commissioner of the General Land Office by his decision of October 27, 1922, required the protestant to serve a copy of the protest upon the permittee, and the permittee to answer same, and also held the application of Stahl for rejection because the land applied for was included in an existing permit. Stahl has appealed.

The protest was served on Stiffler, who filed a sworn answer thereto, alleging that on or about July 1, 1922, he made an agreement and paid for the setting of the corners and monuments as required by the permit and that he was advised that the monuments

had been set and notices posted. He requests that an extension of time be granted him, and states that he will, if required by the Department, furnish such further information as shall be necessary to show due diligence in his endeavors to secure the development of the lands.

In the case of Martin Judge (49 L. D., 171) the Department laid down the general rule that until an outstanding permit is canceled by the Commissioner, and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits on the land included therein by the filing of an application therefor or by the posting of notice of intention to apply for a permit. In *Purvis v. Witt* (49 L. D., 260) it was held that a duly corroborated protest or contest against a permit, sufficiently alleging failure to comply with the law in matters not shown by the records or known to the Department, should be entertained and considered by the Commissioner with a view to the ordering of a hearing for the ascertainment of the facts. There was nothing in this decision which in any way modified the rule announced in the Judge case, or suggested that a protestant would gain a preference right to a permit in the event the protest was sustained. Section 2 of the act of May 14, 1880 (21 Stat., 140), as amended by the act of July 26, 1892 (27 Stat., 270), has no application to contests against permits under the leasing act, and the act itself gives no such preference right.

The fact that a permit application for deposits covered by an existing permit is accompanied by a protest which ultimately results in its cancellation does not give the application any special or preferred status, or except it from the operation of the general rule. The permit has a segregative effect, the deposits covered by it are not subject to appropriation until it is canceled and notation thereof made in the local office, and applications therefor filed prior to that time will not be recognized.

The rejection of Stahl's application by the Commissioner was correct and is affirmed.

The act of January 11, 1922 (42 Stat., 356), authorizes the Department to extend the time for compliance with the requirements of law under prospecting permits, and in view of the showing made in the answer by Stiffler, he will be afforded an opportunity to file a formal application for extension of time, in accordance with the instructions of January 16, 1922, as amended to January 12, 1923, Circular No. 801 (49 L. D., 110 and 403). If such an application is filed the Commissioner will give appropriate consideration thereto, and upon failure to file it the permit will be canceled.

The case is closed and the record returned to the General Land Office.

LEADEN ET AL. v. SANTA FE PACIFIC RAILROAD COMPANY (ON REHEARING).

Decided January 19, 1923.

RAILROAD SELECTION—LIEU SELECTION—COAL LANDS—RELINQUISHMENT—STATUTES.

A railroad selection filed pursuant to the act of April 28, 1904, for land in lieu of other land relinquished by the selector constitutes a contract which is, in theory of law, an immediate obligation the moment that the base land is relinquished at the request of the Secretary of the Interior, if the conditions of the statute are met, the validity of the selection to be determined in accordance with the conditions existing at the time it was made.

RAILROAD SELECTION—LIEU SELECTION—COAL LANDS—SECRETARY OF THE INTERIOR—STATUTES.

While the validity of a railroad selection filed under the act of April 28, 1904, is to be determined as of the date of the filing of the selection, if the conditions of the statute are met, yet the Secretary of the Interior is authorized, sufficient reasons being made to appear, to make subsequent inquiry directed to the ascertainment of whether or not the base and selected tracts were of known inequality at the date of selection.

RAILROAD SELECTION—LIEU SELECTION—COAL LANDS—RELINQUISHMENT—STATUTES.

A railroad selection filed under the act of April 28, 1904, for lands classified as coal lands and appraised at the minimum price at date of selection is valid if the base lands, relinquished at the request of the Secretary of the Interior, were classified and appraised as coal lands at the minimum price prior to date of selection, or, if not so classified and appraised, they were subsequently ascertained to be of quality at least equal to coal lands of the minimum price.

RAILROAD SELECTION—LIEU SELECTION—ADVERSE CLAIM.

The filing of a railroad selection pursuant to the act of April 28, 1904, and in accordance with departmental regulations, when accepted by the local officers, effects a segregation of the land covered thereby, which, during its pendency, precludes the acquisition of rights by a subsequent coal applicant, and a protestant against such selection is a mere protestant without interest.

COURT DECISION CITED AND APPLIED.

Case of Santa Fe Pacific Railroad Company v. Fall, decided by the United States Supreme Court May 29, 1922 (259 U. S., 197), cited and applied.

FALL, Secretary:

The above entitled cause comes before the Department upon motion for rehearing filed by Thomas Leaden, protestant. In determination of the question presented upon the motion, whether or not the protest should stand finally dismissed as ordered by previous departmental decision of August 30, 1922, full consideration has been given to the arguments presented in behalf of protestants.

The issues involved in this action have been the subject of numerous decisions both by this Department and the courts. It is unnecessary to a decision of the pending proceeding to discuss or make reference to all of the various orders and decisions heretofore had.

The record discloses that on May 1, 1911, the Santa Fe Pacific Railroad Company made selection (015272) under the act of April 28, 1904 (33 Stat., 556), for the N. $\frac{1}{2}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 28, T. 16 N., R. 18 W. (560 acres), in lieu of the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and lots 1, 2, 3 and 4, Sec. 15, T. 13 N., R. 17 W. (236.68 acres), and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and lots 1, 2, 3 and 4, Sec. 31, T. 14 N., R. 17 W. (322 acres), a total of 558.68 acres, all within the Santa Fe land district, New Mexico.

The acreage of the selected lands involved herein aggregated 560 acres and the acreage of the lands offered as a basis for said selection was a total of 558.68 acres. Of this total acreage approximately 322 acres of the base lands tendered in connection with this selection at the date thereof had been classified by the Department as coal lands and appraised at the minimum price of \$20 per acre. This portion of the base lands, 322 acres, remained in the same status until August 25, 1915, when it was withdrawn for reclassification and reappraisal. Under the attempted withdrawal of August 25, 1915, the said base lands were reclassified as coal lands and appraised at the value of \$54 per acre. By Executive order of August 30, 1916, said lands were restored to appropriation.

Of the base lands tendered in connection with this selection 236.68 acres had not at the date the selection list was filed been classified as coal lands, and the value thereof fixed by the Department of the Interior.

By Executive order of July 9, 1910, the 236.68 acres of the base lands were withdrawn for classification and appraisal. The base lands thus embraced within the selection were within 15 miles of a railroad and no classification or appraisal thereof having been made, if disposed of, would have been subject to sale at the minimum price fixed by law, namely, \$20 per acre. The lands thus offered for exchange were not formally classified and appraised until 1916, when they were returned as coal lands and appraised at \$61 per acre. The appraisal value of the base lands thus made was in excess of the appraised value of the selected lands at the date the selection list was filed.

At the date of filing the selection, May 1, 1911, as heretofore held by the Department's decision of August 30, 1922, the value of all of the lands included in the selection filed had been fixed and determined by the Government pursuant to law. The appraised value of the selected lands included within the selection list was the minimum price fixed by law, namely, \$20 per acre.

These lands were subject to appropriation by the Santa Fe Pacific Railroad Company at the then existing valuation in accordance with the provisions of the act of April 28, 1904 (33 Stat., 556) under the terms of which the exchange was made, which act provides that the company—

may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States—

any sections of their land grant in New Mexico, any portion of which was and had been occupied by a settler as a homestead for not less than 25 years; and further provides the railroad company— shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

The Santa Fe Pacific Railroad Company acting under authority of and in accordance with the provisions of the Statute, *supra*, and at the request of the Secretary of the Interior, relinquished specific tracts of coal lands which were either at date of selection officially classified or appraised as being of quality equal to coal land of the minimum price, or, if not specifically classified or appraised at date of selection, subsequently ascertained to be of such quality.

Leaden's status before the Department is that of a protestant without interest. It will be conceded that the Department is authorized, good and sufficient reasons being made to appear, to make inquiry directed to the ascertainment of whether or not the base and selected tracts were of known inequality at the date of selection. Under the decision of the Supreme Court of the United States, by opinion of May 29, 1922, in the case of the Santa Fe Pacific Railroad Company *v.* Fall, Secretary of the Interior (259 U. S., 197), it was held that the facts determinative of the equality of the lands to be selected and surrendered in exchange—

must be determined according to the conditions existing at the time when it (the selection) was made.

The case under consideration presents the undisputed fact that as of the date the selection was filed there subsisted a classification officially designating the selected tracts as coal lands of the value of \$20 per acre and as being subject to appropriation, not only by the railroad company through selection but the public generally at the then existing appraised price.

Accepting as valid and subsisting the official classification designating the selected lands as coal lands of the value of \$20 per acre the Santa Fe Pacific Railroad Company availed itself of the opportunity to select or appropriate the land, in accordance with the rights conferred by the act of April 28, 1904, *supra*. The Santa Fe Pacific Railroad Company surrendered specific tracts of land which

were then either officially classified as equal in quality within the meaning of the statute, or subsequently ascertained to be worth not less than the appraised price of the selected tracts existing at the date of selection. The Government's then existing classification and appraisal was the consideration which prompted the selection and represented the then known "quality" of the tracts of land at the date of selection.

There is no allegation in the protest of Leaden, or any evidence submitted, or on file in the Department, that said classification, existing at date of selection and upon which the Santa Fe Pacific Railroad Company in good faith was entitled to rely and proceed, was not made by the Department of the Interior upon adequate consideration and with full knowledge of the conditions affecting the land at the date of such classification and appraisement and in accordance with governing statutes.

The fact that the lands embraced within the selection were subject to disposition at the classified price for years and that no application of any kind looking to the appropriation thereof was filed except for this selection is persuasive, if not conclusive, that under the then known conditions the valuation placed upon the land by the Department of the Interior was an adequate one. There is no suggestion anywhere in the record that the Santa Fe Pacific Railroad Company was guilty of fraud, concealment, or misrepresentation in the premises, or that it was in possession of or had knowledge of any facts which would establish the inequality of the lands selected and surrendered at date of such selection. It is, therefore, entitled to judgment if the record discloses that the consideration offered was at the date of selection an adequate one and the lands officially designated in accordance with law to be subject to appropriation as coal lands at the minimum price.

The Supreme Court of the United States in its opinion, *supra*, construing the act of April 28, 1904, having before it the fact that the company, upon request of the Secretary of the Interior, relinquished tracts which were at date of selection either officially classified or appraised as being of quality equal to coal lands at the minimum price, or subsequently ascertained to be such, and that the company, as authorized by the statute, then proceeded and did in fact select lands classified and appraised at the minimum price, held that—

The moment that lands were relinquished at the request of the Secretary a contract was made and the Government was bound to convey to the company such vacant lands within the Territory as the company should select provided only that they were of equal quality. In theory of law the obligation was immediate when the selection was made, if it complied with the

condition. It is true that the Secretary had to be satisfied upon that point, but his discretion was not arbitrary; it went only to the quality of the lands. If, as Chief Justice Shaw put it, a piepoudre court could have been summoned and the matter determined forthwith, the Secretary would have been bound to act on the facts as they then appeared and could not have elected to wait for better days. At that time, May 1, 1911, the only relevant classification in the statutes, we believe, was of coal lands within fifteen miles of a railroad, valued at not less than twenty dollars per acre, and those more than fifteen miles from one, valued at not less than fifteen dollars per acre. Rev. Stats. 2347. The Department through the Geological Survey had classified further and had valued the products in all the lands concerned at not less than twenty dollars per acre. These were all the elements for decision when the selection was made and if the Secretary had been required to proceed at once, as the statute evidently contemplated that he would, sec. 2, he would have been bound to agree to the company's choice.

As hereinbefore stated there is no evidence in the record, or elsewhere in the Department, tending to establish the inequality of these lands, except evidential factors such as the Supreme Court in its opinion, *supra*, has held to be incompetent. The protestant, Leaden, although allowed ample time within which so to do has failed to make any showing of evidential facts which would justify the Department, more than eleven years after filing of this and other analogous selections, in proceeding *de novo* for the purpose of attempting to establish the fact that the classification and appraisal of the selected lands by the Department prior to the date of selection and upon which the selection was based was erroneous.

Subsequently to the filing of the selection by the Santa Fe Pacific Railroad Company, Kenneth H. Myers, Frank B. Mapel, Charles M. Sabin, and George A. Keepers filed applications to purchase various portions of the land in question under the coal-land laws and on or about the same time filed protests directed against the selection of the Santa Fe Pacific Railroad Company. The applications to purchase and the protests against the selection having been filed subsequently to the selection by the Santa Fe Pacific Railroad Company and subsequently to segregation of the tracts of land by the selection, no rights were acquired. Neither the protests against the selection nor the applications to purchase, each being junior to the rights of the Santa Fe Pacific Railroad Company, set forth any or sufficient cause of action for the Department to proceed thereunder. These subsequent applications to purchase are rejected and the protests dismissed.

The motion for rehearing is denied and the protest of Leaden will stand dismissed. The record is returned with directions that full force and effect be given the prior decision of the Department rendered herein August 30, 1922.

**STATUS OF DESERT LANDS IN IMPERIAL COUNTY, CALIFORNIA,
DURING PENDENCY OF RESURVEYS.**

Instructions, January 19, 1923.

DESERT LAND—SURVEY—PREFERENCE RIGHT—OCCUPANCY—WITHDRAWAL—CALIFORNIA—STATUTES.

The act of July 1, 1902, which authorized the Secretary of the Interior to resurvey certain lands in San Diego (now Imperial) County, California, was in effect a legislative declaration that the lands were to be deemed unsurveyed until the approved plats of resurvey were filed in the local land office, and consequently, in the absence of a withdrawal, they became subject to the preference right provision contained in the proviso to section 1 of the act of March 28, 1908, relating to the occupancy of unsurveyed desert land.

COURT DECISION CITED AND CONSTRUED—DEPARTMENTAL DECISION OVERRULED.

Case of *Cox v. Hart*,¹ decided by United States Supreme Court December 11, 1922 (43 Sup. Ct. Rep., 154; — U. S., —), cited and construed; case of *Hughes v. Greathead* (43 L. D., 497) overruled.

FINNEY, *First Assistant Secretary*:

The Department has considered your [Commissioner of the General Land Office] letter ("F"—M. D. H.) of January 2, 1923, requesting instructions as to whether, in view of the decision of the Supreme Court of the United States in *Cox v. Hart*, rendered December 11, 1922, the rule announced in *Hughes v. Greathead* (43 L. D., 497) should still be followed.

The Supreme Court of the United States in the decision referred to held that—

to justify the application of the term "surveyed" to a body of public land something is required beyond the completion of the field work and the consequent laying out of the boundaries, and that something is the filing of the plat and the approval of the work of the surveyor. If, pending such approval or, still more, if after disapproval of the survey, the lands in contemplation of law are unsurveyed, it is difficult to see why the same result may not follow when the survey originally approved and platted is subsequently annulled or abandoned because the lines and marks established have become obliterated.

The court held that the act of July 1, 1902 (32 Stat., 728), directing the resurvey of the land, was in effect and intent a legislative declaration that the lands therein described were, when the act was passed and for all purposes of settlement and sale, unsurveyed lands.

In *Hughes v. Greathead*, *supra*, Hughes claimed the right to make desert-land entry for a tract of 160 acres in a township which had been on July 22, 1911, suspended from all forms of entry or disposal, pending resurvey. Hughes alleged that his claim had been initiated on February 23, 1912. The plat of resurvey was filed March 10, 1913. The Department held that the land was not unsurveyed on

¹ Rule announced in *Hart v. Cox* (42 L. D., 592) vacated by court decision in *Cox v. Hart*, *supra*.

February 23, 1912, as it had been previously surveyed and plat filed, and that the claim of Hughes did not come within the provisions of the act of March 28, 1908 (35 Stat., 52).

In making resurveys of land, whether the surveys be "dependent" or "independent," prior valid claims are never jeopardized, and in making independent surveys all valid claims, such as "school sections" and entries or selections, are segregated and designated by numbered tracts.

The Department has uniformly held that public land in a township which has been suspended for resurvey is subject to settlement under the homestead law, and in view of the holding of the court in the case cited, the Department is of opinion that the rule announced in *Hughes v. Greathead*, *supra*, should no longer be followed.

Experience has demonstrated that good administration demands that lands in process of resurvey should be reserved not only from location, sale, and entry, but from occupation with a view to making desert-land entry under the proviso to section 1 of the act of March 28, 1908, *supra*. You will, therefore, when it has been determined that it is necessary to resurvey a township in a State where the desert-land law is operative, submit a draft of an Executive order withdrawing the public land in the township from all forms of appropriation except settlement under the homestead law until the plat of resurvey is filed in the local office.

STATUS OF PROPERTY PURCHASED WITH INDIAN TRUST FUNDS.

Opinion, January 24, 1923.

INDIAN LANDS—ALLOTMENT—ALIENATION—MORTGAGE—PAYMENT—TRUST FUNDS.

The proceeds derived from sales of lands allotted to Indians with restrictions against incumbrance and alienation are impressed with a trust to the same extent as were the lands before the sale.

INDIAN LANDS—ALIENATION—DESCENT AND DISTRIBUTION—SECRETARY OF THE INTERIOR—TRUST FUNDS.

Lands purchased with Indian trust funds continue to be impressed with the trust as originally declared, irrespective of whether the purchased property was previously restricted or unrestricted, and the Secretary of the Interior is clothed with full authority to determine the descent thereof to the same extent as he is with respect to the original property from the sale of which the purchase funds were derived.

INDIAN LANDS—TRUST FUNDS—TAXATION.

Property purchased with Indian trust funds, even though unrestricted prior to purchase, is exempt from taxation until the termination of the trust period.

BOOTH, *Solicitor*:

There has been referred to me for consideration, on request of the Commissioner of Indian Affairs, a question submitted by the

superintendent of Pawnee Indian Agency, Oklahoma, as to the authority of the Department to determine the descent of property purchased with trust funds where such property was previously unrestricted or held in fee.

The superintendent also raises the question as to whether unrestricted property purchased for an Indian with funds held in trust for him is subject to taxation by the State.

The practice of the Department heretofore has been to determine the heirs of deceased Indians whose property is of the character of that referred to. That in itself constitutes decision of the Department as to its authority in the premises. One of the recent instances in which the Department assumed jurisdiction to determine the heirs was that of Charlie Wilson, deceased Pawnee Indian, whose property consisted in part of a house and lot in the town of Pawnee, Oklahoma, purchased with funds to the credit of decedent, there being inserted in the deed to such property a condition that it should not be alienated or incumbered without the approval of the Secretary of the Interior. This property was unrestricted at the time of its purchase for the Indian.

The power to insert in deeds covering property purchased with trust funds a condition that the property shall not be alienated or incumbered without the approval of the Secretary of the Interior; also the authority of the Department to determine the descent of the purchased property; and as to whether or not such property is subject to taxation are all allied subjects.

It is clearly within the power of the Secretary of the Interior to attach conditions to sales of Indian allotted lands because such power is expressly conferred in acts authorizing such sales; that is, they are to be made subject to his approval and on such terms and conditions and under such regulations as he may prescribe. It was held in the case of *United States v. Thurston County, Nebraska, et al.* (143 Fed., 287) that the proceeds of sales of allotted lands are held in trust for the same purposes as were the lands; that no change of form of property divests it of the trust; and that the substitute takes the nature of the original and stands charged with the same trust. From this situation arose the practice of inserting in deeds of conveyance covering property purchased for an Indian with trust funds the nonalienation clause referred to, which is merely a continuation over the new property of the trust declared for the old or original property. For sanction of this practice see 13 Ops. A. A. G., 109; *Jackson v. Thompson et al.* (80 Pac., 454); and *Beck v. Flournoy Live-Stock and Real-Estate Co.* (65 Fed., 30).

It thus being established that lands purchased with trust funds continue under the trust as originally declared and that power exists to insert in deeds covering such lands a condition against alienation

and incumbrance, it follows that upon the death of an Indian for whom the property is held in trust his heirs are to be determined by the Department the same as in the case of the original property from the sale of which the purchase funds are derived. Apparently no question is raised as to the authority of the Department to determine the descent of property purchased with trust funds derived from the sale of lands previously held in trust or restricted. The question submitted has reference to lands that were unrestricted prior to purchase. The theory on which the Department and the courts have proceeded in this matter is that property purchased with trust funds becomes impressed with the trust nature of the purchase money. In this view it can make no difference whether the purchased lands are restricted or unrestricted; the authority to determine heirs is coexistent with the continuation of the trust. By the act of June 25, 1910 (36 Stat., 855), Congress conferred exclusive jurisdiction upon the Secretary of the Interior to determine the heirs of deceased Indian allottees, and this power extends not only to property held in trust but also to property on which restricted fee patents have issued, under legislation providing for "determining the heirs of deceased Indian allottees having any right, title, or interest, in any trust or restricted allotment, under regulations prescribed by the Secretary of the Interior." (*United States v. Bowling et al.*, 256 U. S., 484.)

The question as to whether lands or property acquired with the proceeds of the sales of allotted Indian lands are subject to taxation by the State is one fully settled by both departmental and court decisions which cover the purchase on behalf of Indians of both restricted and unrestricted lands. The general rule was long since established by the Supreme Court in the case of *McCulloch v. Maryland* (4 Wheat., 315, 429) that "all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." See also cases of *Van Brocklin v. State of Tennessee* (117 U. S., 151) and *United States v. Nashville Railway Company* (118 U. S., 120).

As to the purchase of unrestricted property with trust funds it was held in Instructions of January 2, 1914 (43 L. D., 26, 29):

* * * The question is whether, in the purchase of unrestricted lands, involving as it does, lands that are taxable, such lands become impressed with the trust nature of the purchase money and are, thereafter, exempt from taxation so long as the trust period continues. The fact that the property was once taxable would seem to constitute no valid distinction. Under the decisions of the courts, funds derived from the sale of trust lands take the character of the lands and stand charged with the same trust. It is not seen why lands purchased with trust funds do not equally take the character of the funds

and also stand charged with the same trust. It was said in the case of *National Bank of Commerce v. Anderson*, 147 Federal Rep., 87:

"The statute provides that the lands may be sold with the consent of the Secretary. It thus permits a change in form of the trust property from land to money. This change may be effected only with the consent of the trustee represented in the person of the Secretary of the Interior. No citation of authority is needed to sustain the general doctrine that into whatever form trust property be converted, it continues to be impressed with the trust.

* * * * *

"The property being held in trust by the United States for a period which had not yet expired and which period was subject to further extension by the President, the intention to terminate the trust must be found to be clearly expressed in order to warrant us in holding that the trust does not follow the property in its changed form."

There is no question under the authorities that the power of the Government over trust property continues until the expiration of the trust period regardless of the form of such property, unless an intention has been expressed to relinquish such power.

The same reasons exist against the alienation of unrestricted land purchased with trust funds without the consent and approval of the Secretary of the Interior as existed in respect to the original allotment, from the sale of which such funds are derived. The land so purchased with trust funds becomes none the less an instrumentality employed by the Government for the benefit of the Indian than where land *held in trust* is purchased and, hence for the like reason, should be exempt from taxation. The Indian continues in the incompetent class and is entitled to the same protection and supervision. All these conditions are imposed on the theory that they are for the best interests of the Indian wards of the Government, among other things to protect them from the improvident disposition of the lands and funds.

There are numerous instances in which the courts have ruled that unrestricted property purchased with trust funds are not subject to taxation. Thus in the case of *United States v. Nez Perce County, Idaho, et al.* (267 Fed., 495), which involved the purchase of property in the town of Fort Lapwai, it was held that the property was not subject to taxation by the State; also in the case of *United States v. Yakima County et al.* (274 Fed., 115, syllabus):

Where an Indian allottee of the Yakima tribe in Washington died before the expiration of the trust period, and his land was sold by the Secretary of the Interior under Act May 29, 1908, section 1 (Comp. St. Sec. 4224), which authorizes such sale and the use of the proceeds during the trust period for the benefit of the heirs, and the proceeds were invested in other lands, the conveyances reciting that they could not be disposed of or incumbered without the consent of the Commissioner of Indian Affairs, such substitute lands during the trust period *held* exempt from taxation.

A similar ruling was made by the United States District Court, eastern district of Washington, in the case of *United States v. Yakima County*, December 5, 1922, involving the purchase of lots in the city of Toppenish, Washington. In addition to the cases hereinbefore cited see *Page et al. v. Pierce County et al.* (64 Pac., 801);

United States *v.* Law (250 Fed., 218); United States *v.* Chehalis County *et al.* (217 Fed., 281); United States *v.* Pearson *et al.* (231 Fed., 270); United States *v.* Gray *et al.* (201 Fed., 291); Ward *v.* Love County (253 U. S., 17); Choate *v.* Trapp (224 U. S., 665); and Morrow *et al. v.* United States (243 Fed., 854).

In the case of Page *v.* Pierce County, *supra*, the court after referring to the case of the The New York Indians (5 Wall., 761), said:

Applying the doctrine announced in the decisions of the Supreme Court of the United States to the case at bar, it would seem reasonably clear that the lands in question can not be taxed by the State so long as the Government has an interest in them "either legal or equitable," or is even charged with the performance of some obligation or duty respecting them.

Referring specifically to the questions submitted for consideration it would seem clear from the foregoing that the Department has full authority to determine the descent of property purchased with Indian trust funds, whether the property was previously restricted or unrestricted; and that until the trust is terminated such property is exempt from taxation. As was said in the Instructions (43 L. D., 26, 31):

Congress has conferred upon the Secretary of the Interior authority to prescribe regulations and conditions to govern the sale of Indian allotted lands as well as the expenditure of the proceeds which implies an exclusion of all other authority. The lands and proceeds are held by the Government for a specified period in trust for the Indians, such trust being an agency for the exercise of a Federal power and therefore outside the province of State authority.

Approved:

F. M. GOODWIN,
Assistant Secretary.

BLAKESLEY *v.* McCORD ET AL.

Decided January 30, 1923.

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—NOTICE.

The preference right accorded by section 13 of the act of February 25, 1920, in the award of an oil and gas prospecting permit to one who has properly monumented and posted notice in accordance with the provisions of the act must be denied if the terms of the act with respect thereto are not strictly complied with.

FINNEY, *First Assistant Secretary:*

At the Buffalo, Wyoming, land office on January 20, 1922, James Elroy Blakesley applied for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon Secs. 4 and 5, NE $\frac{1}{4}$, Sec. 8, and N. $\frac{1}{2}$ and SW. $\frac{1}{4}$, Sec. 9, T. 54 N., R. 94 W., 6th P. M., alleging that he had posted a notice on the land on December 20, 1921.

Said application conflicts as to Sec. 4 with the like application of Evan S. McCord; as to Sec. 5 with the application of Isaac Newton Dally; and as to the subdivisions in Secs. 8 and 9 with the application of Lee J. Brawley, which applications were filed January 23, 1922, each applicant alleging the posting of notice on December 31, 1921.

By decision dated September 20, 1922, the Commissioner of the General Land Office required Blakesley to show cause why his application should not be rejected for conflict with the applications of McCord, Dally, and Brawley. Blakesley made response, protesting against the allowance of the conflicting applications, and setting forth that he deposited his application in the mails in time to have reached the local land office in the ordinary course of the mails two days sooner than it actually did, or 29 days after the posting of notice; that McCord, Dally, and Brawley posted their notices on posts 2 by 4 inches in diameter, not over 2½ feet high, and nailed on a board 1 by 6 inches, and not protected from the weather, and that within three days after the notices were posted they were blown away and destroyed.

By decision dated November 3, 1922, the Commissioner held that Blakesley's showing was not sufficient to defeat the conflicting applications, and his application was rejected. Blakesley has appealed, contending that the regulations as to posting of notice had not been complied with by McCord, Dally, and Brawley.

Section 13 of the act of February 25, 1920, *supra*, provides, *inter alia*, that if a person desiring a prospecting permit—

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, * * * 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.

Paragraph 5 of the regulations of March 11, 1920 (47 L. D., 437), states that a preference right over others to a permit under section 13 of the act may be obtained by—

(a) Erecting upon the land desired, subsequent to the approval of the act, a monument not less than 4 feet high, at some conspicuous place thereon, of such a size as to be visible to anyone who may be interested. The monument may be of iron, stone, or durable wood, not less than 4 inches square or in diameter, and must be firmly embedded in the ground.

(b) Posting on or near said monument a notice stating that an application for permit will be made within 30 days after date of posting said notice, the notice to give the date and hour of posting, to be signed by the applicant, and give such a general description of the land to be covered by the permit, by reference to courses and distances from such monument and other natural objects and permanent monuments, as will reasonably identify the land. The area, approximately, must also be stated, and the notice must be so protected as to prevent its destruction by the elements. * * *

The provisions of section 13 above quoted are so plain that should it be made to appear that the monument erected by one who seeks a preference right was less than four feet high, the Department would be obliged to deny the claim of preference right.

The record discloses that Blakesley served copies of his protest on McCord, Dally, and Brawley, but no response was made thereto, nor has an answer to Blakesley's appeal been filed. However, the Department hesitates to take final action in the matter without affording McCord, Dally, and Brawley a further opportunity to be heard. Accordingly, the case is remanded, with directions that the local officers be instructed to notify the conflicting applicants that they will be allowed fifteen days from notice within which to deny Blakesley's allegation that the notices posted by them did not comply with the provisions of the section under which the applications were filed. If one or more of the parties shall avail himself or themselves of this privilege, a hearing should be ordered to determine the facts. If issue is not joined within the time fixed, the application of the defaulting applicant will stand rejected to the extent that it conflicts with the application of Blakesley.

The decision appealed from is modified to agree with the views herein expressed.

Remanded.

MINING CLAIMS WITHIN INDIAN RESERVATIONS.

Opinion, July 7, 1922.¹

INDIAN LANDS — MINING CLAIM — PREFERENCE RIGHT — FORFEITURE — ADVERSE CLAIM — STATUTES.

While the first proviso to section 26 of the act of June 30, 1919, declares that all rights under a mining claim within an Indian reservation shall be forfeited if the preference right accorded thereby to the locator is not exercised within one year from the date of location, yet such forfeiture does not, in the absence of an intervening adverse claim, preclude the locator from relocating the same ground, but in such event his rights under the act will commence with the date of the new location, and will be subject to compliance with all the terms, conditions, and regulations governing the original location.

BOOTH, Solicitor:

My opinion is requested as to the validity of new locations made on ground covered by prior locations to which the locators have forfeited their rights under that provision in section 26 of the act of June 30, 1919 (41 Stat., 3, 31), which reads:

Provided, That the locators of all such mining claims, or their heirs, successors, or assigns, shall have a preference right to apply to the Secretary of

¹ See opinions of July 10, 1922, and January 30, 1923 (49 L. D., 421 and 424).

the Interior for a lease, under the terms and conditions of this section, within one year after the date of the location of any mining claim, and any such locator who shall *fail* to apply for a lease within one year from the date of location shall *forfeit* all rights to such mining claim. (*Italics supplied.*)

Under the foregoing, original locators who failed to apply for a lease within one year forfeit all rights to the claims located by them. In the absence of intervening rights, however, no reason is seen why new locations covering the same ground may not be accepted from the same parties. Under such circumstances their rights will date from the new locations rather than from the old, as under the latter all rights are clearly forfeited, and applicants for leases under the new locations must conform to all the terms, conditions, and regulations that governed the original locations.

Approved July 10, 1922.

F. M. GOODWIN,

Assistant Secretary.

MINING CLAIMS IN THE FORT APACHE INDIAN RESERVATION.

Opinion, July 10, 1922.¹

INDIAN LANDS—FORT APACHE LANDS—ARIZONA—MINING CLAIM—LEASE.

Valid discovery of a mineral deposit, being one of the essential elements of a mining claim, is also a prerequisite to the granting of a lease based on a mining claim pursuant to section 26 of the act of June 30, 1919, as amended by the act of March 3, 1921, which relates to the leasing of specified deposits of minerals in unallotted lands within Indian reservations in certain States that were withheld from disposition under the mining laws of the United States.

INDIAN LANDS—FORT APACHE LANDS—ARIZONA—MINING CLAIM—LEASE—NOTICE—WAIVER—PREFERENCE RIGHT.

The requirement in section 26 of the act of June 30, 1919, that a copy of the location notice must be filed as specified therein within 60 days after location of a mining claim for mineral deposits in an Indian reservation, can not be waived, and if the locator fails to comply strictly therewith he forfeits all right to be preferred in the award of a lease thereunder.

BOOTH, *Solicitor:*

On June 22, 1922, my opinion was requested with respect to the validity of certain conflicting lode locations for asbestos deposits within the Fort Apache Indian Reservation, Arizona. Applications for leases for the claims have been filed by E. D. and Ernest A. Reidhead jointly and by E. E. Swan pursuant to section 26 of the act of June 30, 1919 (41 Stat., 3, 31), as amended March 3, 1921 (41 Stat., 1225, 1231). The questions involved relate to priority and discovery in connection with the locations sought.

¹ See opinions of July 7, 1922, and January 30, 1923 (49 L. D., 420 and 424).

The first mentioned statute authorized the Secretary of the Interior to lease under general regulations unallotted lands within Indian reservations in Arizona and eight other western States for the purpose of mining for deposits of gold, silver, copper, and other metalliferous minerals. The Secretary was to declare what lands were to be subject to exploration—

And after such declaration mining claims may be located by such citizens in the same manner as mining claims are located under the mining laws of the United States: *Provided*, That the locators of all such mining claims, or their heirs, successors, or assigns, shall have a preference right to apply to the Secretary of the Interior for a lease, under the terms and conditions of this section, within one year after the date of the location of any mining claim, and any such locator who shall fail to apply for a lease within one year from the date of location shall forfeit all rights to such mining claim: *Provided further*, That duplicate copies of the location notice shall be filed within sixty days with the superintendent in charge of the reservation on which the mining claim is located, and that application for a lease under this section may be filed with such superintendent for transmission through official channels to the Secretary of the Interior.

The act of March 3, 1921, made the following amendment:

That whenever the term "metalliferous" is used in said section 26 of the above-entitled Act, it shall be defined and construed by the Secretary of the Interior to include magnesite, gypsum, limestone, and asbestos.

The regulations of September 16, 1919 (47 L. D., 261, 263), under the act of 1919, in part read:

3. Should valuable metalliferous minerals be found the section contemplates the location of mining claims in the same manner as mining claims are located under the mining laws of the United States. Should the locator fail to file a duplicate copy of the location notice with the officer in charge of the land within 60 days or fail within one year thereafter to make application through the officer in charge to the Secretary of the Interior for a lease of the land he will thereby forfeit all preference right to a lease. Any locator who fails to comply with the United States mining laws and the regulations of the General Land Office prescribed thereunder as to the location of mining claims will also forfeit all preference right to a lease.

The regulations contemplate that a discovery of mineral shall be made as the basis for the location of a mining claim. As amended on March 3, 1921 (48 L. D., 263), section 4 of the regulations states that discovery of ore by prospect drilling or boring methods will be equivalent to discovery by shaft sinking.

From the papers submitted it appears that on December 10, 1920, E. D. and Ernest Reidhead located the Ring Cone Nos. 1 and 2 lode claims upon an out-cropping of asbestos. Being advised that asbestos locations would not receive consideration at the hands of the Government, they did not within 60 days after location file with the superintendent copies of their location notices. When informed of the amendment of March 3, 1921, they did file copies of their loca-

tion notices on March 29, 1921. Their application for lease of the above claims was filed on December 9, 1921.

On March 8, 1921, E. E. Swan located the Casey Jones and the Casey Jones Nos. 1 to 9 lode claims and on April 11, 1921, the Casey Jones Nos. 10 to 18 claims. Copies of location notices were filed with the superintendent on April 20, 1921. Swan's application for lease of the Casey Jones group of claims was filed at the agency office on March 4, 1922.

The record indicates that the Reidheads and John C. Earl on April 15, 1921, made locations of the Ring Cone Nos. 1 to 5 claims and on April 19, 1921, filed location notices with the superintendent of the Ring Cone claims Nos. 1 to 3. These claims, however, are not the ones described in the application for lease. Also on June 1, 1921, E. E. Swan, by John Carter, agent, made amended locations of the Casey Jones and Casey Jones Nos. 1 to 17 claims for correction of errors in descriptions. Amended notices were filed with the superintendent on June 2, 1921.

As the claims involved are all unsurveyed it is not possible to determine with certainty the area in conflict between the two applications. From rough diagrams submitted by both parties it would appear that the original Ring Cone Nos. 1 and 2 claims are in large part in conflict with the southwestern portion of the Casey Jones group. A hearing was had on May 1, 1922, after due notice, with respect to conflicting claims. The superintendent in his report states that from the evidence the Ring Cone Nos. 1 and 2 claims were located in good faith by the claimants. However, he reports that at that time under his instructions he could not have accepted filings on asbestos claims or recognized locations for asbestos.

The applicants for the Ring Cone claims have asked that the requirement with respect to filing of notice within 60 days after location be waived.

The requirement referred to is statutory and not one fixed by regulations. In the face of the intervening adverse Casey Jones claims the Department would not be justified in undertaking to pass over the plain statutory provisions or in recognizing as valid and superior the Ring Cone claims. It does not appear that the Reidheads tendered or offered for filing their notices within the 60-day period named in the statute. The regulations (47 L. D., 261, 263), *supra*, declare that failure to file notice within the 60-day period forfeits all preference right to a lease. It must be concluded that the Reidheads have not shown a proper basis upon which to rest their application for a lease of the Ring Cone Nos. 1 and 2 claims, and that their application should be denied and disapproved.

This disposition renders it unnecessary to consider or discuss the status of an asbestos location made prior to the approval of the amendatory legislation of March 3, 1921.

The record submitted shows that upon some of the Casey Jones claims in the northern half of the group it is conceded that asbestos or the serpentine formation carrying it has not been found and that there is no mineral in sight or disclosed. In short, no discovery has been made upon certain of the claims. In the southeastern portion of the group there is a conflict with the Horseshoe Nos. 1 and 2 claims which appear to have been heretofore approved for lease. With the exclusion of the area of these claims from the Casey Jones group still other claims will probably be without discovery or disclosure of asbestos or other mineral upon claimed ground.

The statute contemplates (1) exploration for the discovery of the deposits mentioned; (2) location of mining claims in the same manner as under the mining laws; and (3) the leasing of such claims. An annual expenditure of not less than \$100 in development work for each mining claim located or leased is also required in addition to the rents and royalties. Under the general mining laws and regulations a discovery of mineral is essential to the validity of a mining claim and must take place before annual expenditure is in order. Under this leasing act a mining claim in order to afford a basis for a lease must rest on an adequate discovery of a mineral deposit. By the act those unallotted lands theretofore withdrawn from entry and withheld from disposition under the mining laws were made subject to lease with respect to the deposits specified. Discovery stamps the land as mineral in character and as containing one or more of the deposits named in the statute. Discovery follows and is a result of exploration. The discoverer's reward consists of his right to locate a mining claim and within one year thereafter apply for a lease. The discovery and disclosure of the mineral deposit is essential.

Those claims of the Casey Jones group which are without a discovery can not be properly included in a lease, and as to said locations the application for lease should be denied and disapproved.

Approved:

F. M. GOODWIN,
Assistant Secretary.

MINING CLAIMS IN THE NAVAJO INDIAN RESERVATION.

Opinton, January 30, 1923.¹

INDIAN LANDS—NAVAJO LANDS—MINING CLAIM—LEASE—OFFICERS—WAIVER—APPLICATION.

Administrative officers, being without authority to alter or amend existing law or to waive the specific requirement of a statute, can not waive that requirement in section 26 of the act of June 30, 1919, which provides that an applicant for a lease based upon a mining claim on Indian lands shall file application therefor within one year from the date of location.

¹ See opinions of July 7, 1922, and July 10, 1922 (49 L. D., 420 and 421).

INDIAN LANDS—NAVAJO LANDS—MINING CLAIM—LEASE—OFFICERS—SURVEY.

Inasmuch as an official survey of a mining claim located within an Indian reservation is not required prior to application for a lease based thereon under the act of June 30, 1919, delay on the part of administrative officers in causing a survey to be made, or in furnishing blank forms of lease, can not be pleaded as a ground for failure on the part of the applicant to comply with the plain requirements of the statute.

BOOTH, *Solicitor*:

You request my opinion regarding the validity of a number of conflicting lode mining claims covering deposits of metalliferous minerals in certain lands within that part of the Navajo Indian Reservation, Arizona and New Mexico, lying under the immediate supervision of the San Juan Indian School and Agency.

The claims in question were filed pursuant to section 26 of the Indian Appropriation Act of June 30, 1919 (41 Stat., 3, 31), and the regulations promulgated thereunder (47 L. D., 261) as amended (48 L. D., 263 and 266). The act referred to authorizes the Secretary of the Interior to declare what unallotted lands within Indian reservations in certain western States, including Arizona and New Mexico, should be open to exploitation for the deposits of gold, silver, copper, and other metalliferous minerals, and to lease the lands containing deposits of this kind to citizens of the United States or to any association or corporation organized under the laws of any State or Territory, for terms of twenty years, with certain preferential rights of renewal. After providing that mining claims on such lands may be located in the same manner as mining claims are located under the general mining laws of the United States, it was further provided in said act:

That the locators of all such mining claims, or their heirs, successors, or assigns, shall have a preference right to apply to the Secretary of the Interior for a lease, under the terms and conditions of this section, *within one year* after the date of the location of any mining claim, and any such locator who shall fail to apply for a lease *within one year* from the date of location shall *forfeit all rights* to such mining claim: *Provided further*, That duplicate copies of the location notice shall be filed within sixty days with the superintendent in charge of the reservation on which the mining claim is located, and that application for a lease under this section may be filed with such superintendent for transmission through official channels to the Secretary of the Interior. (Italics supplied.)

The regulations approved September 16, 1919, as amended March 3, 1921 (47 L. D., 261, and 49 L. D., 263), provide in part:

3. Should valuable metalliferous minerals be found the section contemplates the location of mining claims in the same manner as mining claims are located under the mining laws of the United States. Should the locator fail to file a duplicate copy of the location notice with the officer in charge of the land within 60 days or fail within one year thereafter to make application through

the officer in charge to the Secretary of the Interior for a lease of the land he will thereby forfeit all preference right to a lease. Any locator who fails to comply with the United States mining laws and the regulations of the General Land Office prescribed thereunder as to the location of mining claims will also forfeit all preference right to a lease.

* * * * *

5. * * * Locations, if upon surveyed land, must be located in conformity to the legal subdivisions of the survey. If made upon unsurveyed land the locations must be marked in the same manner as lode locations, but shall conform as nearly as practicable to what would be public land surveys and the rectangular subdivisions thereof.

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.

It will be noted that the regulations, of course, follow the statute with respect to requiring applicants to serve duplicate copies of the notice of location on the superintendent or other officer in charge of the particular reservation "within 60 days" from the date of location, and to apply for a lease within one year from the date of such location. In other words, the requirements in this respect are statutory rather than by way of regulation.

The facts at hand in connection with the applications presented are somewhat involved and in so far as shown by the record are not as complete as might be desired. It appears therefrom, however, that during April and May, 1920, W. F. Hunter, Vernon Dalton, Biffle M. Morris, and Joseph H. Harris allege location of the claims known as Canary, North Star, North Star No. 2, and Valley View Nos. 1 to 3 inclusive, although the duplicate copies of notice of location filed with the superintendent of the San Juan School under date of May 4 and May 31, 1920, covering these claims, are all unsigned and undated. Further, that by a signed notice dated November 15, 1920, W. F. Hunter, B. M. Morris, and Vernon Dalton alleged location of the North Star No. 4, although the copy of the location notice in this case was not filed with the superintendent, until February 12, 1921. Amended location certificates bearing dates of July 24, July 26, and July 27, 1920, covering respectively the Canary, North Star, and North Star No. 2 claims were likewise filed with said superintendent on February 12, 1921. Each of these latter certificates were also signed by the said Hunter, Morris, and Dalton. No copy

of a notice of location or of an amended certificate of location is found in the record covering the claims known as North Star No. 3 and Valley View No. 4. By three separate quitclaim deeds, all dated January 4, 1921, V. E. Dalton, Biffie M. Morris, and W. F. Hunter released and quitclaimed unto the Carizo Uranium Company, a corporation organized under the laws of the State of New Mexico, all of their right, title, and interest, among other claims, to those particular locations known as Canary, North Star, North Star Nos. 2, 3, and 4, and Valley View Nos. 1 to 4 inclusive. Thereafter the Carizo Uranium Company appears as the party applicant for a lease covering said claims.

In a brief filed by said company in support of its application it is alleged that during the winter of 1920-1921 considerable assessment work was done by it and by its predecessors on said claims and the construction of a wagon road to the properties begun; that on March 28, 1921, it applied to one Allison L. Kroeger, United States mineral surveyor, at Durango, Colorado, to have an official survey made of said claims, but that because of the fact that these claims or a part of them at least are in the State of Arizona and a part in New Mexico considerable valuable time was lost in obtaining proper instructions and orders pertaining to such surveys to the deputy mineral surveyor from the offices of the two surveyor generals, one at Phoenix and the other at Santa Fe; that during the progress of the field work it became necessary to relocate and retrace some 17 miles of the boundary line between the two States in order to determine the jurisdiction of the respective surveyor generals; that the approved field notes covering the mineral claims applied for were not mailed out of Phoenix, Arizona, to the Carizo Uranium Company at Farmington, New Mexico, until April 13, 1922; that said approved field notes were not received by said company until April 18, 1922; that on April 26, 1922, application was made to the officer in charge of the San Juan Indian Agency for blank leases to fill out in accordance with the field notes of survey and the regulations of the Department, but that, that officer having no blanks on hand, the same had to be requested from the Commissioner of Indian Affairs at Washington; that the desired blanks were received on May 10, 1922, and that on May 18, 1922, application for lease was duly filed with the officer in charge of the reservation. In urging a consideration of its application on the merits the Carizo Uranium Company further alleges that it has always endeavored in good faith to diligently comply with the statute and the regulations of this Department relating thereto but that unavoidable delays over which it had no control, especially in connec-

tion with the prosecution of the survey work in the field and in obtaining proper blank forms on which to submit its application, prevented said company from perfecting its application within the time required by the statute; that it construed sections 3 and 6 of the regulations above reproduced together, under the assumption that an official survey of claims of this character must precede an application for lease thereof.

The conflicting or adverse claim appears as the Syracuse Lode, located May 6, 1922; by one George O. Williams. A copy of the notice of location covering this claim was duly filed with the superintendent May 8, 1922, and Mr. Williams has also filed application for lease under date of August 14, 1922, which was received at the San Juan Indian School on August 15 of that year. Reference is also made in the correspondence submitted to an application by Mr. Williams covering claims known as the Red Wash Group, consisting of Red Wash No. 1 and Red Wash No. 2, based on locations made in August, 1921, by Nephi Johnson, and by Mr. Johnson assigned to the said Williams on May 8, 1922. No copies of the original notice of location covering the two claims last mentioned are found with the records submitted here. From an examination of the sketch plat covering those claims it does not appear that there is any conflict on the ground with the claims applied for by the Carizo Uranium Company. From the descriptive matter relating to the Red Wash Group it appears that:

From the monument at the point of discovery and location, a mineral monument erected for the Carizo Uranium Company on their most *southerly* group of claims sometime in 1920, lies distant about *one mile*. (Italics supplied.)

When we test the validity of these various claims by the requirements of the statute I am of the opinion that the following conclusions must be reached:

1. The application for lease by the Carizo Uranium Company, covering the Canary, North Star, North Star Nos. 2, 3, and 4, and Valley View Nos. 1 to 4 inclusive, must be rejected because such application was not filed within one year from the date of location as required by the act of June 30, 1919. This is entirely aside from the further fact that the record at hand does not show any copy of the notice of location covering the North Star No. 3 and Valley View No. 4 as having been filed with the superintendent in charge, and that the copy of the notice covering North Star No. 4 was not filed on said superintendent until after the 60-day period provided by law had expired. In itself these would be sufficient reasons for rejecting the application in so far as the three claims last mentioned are concerned. Administrative officers being without power to alter or amend exist-

ing law the requirements of the statute in this respect can not be waived.

2. The application by George O. Williams, covering the Syracuse lode claim, comes within the statute and can be accepted provided the applicant furnishes copies of the plat of survey, field notes, bond, and other data called for by the regulations.

3. The application of George O. Williams, covering the Red Wash Group, must be rejected for the reason that copies of the notice of location covering those claims were not filed with the superintendent within 60 days from the date of location as required by law.

4. In the absence of adverse intervening rights applicants whose claims have been rejected for failure to comply with the statutes may initiate proceedings *de novo* for the same lands by filing new copies of notice of location and otherwise complying with the law. This is in accordance with my prior opinion of July 7, 1922 (49 L. D., 420).

Approved:

F. M. GOODWIN,
Assistant Secretary.

**HOMESTEAD RIGHTS OF CITIZENS OF THE UNITED STATES WHO
SERVED IN THE ALLIED ARMIES DURING THE WORLD WAR.**

INSTRUCTIONS.

[Circular No. 871.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 31, 1923.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Public Resolution No. 79, Sixty-seventh Congress, approved December 28, 1922, provides:

That the provisions of the Act of Congress of February 25, 1919, allowing credit for military service during the war with Germany in homestead entries, and of Public Resolution Numbered 29, approved February 14, 1920, allowing a preferred right of entry for at least sixty days after the date of opening in connection with lands opened or restored to entry, be, and the same are hereby, extended to apply to those citizens of the United States who served with the allied armies during the World War, and who were honorably discharged upon their resumption of citizenship in the United States, provided the service with the allied armies shall be similar to the service with the Army of the United States for which recognition is granted in the Act and resolution herein referred to.

Paragraphs 16 and 18 of the soldiers' right Circular No. 302 (49 L. D., 118), are therefore hereby amended to read as follows:

16. House Joint Resolution No. 30, approved January 21, 1922 (42 Stat., 358), amended Joint Resolution No. 29, approved February 14, 1920 (41 Stat., 434), by extending the provisions of the last-mentioned resolution for a period of 10 years from and after February 14, 1920, and increased the preference right conferred thereby from not less than 60 to not less than 90 days from the beginning of the preference right period. Said resolution as amended is applicable to all openings of public or Indian lands to entry or to restoration to entry of public lands withdrawn from entry, and confers upon officers, soldiers, sailors, and marines in the Army or Navy of the United States during the late war, who were honorably separated or discharged from such service or placed in the regular Army or Naval service, a preference right of not less than 90 days from the date of opening or restoration in which to make entry for the land under the homestead or desert-land laws, except as against prior existing valid settlement rights and preference rights conferred by existing laws or equitable claims subject to allowance and confirmation.

Said resolution was further amended by Public Resolution No. 79, approved December 28, 1922, extending its provisions to those citizens of the United States who served with the allied armies during the World War, and who were honorably discharged upon the resumption of citizenship in the United States, provided the service with the allied armies was similar to service with the Army of the United States for which recognition is granted by said Resolution No. 29, as amended.

18. Under the act of February 25, 1919 (40 Stat., 1161), as amended by section 1 of the act of April 6, 1922 (42 Stat., 491), and by Public Resolution No. 79, approved December 28, 1922, one who was in the military or naval service of the United States during the Mexican border operations (regarded as having begun May 9, 1916, and continued until the declaration of war with Germany); or the late war, and who was honorably discharged after having served at least 90 days during such period, or who served for such period with the allied armies during the World War and was honorably discharged and resumed citizenship in the United States, is entitled to a deduction from the homestead residence requirements (three years) equal to the period of service but not to exceed two years—that is, there must be shown residence on the homestead for at least one year even though the military or naval service exceeded two years. If the soldier or sailor after having served for at least 90 days was discharged because of disability incurred in line of duty or regularly discharged from the service but subsequently awarded compensation by the Government for wounds received or disabilities incurred in the line of duty, he may claim credit for the full period of his enlistment, subject to the requirement that residence on the homestead for at least one year must be shown. In either case the credit is in lieu of the cultivation specified by law as well as residence and if the period of service is such that residence for but one year need be shown, no cultivation is required to be shown for that year. A year's residence under the homestead laws consists of actual residence for at least seven months and allowable absence of five months in not more than two periods, notice of leaving the homestead and returning thereto to be given to the proper district land officers. The final proof must show that there is a habitable house on the land.

Those citizens of the United States who, during the existence of the war with Germany entered the military or naval service of a

country allied with this country in the World War and who, by taking the oath of allegiance to such foreign country prior to April 6, 1917, expatriated themselves, must, before they may avail themselves of the benefits of this resolution, resume their American citizenship by taking the oath of allegiance to the United States prescribed by the naturalization laws and regulations and file evidence thereof in support of their claims. Such oath may be taken before any court of the United States or of any State authorized by law to naturalize aliens or before any consul of the United States. See act of May 9, 1918 (40 Stat., 542).

A citizen who entered such service after April 6, 1917, did not expatriate himself, as the last proviso to section 2 of the act of March 2, 1907 (34 Stat., 1228), provides:

"That no American citizen shall be allowed to expatriate himself when this country is at war."

The service for which credit may be claimed under said resolution must have continued for a period of at least 90 days during the World War and the claimant must show his qualifications to make the entry sought in order to exercise the preference right of entry conferred thereby and in addition thereto as a part of his application or by an accompanying statement sworn to before an officer qualified to verify homestead applications must show the date when his service began, the country with which he served, the nature and length of such service, and that he was honorably separated or discharged therefrom giving the date thereof. The original or certified copy of the discharge or order of separation from such military or naval service should be attached to the application to make entry or proof thereon. If the claimant has lost his discharge or is otherwise unable to secure a copy thereof, he must in a verified statement explain fully why he can not furnish the same.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**OIL AND GAS PROSPECTING PERMITS AND LEASES EMBRACING
LANDS IN EXECUTIVE-ORDER INDIAN RESERVATIONS.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 5, 1923.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Before taking favorable action on applications for permits under the act of February 25, 1920 (41 Stat., 437), to prospect upon lands

in Executive-order Indian reservations, you will request the Commissioner of Indian Affairs to advise you whether any reason is known to exist why the application should not be granted.

In all permits which involve lands in said reservations the following paragraph should be inserted:

To not permit the use of any part of the land for the manufacture, sale, gift, or storage of any distilled, fermented, or other process intoxicating liquors or beverages, nor permit the introduction of any intoxicating liquors or beverages into or upon the premises.

And in all leases the following paragraph should be inserted in that portion which sets forth what the lessee agrees to do:

To not permit the use of any part of the leased premises for the manufacture, sale, gift, or storage of any distilled, fermented, or other process intoxicating liquors or beverages, nor permit the introduction of any intoxicating liquors or beverages into or upon the leased premises.

E. C. FINNEY,
First Assistant Secretary.

ASSESSMENT WORK UPON PLACER MINING CLAIMS IN ALASKA.

Instructions, February 5, 1923.

MINING CLAIM—IMPROVEMENTS—FORFEITURE—ALASKA—STATUTES.

The special act of August 1, 1912, which made the requirements with respect to annual assessment work upon placer mining claims in Alaska more stringent than theretofore, did not abridge the self-executing forfeiture penalty imposed by the act of March 2, 1907, for failure to perform the required assessment work, and the rule which prevailed under the latter act that an owner in default can not save his claim by the resumption of work prior to a relocation is applicable, regardless of whether the original location was made after or before August 1, 1912.

MINING CLAIM—IMPROVEMENTS—ALASKA—STATUTES.

The general act of August 24, 1921, which amended section 2 of the act of January 22, 1880, by changing the period for the performance of annual assessment work from the calendar to the fiscal year, is applicable to placer mining claims in Alaska, but it did not abrogate the requirements of the act of August 1, 1912, as to the annual work that must be performed during the year of location.

FINNEY, *First Assistant Secretary:*

You [Director of the Bureau of Mines] have referred to the Department a letter from Mr. B. D. Stewart, supervising mining engineer, of Juneau, Alaska, and other papers, relating to the requirements of the statutes pertaining to annual assessment work on placer mining claims in the District of Alaska, and have asked whether the opinion of the Attorney General should be sought.

I do not deem it essential at this time to submit the matter to the Department of Justice for an opinion. No concrete case is presented

and any opinion expressed would be advisory only. In general it may be said that the question with respect to the due performance of assessment work is one which involves the right of possession between litigating claimants in the courts having jurisdiction.

In substance the questions submitted are whether the resumption of work will protect a placer claim located under the Alaska placer act of 1912, and whether the act of 1921 changed the assessment period for such placer claims.

The act of March 2, 1907 (34 Stat., 1243), amended the laws governing labor or improvements upon mining claims in Alaska and expressly provided that upon failure of the owner of any claim to comply with the provisions of the act as to the performance of work and improvements "such claim shall become forfeited and open to location by others as if no location of the same had ever been made." Under that legislation the courts have held that an owner in default can not save his claim by the resumption of work prior to a relocation, the statute being in effect self-executing with respect to the forfeiture.

The mining laws were further modified and amended in their application to the Territory of Alaska as to placer claims by the act of August 1, 1912 (37 Stat., 242). That act prescribed that on every placer claim thereafter located in Alaska not less than \$100 worth of labor should be performed or improvements made "during each year, including the year of location, for each and every twenty acres or excess fraction thereof."

I have no doubt that the forfeiture provision of the act of 1907 continues and applies to those placer claims located after the act of August 1, 1912, equally as well to those located prior thereto. There is nothing in the later act pointing to the contrary. It simply prescribes more stringent requirements with respect to annual work.

The act of August 24, 1921 (42 Stat., 186), is entitled:

An Act changing the period for doing annual assessment work on unpatented mineral claims from the calendar year to the fiscal year beginning July 1 each year.

It is in form an amendment of section 2 of the act of January 22, 1880 (21 Stat., 61), and provides:

That the period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim: *Provided further*, That on all such valid existing claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.

Certain suspension enactments excusing annual work upon mining claims in Alaska have applied to placer as well as to other claims.

See the act of December 1, 1913 (38 Stat., 235); joint resolution of February 28, 1919 (40 Stat., 1213); and joint resolution of November 13, 1919 (41 Stat., 354). The last two of these covered the years 1917, 1918, and 1919.

The act of December 31, 1920 (41 Stat., 1084), extended the assessment period of 1920 to and including July 1, 1921, so that work done upon any mining claim in the United States or Alaska on or before July 1, 1921, was of the same effect as if performed within the calendar year of 1920. Thereafter the act of 1921, *supra*, was passed which changed the assessment period from the calendar to the fiscal year and specified that the period should commence at 12 o'clock meridian of July 1 succeeding the date of location. It also extended the assessment period of 1921 to 12 o'clock noon, July 1, 1922.

This was a general act applying to all unpatented claims, including those in Alaska. The purpose and scope of the act is indicated in its title as quoted above. By considering this act in connection with the suspension laws and the special placer act of 1912, the intent of Congress can be clearly discerned and the provisions of each act given due operation. The act of 1912 was special and detailed in its requirements. It was designed to correct for the future certain undesirable conditions existing in the Territory and applied to every placer claim thereafter located in Alaska. Specifically it required assessment work during each year, including the year of location. The calendar year then constituted the assessment year. There was no purpose or intent to repeal the requirement relating to assessment work for the year of location.

It is my opinion that upon an Alaska placer claim located during the year 1920, the requisite annual work completed on or before July 1, 1921, was effective to preserve the claim (act of December 31, 1920); that upon such a claim located during the year 1921 and during 1922, prior to noon of July 1, 1922, assessment work completed before 12 o'clock meridian, July 1, 1922, was fully effective, and that as to Alaska placer claims located thereafter, first annual work must be performed prior to noon of July 1 succeeding the date of location (acts of 1912 and 1921). This view of the law accords with the purpose and spirit of the several acts and gives uniform and harmonious operation to the different provisions of law.

The language of the act of 1921 to the effect that the assessment period shall *commence* at 12 o'clock meridian on July 1 succeeding the date of location is not applicable in its literal form to Alaska placers located since the passage of the act, for the reason that the special act of 1912 still controls and excepts such claims in that respect from the general law just as it did from the act of 1880,

which is now amended by said act of 1921. The special act of 1912 did not undertake to fix or define the assessment period; that was determined by the provisions of the act of 1880 as the calendar year. The main purpose of the act of 1921 was to change the assessment period from the calendar to the fiscal year. The requirements of the special act of 1912 with respect to assessment work for the year of location should not be deemed repealed or superseded by the later act of 1921.

Referring to the engineer's inquiries, I would state that in my opinion an Alaska placer claim located pursuant to the act of August 1, 1912, becomes forfeited for failure to complete the required assessment work during the assessment period, in accordance with the provisions of the act of March 2, 1907; that the resumption of work will not protect or preserve such a location, and that the act of August 24, 1921, changed the assessment period from the calendar to the fiscal year beginning at 12 o'clock meridian, July 1, with respect to Alaska placer claims upon which annual work for the year of location must still be performed.

STATE OF NEW MEXICO AND HORACE W. FLORA.

Instructions, February 7, 1923.

MINERAL LANDS—SALINE LAND—SURFACE RIGHTS—RESERVATION.

Entries, selections, or locations can not be allowed for lands valuable for deposits of chloride of sodium, or salt, inasmuch as there is no provision of law under which a reservation of such mineral to the United States may be made.

FINNEY, First Assistant Secretary:

I am in receipt of your [Commissioner of the General Land Office] letter ("A"—GRW) of January 24, 1923, requesting instructions as to the proper disposition of an indemnity selection (Santa Fe 045230) filed by the State of New Mexico, which is in conflict as to two legal subdivisions with a prior application (Santa Fe 042499) for a permit under section 23 of the act of February 25, 1920 (41 Stat., 437), to prospect for sodium, filed by Horace W. Flora.

The form of sodium which Flora desires to prospect for is apparently chloride of sodium, or salt, and as there is no provision of law under which entries, selections or locations can be allowed for lands valuable for such deposits with a reservation of the mineral to the United States, it follows that the State selection must be rejected to the extent of its conflict with Flora's application, which appears allowable.

All the papers forwarded with your letter are herewith returned.

HOBART L. PIERSON ET AL.

Decided January 24, 1923.

SCHOOL SELECTION—INDEMNITY—WITHDRAWAL—MINERAL LANDS—OIL AND GAS LANDS—BURDEN OF PROOF—PATENT—SURFACE RIGHTS—VESTED RIGHTS.

A vested right does not attach under an indemnity school selection until all of the requirements of the law and the authoritative regulations thereunder have been fulfilled, and where the land is withdrawn and included within a petroleum reserve before such fulfillment, the selector must either agree to accept a restricted patent as provided by the act of July 17, 1914, or assume the burden of proof and show that the land is in fact nonmineral in character.

SCHOOL SELECTION—INDEMNITY—RELATION—VESTED RIGHTS—WITHDRAWAL.

Where an indemnity school selection, imperfect when filed, is perfected at some subsequent time, the selector can not invoke the doctrine of relation with the view to creating a complete equitable title as of the date of the filing of the selection, and thereby defeat the operation of an intervening withdrawal.

SCHOOL SELECTION—INDEMNITY—REINSTATEMENT—LACHES—PATENT—SURFACE RIGHTS—ADVERSE CLAIM—IMPROVEMENTS.

An indemnity school selection, canceled upon the neglect of the selector to comply with the law and governing regulations, will not be reinstated on the ground that at the time of its cancellation the selector was entitled to receive at least a restricted patent, if, as the result of that neglect, another was permitted to acquire an adverse claim and make substantial expenditures of time and money in placing valuable improvements upon the land.

COURT DECISIONS CITED AND DISTINGUISHED—DEPARTMENTAL DECISIONS CITED AND APPELLED.

Cases of *Payne v. State of New Mexico* (255 U. S., 367), and *State of Wyoming v. United States* (255 U. S., 489), cited and distinguished; cases of *Honey Lake Valley Company et al.* (48 L. D., 192), and *State of California, Robinson, transferee* (48 L. D., 384), cited and applied.

FINNEY, *First Assistant Secretary*:

May 31, 1907, the State of California filed indemnity school land selection for the NE. $\frac{1}{4}$, Sec. 8, T. 29 S., R. 22 E., M. D. M., Visalia land district. This land was included in Petroleum Reserve No. 23 by Executive order of September 14, 1911. By Commissioner's letter of June 30, 1915, the local officers were directed in accordance with paragraph 10 (b) of the (unpublished) circular of March 2, 1915, issued under the act of July 17, 1914 (38 Stat., 509), to advise the proper State officials that patent, if issued, will contain reservation to the United States of the oil and gas deposits under said act unless there is filed in the local office an application for classification of the land as nonmineral, and that in the event said application for classification is filed, and same is denied, a hearing will be allowed, if applied for, at which the burden of proof will be upon the State to show that the land is not valuable for oil and gas.

November 16, 1915, the application for classification of the land as nonmineral filed by Hobart L. Pierson, as transferee of the State, was denied. This decision was affirmed by the Department on March 22, 1916. On July 26, 1916, the Commissioner directed the local officers to notify the State and transferee that they would be allowed 30 days within which to file application to receive patent with the reservation to the United States of the oil and gas deposits contained in said land or to apply for a hearing at which the burden of proof will be upon the State and transferee to prove the nonmineral character of the land and that in the event of failure to comply with such requirements within 30 days or to appeal, the selection will be canceled without further notice.

Under date of September 8, 1916, the Commissioner in reply to a communication from Pierson requesting adjudication of the selection notified him that there did not appear with the record a certificate of nonincumbrance of the base land and advised him that before the selection could be finally adjudicated it would be necessary to file same. Thereafter, on October 28, 1916, the State filed the required certificate.

By his letter of June 27, 1917, the Commissioner directed the local officers to proceed with the hearing to determine the character of the land. Pierson was duly served with notice but failed to appear at the hearing and default was entered against him. The case was ordered closed by the register and Pierson was so advised on July 20, 1918. The record was transmitted to the Commissioner who, on March 7, 1919, canceled the selection because of Pierson's default, and the case was closed.

Thereafter, on March 25, 1919, Lewis O. Dwight filed homestead application for said land which was allowed the same day.

On April 19, 1919, Pierson filed a proposed appeal from said order of March 7, 1919, canceling the selection. Notice of the appeal was not served upon the entryman and it was not filed with the local officers, and it was not transmitted by the Commissioner to the Department. On April 29, 1919, the Commissioner reinstated the selection.

Under date of April 19, 1922, the entryman, Dwight, addressed a communication to the Commissioner stating that since the allowance of the entry he had constantly resided thereon and had made improvements thereupon to the value of \$800 and that he desired to submit final proof which he was entitled to do but before offering such proof he desired to know whether or not his entry would be confirmed on account of its conflict with the State selection. By decision dated May 26, 1922, the Commissioner held that his action in reinstating the selection by order of April 29, 1919, was erroneous and vacated same, holding the selection for cancellation.

Pierson has appealed from said decision. It is contended by him that his case comes clearly within the rule announced in *Payne v. State of New Mexico* (255 U. S., 367); *Wyoming v. United States* (255 U. S., 489), and related cases, wherein it is held in effect that when such a selection has been duly made and completed in full conformity with the law and the directions of the Secretary the equitable title to the tract selected passes to the State and the rights of the State can not be affected by a subsequent attempt by the Executive to reserve the tract selected. It is contended and asserted that a proper county recorder's certificate of nonincumbrance of the base land was filed in 1907, thereby completing the selection before any withdrawal of the selected land but that same was subsequently lost in the General Land Office and the second certificate filed in 1916 was furnished by appellant immediately after being notified of such loss.

It is contended that the Commissioner erred in not deciding that if the selection was not perfect and complete when made it became perfected upon the filing of the nonincumbrance certificate in 1916 before the intervention of any adverse rights and by relation as of the date of the filing of the selection.

In view of the contention and assertion first made, the records and files of the General Land Office have been carefully examined and in order that claimant may labor under no misapprehension as to the record facts a resumé of same will be made.

As stated a county recorder's certificate of nonsale and nonincumbrance of the base land was filed in support of the above selection on October 28, 1916. On that date a certificate dated October 18, 1916, was received in the General Land Office together with a letter from the deputy State surveyor general of the State of California of date October 23, 1916. This Visalia list was filed in the local office and was allowed May 31, 1907. As base for the selection therein the State assigned the NW. $\frac{1}{4}$, Sec. 16, T. 32 N., R. 12 W., M. D. M. Prior to that time and on April 12, 1906, the State filed an indemnity school land selection (Visalia 466) assigning said NW. $\frac{1}{4}$, Sec. 16, as base, and on August 13, 1906, filed a county recorder's certificate, dated July 27, 1906, in support of that selection. The selection, Visalia 466, was canceled October 15, 1906, reinstated March 21, 1907, and on July 15, 1907, it was ordered that the selection stand canceled as of date October 15, 1906. On December 24, 1906, the State filed an indemnity school land selection (Visalia 522) and assigned as base in support thereof the SE. $\frac{1}{4}$, said Sec. 16, T. 32 N., R. 12 W. In support of this selection the State on March 18, 1907, filed a county recorder's certificate dated February 2, 1907, covering all of said Sec. 16. This selection received departmental approval June 3, 1917.

It is quite possible that appellant in the present case (Visalia 04741) had in mind one or both of the certificates filed in support of the other selections named, which, however, involved separate and distinct transactions for other selected lands and relate in no way to that being considered. Furthermore, county recorder's certificates dated July 27, 1906, and February 2, 1907, can not be considered as proofs in support of a selection filed May 31, 1907, the purpose of such a certificate being to show that, at the time of filing the particular selection list, there was not of record in the county recorder's office any instrument purporting to convey or in any way incumber the State's title in and to the base land offered by the State in exchange with the United States. It will thus be seen that the State had not done all that was required prior to such withdrawal under the rules and regulations then in force and the case accordingly does not come within the purview of the cases cited by reason of the contention first advanced. See 35 L. D., 537. The basis of fact upon which the decisions relied on rests is that a claimant must have done all that the law and regulations required before an equitable title to the land becomes vested in him.

The remaining question to be considered is whether or not by the filing of the nonincumbrance certificate in 1916 claimant thereby completed the selection so as to bring his case within the rule relied on.

In determining such question the prior withdrawal and its effect must be taken into consideration. The regulations issued under said act of July 17, 1914 (38 Stat., 509), and in force when said certificate was filed in 1916, provided for the issuance of a patent with a reservation or required the claimant to sustain the burden of showing at a hearing, if one be ordered, that the land is in fact nonmineral. See 44 L. D., 32.

A hearing was duly ordered in this case and claimant defaulted. The case was ordered closed by the register and Pierson was so advised on July 20, 1918. He took no appeal and the selection was thereafter on March 7, 1919, duly canceled by the Commissioner under then existing practice and regulations. The land thereupon became subject to the homestead application of Dwight which was duly allowed. Dwight has since that time lived upon the land, cultivated it, and made valuable improvements on it and is now in position to submit final proof. In view of such a state of facts, it is the opinion of the Department that claimant's case does not come within the doctrine announced in the cases relied on by him by reason of his failure to comply with the requirements of the Department. He was required either to accept a restricted patent or to sustain the burden of showing at the hearing the nonmineral character of the land or in default thereof to subject himself to the penalty of

cancellation. He did neither and his neglect was the immediate and proximate cause of the allowance of the homestead entry of Dwight. His failure to take any action must be considered and treated as an abandonment of his claim, and he can not now be heard to say that he was entitled to at least a restricted patent and that the selection should not have been summarily canceled. It is believed that the governing rule is correctly announced in the case of Honey Lake Valley Company *et al.* (48 L. D., 192), wherein it is held (syllabus):

The right initiated by the filing of a State indemnity school selection must be treated as an abandoned right, and not one 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.

See also case of State of California, Robinson, transferee (48 L. D., 384).

The decision appealed from is affirmed.

LEWIS v. DUNNING.

Decided February 10, 1923.

STOCK-RAISING HOMESTEAD — PREFERENCE RIGHT — APPLICATION — RELATION — STATUTES.

The preference right accorded by section 8 of the stock-raising homestead act to one asserting through the holding or ownership of contiguous land is defeated by the preference right granted to a petitioner for the designation of the land under section 2 of that act, where the former's application to make original entry, although filed prior to the latter's petition, was not and could not have been allowed until subsequently thereto.

DEPARTMENTAL INSTRUCTIONS APPLIED—DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

Instructions of May 20, 1919 (47 L. D., 150), applied; case of Rippey *v.* Snowden (47 L. D., 321), cited and distinguished.

FINNEY, *First Assistant Secretary:*

Forest N. Dunning has appealed from a decision of the Commissioner of the General Land Office dated June 2, 1922, holding for cancellation his additional entry under the stock-raising homestead act.

It appears that on March 1, 1919, at the Miles City, Montana, land office, said Dunning made entry under section 2289, Revised Statutes, for N. $\frac{1}{2}$ N. $\frac{1}{2}$, Sec. 10, T. 4 S., R. 45 E., M. M. On the same day he applied to make an additional entry under the stock-raising homestead act for S. $\frac{1}{2}$, Sec. 12, said township.

Prior thereto, to wit, on August 20, 1918, Leroy C. Lewis applied to make entry under the enlarged homestead act for N. $\frac{1}{2}$, said Sec. 12, filing therewith a petition for the designation of the land. The tract was designated under the enlarged homestead act on September 20, 1919, effective November 10, 1919. Lewis's application was allowed on the latter date.

The N. $\frac{1}{2}$ N. $\frac{1}{2}$, Sec. 10, and S. $\frac{1}{2}$, Sec. 12, were designated under the stock-raising homestead act on June 30, 1920, effective July 30, 1920. The N. $\frac{1}{2}$, Sec. 12, was designated under the stock-raising homestead act on March 10, 1921, effective March 28, 1921.

Dunning's application to make an additional entry for S. $\frac{1}{2}$, Sec. 12, was allowed March 3, 1921. The entry was held for cancellation on the ground that Lewis was entitled to a preference right under section 8 of the stock-raising homestead act to make entry for the tract under his application filed on December 20, 1919.

The stock-raising homestead act provides for two preference rights of entry, (1) under section 2, by the filing of an application and petition for designation, and (2) under section 8 through the holding or ownership of contiguous land. Dunning's claim to the tract is under the provisions of section 2, while Lewis is asserting a claim under section 8. Under date of May 20, 1919 (47 L. D., 150), the Department considered the two preference rights, and held that—

* * * It was not the purpose of Congress to permit the right accorded to a petitioner for the designation of land to be defeated by one who thereafter makes an original homestead entry of adjoining land. To so hold, would be to invite entries, in advance of designation, over large areas for the purpose of securing preference rights of additional entry, resulting in a defeat of the claim under the application for designation. In instances where there is no application for designation, the statute plainly gives the entryman a preference right, but this is because no other right exists of prior initiation. An application for designation conforming to the statute creates a right of entry upon designation of the land, and this is a preferential right in the same sense as the right given by section 8. In the one case, when the designation is made the right relates in point of time to date of the application for designation; in the other, to the date of the original entry. Under familiar rules of construction, the first in time is first in right.

While Lewis's right to make entry for the N. $\frac{1}{2}$, Sec. 12, related back to the date of the filing of his application therefor—August 20, 1918—no right to any other land, under that application, attached until the application was allowed on November 10, 1919, section 4 of the stock-raising homestead act—the only section under which Lewis could apply—limiting the right of additional entry to "any homestead *entryman* of lands of the character herein described." In the meantime, Dunning had fully complied with the statute relative to filing an application and petition for designation, and his right to

make entry was superior to the claim of Lewis. The rule announced in *Rippy v. Snowden* (47 L. D., 321, syllabus)—

a homestead application filed, for land subject thereto, accompanied by the required showing and payment, has the segregative effect of an entry, and when allowed all rights thereunder relate back to date the application was filed

is pertinent only to cases where, upon the face of the records, the applicant is qualified and the land subject to the particular entry sought, and where the failure to have the entry allowed is due solely to administrative delay. Where, as here, the application was for undesignated land, necessitating an investigation by the Department and a determination of the character of the land upon a record to be made up after the date of the application, that rule does not apply.

The decision appealed from is accordingly reversed.

TASH v. YOCK.

Decided February 10, 1923.

SELECTION—OCCUPANCY—NOTICE—LACHES—ADVERSE CLAIM—COLOR OF TITLE—
HOMESTEAD ENTRY.

A purchaser of a State selection who, after cancellation thereof with due notice to him, continues in control and possession for a long period of years without manifesting an intention of perfecting the claim into a legal title is chargeable with laches and does not acquire a right under a *bona fide* claim or color of title superior to another who is permitted to make a homestead entry and takes possession peaceably and unopposed.

COURT DECISION CITED AND DISTINGUISHED.

Case of *Atherton v. Fowler* (96 U. S., 513), cited and distinguished.

FINNEY, *First Assistant Secretary*:

The contention in this case involves title to a parcel of land, described as lot 1, Sec. 1, T. 19 S., R. 4 E., M. D. M., containing 37 acres, within the San Francisco land district, California, for which August Yock made homestead entry 011942, March 4, 1918, under the act of June 11, 1906 (34 Stat., 233).

The Commissioner of the General Land Office, by decision dated July 12, 1922, held the entry intact and dismissed contest proceedings instituted against same by A. M. Tash. The affidavit of contest filed March 15, 1920, charged in substance that contestant held from the State of California certificate of school land indemnity purchase No. 4183, dated March 18, 1903, signed by the surveyor general of the State of California for the land in question; that he has never surrendered said land or abandoned the same, or authorized contestee to enter upon and locate the land; that he expects to acquire

same under and by virtue of the papers and payments made to the State of California, or by any other necessary proceedings.

Considering said affidavit the local officers, by decision of April 29, 1920, dismissed the contest upon the ground that the State selection under which Tash claimed title had been canceled by the Commissioner's letter of January 8, 1907, after due notice to the State of California, because the State failed to furnish a certificate of non-incumbrance of the land assigned, and that it was too late to reopen the case or to appear as an intervener.

Notwithstanding the dismissal of the contest by the local officers, contestant served copy of the contest affidavit upon contestee, who thereupon filed answer alleging that subsequently to the cancellation of the State's selection, the land was open, vacant, and unappropriated for at least ten years when he made entry thereof, and that he has been living thereon and cultivating same since date of entry. Upon appeal, the action of the local officers was affirmed by the Commissioner, and upon further appeal, the decision of the Commissioner was reversed by departmental decision dated June 6, 1921, wherein it was held that the contest affidavit was sufficient. The case was accordingly remanded and a hearing ordered.

Upon the answer already filed, and pursuant to notice, a hearing was duly held before the local officers October 26, 1921, when both parties appeared with counsel and submitted testimony. Upon consideration of the facts, the local officers rendered their joint decision recommending dismissal of the contest. Tash appealed from said decision, and in the decision from which this appeal is prosecuted the Commissioner affirmed the action of the local officers.

There is no material conflict as to the facts. It is shown, as charged in the contest affidavit, that contestant Tash, applicant under the canceled State selection, applied for the land in controversy in 1901 through the State of California, and that in 1902 there was issued to him by the State a paid up certificate of purchase for same. It is admitted that in 1907 he received due notice from the State surveyor general that the State selection under which said certificate of purchase was issued had been canceled. It is also admitted that until March, 1920, when he filed the contest affidavit in the case now under consideration, no steps were taken by him to have his invalid filing restored, except to consult with several attorneys.

He testified that the fence he erected did not define the boundaries of the land in dispute but was built to include about 100 acres in the field in addition to this specific tract; that in his application to the State he described the land as grazing, when in point of fact 30 acres can be cultivated; that at the time Yock entered into possession of same it was possible for him to do so without going over any inclosures or breaking down any fences to establish residence. It is

shown that Tash used the land from 1901 to 1904, in connection with other land he owned adjacent thereto for grazing purposes, and to a certain extent cultivated the same; that prior to 1901 he claimed the land by virtue of a possessory right purchased a number of years previous to that time; that in 1904 he moved to another place he owned some 25 miles distant, which contains about 1,000 acres, where he has resided ever since. He does not claim to have resided on the land in dispute; but does claim adverse possession, and to have farmed it for many years by inclosing part of it with a fence embracing, as stated, about 100 acres.

The records of the General Land Office show that plat of survey was filed September 26, 1884; that entry of lot 2, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, said section, was made by A. M. Tash May 15, 1888, for which patent issued February 26, 1891; that lot 1 of said section, the land in question, was selected by the State August 9, 1902, as stated, and the selection canceled by the Commissioner's letter of January 8, 1907, for failure of the State to furnish a certificate of nonincumbrance of the base land assigned; that the township was made a part of the Monterey forest reserve by proclamation dated June 25, 1906, and was again withdrawn for forest purposes by proclamation of January 9, 1908; that said lot was restored under the act of June 11, 1906, and opened to entry again August 19, 1916, and that entry thereof was made by August Yock March 4, 1918.

It is shown that the entryman Yock, a divorced man with two minor children living with him, upon being informed that the land was vacant filed upon it and immediately proceeded to improve and cultivate the land, and has lived there continuously since March, 1918. It is shown that he built a substantial house 12 by 24 feet, furnished same with all necessary housekeeping furniture, and that his total improvements are of the value of about \$800; that his entry into possession of the tract was unopposed, and that it is essentially farming land, 22 acres having been cultivated the first year of his entry, 26 acres the second, and all but one acre plowed the third year (1921).

The Department can not agree with the contention urged upon appeal that long possession, coupled with purchase of a State selection when the selection was canceled, of which action he received due notice, would thereby segregate the tract involved from entry by others. For a period of more than ten years, and until long after the allowance of Yock's entry, Tash failed to take any steps toward perfecting title to the land. By his failure for so long a time to assert any right he is clearly chargeable with laches. The most that can be said of his claim is that under the purchase of the State's selection he had the control and use of the land for a number of years, continuing in possession of same, but without *bona fide* inten-

tion to perfect the claim into a legal title, although he may have thought he would eventually acquire title by purchase of a State indemnity selection.

In view of the laches shown, and Yock's entry and improvements, there is no equity in the contention that he should now be dispossessed, and Tash be given opportunity to obtain title through the allowance of a State lieu selection, on the ground of long continued occupancy. Furthermore, the element of superior right under a *bona fide* claim or color of title as a basis of title, is wanting, and the doctrine in *Atherton v. Fowler* (96 U. S., 513), does not apply.

The decision appealed from is accordingly affirmed.

MAURICE M. ARMSTRONG.

Opinion, February 13, 1923.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT.

Where a permittee upon the discovery of oil or gas is awarded a five per cent lease and a sliding scale lease under the act of February 25, 1920, the drilling regulations set forth in subdivision (b) of section 2 of the lease must be complied with as to both tracts, and if the lessee assigns one of his leases the assignee becomes obligated to the same extent as the original lessee.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT.

Where a permittee upon the discovery of oil or gas is awarded a five per cent lease and a sliding scale lease and subsequently assigns one of his leases, his failure to comply with the drilling regulations under the lease retained by him does not impair the rights of the sublessee under the assigned lease.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT.

Where a permit is assigned prior to the discovery of oil or gas, the assignee becomes subrogated to all of the rights of the original permittee, and obligations with respect to drilling under any lease or leases subsequently awarded are assumed to the same extent as if discovery had been made prior to the assignment.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT.

Where permit rights are assigned to several individuals as to separate tracts and upon discovery of oil or gas a separate lease is awarded for each specific tract, the assignees assume separate and distinct undertakings that obligate them to comply with the drilling requirements with respect to each tract.

OIL AND GAS LANDS—LEASE—WAIVER—SECRETARY OF THE INTERIOR.

While the drilling requirements under an oil and gas lease can not be waived, yet where the enforcement of the obligation to proceed to drilling appears to the Secretary of the Interior to be inequitable in any particular case, he may grant a suspension of the requirement.

FINNEY, *First Assistant Secretary*:

I have your [Attorneys for Maurice M. Armstrong] letter of January 16, 1923, wherein you state that he holds permit 028599, Cheyenne, Wyoming, series, for the S. $\frac{1}{2}$, Sec. 34, S. $\frac{1}{2}$ and NE. $\frac{1}{4}$, Sec. 35, and S. $\frac{1}{2}$ and NE. $\frac{1}{4}$, Sec. 25, T. 25 N., R. 88 W., 6th P. M. You quote from the lease form issued by the Department and in connection therewith you ask the following questions:

1. If the permittee upon the discovery of gas or oil, takes, in his own name, both the 5% lease and the sliding scale lease, are these instruments regarded as separate leases in the sense that the lessee is obligated, within three months of the delivery of the leases, to institute and continuously maintain drilling on the land covered by *each* lease?

2. (a) If the lessee assigns one of his leases, must he drill on the land covered by the lease he retains?

(b) Must the assignee drill on the land covered by the assigned lease?

3. (a) If the lessee assigns one of his leases, and thereafter is in default in drilling on the land covered by the retained lease, does his default impair any right of the assignee of the assigned lease?

(b) If the answer to (a) is yes, how, if at all, can the assignee (or sublessee) protect himself against such impairment?

4. If the permittee assigns his entire permit, and thereafter oil or gas is discovered on the permitted tract, are the rights of the assignee (a) in the 5% land, and (b) in the sliding scale land, the same as would have been the rights of the permittee if there had been no assignment?

5. If the permittee assigns to A his permit rights to one-quarter of the land (which he designates in the assignment as the 5% land) and assigns to B his rights to the remainder of the permitted tract, and, upon the discovery of oil or gas, A and B apply for leases, will it be necessary for both A and B to covenant separately with the Government for continuous drilling?

6. If the permit rights to the 5% land are assigned to A and the permit rights to the remainder of the tract are assigned separately to as many persons as there are 40-acre tracts included therein must each of these persons, within three months of the issuance of a lease or leases, drill a well?

7. Under what circumstances will the Department waive or suspend multiple drilling requirements in the Lost Soldier Field in Wyoming?

Your questions will be considered in their order:

1. Where the permittee upon the discovery of oil or gas takes in his own name one lease for a part of the area under a 5% royalty and another lease of the remainder of the area on a sliding scale royalty, these leases are designated as A and B, respectively, and so long as they remain in the name of the original permittee they may for certain purposes be regarded as one obligation; but it is obvious that the law does not intend that the lessee may, nor will the Department permit him to, confine his drilling to the land upon which he is paying a 5% royalty, and defer drilling upon the remainder of the land with respect to which, under the law and regulations, he is required to pay the higher royalty. In such cases the lessee will also be required to comply with the drilling regulations as to

both tracts, as provided in paragraph (b), section 2 of the lease, viz: to not only drill wells to offset wells on adjoining privately owned lands, but to also promptly drill wells on the said higher royalty lands to offset wells drilled by him on his 5% area. The practice of the Department in regarding such leases as a single undertaking for certain purposes is merely for the convenience of the lessee and the Department, and is not designed to relieve the lessee of the necessity of complying with his obligations as to drilling with respect to either the 5% or the higher royalty portion of the area.

2. (a) If the lessee assigns one of his leases the lessee must nevertheless comply with his obligation taken under the other lease.

(b) The assignee in taking an assignment becomes obligated in the same manner as the original lessee and he must necessarily comply with his obligations.

3. (a) If the lessee assigns one of his leases and thereafter is in default in drilling on the land covered by the retained lease, this fact does not impair the rights of the assignee of the assigned lease which has been approved by the Department.

4. If the permittee assigns his entire permit to any one person, company or association of persons, and thereafter oil or gas is discovered on the lands the assignee will have the same rights that the original permittee would have had if the discovery had been made by him.

5. If a permittee assign to one person his permit rights with respect to one-quarter of the area included in his permit, and intended to represent 5% land, and assign to another person the remainder of the permitted tract, it will be necessary, upon the discovery of oil or gas upon the permitted tract, for each of the assignees seeking a lease, to covenant separately and individually with the Government for drilling upon the area included in his assignment, as leases which might be issued to such assignees would represent separate and distinct undertakings.

6. Where the permit rights are assigned to specific tracts covered by a permit to several individuals, each person acquiring a separate tract, it must necessarily follow that upon discovery and the issuance of leases a separate lease will issue to each individual and each individual will be obligated to the Government as to that particular tract, hence it follows that each individual in complying with the terms of the lease must proceed to the drilling operations covered by his lease.

7. There are no particular circumstances that can be advanced to justify the waiving of the obligation to proceed to drilling in such instances but where the enforcement of this rule would appear to be

inequitable upon a showing to this effect the Government will give each particular case its individual attention and if the particular facts justify suspension of the requirement, such action will be taken.

**MALHEUR NATIONAL FOREST, OREGON—EXCHANGE OF LANDS
AND TIMBER—ACT OF MARCH 8, 1922.**

INSTRUCTIONS.

[Circular No. 873.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 17, 1923.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES IN OREGON :

Your attention is called to an act of Congress, approved March 8, 1922 (42 Stat., 416), entitled "An act authorizing the exchange of lands within the exterior boundaries of the Malheur National Forest, in the State of Oregon, and for other purposes," which is as follows:

That the Secretary of the Interior be, and hereby is, authorized in his discretion to accept, on behalf of the United States, title to any lands in private ownership within the exterior boundaries of the Malheur National Forest which, in the opinion of the Secretary of Agriculture, are chiefly valuable for national forest purposes, and, in exchange therefor, may issue patent for an equal value of national forest land in the State of Oregon; or the Secretary of Agriculture may permit the grantor to cut and remove an equal value of timber from any national forest in the State of Oregon, the values in each instance to be determined by the Secretary of Agriculture and be acceptable to the owner as fair compensation. Timber given in such exchanges shall be cut and removed under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands conveyed to the United States under this Act shall, upon acceptance of title, become part of the Malheur National Forest.

This act is one of a number of acts passed by Congress, providing for exchanges of lands in national forests. Special regulations governing each of such acts have not been prepared, but procedure under all is intended to be in accordance with the instructions of Circular No. 863, approved October 28, 1922 (49 L. D., 365), entitled "Consolidation of National Forests," which defined the procedure in detail and which is sufficiently comprehensive to afford ample guidance in proceeding under any of such acts.

Therefore, in considering applications for exchanges under this act, you are directed to be governed by the instructions given in

said Circular No. 863, with such modifications as may be necessary and proper to make applicable to this act.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

STATE OF CALIFORNIA, ROBINSON, TRANSFEREE.

Decided February 20, 1923.

SELECTION—INDEMNITY—OIL AND GAS LANDS—WITHDRAWAL—BURDEN OF PROOF.

The Government is not required to establish the mineral character of land as of the date of the filing of a State selection, if the selection was incomplete when filed; and the inclusion of the land within a petroleum reserve prior to its completion casts the burden of proof as to its non-mineral character on the State and its transferee.

COURT DECISIONS DISTINGUISHED—DEPARTMENTAL DECISION CITED AND ADHERED TO.

Cases of *Payne v. State of New Mexico* (255 U. S., 367), and *State of Wyoming v. United States* (255 U. S., 489), cited and distinguished; case of *State of California, Robinson, transferee* (48 L. D., 384 and 387), cited and adhered to.

FINNEY, *First Assistant Secretary*:

Wilbur S. Robinson, transferee, has appealed from a decision of the Commissioner of the General Land Office dated August 18, 1922, denying his application for the recertification, without the reservation of the oil and gas, of the NE. $\frac{1}{4}$, Sec. 28, T. 28 S., R. 27 E., M. D. M., Visalia, California, land district, certified to the State of California on March 3, 1920, under its indemnity selection list, filed November 15, 1907.

When filed, the selection assigned as base the NE. $\frac{1}{4}$, Sec. 16, T. 18 S., R. 12 E., M. D. M., then within the limits of the Monterey National Forest.

The selected tract having been withdrawn and included in Petroleum Reserve No. 18 by Executive order of January 26, 1911, the Commissioner of the General Land Office, under date of July 13, 1915, held that if patent issued it would contain the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas, unless the State of California applied for the classification of the selected land as nonmineral. A petition for the classification of the land as nonmineral was filed by the State's transferee, which

was denied by the Commissioner of the General Land Office on November 29, 1915, on the basis of a report by the Director of the Geological Survey. On appeal, the Department, by decision of May 12, 1916, affirmed the Commissioner's decision.

The base land having been eliminated from the national forest by Executive order of September 5, 1916, the Commissioner of the General Land Office, by decision dated September 29, 1916, held the selection for cancellation because not supported by valid base. The transferee appealed, and by decision of January 30, 1917, the Department affirmed the decision below.

On August 17, 1917, the State substituted the NE. $\frac{1}{4}$, Sec. 36, T. 37 N., R. 8 E., M. D. M., within the boundaries of the Modoc National Forest, as base for the selection.

In the meantime, the State's transferee had applied for a hearing to afford him an opportunity to introduce evidence tending to prove the nonmineral character of the land. A hearing was had on June 17, 1918, before the local officers, who by a decision of June 28, 1918, held the land to be mineral in character, and recommended that the patent to be issued under the selection contain the provisions and reservations of the act of July 17, 1914, *supra*, as to oil and gas. No appeal from said decision was filed by the State or its transferee, and on November 9, 1918, the Commissioner of the General Land Office affirmed the decision of the local officers.

On December 4, 1918, there was filed in the local office by the State surveyor general, on behalf of the State of California and of its transferee, a waiver of all mineral rights in and to the land, and a consent that the selection be approved subject to the provisions and reservations of the act of July 17, 1914, *supra*, as to oil and gas.

The petition for the issuance of an unrestricted patent was filed August 13, 1921. Prior thereto the State's transferee had applied for a permit under section 20 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon the land. The permit was granted February 16, 1922.

It appears from the record that the selection was not completed until February 23, 1916, when there was filed a certificate by the county recorder that the tract originally assigned as base was not incumbered.

Except as to the requirement that the State substitute new base, all the questions involved are identical with those discussed by the Department in State of California, Robinson, transferee (48 L. D., 384), involving a tract of land in the same township, which decision was adhered to, on rehearing (48 L. D., 387). A second motion for rehearing was denied by decision of January 27, 1923, unreported.

The transferee was not injured by the requirement of the Department that the State assign new base. While under the decision of

the Supreme Court of the United States in *Payne v. State of New Mexico* (255 U. S., 367), the elimination of the base land from the national forest did not warrant the cancellation of the selection, the fact that the selection was incomplete, and remained so until long after it had been withdrawn as valuable for oil and gas and included in a petroleum reserve, demanded that the Department proceed in accordance with the provisions of the act of July 17, 1914, *supra*.

Appellant cites the decision of the Supreme Court of the United States in *State of Wyoming et al. v. United States* (255 U. S., 489). The court there held, in substance, that a vested right attaches under a State selection as soon as the selector has done everything required preliminary to the passing of title, and that the character of the land must be determined, where it becomes an issue, as of the date of completion of the selection. Inasmuch as the selection was not complete when filed, it was not incumbent on the Government to establish the mineral character of the land as of November 15, 1907. Because of the creation of the petroleum reserve prior to the completion of the selection, the burden of proof as to the nonmineral character of the land fell on the State and its transferee, and they failed to produce any evidence to overcome the conclusion which was warranted by the presence of producing oil wells in the township.

The decision appealed from is affirmed.

EXCHANGE OF SANTA FE PACIFIC RAILROAD COMPANY LANDS IN MOHAVE COUNTY, ARIZONA—ACT OF AUGUST 24, 1922.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 20, 1923.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

The act of Congress approved August 24, 1922 (42 Stat., 829), provides:

That the Secretary of the Interior be, and he is hereby, authorized and empowered, in his discretion, to accept a relinquishment from the owners of the odd-numbered sections of land falling within townships sixteen, sixteen and one-half, and seventeen north of range thirteen west, Arizona, and permit said owners to select and receive in exchange therefor patents of an equal area of vacant surveyed, nonmineral, nontimbered public land of the United States in the County of Mohave, State of Arizona.

According to the report (No. 722, Sixty-seventh Congress, second session) of the Committee on Public Lands, House of Representatives, which report was adopted by the Senate Committee on Public Lands and Surveys (Report No. 801), the object of the bill was to afford relief to those persons who had settled on land in the odd-numbered sections of land in the townships described, which land,

unless mineral in character, inured to the Santa Fe Pacific Railroad Company (successor to the Atlantic and Pacific Railroad Company) under its grant by the act of July 27, 1866 (14 Stat., 292), upon the filing of the map of definite location of the line of road on March 12, 1872.

Under the discretion vested in the Secretary of the Interior by said act, the Santa Fe Pacific Railroad Company will be allowed six months from the date hereof within which to relinquish to the United States the lands inuring to it in the townships described. Such relinquishment should be made in accordance with the regulations governing relinquishments under the exchange provisions of the act of June 4, 1897 (30 Stat., 11, 36). Upon the acceptance of the relinquishment, which should be accompanied by a satisfactory abstract of title of the relinquished land, the said railroad company will become entitled to select, within ten years from the date hereof, an equal area of vacant surveyed, nonmineral, nontimbered public land in Mohave County, Arizona.

Selections filed under the provisions of the act will be governed, as to posting and publication of notice, by the regulations governing selections under the act of June 4, 1897, *supra*. The fees to be paid will be at the rate of \$2 for each 160 acres or fraction thereof included in the selection.

As selections are perfected you will, if all be found regular, submit them to the Department for approval.

E. C. FINNEY,
First Assistant Secretary.

ETOILE P. HATCHER AND W. M. PALMER ET AL. (ON PETITION).

Decided February 23, 1923.

SURVEY—LAKE—FRAUD—PUBLIC LANDS—ESTOPPEL.

In applying the well established principle that where substantial areas of public lands are omitted by reason of fraud or gross error in the original survey, the Government is not estopped from surveying the omitted areas for disposal under the public land laws, it is impracticable to fix any general rule, even an arbitrary one, based upon acreage or measure of depth that may be regarded as the minimum of which cognizance of error will be taken.

SURVEY—INDIAN LANDS—RESERVATION—LAKE—NAVIGABLE WATERS—RIPARIAN RIGHTS.

Sovereign rights have never been recognized by the United States as being vested in the Indian tribes, and the fact that lands were within an Indian reservation at the date of the admission of a State into the Union does not prevent the title to the beds of the navigable waters within the boundaries of the reservation from vesting in the State by virtue of its sovereignty.

SURVEY — LAKE — RIPARIAN RIGHTS — ACCRETIONS AND RELICTIONS — WATER RIGHT — LOUISIANA.

The question as to how far the title of a riparian owner extends is one to be determined by State law, and in Louisiana while the State has by legislation granted to owners of adjoining lands, accretions, and relictions found and added imperceptibly on the edge of rivers or running waters, yet the State has not, with the exceptions mentioned, resigned to riparian proprietors the rights inuring to it as a sovereign power.

FINNEY, *First Assistant Secretary*:

October 28, 1922, the Department approved the recommendation of the Commissioner of the General Land Office for survey of certain islands in Cross Lake, Louisiana, and also certain areas about the margin of said lake which were omitted from the original survey.

January 27, 1923, petition was filed in behalf of Mrs. Etoile P. Hatcher and Mrs. W. M. Palmer for the exercise of the supervisory authority of the Department to reconsider and vacate its former action.

It is represented that Mrs. Hatcher owns lands in Secs. 1 and 12, T. 17 N., R. 15 W., and also in the adjoining Secs. 6 and 7, T. 17 N., R. 14 W., in which there is an additional area covered by the order for survey; also that Mrs. Palmer owns lands in Sec. 34, T. 18 N., R. 15 W., to which there is a proposed addition under the contemplated survey. It is claimed in behalf of these owners of surveyed lands that the alleged unsurveyed areas are not properly subject to survey as public lands of the United States when considered in the light of the recent decision of the Supreme Court of the United States rendered January 22, 1923, in the case of the United States *v. Loucks et al.* (43 Sup. Ct. Rep., 236), involving lands on the border of Ferry Lake in the near vicinity of the lands here in question.

It is a well established principle that where substantial areas are omitted by reason of fraud or gross error in the original survey the Government is not precluded from surveying the omitted areas for disposal under the public land laws. The difficulty encountered in this class of cases is to determine whether the principle is applicable to the situation involved in the particular case considered.

In *Security Land & Exploration Co. v. Burns* (193 U. S., 167, 183), the court used the following language:

As is said in the trial court in this case, there must be some limit to the length courts will go in search of the water delineated on a plat of survey, with a meander line shown thereon. If the water were ten miles away, it is certain that a claim to be bounded thereon would not for one moment be admitted. A distance of half a mile, enough to plainly show the gross error of the survey, together with other facts adverted to herein, are sufficient to justify a refusal to apply the general rule that a meander line is not usually one of boundary.

It seems impracticable to establish any general rule, even an arbitrary one, based upon a certain acreage or measure of depth that would be regarded as the minimum of which the Government would take cognizance for purpose of survey and disposal. One of the added areas in the Loucks decision constituted a compact body of 97.64 acres. It was in the shape of a crescent about 4000 feet in length with an extreme width of about 1200 feet. Yet, considering the topography of the land, cut by ravines, and the difficulties surrounding the work of the surveyor, the small value of the land at time of the original survey, etc, the court held that failure of the surveyor to follow the shore of the lake more closely was not unreasonable and that the lake rather than the old meander line was the boundary of the land originally surveyed, and that the disposal of the surveyed land by the Government carried title to the so-called omitted area.

The said decision established no new principle and the most that can be said of it is that it appears to have applied the established rule with some liberality to the claimants under patent. A smaller omitted area was involved in *Producers Oil Company v. Hanzen* (238 U. S., 325), wherein the disputed area was described as—

1,636.8 feet long and contiguous fast ground, amounting altogether to about forty acres (87 according to defendants' estimate), upon which is much large growing timber including cypress, hickory, gum and oak—one oak 400 feet beyond the traverse lines being 14 feet in circumference. This is the land in dispute.

The court held that title to the omitted area did not pass with the disposal of the adjacent surveyed lot, but that the meander line of the lot was its boundary. Numerous decisions were cited to show the principle of law applicable, and in that connection it was said (page 339):

A review and analysis of these cases would be tedious and unprofitable; thorough acquaintance with the varying and controlling facts is essential to a fair understanding of them. They unquestionably support the familiar rule relied on by counsel for the Oil Company that in general meanders are not to be treated as boundaries and when the United States conveys a tract of land by patent referring to an official plat which shows the same bordering on a navigable river the purchaser takes title up to the water line. But they no less certainly establish the principle that facts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse lines these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section borders a body of water and that a patent thereto confers riparian rights.

Reference may also be made to the recent decision by the Supreme Court dated January 2, 1923, in the *Jeems Bayou Fishing and Hunting Club* case (43 Sup. Ct. Rep., 205). That case involved an omitted area having a depth from a few hundred feet to three-fourths

of a mile forming a body of more than 500 acres. It was said *inter alia*:

The defendants rely upon the rule that where lands are patented according to an official plat of survey, showing meander lines along or near the margin of a body of water, the plat is to be treated as a part of the conveyance and the water itself constitutes the boundary. The rule is familiar and has received the approval of this Court many times. *Producers Oil Company v. Hanzen*, 238 U. S. 325, 338, and cases cited. But it is not absolute, as this Court has also frequently decided. It will not be applied where, as here, the facts conclusively show that no body of water existed or exists at or near the place indicated on the plat or where, as here, there never was, in fact, an attempt to survey the land in controversy.

The tracts referred to in this petition are considerably larger than that involved in the Loucks case. One of the tracts here contains at least 160 acres and the other perhaps more than 200 acres, and the report of the examiner who made close inspection of the ground indicates that gross error was made in the original survey in the purported meander of the lake, and that an aggregate area of about 2,500 acres was omitted from the survey about the margin of the lake in the portion reported on. It is mainly upland in character and has been cultivated and improved for many years.

The Department sees no sufficient reason to vacate its former action and the petition is accordingly denied.

Another petition addressed to the supervisory power of the Department has been filed by counsel for certain alleged settlers and applicants for survey, in respect to a different phase of the case. By its former action of October 28, 1922, the Department rejected applications for survey of certain small areas on the margin of the lake and also the areas applied for in the bed or former bed of the lake. Some complaint is made with respect to elimination of said small marginal areas from the proposed survey, but the argument is mainly devoted to the contention that the bed areas belong to the United States and not to the State, as was held in the former decision.

The Department found that Cross Lake was a navigable body of water in 1812 when the State of Louisiana was admitted into the Union and that under the well known doctrine the title to the land forming the bed of the lake passed to the State by virtue of its sovereignty. In opposing this view the petition advances the novel proposition that this vicinity was Indian territory owned by the Caddo Indians at the time of the admission of the State and that the title to the bed as well as the shores of the lake was in the Indians; that they had full sovereign power over the same, could eject other tribes and make grants to individuals, and that all accretions of the streams and lakes in that region belonged to them; that said area did not become part of the public domain until after

confirmation of the treaty of July 1, 1835, between the United States and the Caddos (7 Stat., 470). And following this line of argument it is suggested that before the date of the said treaty of cession by the Indians, the waters of the lake had receded so as to leave bare some of the former bed, and that this inured to the Indians and was in turn ceded to the United States, so that the State's claim of title by sovereignty had no chance to attach.

This contention is as untenable in law as it is unsupported by fact. Its fallacy is apparent when it is considered that the right of sovereignty over the area in question was acquired by the United States from France in 1803 by the treaty known as the Louisiana Purchase, and that the Indians in this country have never been recognized as having sovereign rights. Their interest in the soil was merely that of possession. The fee vested in the respective European governments by virtue of discovery and conquest and inured to the Government of the United States or the separate States. This subject was very learnedly and exhaustively discussed by Chief Justice Marshall in the case of *Johnson and Graham's Lessee v. McIntosh* (8 Wheat., 543), from which the following excerpts are taken (pages 573, *et seq.*):

* * * Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles. Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title. France also founded her title to the vast territories she claimed in America, on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable,

and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi, and the rivers which empty into it, by the title of discovery. * * *

* * * The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

* * * The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands can not exist, at the same time, in different persons, or in different governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

The fact of the navigability of Cross Lake at the time of the admission of the State into the Union, at the time of the said Indian treaty, and at the time of the survey of the lands in 1837-38 is well authenticated. This is one of a series of lakes, including Ferry Lake, in western Louisiana near the Texas border formed probably some time in the eighteenth century, not later than 1780, as result of obstruction of the channel of Red River by an accumulation of drift wood and débris known as the great raft. This was a feature of much historic and scientific interest. Its results have been brought to the attention of the Department in various ways during the last 25 or 30 years.

In 1896 the Department reported to Congress in response to a Senate resolution (Senate Document 101, 54th Congress, 1st session), in respect to lands constituting the beds of Cross Lake, Soda Lake, Clear Lake, and Ferry Lake, wherein it was said:

As to the unsurveyed portion of the lands forming the beds of said lakes the same is not, under existing regulations and judicial decisions relative to lands of this class, now regarded as subject to survey and disposal by the United States.

Some years ago title to the bed of Ferry Lake was questioned, and the subject was considered by the Attorney General in his opinion of September 11, 1916, wherein it was found and held that Ferry Lake was a navigable body of water at the time of the admission of the State and that the State was entitled to the bed of the lake by virtue of its sovereignty, including the shallow parts not navigable in fact; that, however, if the shallow portions be regarded as severable from the navigable channels (which in his judgment

was not permissible) the former would at least be classed as overflowed lands at the date of the swamp land grant and the State could claim under that grant if its claim under its sovereign rights be denied.

The examiner reported that the conditions of Cross Lake are quite similar to those of Ferry Lake, and that Cross Lake was navigable at the time of the admission of the State into the Union and did not commence to recede perceptibly until about 1850, and that it had receded six or eight feet by 1860.

The early decision in the case of *Pollard v. Hagan* (3 How., 212), is the foundation of the doctrine that States upon admission to the Union become entitled to the soil under the navigable waters within the limits of the State, not previously granted. Since then that has been the established rule and has been uniformly followed in similar cases. This subject was considered at great length by Justice Gray in the case of *Shively v. Bowlby* (152 U. S., 1), with special reference to the rights of riparian owners in the soil below high water mark of navigable waters. The view was adhered to that such rights were to be determined by the laws of the respective States, and a review was made of the law of a number of States on the question showing lack of uniformity as to the rights recognized in riparian proprietors. Some States recognize the right of riparian owners to such lands beneath adjacent waters, and as was said by Mr. Justice Bradley in *Barney v. Keokuk* (94 U. S., 324) :

If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

Again, in the case of *McGivra v. Ross* (215 U. S., 70), it was held that each State has full jurisdiction over lands within its borders including the beds of streams and other waters, subject to the rights granted by the constitution to the United States, and that this principle is so well established that it is no longer open to discussion, and that anyone attempting to raise it does not present a Federal question so as to give jurisdiction to a Federal court.

The attitude of the State of Louisiana in respect to lands which thus inured to it by virtue of its admission into the Union and which have since been uncovered by reliction of the waters, is sufficiently shown in a comparatively recent case (*Slattery v. Arkansas Natural Gas Company*, 70 So., 806), involving lands in the former bed of Soda (or Sodor) Lake, one of the lakes in this same region and affected by conditions similar to Cross Lake. In that case the Supreme Court of Louisiana held that while the State had by legislation granted to owners of adjoining lands accretions and derelictions formed and added imperceptibly on the edge of rivers or running waters, yet these provisions have no application to the condition there considered, and that the State had not, with the exceptions

mentioned, resigned to riparian proprietors the rights inuring to it as a sovereign power.

The question as to how far the title of a riparian owner extends, being one of State law, is best and authoritatively determined by decisions of its highest court. *St. Louis v. Rutz* (138 U. S., 226); *Packer v. Bird* (137 U. S., 661).

In view of the law and the facts in the instant case, the Department must adhere to its prior ruling that the bed of Cross Lake is not subject to survey and disposal as public land of the United States. In respect to the small marginal areas omitted from the order for survey, it can only be said that the Department exercised its best judgment and discretion in view of the facts shown as to the tracts reasonably subject to claim by the Government, and no reason is now apparent for modification of that order.

Accordingly the petition of the applicants for survey is likewise denied.

REFUNDING PREPAID RENTALS ON OIL AND GAS LANDS—RULE 4, CIRCULAR NO. 795, MODIFIED.

INSTRUCTIONS.

[Circular No. 874.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 24, 1923.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

For the convenience of lessees of oil and gas lands and to avoid the confusion resulting from the present practice of deducting from royalty paid in kind such quantity thereof as will equal in value the cash rental paid in advance, Rule 4 of Circular No. 795, approved December 8, 1921 (48 L. D., 340), is hereby modified to read as follows:

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: *Provided, however,* That by consent of the lessee the amount of annual rental paid in any one year may, in lieu of being refunded in oil, continue to be held by the government as a deposit through succeeding years subject to correction if the acreage of the lease shall change or to refund of any amount due when the lease shall terminate.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

BENJAMIN F. KOHAL.

Decided February 27, 1923.

HOMESTEAD ENTRY—VESTED RIGHTS—RAILROAD LAND—SELECTION—INDEMNITY—
WITHDRAWAL—OIL AND GAS LANDS—FINAL RECEIPT—PATENT—STATUTES.

A withdrawal under the act of June 25, 1910, does not stop the running of the two-year period fixed by the proviso to section 7 of the act of March 3, 1891, and a homestead entry within the limits of such a withdrawal is confirmed by that act if the institution of adverse proceedings is not commenced within two years from the date of the issuance of the receiver's receipt upon the final entry.

COURT DECISION CITED AND APPLIED—DEPARTMENTAL INSTRUCTIONS VACATED.

Case of *Stockley et al. v. United States* (43 Sup. Ct. Rep., 186; — U. S., —), cited and applied; instructions of April 25, 1914 (43 L. D., 294), vacated.

FINNEY, First Assistant Secretary:

At the Billings, Montana, land office on April 29, 1912, Benjamin F. Kohal made entry under section 2289, Revised Statutes, for S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 2, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 11, T. 7 S., R. 21 E., M. M., Billings, Montana, land district, and on October 4, 1915, submitted final proof. The receiver's receipt for the final commissions, etc., and the register's final certificate issued the following day.

By decision dated November 16, 1916, the Commissioner of the General Land Office held the entry for cancellation as to NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 11, because of conflict with a mineral indemnity selection filed on March 20, 1911, by the Northern Pacific Railway Company. On appeal, the Department, by decision of March 9, 1917, affirmed the Commissioner's decision. The selection had been rejected by the local officers, and the railway company had appealed, and during the pendency of the appeal the entry of Kohal was allowed. Under date of May 18, 1917, the railway company signified its willingness to relinquish its claim, whereupon, by decision of May 25, 1917, on motion for rehearing, the Department vacated its decision of March 9, 1917, and directed that the entry be passed to patent in the absence of further objection.

By decision dated December 14, 1917, the Commissioner of the General Land Office, after stating that the land had been withdrawn by Executive order of December 6, 1915, and included in Petroleum Reserve No. 40, Montana No. 1, held that entryman was not required to accept patent for the land with the reservation of the oil and gas therein unless the Government could establish that at date of final proof the land was known to be mineral in character. Directions were given that a field investigation be made unless entryman consented to accept a patent containing the provisions and reservations of the act of July 17, 1914 (38 Stat., 509).

Under date of October 25, 1922, Kohal requested that an unrestricted patent issue to him, contending that any proceeding against the entry was barred by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095, 1099). The decision appealed from denied the request, on the ground that the land was included in a petroleum reserve within two years after the issuance of final certificate.

In holding that the inclusion of the land in a petroleum reserve stopped the running of the two-year period fixed by said proviso, the Commissioner followed the reasoning of the rule announced by the Department in its instructions of April 25, 1914 (43 L. D., 294). Since the date of said instructions, the Supreme Court of the United States has held that the Department's interpretation of said proviso was erroneous. In *Thomas J. Stockley et al. v. United States*, decided January 2, 1923 (43 Sup. Ct. Rep., 186), that court held that as more than two years had elapsed "from the date of the issuance of the receiver's receipt upon the final entry" without the institution of proceedings against the entry of Stockley, the question as to whether the land was valuable for oil and gas was no longer open, proceedings on that ground having been foreclosed, along with all others, after the lapse of the two-year period, citing *Lane v. Hoglund* (244 U. S., 174) and *Payne v. Newton* (255 U. S., 438).

In view of the foregoing, the instructions of April 25, 1914, *supra*, will no longer be followed.

The decision appealed from is reversed, and an unrestricted patent will issue.

UNITED STATES v. HEIRS OF ELIZABETH SUVERY AND ANTON SCHAFFER, TRANSFEREE.

Decided February 27, 1923.

HOMESTEAD ENTRY—FINAL PROOF—FINAL CERTIFICATE—FINAL RECEIPT—FEES—VESTED RIGHTS.

The receipt issued by the receiver for final commissions and testimony fees upon the submission of final proof by a homestead entryman is the "receiver's receipt upon final entry" within the meaning of that term as used in the proviso to section 7 of the act of March 3, 1891, and the mere suspension of the issuance of a final certificate does not operate to stop the running of the two year period fixed by that act.

COURT DECISION CITED AND APPLIED—DEPARTMENTAL DECISIONS CITED AND OVERRULED SO FAR AS IN CONFLICT.

Case of *Stockley et al. v. United States* (43 Sup. Ct. Rep., 186; — U. S., —), cited and applied; case of *Cornelius Willis et al.*, on petition (47 L. D., 135), overruled; case of *Veatch, Heir of Natter*, on rehearing (46 L. D., 496), overruled so far as in conflict.¹

¹ See decision in case of *Mattie J. Baird*, on petition, 49 L. D., 492, in which a portion of *Veatch, Heir of Natter*, on rehearing, 46 L. D., 496, is adhered to.

FINNEY, *First Assistant Secretary*:

Anton Schafer, transferee, has appealed from a decision of the Commissioner of the General Land Office dated August 28, 1922, holding for cancellation the homestead entry of Elizabeth Suvery, made June 17, 1910, for N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 9, T. 16 N., R. 14 E., M. M., Lewistown, Montana, land district.

It appears that the entrywoman died on August 18, 1911. On July 7, 1915, her surviving husband, Joseph Berger, submitted five-year final proof on behalf of the heirs, and on the following day the receiver issued his receipt (No. 1509974) for the final commissions (\$3) and the testimony fees (\$1.50). Final certificate was withheld at the request of the Chief of Field Division. On December 14, 1921, proceedings were instituted against the entry on five charges preferred by a special agent—(1) that entrywoman was not qualified to make the entry, (2) that the entry was made at the instance and for the use and benefit of Anton Schafer, (3) that the entrywoman had not established residence on the land, (4) that the heirs of entrywoman had not cultivated the required area, and (5) that the heirs of entrywoman had not perfected the entry in good faith but for the use and benefit of Anton Schafer.

An answer was filed by Anton Schafer, in which he denied the charges and alleged that the land had been transferred to him in good faith. A hearing was had on March 8, 1922, before the local officers, who by decision of April 25, 1922, recommended that the entry be canceled.

The proceedings were instituted under an interpretation of the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095, 1099), which the Supreme Court of the United States in *Thomas J. Stockley et al. v. United States* (43 Sup. Ct. Rep., 186) held is erroneous.

In the case cited, Stockley had submitted final proof on a homestead entry, and the receiver had issued his receipt for the final commissions and testimony fees. Three years later proceedings against the entry were instituted on the charge that the land was mineral in character, being chiefly valuable for oil and gas, and that when Stockley made his final proof he knew or, as an ordinarily prudent man, should have known this fact. After a hearing, the register and receiver decided in favor of Stockley, but the Commissioner of the General Land Office reversed the decision and held the entry for cancellation. On appeal, the Department by decision of July 9, 1915 (44 L. D., 178) held that unless Stockley consented to accept a patent containing the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas, the entry would be canceled. A motion for rehearing was denied by departmental

decision of August 26, 1915 (44 L. D., 180), and on January 21, 1916, the entry was canceled, Stockley having failed to consent to the acceptance of a restricted patent. Thereafter a suit in equity was brought by the United States against Stockley *et. al.*, by which a decree was sought adjudging the United States to be the owner of the land, enjoining all interference therewith, and requiring the defendants to account for the value of oil and gas extracted by them therefrom. The case was taken to the Supreme Court of the United States on appeal from a decision of the Circuit Court of Appeals for the Fifth Circuit (271 Fed., 632).

The following is quoted from the decision of the Supreme Court (43 Sup. Ct. Rep., 186), rendered January 2, 1923:

The defendants contended that the Commissioner of the General Land Office and the Secretary of the Interior were without authority to entertain this contest because prior thereto full equitable title had vested in Stockley and he had become entitled to a patent by virtue of the provisions of Sec. 7 of the Act of March 3, 1891, c. 561, 26 Stat., 1095, 1099. That section, so far as necessary to be stated, provides:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

The court below rejected defendants' contention, holding that the receipt issued to Stockley was not a 'receiver's receipt upon the final entry' for the reason that, in the view of that court, a final entry could not become effective until the issuance of the certificate of the register. In other words, it was the opinion of the lower court that in order to constitute a final entry within the meaning of the statute above quoted, there must be an adjudication upon the proofs and the issuance of a final certificate, evidencing an approval thereof.

We think the language of the statute does not justify this conclusion. It must be assumed that Congress was familiar with the operations and practice of the Land Department and knew the difference between a receiver's receipt and a register's certificate. These papers serve different purposes. One, as its name imports, acknowledges the receipt of the money paid. The other certifies to the payment and declares that the claimant on presentation of the certificate to the Commissioner of the General Land Office shall be entitled to a patent.

The evidence shows that prior to the passage of the statute, and thereafter until 1908, the practice was to issue receipt and certificate simultaneously upon the submission and acceptance of the final proof and payment of the fees and commissions. In 1908 this practice was changed, so that the receipt was issued upon the submission of the final proof and making of payment, while the certificate was issued upon approval of the proof and this might be at any time after the issuance of the receipt. The receiver and register act independently,

the former alone being authorized to issue the receipt and the latter to sign the certificate. The receipt issued to Stockley was after submission of his proof and payment of all that he was required to pay under the law. No certificate was ever issued by the register.

It is contended by the Government that the receiver's receipt named in the statute should be restricted to a receipt issued simultaneously with the register's certificate after approval of final proofs, and that, after the change of 1908 in the practice of the Department, a receipt issued before such approval does not come within the meaning of the statute. Such a receipt, it is contended, obtains no validity as a 'receiver's receipt upon the final entry' until after the proof has in fact been examined and approved.

We can not accept this conception of the law. A change in the practice of the Land Department manifestly could not have the effect of altering the meaning of an act of Congress. What the act meant upon its passage, it continued to mean thereafter. The plain provision is that the period of limitation shall begin to run from the date of the 'issuance of the receiver's receipt upon the final entry.' There is no ambiguity in this language and, therefore, no room for construction. There is nothing to construe. The sole inquiry is whether the receipt issued to Stockley falls within the words of the statute. In *Chotard v. Pope*, 12 Wheat., 586, 588, this Court defined the term entry as meaning: "That act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land offices, under the acts of the United States." It was in this sense that the term 'final entry' was used in this statute. Having submitted to the proper officials proof showing full compliance with the law, and having paid all the fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him. No subsequent receipt was contemplated or required. From the date of the receipt the entry may be held open for the period of two years, during which time its validity may be contested. Thereafter the entryman is entitled to a patent and the express command of the statute is that 'the same shall be issued to him.' *Lane v. Hoglund*, 244 U. S. 174; *Payne v. Newton*, 255 U. S. 438.

* * * * *

The action of the Commissioner of the General Land Office, therefore, in directing a contest against Stockley's entry three years after the issuance to him of the receiver's receipt was unauthorized and void.

Adopting the interpretation given to the act of 1891 by the Supreme Court, it must be held that the proceedings against the entry of Suvery were unauthorized and void. The decision appealed from is reversed, and final certificate and patent will issue in due course to the heirs of the entrywoman.

The rule announced in *Veatch*, heir of *Natter*, on rehearing (46 L. D., 496), so far as in conflict, and in *Cornelius Willis et al.*, on rehearing (47 L. D., 135), will no longer be followed.

UNITED STATES v. CENTRAL PACIFIC RAILWAY COMPANY.

Decided March 2, 1923.

PRACTICE—APPEAL—OFFICERS—COMMISSIONER OF THE GENERAL LAND OFFICE.

Rule 51, Rules of Practice, which declares that decisions of the local officers shall, with certain stated exceptions, become final upon failure of any party to appeal, did not change the long established principle that the Commissioner of the General Land Office is not precluded, in the absence of an appeal, from reviewing the decisions of those officers and taking such action as the interests of the Government require; nor did paragraph 13 of the instructions of February 26, 1916, making the Rules of Practice applicable to appeals thereunder, modify the Commissioner's powers and duties in that respect.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Morrison v. McKissick* (5 L. D., 245), *Southern Pacific Railroad Company v. Saunders* (6 L. D., 98), and *Rice v. Simmons* (43 L. D., 343), cited and applied.

FINNEY, *First Assistant Secretary*:

The Central Pacific Railway Company has appealed from the decision of the Commissioner of the General Land Office, dated December 8, 1921, holding for cancellation from List No. 83, serial 09884, filed December 23, 1916, the S. $\frac{1}{2}$ and S. $\frac{1}{2}$ N. $\frac{1}{2}$, Sec. 25, T. 17 N., R. 20 E., M. D. M., Carson City land district, Nevada.

On January 29, 1918, adverse proceedings were directed by the Commissioner under the circular of February 26, 1916 (44 L. D., 572), on the charge "that the land is mineral in character, containing valuable deposits of gold and silver." Hearing was held, and on December 16, 1920, the register and receiver rendered their decision, finding that the SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$ are more valuable for mineral than for agricultural purposes, and recommending that title thereto remain in the Government, but that the railway company be allowed to retain the SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$.

The company appealed and the Commissioner thereupon rendered his decision, finding that all of the land involved was mineral.

It is contended that the Commissioner erred in reversing the decision of the register and receiver with respect to the SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, as the Government had failed to appeal from their decision, and under Rule 51 of the Rules of Practice (48 L. D., 246, 255), when a party fails to appeal from the decision of the register and receiver in a contest case such decision is final and will not be disturbed except in case of (a) fraud or gross irregularity, or (b) disagreement between the local officers. It is further pointed out that paragraph 14 of the circular of February 26, 1916, provides that proceedings thereunder will be governed by the Rules of Practice.

Proceedings instituted on charges preferred by Government representatives have long been governed by special instructions. The first instructions in the reported land decisions are those of May 8, 1884 (2 L. D., 807), which make no provision with respect to appeals by the Government. The instructions of November 4, 1895 (21 L. D., 367, 369), provided that—

Special agents are not required to file appeals from decisions adverse to the Government nor are they expected to file briefs in any case.

And in the later circulars of February 14, 1906 (34 L. D., 439, 441), September 30, 1907 (36 L. D., 112, 113), and January 19, 1911 (39 L. D., 458, 459), somewhat similar provisions were made, the last mentioned containing this language:

13. Appeals or briefs must be filed under the rules and served upon the special agent in charge of hearing, and when land is in a national forest, upon the proper District Assistant to the Solicitor of the Department of Agriculture. The special agent will not file any appeal or brief unless directed to do so by this office, or the chief of field division.

The circular of September 4, 1915 (44 L. D., 360, 363), with respect to proceedings initiated by representatives of the Forest Service provides:

That the Department of Agriculture shall not be required to take formal appeals from decisions of registers and receivers.

In the revision of the instructions of January 19, 1911, contained in the circular of February 26, 1916, *supra*, now in force, paragraph 13 was modified to read:

Appeals or briefs, if filed, must be in accordance with the rules but need not be served upon the chief of field division or Government representative in charge of hearing.

This obviously refers to appeals and briefs by the defendants, and no provision was made with respect to appeals by representatives of the Government.

The long established rule that Government representatives were not required to appeal from decisions of the local officers was based on fundamental principles of public land law. The Commissioner is charged by law with the administration of the public lands, under the general direction of the Secretary of the Interior. He is charged with the issuance of patents, with the determination of the character of lands, and the question of whether the provisions of the applicable laws have been complied with. Decisions of the local officers are advisory only, and even in private contest cases, where their decisions are made final in the absence of appeal, such finality is effective only as to the rights of the parties as between themselves, and does not affect the rights of the Government, or preclude the Commissioner, regardless of any appeal, from reviewing the record

either as to the law or the facts and taking such action therein as the interests of the Government require. *Morrison v. McKissick* (5 L. D., 245); *Southern Pac. R. R. Co. v. Saunders* (6 L. D., 98); *Rice v. Simmons* (43 L. D., 343).

It was not the intention in the adoption of the instructions of February 26, 1916, to depart from the practice based on proper considerations of the Commissioner's powers and duties. The modifications in that circular were for the purpose, as stated in the Commissioner's letter of submission of February 5, 1916—

of eliminating as far as possible the special agents of this office as prosecutors in cases of this kind;

and the change in paragraph 13 was to eliminate all suggestion of the filing of briefs or appeals by the special agents and not for the purpose of requiring that they be filed.

Rule 51 of practice is not applicable to the Government in proceedings instituted under the circular of February 26, 1916, and the Commissioner did not err in considering the entire record when the case came before him.

On the merits of the appeal it is found that the record sustains the concurring decisions of the local officers and the Commissioner as to the mineral character of the SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 25, and the selection will be canceled to that extent. With respect to the SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$ the evidence does not warrant a mineral classification, and the Department concurs in the finding of the local officers that those tracts are nonmineral. The Commissioner's decision is reversed as to said lands.

OIL AND GAS PERMITS AND LEASES ON LANDS IN OKLAHOMA SOUTH OF THE MEDIAL LINE OF RED RIVER.

INSTRUCTIONS.

[Circular No. 876.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 7, 1923.

REGISTER AND RECEIVER,

GUTHRIE, OKLAHOMA:

Your attention is called to the provisions of the act of Congress approved March 4, 1923 (Public No. 500), entitled "An act to authorize the Secretary of the Interior to issue to certain persons and certain corporations permits to explore, or leases of, certain lands that lie south of the medial line of the main channel of Red River, in Oklahoma, and for other purposes." A copy of the act is appended.

The "Regulations Concerning Oil and Gas Permits and Leases," as amended to October 29, 1920, Circular No. 672 (47 L. D., 437), contains the departmental instructions under the act of February 25, 1920 (41 Stat., 437), and they are hereby extended to the act of March 4, 1923, so far as applicable. Attention is called to the fact that not more than 160 acres may be granted by lease or permit to any one person or corporation, except where two or more claims have been assigned to one person or corporation, in which event the assignee is limited to the amount of his assigned interests, but not to exceed 640 acres. The following supplementary instructions are issued:

1. The application for an oil and gas prospecting permit or for a lease must be filed in the United States land office at Guthrie, Oklahoma, between the opening hour of March 5, 1923, and the closing hour of May 3, 1923. The application must be made under oath and the supporting papers certified or under oath as far as necessary and practicable. They should specifically include the following, and such additional matter as may be of assistance in establishing the right to relief:

A. Application:

(a) Applicant's name and headquarters address.

(b) Proof of citizenship of applicant, by affidavit of such fact, if native born; or if naturalized, by a certified copy of the certificate of naturalization on the form provided for use in public land matters, unless such a copy is already on file; if a corporation, by certified copy of articles of incorporation.

(c) Whether the application is for a permit to prospect for oil and gas, or is for a lease based on a substantial discovery of oil or gas.

(d) Exact description of the land applied for and the acreage thereof. If the land is not embraced within the plat of an official survey, its boundaries must be located by an accurate, instrumental, metes-and-bounds, closed survey, a point of which must be connected with an established corner of the approved public-land survey fronting on the left bank of Red River, in Oklahoma. A diagram of each river-bed location will be laid down upon a copy of the official "Map of Disposals of Lands Bordering Red River," which will be furnished for the purpose.

(e) The respective interests and the nature and extent thereof, of the applicant and all who claim with or through him.

(f) A full statement of the facts and a historical résumé of the origin and basis of the claim for relief, and of the chain of title under which it is asserted. It must be specifically shown on what date the applicant or his predecessor in interest initiated the rights

upon which the claim for relief is based and the full circumstances of such initiation.

(g) A statement of any litigation that the land may be involved in, and of all adverse claims being asserted for the land or its production.

(h) An itemization and description of all improvements made by the applicant or his predecessor in interest and the dates during which they were made, together with a map or sketch showing their location. Full details of the nature, extent, and date of any discovery of oil or gas must be shown.

(i) Statement of all interests being held or applied for under this act by each applicant.

(j) Agreement to permit the inspection or to furnish copies of all records having a bearing on the application.

B. Detailed statement by months of all past production up to date of filing the application, giving value of the production and to whom disposed.

C. An unconditional quitclaim deed to the United States of the involved land from the applicants and the claimants of record.

D. Authority of any representative of an individual or corporation to act.

E. A certified stocklist, if the application is made by an association or corporation, showing name and address and number of shares of each stockholder, together with a statement as to the citizenship of the stockholders. The stocklist will be retained in the confidential files.

F. A certified abstract of title brought down to the date of the application, which must be filed within thirty days after application.

The application (A) and the supporting papers (B to D, inclusive) must be filed in duplicate. Only one copy of the stocklist and the abstract of title should be filed. A bond for the protection of the oil strata or deposits against improper methods of drilling and operation need not be filed at time of making the application for a permit or lease.

2. Applications, so far as possible, should be prepared from the viewpoint that lease or permit, if issued, will be granted to the claimants of record; if any of these are not brought into the application, their absence must be explained and the fullest evidence presented that they can not be brought into the application. Protests will be received at any time up to the issuance of permits or leases, but neither a protest nor a notice of intention to make application can be used as the basis of an application. A full and formal application as indicated under paragraph A above must be filed within the stated sixty-day period, but the supporting papers may be filed within a reasonable time thereafter if proper reasons for the delay are shown.

3. Applicants should note that under the terms of the act the following conditions are necessary to the issuance of a permit or lease:

- (a) That the title to the oil and gas is in the United States.
- (b) That the lands lie south of the medial line of the main channel of Red River, Oklahoma.
- (c) That the lands were claimed and possessed by the applicant or his predecessor in interest prior to February 25, 1920.
- (d) That such claim and possession prior to February 25, 1920, was in good faith.
- (e) That expenditures were made upon the land and with reasonable diligence in an effort to discover or to develop oil or gas.

4. The act states "That after the adjudication and disposition of all applications under this act any lands and deposits remaining unappropriated and undisposed of shall, after date fixed by order of the Secretary of the Interior, be disposed of in accordance with the provisions of said act of February 25, 1920." Due notice in accordance therewith will be given at the proper time, but until such notice is given no application can be received under said act of February 25, 1920, nor will any rights be acquired by any occupation prior to the announced date.

WILLIAM SPRY,
Commissioner.

Approved:

HUBERT WORK,
Secretary.

PUBLIC—No. 500—67TH CONGRESS.

(S. 4197.)

An Act To authorize the Secretary of the Interior to issue to certain persons and certain corporations permits to explore, or leases of, certain lands that lie south of the medial line of the main channel of Red River, in Oklahoma, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to adjust and determine the equitable claims of citizens of the United States, and domestic corporations to lands and oil and gas deposits belonging to the United States and situated south of the medial line of the main channel of Red River, Oklahoma, which lands were claimed and possessed in good faith by such citizens or corporations, or their predecessor's in interest, prior to February 25, 1920, and upon which lands expenditures were made in good faith and with reasonable diligence in an effort to discover or develop oil or gas, by issuance of permits or leases to those found equitably entitled thereto.

SEC. 2. That applications for permits and leases under this Act shall be made to the Secretary of the Interior, and shall be made within and not after sixty days from and after the date that this Act becomes a law. Leases and permits

under this Act may be granted to the assignees or successors in interest of the original locators or the original claimants in all cases where the original locators or original claimants have assigned or transferred their rights, but when leases or permits are granted to the assignees or successors in interest of the original locators or original claimants the said leases and permits shall be subject to all contracts, not contrary to law or public policy, between the original locators or original claimants and their successors in interest.

In case of conflicting claimants for permits or leases under this Act, the Secretary of the Interior is authorized to grant permits or leases to one or more of them as shall be deemed just.

SEC. 3. That not more than one hundred and sixty acres shall be granted by leases or permits to any one person or corporation, except in those cases where two or more locations or claims have been assigned to one person or corporation, and in such cases not more than six hundred and forty acres shall be granted by leases or permits to any one person or corporation.

SEC. 4. That each lessee shall be required to pay as royalty to the United States an amount equal to the value at the time of production of $12\frac{1}{2}$ per centum of all oil and gas produced by him prior to the issuance of the lease, except oil or gas used on the property for production purposes or unavoidably lost; and shall be required to pay to the United States a royalty of not less than $12\frac{1}{2}$ per centum of all oil and gas produced by him after the issuance of the lease, except oil and gas used on the property for production purposes or unavoidably lost. Of the proceeds of the oil and gas that have been produced or that may hereafter be produced by the receiver of said property, appointed by the Supreme Court of the United States, $12\frac{1}{2}$ per centum as royalty shall be paid to the United States, and the residue after deducting and paying the expenses of the litigation incurred by the United States and the expenses of the receivership shall be paid to the person or corporation to whom may be granted a lease of the land on which said oil and gas were produced: *Provided*, That the Secretary of the Interior is authorized and directed to take such legal steps as may be necessary and proper to collect from any person or persons who shall not be awarded a permit or lease under this Act an amount equal to the value of all oil and gas produced by him or them from any of said lands prior to the inclusion of said property in the receivership, except oil or gas used on the property for production purposes or unavoidably lost and except other reasonable and proper allowances for the expenses of production: *Provided further*, That of the amount so collected, $12\frac{1}{2}$ per centum shall be reserved to the United States as royalty and the balance after deducting the expense of collection shall be paid over to the person or persons awarded permits or leases under this Act, as their interests may appear.

SEC. 5. That except as otherwise provided herein the applicable provisions of the Act of Congress approved February 25, 1920, entitled "An Act to permit the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," shall apply to the leases and permits granted hereunder, including the provisions of sections 35 and 36 of said Act relating to the disposition of royalties: *Provided*, That after the adjudication and disposition of all applications under this Act any lands and deposits remaining unappropriated and undisposed of shall, after date fixed by order of the Secretary of the Interior, be disposed of in accordance with the provisions of said Act of February 25, 1920: *Provided further*, That upon the approval of this Act the Secretary of the Interior is authorized to take over and operate existing wells on any of such lands pending the final disposition of applications for leases and permits, and to utilize and expend in connection with such administration and operation so much as may be necessary of moneys heretofore impounded from past pro-

duction or hereafter produced, and upon final disposition of applications for and the issuance of leases and permits, after deducting the expenses of administration and operation and payment to the United States of the royalty herein provided, to pay the balance remaining to the person or company entitled thereto: *And provided further*, That out of the 10 per centum of money hereafter received from royalties and rentals under the provisions of this Act and paid into the Treasury of the United States and credited to miscellaneous receipts, as provided by section 35. of the said Act of February 25, 1920, the Secretary of the Interior is authorized to use and expend such portion as may be required to pay the expense of administration and supervision over leases and permits and the products thereof.

Sec. 6. That nothing in this Act shall be construed to interfere with the possession by the Supreme Court of the United States, through its receiver or receivers, of any part of the lands described in section 1 of this Act, nor to authorize the Secretary of the Interior to dispose of any of said lands or oil or gas deposits involved in litigation now pending in the Supreme Court of the United States, until the final disposition of said proceeding. The authority herein granted to the Secretary of the Interior, to take over and operate oil wells on said lands, shall not become effective until the said lands shall be, by the Supreme Court of the United States, discharged from its possession. And nothing in this Act shall be construed to interfere with the jurisdiction, power, and authority of the Supreme Court of the United States to adjudicate claims against its said receiver, to direct the payment of such claims against the said receiver as may be allowed by the said court, to settle the said receiver's accounts, and to continue the receivership until, in due and orderly course, the same may be brought to an end. The Supreme Court of the United States is hereby authorized, upon the termination of the said receivership, which the Attorney General is hereby directed to apply for and secure at the earliest practicable date, to direct its receiver to pay to the Secretary of the Interior all funds derived from oil and gas produced from lands of the United States that may at that time remain in the hands of the said receiver; and when said funds shall be paid to the Secretary of the Interior the same shall be administered as in this Act provided.

Sec. 7. That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act.

Approved, March 4, 1923.

RECLAMATION PROJECTS—RELIEF TO WATER USERS—EXTENSION ACTS OF MARCH 31, 1922, AND FEBRUARY 28, 1923.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

RECLAMATION SERVICE,

Washington, D. C., March 7, 1923.

TO ALL FIELD OFFICERS:

1. The relief act of March 31, 1922 (42 Stat., 489), reads as follows:

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. The relief act of February 28, 1923 (Public No. 454, 42 Stat., —), reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Act entitled "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," approved March 31, 1922, is amended by striking out the words "one year" where they appear in such section and inserting in lieu thereof the words "two years."

SEC. 2. That the Secretary of the Interior is authorized, in the manner and subject to the conditions imposed by such Act of March 31, 1922, to extend for a period not exceeding two years from December 31, 1922, the date of any payment of any charge the date of payment of which has been extended under the provisions of section 1 of such Act.

SEC. 3. That every charge, the date of payment of which is extended under the provisions of section 2 of this Act, shall draw interest at the rate of 6 per centum per annum from the date from which it was so extended in lieu

of any penalty that may now be provided by law, but in case such charge is not paid at the end of the period for which it is so extended any such penalty shall attach from the date the charge was originally due, as if no extension had been granted.

Sec. 4. That section 2 of such Act of March 31, 1922, is amended by striking out the words "season of 1922" where they appear in such section and by inserting in lieu thereof the words "seasons of 1922 and 1923."

Sec. 5. That where an individual water user or individual applicant for a water right under a Federal irrigation project constructed or being constructed under the act of June 17, 1902: (Thirty-second Statutes at Large, page 388), or any act amendatory thereof or supplementary thereto, is unable to pay any construction or operation and maintenance charge due, excepting operation and maintenance charges for drainage on the Boise, Idaho, project for the year 1922, or prior thereto, the Secretary of the Interior is hereby authorized in his discretion to add such accrued and unpaid charges to the construction charge of the land of such water user or applicant, and to distribute such accumulated charges equally over each of the subsequent years, beginning with the year 1924, at such rate per year as will complete the payment during the remaining years of the twenty-year period of payment of the original construction charge: *Provided*, That upon such adjustment being made, any penalties or interest which may have accrued in connection with such unpaid construction and operation and maintenance charges shall be canceled, and in lieu thereof the amount so due, and the payment of which is hereby extended, shall draw interest at the rate of 6 per centum per annum, paid annually from the time said amount became due to date of payment: *Provided further*, That the applicant for the extension shall first show to the satisfaction of the Secretary of the Interior detailed statement of his assets and liabilities and actual inability to make payment at the time of the application and an apparent ability to meet the deferred charges in 1924 and subsequent years: *And provided further*, That in case the principal and interest herein provided for are not paid in the manner and at the time provided by this Act, any penalty now provided by law shall attach from the date the charge was originally due: *And 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.

3. *Scope of the Relief Law.*—The two acts will together be referred to as the relief law. This law 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 does not apply to projects being constructed by the Reclamation Service for the Bureau of Indian Affairs. It is temporary legislation necessitated by conditions on some projects, and permits three classes of relief, to wit: (a) Extension of time of payment of construction charges due in 1922 or prior thereto to any date not beyond December 31, 1924; (b) the furnishing of irrigation water during the season of 1923, notwithstanding a delinquency of more than one year in the payment of any operation and maintenance or construction charges; and (c) the distribution of accrued operation and

maintenance and construction charges for the year 1922 and prior thereto, over the period covered by the remaining construction installments, in those cases where the water users are unable to pay such accrued charges on or before December 31, 1924. A specific exception is made as to operation and maintenance drainage charges on the Boise project under public notice dated February 15, 1921.

4. *General Policy of the United States.*—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 reasonably 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 this law, may be expected to become successful farmers. The experience of the Reclamation Service has demonstrated that great individual industry on our projects is not always rewarded with success, and that even the hardest of labor and the closest of application, will not overcome a defective plan of farming. Applicants for relief will therefore be required to show the plan of farming they are following and if the plan is defective, they will be advised to change it, and the nature of the relief given will depend largely upon their cooperation in this matter. The law 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.

5. *Delivery of Water in 1923.*—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 4 of the relief act of February 28, 1923, is to authorize the Secretary of the Interior, in his discretion, to waive such inhibition for the year 1923. In other words, during the season of 1923, 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. *Short Extension of Charges.*—Under sections 1, 2, and 3 of the relief act of February 28, 1923, the Secretary is authorized, in his discretion, and under the conditions and limitations set forth below, to extend the date or dates of payment of all or a portion of the construction charges due in 1922 or prior years. Under these sections no such charge can be extended beyond December 31, 1924, and all such charges extended will draw interest at the rate of 6 per centum per annum from the time they originally became due and payable. However, if unpaid at the end of the extension period, all penalties provided by the reclamation law will attach from the original due date or dates. Under the sections referred to in this paragraph, no extension can be made of any operation and maintenance charge of any year.

7. *Long Extension of Charges.*—In a case where the relief described in paragraphs 5 and 6 hereof would be insufficient, the Secretary is authorized under section 5 of the relief act of February 28, 1923, in his discretion, to distribute the accrued and unpaid charges for 1922 and prior thereto, both on account of construction and of operation and maintenance, equally over each of the remaining construction installments. This is the only section of the relief law under which operation and maintenance charges may be extended. Such penalties as may have accrued upon the charges extended under this section will be canceled and all charges extended will draw interest at the rate of six per centum per annum, to be paid annually from the original due date to date of payment. It is important that all applicants for relief under this section have a clear understanding of the interest provision, for the reason that while the old penalties will be canceled when the extension is permitted, the delinquent charges will continue to draw interest at six per centum per annum until all of such delinquency has been paid. This section also provides that upon failure to pay any installment as extended or the interest thereon, all penalties as provided by the reclamation law will attach to such installment from the original due date. Operation and maintenance charges for drainage on the Boise project, Idaho, under public notice of February 15, 1921, are excluded from the benefits of this section.

8. *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 are actually being cultivated are eligible to receive the benefits of the relief law. 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. As a general rule relief will not be granted to nonresidents of the vicinity and as to lands held in tenancy. An exception to the

rule as to cultivation is made in the case of those 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 the Mesa division lands may be extended but not the purchase price for the lands. A further exception to the general rules as to residence and cultivation may also be proper where serious illness or death in a family, or some other good reason 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. The requirements of this paragraph apply to all three classes of relief.

9. *Who Are Entitled to Relief.*—The Secretary is authorized to extend 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 relief law. In other words, relief may be given to an applicant who shows he is unable to now pay a past-due charge, only in the event of his being able to show a reasonable expectation of paying the charge at a later date. When the water user is much involved by reason of large financial obligations carrying heavy rates of interest, it will be difficult for him to make the necessary showing as to apparent ability to pay at a later date, unless the applicant's creditors will make some concessions by way of extensions of principal and reductions of interest, at least as to obligations past due. In all such cases the applicant should solicit the cooperation of his creditors, and the willingness of the creditors to make such extensions and reductions will be considered in determining the ability of the applicant to pay the water charges at a later date. Concessions made by a creditor must be in writing, signed and acknowledged by the creditor. Where it appears from the showing made that there is a reasonable expectation that all delinquencies may be met on or before December 31, 1924, the relief described in paragraph 6 hereof will be appropriate. The longer extension described in paragraph 7 hereof will be granted only in those cases where the financial condition of the applicant, when considered in connection with the total amount then due, is such that he may not reasonably be expected to overcome his delinquency within the shorter period.

10. *Holders of Excess Lands.*—Every effort should be made to reduce excess holdings within the limit of time established by the reclamation law for such reduction, and no relief will be given to a person who is holding for an unreasonable time an excess area in violation of the law.

11. *Sale of Land Through the Reclamation Service.*—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. 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.

12. *Procedure by Applicant.*—Every person who desires to obtain any of the benefits of the relief law 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 law. A full and frank answer to each question propounded should be made. Each applicant should state definitely the nature of the relief desired and the particular paragraph of these regulations under which it is sought, and where relief is applied for under paragraph 7 hereof the applicant should recite fully the conditions and circumstances that make payment impossible within the shorter period prescribed. The application may be supplemented by any additional showing, provided same is submitted in the form of an affidavit. The form (7-298a) 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. Preferably, the application should be presented in person at the project office by the applicant, and if delivered otherwise it must be with the understanding, except in an unusual case, that before action is taken thereon the applicant will if necessary appear personally to be questioned relative to the statements made in the application.

13. *Procedure by United States.*—If necessary, the project manager or some person delegated by him, shall personally confer with the applicant as to the statements set forth in the application, and in every case shall 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, his personal and actual ability or inability to pay the charges due, and his probable ability to pay the same at a later date. The statement should 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 im-

mediately 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.

14. *Relief to Organized Group of Water Users.*—Relief under paragraphs 6 and 7 hereof may be granted to a legally organized group of water users, such as an irrigation district or a water users' association having a contract with the United States covering the group payment of water charges, or desiring to make such contract. 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.

A. P. DAVIS,

Director, United States Reclamation Service.

Approved:

HUBERT WORK,

Secretary of the Interior.

HENRY J. BEAN.

Decided March 8, 1923.

REPAYMENT—UMATILLA LANDS—PURCHASER—INDIAN LANDS—PAYMENT—RELINQUISHMENT.

The special repayment provision in section 2 of the act of March 3, 1885, is applicable to reimbursement of full as well as partial payment made by a purchaser of Umatilla Indian lands after failure to obtain title because of inability to fulfill other requirements of the act, if the land has been resold and the purchase price paid by the subsequent purchaser.

DEPARTMENTAL DECISION CITED AND HELD NOT IN POINT.

Case of William F. Earnhart (44 L. D., 3), cited and held not to be controlling.

FINNEY, *First Assistant Secretary:*

The act of March 3, 1885 (23 Stat., 340), provided for the allotment of lands in severalty to the Indians residing upon the Umatilla Reservation and for the sale for their benefit of the residue of their lands not needed for such allotment.

Section 2 of said act made provision for the sale of such residue. It is therein provided that a purchaser of any of said lands shall be entitled to purchase 160 acres of untimbered lands and an additional tract of 40 acres of timbered lands; that he shall pay one-third of the purchase price of untimbered lands at the time of purchase, one-

third in one year and one-third in two years, with interest on the deferred payments at the rate of 5 per cent per annum and shall pay the full purchase price of timbered lands at the time of purchase; that before a patent shall issue for untimbered lands the purchaser shall make satisfactory proof that he has resided upon the lands purchased at least one year and has reduced at least 25 acres to cultivation.

Said section further provided that—

No patent shall issue until all payment shall have been made; and on the failure of any purchaser to make any payment when the same becomes due, the Secretary of the Interior shall cause said land to be again offered at public or private sale; and if said lands shall sell for more than the balance due thereon, the surplus, after deducting expenses, shall be paid over to the first purchaser.

On August 15, 1902, Judge Henry J. Bean made Umatilla entry for lots 5, 6, 7 and 8, Sec. 25, T. 1 N., R. 32 E. (untimbered) and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ (timbered), Sec. 8, T. 1 S., R. 35 E., W. M., 198.46 acres, La Grande, Oregon, land district. The entryman paid for the land in full, his payments consisting of three installments, August 15, 1902, August 15, 1903, and August 15, 1904. The entry was canceled on relinquishment September 21, 1912. It had been held for cancellation by Commissioner's letter of July 6, 1911, upon the ground that entryman had not made proof on the entry. In support of the entry affidavit was filed stating—

That after making said entry and before completing residence of one year he was elected in July, 1904, as County Judge of Umatilla County and qualified as such officer; that his duties required him to remove to the county seat, which he did and that at the general election in 1906 he was again elected as circuit judge; that he subsequently qualified as same; that in 1910 he resigned said position and was elected as Justice of the Supreme Court of the State of Oregon; that by reason of his official position it is necessary for him to reside at the capital of the State.

The said decision of the Commissioner was reversed by departmental decision January 25, 1912, and applicant was allowed 30 days from notice within which to take steps looking toward submission of proof. By departmental decision of May 3, 1912, entryman was allowed one year after the expiration of his official employment within which to make proof. On September 21, 1912, the entry was canceled on relinquishment as stated.

On November 12, 1921, Judge Bean filed application for refund of money paid by him in connection with said entry and repayment is sought under the provisions of said act of March 3, 1885. On May 25, 1922, the Commissioner of the General Land Office denied repayment, holding that claimant is not entitled thereto under said section 2 of said act for the reason that there was no failure to pay

any installment of the purchase price and that even though the land has been resold and paid for in full the special repayment provision in said section 2 is not operative to afford repayment where the full purchase price has been paid and the entry is relinquished in lieu of compliance with the law, citing the case of William F. Earnhart (44 L. D., 3).

The Department can not concur in the Commissioner's action. It is believed that said act of March 3, 1885, which by its terms is a special repayment statute, does not limit the right of repayment to that class of applicants who had made either one or two of the payments provided for under the act and who made default as to other payments but that a reasonable construction thereof warrants repayment also to an applicant who had made payment in full for the land purchased but who was unable to perfect his claim, provided the land was resold for a sufficient amount to reimburse such payment. The purpose of the act was to create a fund out of the sale of Umatilla lands for the benefit of the Umatilla Reservation Indians at an appraised price per acre. In the instant case claimant paid such price and on account of his election to a judicial office he was prevented from complying with that feature of the act which required one year's residence upon the land, his judicial duties requiring his presence at the place of holding court. By reason thereof he was caused to file a relinquishment and thereafter the land in question was resold to one Kirchoff under Umatilla entry 011184, who paid \$258.09 purchase money. However, Kirchoff only paid \$8.65 interest, whereas Bean paid \$9.90 interest. Bean must sustain this loss of \$1.25.

The act of March 3, 1885, does not contain any clause of forfeiture of the moneys paid by a purchaser in the event he does not complete the entry by failure to reside for one year on the untimbered lands purchased, and in a case such as the instant one, where a purchaser was unable to reside upon the land by reason of matters arising after such purchase, and after the payment in full of the purchase price, it is believed that the repayment features of said act would clearly contemplate the return to him of such purchase money, after the land has been resold and the Indians have obtained for same the full appraised purchase price through a subsequent purchaser. Clearly the Indians are not entitled to be paid twice for the same land, and equity, as well as a reasonable construction of said act demands repayment in case of payment in full as it does in a case where only one or two installments of such purchase price had been made and the land has been resold and fully paid for by a subsequent purchaser.

The decision appealed from is reversed and repayment will be allowed less the \$1.25 hereinbefore mentioned.

BIG-4 CONSOLIDATED OIL COMPANY.

Decided March 13, 1923.

OIL AND GAS LANDS—APPLICATION—LEASE—POSSESSION—RELATION.

The date of the filing of the application, not the date of the granting of the lease, determines the time from which the annual rental begins to accrue, where an oil and gas lease is granted pursuant to the act of February 25, 1920, to an applicant who, from and after the filing of an application therefor, has had uninterrupted, exclusive possession and use of the premises.

FINNEY, *First Assistant Secretary:*

On August 24, 1920, application 026609, Douglas series, was made by the Wyoming Drilling Trust for an oil and gas lease under section 19 of the act of February 25, 1920 (41 Stat., 437) covering the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 11, T. 33 N., R. 83 W., 6th P. M., Wyoming.

On February 23, 1922, the Secretary approved a recommendation by the Commissioner of the General Land Office that a lease of the premises be granted to the Big-4 Consolidated Oil Company. The said company executed the lease authorized and tendered \$80, characterizing such sum as payment of the first year's rental on account of said lease.

By decision of January 11, 1923, the Commissioner held that under the oil and gas regulations the lease commenced and became effective as of the date of the filing of the relinquishment and application for relief and that consequently three-years' annual rental, at the rate of \$1.00 per acre, of the land was due and payable, and made demand upon the prospective lessee to pay two-years' additional annual rental before recommendation would be made to the Department that a lease be executed.

The Big-4 Consolidated Oil Company appealed from that decision, contending that as no lease had yet been granted, therefore no rent is due until such lease is granted.

The record shows that the Commissioner found that the appellant company not the original applicant, its lessee, was invested with the mining title to the placer location used as a base for the claim for relief, whereupon said company filed supplemental application, therein stating that the original application was filed in its behalf and that the supplemental application was filed as a part of the original. It further appears that, at the instance and request of the appellant company, extensions of time were allowed by the Commissioner to cure defects in the abstract of title. It is thus apparent that the delay in the issuance of the lease has been due to the filing of a defective application and failure to file with the supplemental

application the requisite supporting evidence, necessitating indulgences in time in order to supply it.

The record shows that from and after the date of the filing of the original application, the appellant through its lessee, the Wyoming Drilling Trust, has had uninterrupted, exclusive possession and use of the premises, and by virtue of its application for lease has been free to exercise the rights and privileges and enjoy the benefits that inure to the lessee by the terms of the lease. The appellants, by applying for the benefits of section 19 of the leasing act, and relinquishing its title to the placer location covering the land, surrendered its possessory right by virtue of such application, and its exclusive occupation and use of the land thereafter is lawful only upon the assumption that the appellant company could and would establish its claim that it is entitled to a lease as of the date of the application.

The applicant for lease must be presumed to contemplate that the lease applied for will be granted in accordance with the provisions of the leasing act and regulations thereunder. Section 21 (b) of the oil and gas regulations, Circular 672 (47 L. D., 437, 454), provides as follows:

A claimant qualified under the above conditions relating to leases (referring to paragraph 2-B of the regulations), is entitled to a 20-year lease from the United States effective from the date of filing application for relief, substantially in the form prescribed in section 17, hereof, * * * [Parenthetical data supplied.]

Section 2 (c) of the lease, authorized as the result of this application, follows the form prescribed in said section 17 of the regulations and is drawn in conformity with the above cited regulations, the clause applicable (47 L. D., 448) reading as follows:

Royalties and rents: To pay the lessor, in advance, beginning with the date of the execution of this lease, a rental of \$1 per acre per annum during the continuance hereof, * * *

The lease in express terms declares it is entered into "as of August 24, 1920," and by the terms of section 1 thereof the exclusive right to drill for, mine, extract, remove and dispose of the oil and gas deposits, is granted in consideration of the rents and royalties to be paid. The Department in harmony with the provisions cited has established a practice of requiring a lessee upon the granting of a lease to pay the royalties due the Government on production, from and after the date of application for lease, according to the rates prescribed in such lease. Upon the granting of the lease the right to produce and dispose of the oil is recognized as relating back to the date thereof. No reason is perceived why the correlative duty to pay the rent fixed should not be reckoned from the same date.

Upon the granting of the lease the appellant company is entitled, retrospectively, to the benefits of the lease from its date and must be required therefore to assume its burdens.

The decision of the Commissioner is affirmed, and the record returned for appropriate action hereunder.

BIG-4 CONSOLIDATED OIL COMPANY.

Motion for rehearing of departmental decision of March 13, 1923 (49 L. D., 482), denied by First Assistant Secretary Finney, April 13, 1923.

RULES RELATING TO MEASURE OF DAMAGES TO BE APPLIED IN CASES OF TIMBER, COAL, OIL AND OTHER TRESPASSES ON THE PUBLIC DOMAIN.

INSTRUCTIONS.

[Circular No. 881.]

DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE,

Washington, D. C., March 14, 1923.

CHIEFS OF FIELD DIVISIONS:

I inclose herewith for your information a photographic copy of the decision of the Supreme Court of the United States in *Sam W. Mason et al. v. United States*, decided January 2, 1923 (43 Sup. Ct. Rep., 200).

You will observe that the court holds that the measure of damages for the oil trespass involved is within the controlling scope of State legislation, and that the court stated:

Here, while the suit is one in equity, the statute and decisions relied upon have nothing to do with the general principles of equity or with the federal equity jurisdiction, but simply establish a measure of damages applicable alike to actions at law and suits in equity.

Hereafter the rule of damages to be applied in cases of timber, coal, oil and other trespass will, in accordance with said decision, be the measure of damages prescribed by the laws of the State in which the trespass is committed.

In view of the foregoing you will, both as to your pending trespass cases and cases that may arise in the future, ascertain the laws of the State in which the trespass was committed as to measure of damages, and make your demands for settlement and your recommendations to this office in accordance therewith, citing in your reports to this office the book and page of the State statutes and the decisions on which your recommendations are based.

If a trespass is committed in a State where there is no State law governing such trespass, the measure of damages will be as follows:

TIMBER.

1. Where the trespass is willful, the full value of the property at the time and place of demand, or of suit brought, with no deduction for labor and expense.
2. In case of an unintentional or mistaken trespass, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which the vendor has added to its value.¹
3. In case of a purchase without notice of wrong from a willful trespasser, the value at the time of purchase. *Woodenware Co. v. United States* (106 U. S., 432).

TURPENTINE.

1. Innocent Trespass. Value of the gum, and injury done to the trees. *United States v. Taylor* (35 Fed., 484).
2. Willful Trespass. Value of the product manufactured from the crude turpentine by the settler, or any person into whose possession same may have passed, without credit for labor bestowed on the turpentine by the wrongdoer. *Union Naval Stores Company v. United States* (240 U. S., 284).

COAL.

1. Innocent Trespass. Value of the coal in place, before severance. *United States v. Homestake Mining Co.* (117 Fed., 481).
2. Willful Trespass. Full value of the property at time of conversion, without deduction for the labor bestowed or expense incurred in removing and preparing it for market. *United States v. Ute Coal and Coke Co.* (158 Fed., 20).

ORES.

Measure of damages is the same as in the case of coal. *Benson Mining and Smelting Company v. Alta Mining and Smelting Company* (145 U. S., 428); *Durant Mining Co. v. Percy Consolidated Mining Co.* (93 Fed., 166).

OIL.

1. Innocent Trespass. Value of oil taken, less amount of expense incurred in taking the same.

¹ For prior departmental rulings relating to the measure of damages in cases of innocent timber trespass, see instructions of March 1, 1883, 1 L. D., 695, *John W. Henderson*, 40 L. D. 518, *Id.*, 43 L. D., 106, and instructions of June 22, 1915, 44 L. D., 112.—Ed.

2. Willful Trespass. Value of the oil taken without credit or deduction for the expense incurred by the wrongdoers in getting it. *Mason v. United States* (173 Fed., 135).

The cases now pending in this office for action will be adjudicated in accordance with the above instructions.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

SANDEL ET AL. v. NEW ORLEANS PACIFIC RAILWAY CO.

Decided March 15, 1923.

RAILROAD GRANT — SETTLEMENT — TRANSFEREE — ENTRY — POSSESSION — ADVERSE CLAIM — ESTOPPEL.

The act of February 8, 1887, confirming the assignment to the New Orleans Pacific Railway Company of the grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of March 3, 1871, gave the right of entry to a transferee of an actual settler, occupying land within the granted limits at the date of the definite location of the road and remaining in possession thereafter, and mere tardiness in asserting his claim does not estop him from seeking title adversely to the railroad company.

RAILROAD GRANT — SETTLEMENT — TRANSFEREE — ENTRY — ADVERSE CLAIM — LACHES — EVIDENCE.

Lack of diligence in securing evidence to show that a settlement claim was excluded by the act of February 8, 1887, from the confirmation of the grant to the New Orleans Pacific Railway Company is not sufficient to defeat the right of the transferee to make entry, if the land was in fact embraced within a valid subsisting claim at the date of the definite location of the road and continued as such thereafter.

FINNEY, *First Assistant Secretary:*

The W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 7, T. 5 N., R. 8 W., L. M., Baton Rouge, Louisiana, land district, is within the primary limits of a grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of March 3, 1871 (16 Stat., 573), and was on March 3, 1885, patented to the New Orleans Pacific Railway Company, successor in interest to the original grantee, under the act of February 8, 1887 (24 Stat., 391), after the line of its road had been definitely located opposite this land on November 17, 1882, and the controlling question in this case is as to whether one Goins who was in possession of and living on that tract at the date of the definite location was qualified to make a homestead entry, and then intended to acquire the land under the settlement laws of the United States.

Lands occupied by settlers at the date of definite location were specifically excepted from the operation of both these grants (New Orleans Pacific Railway Company, 33 L. D., 324), and, inasmuch as the act of 1887 gave the right of entry to the transferees of such settlers, James F. Sandel on February 23, 1895, filed his unnumbered application to make a homestead entry for this land, and accompanied it by his sworn statement that he had been residing thereon as a settler "through himself and others continuously ever since the year 1881."

Later, a hearing as between Sandel and the railway company was held, with both parties present, at which testimony was taken in substance as follows:

Sandel swore that the land was first settled on in 1868 or 1869, and thereafter continuously resided on by different persons until 1881, when "a man by the name of Goins was living upon" it with his family; that Goins was a native-born citizen of the United States, about 45 years old, and had never taken advantage of the homestead laws, and did not own any other land so far as he knew; that there was a dwelling house, stable and crib on the land at that time, and about 30 acres of it had been fenced and cleared, which Goins cultivated; that Goins continued to live on the land until 1883, when he sold it to Francis Dowden, who cleared and fenced three acres and otherwise improved the land, and lived there until 1885, when he sold his improvements to him, Sandel; that he, Sandel, has since that year lived on the land, and fenced and cleared six or seven acres.

On cross-examination Sandel testified that he paid Dowden \$200.00 for his interest in the land and improvements; that he did not apply to enter the land at an earlier date for the reason that he was financially unable to do so; that he was only sixteen years old when he bought the land from Dowden, and was 26 years of age on September 26, 1896; that he paid his own money for the land; that his father was completely paralyzed and unable to work, and that he, Sandel, was the head and main support of the family when, and always after, he and his father, mother, and a crippled brother moved onto the land in December, 1885.

A. R. Dowden, 57 years of age, testified that he had lived about a mile from the land since 1861; that the land was first settled on in 1866 or 1867 by "a Mr. Hinson;" that "in 1880, a man by the name of Brown was living upon this land;" that in 1882-83, Goins, who was 45 or 50 years old and the head of a family, lived there; that he did not think that Goins had exhausted his homestead rights or owned other lands; that in 1883, Goins sold his improvements to F. M. Dowden, who lived on and cultivated the land until 1885, when he sold it to Sandel, who had lived there ever since and improved and cultivated it, and that Sandel was "looked upon as the

head of the family at the time he bought these improvements, his father being an invalid, and his mother old and feeble."

On cross-examination Dowden swore that Sandel had an older brother who was a cripple, and not interested in the purchase of the land; that "old man Sandel is paralyzed all over, and confined to his bed most of the time."

F. M. Dowden was introduced as a witness and testified that he had heard, and fully corroborated the statements of the other two witnesses, and that he was over twenty-one years of age and not the owner of any other land at the time he occupied and sold this tract to Sandel.

No testimony was offered on behalf of the railroad company, and it in no way questioned the truth of the statements of Sandel or his witnesses.

On this testimony the register and receiver found for Sandel, but on the company's appeal from that action it was reversed by the General Land Office in its decision of May 27, 1901, on its finding that—

the testimony does not show either satisfactorily or conclusively that Goins, who it is claimed resided on the land in controversy in the years 1881 and 1882, which comprises the date when the right of the Company attached to the lands within the limits of its grant, was lawfully qualified to make a homestead entry.

No further action was taken in this matter until after the Supreme Court rendered the decision hereafter mentioned in 1919, when Sandel filed his homestead application, Baton Rouge 010032 on October 27, 1921, for the land "for the heirs of William Fletcher Sandel and Mary Jane Sandel." That application is accompanied by Sandel's affidavit in which he made reference to his age at the date of his purchase from Dowden; but he did not make any statement or explanation as to why he presented this application on behalf of the heirs of his parents, and not exclusively in his own behalf. It is possible, however, that he was induced to present it in that way by a fear that it might possibly be held that he was not qualified to succeed to the rights of Dowden because he was under the age of twenty-one years at the time he made the purchase.

That affidavit was corroborated by the oaths of two witnesses, both of whom stated that Sandel's father died on January 24, 1902, and— was paralyzed some 15 years before his death, unable to attend to his business, and the present applicant, James F. Sandel, was considered as the head of the family for all business purposes long before the death of the father and before he himself had reached the age of majority.

By its decision of January 7, 1922, the General Land Office rejected that application and denied relief of any kind to Sandel, for the reason that he had not shown that Goins was qualified to make a

homestead entry at the time he occupied the land, and for the further reason that the case had been closed for twenty years.

On August 8, 1922, Sandel filed an informal petition asking that the case be reopened and given further consideration, and in support of that action alleged that at—

the original hearing of January 29, 1897 he did not know the whereabouts of Mr. Aaron Goins, and could not get his evidence at that time, but since has discovered new evidence upon which he bases for reopening of a new hearing.

In further support of his petition, Sandel furnishes the affidavit of Amos Goins, certified by the notary public "to be to me well known, and of good repute," who swore—

That during the year 1882, he made some improvements and resided as a settler on W. $\frac{1}{2}$ of W. $\frac{1}{2}$, Sec. 7, T 5 N., R. 8 W., La. Mer. That at said time or prior thereto he had not filed application for any homestead entry, but sold said improvements to Mr. F. M. Dowden in the year 1883, relinquishing any and all claims I might have had by virtue of improvements thereon. He further says that he did not file application for homestead entry until the year 1898 and that included NW. $\frac{1}{4}$, Sec. 16, T. 4 N., R. 9 W., La. Mer.

The matter is now before this Department for consideration on Sandel's very informal appeal from the decision of the Acting Assistant Commissioner of the General Land Office on October 24, 1922, in which he denied the petition to reopen the case on the ground that Sandel must have known where Goins lived at the date of the hearing under his original application for the reason that the final proof offered by Goins under his homestead entry showed that he was at that time living on lands located nine miles from the tract occupied by Sandel, "and Goins appears to have had relatives in the neighborhood (where Sandel lived), there being other entrymen by the same name in the vicinity," as is shown by the records of the General Land Office.

From what has already been said, it will be seen that the unquestioned facts in this case are that this land has been continuously occupied for more than fifty-five years as a farm home; that it was so occupied for about five years before the grant was made, and sixteen years before the rights of the company attached by the definite location of its road; that for nearly forty years about forty acres have been cleared, fenced and under cultivation, and that for more than thirty-nine years it has constantly been Sandel's only home.

Under these circumstances, and other facts disclosed by the record, this Department is unwilling to now finally close its doors against this applicant by affirming the Acting Assistant Commissioner's decision, and this is especially true in view of the fact that a particular duty has been specifically imposed on the Secretary of the

Interior in cases such as this one by the act of February 8, 1887, *supra*, on which Sandel's claim is based.

The title secured by the New Orleans Pacific Railway Company from the original grantee and patents already issued to it before 1887, were defective and, it was for the purpose, among others, of confirming that title, and validating those patents that the act of 1887 was passed, section 2 of which declares that—

all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

Inasmuch as the patent here involved was issued before the passage of that act, this case comes within the provisions of section 6, which reads as follows:

That the patents for the lands conveyed herein that have already been issued to said company be, and the same are hereby confirmed; but the Secretary of the Interior is hereby fully authorized and instructed to apply the provisions of the second, third, fourth, and fifth sections of this act to any of said lands that have been so patented, and to protect any and all settlers on said lands in all their rights under the said section of this act.

In construing that provision, the United States Supreme Court declared in the case of *United States et al. v. New Orleans Pacific Railway Company et al.* (248 U. S., 507, 518), that—

By the act of 1887 the United States undertook to invest settlers coming within the provisions of that act with the title to the lands in their possession, and also "to protect" them in that right. This meant that they were to receive a clear title. The act charged the Secretary of the Interior with the duty of adopting appropriate measures to that end, and when other means failed he invoked the aid of the Attorney General, who brought these suits. Through them the United States seeks to fulfill its obligations under the act to the settlers, and in this it has the requisite interest or concern.

It is apparent from the record in this case that Sandel is a man of limited means, and lacking in such education and knowledge as would have enabled him to more efficiently protect his interests, and he has not at any time been represented by an attorney of record. His delay in presenting his first application to enter was due to his lack of means necessary for that purpose, and the reason he did not make further effort until about twenty years after that application was rejected, is explained by the fact that it was not until 1919 that the United States Supreme Court declared it was the duty of the Secretary of the Interior to take steps to protect the interests of claimants such as he.

But a mere tardiness in asserting his claim did not give the railroad company a right to say that Sandel is now estopped from seeking title. In the case of *Victorien v. New Orleans Pacific Railway*

Company, on review (10 L. D., 637, 639), the application to enter was not presented until twenty-three years after settlement was made and it was there said that—

* * * it is well settled by the decisions of this Department, that the statutory limitations as to the time of filing formal application, are intended for the protection of the settler against intervening adverse claims, and in cases between the government and the citizen, will not be enforced by the government when the citizen has acted in good faith. The railroad company being a mere grantee of the government, a forfeiture on account of laches of a claimant will not be declared in favor of the railroad, where it would not be claimed by the government, and the former can not be heard to complain of defaults which the latter sees fit to waive. The filing of a homestead application or a pre-emption declaratory statement within the statutory periods, is not necessary to constitute an "actual settler," according to any definition of those words heretofore promulgated and certainly is not under the proviso to section two of the act of 1887, which accords to "actual settlers" the right thereafter to make formal entry of the lands settled on.

Nor does the fact that Sandel possibly did not use diligence in his efforts to secure the testimony of Goins at the original hearing defeat his rights in this land, if he is otherwise entitled to make the entry, because if Goins had a valid settlement on the land at the date of the definite location that tract must at least in so far as Sandel is concerned, "be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States," as was declared in section 2 of the act of 1887. See *Victorien v. New Orleans Pacific Railway Company*, *supra*, *New Orleans Pacific Railway Company v. Elliott* (13 L. D., 157), and *New Orleans Pacific Railway Company* (33 L. D., 324).

While it now appears that Goins was, and has been later recognized by the Land Department as being qualified to make a homestead entry at the date of the definite location of the road, Sandel's rights are dependent upon the further question as to whether Goins went onto and occupied the tract "with an intention to make entry of the land at some future time under the provisions of the settlement laws of the United States," as was held in *Pennington v. New Orleans Pacific Railway Company* (25 L. D., 61, 63). The evidence as to the intent with which he took possession of the land consists only of his statement in his affidavit that "he resided as a settler" on the tract, which must, in the absence of other evidence to the contrary, be taken as sufficient to meet the requirements of the rule just mentioned.

However, this Department does not feel that it would be justified to give final directions in this matter at this time for the reason that notice of the present application and proceedings does not appear to have been served on the railroad company, and for that reason the action taken below is hereby set aside and the case is remanded

with directions that the register and receiver be instructed to make diligent and exhaustive efforts to ascertain the names and post-office addresses of any and all persons who may be now claiming any interest in this land adverse to Sandel, as transferees of the railroad company, or otherwise, and that after doing so they will serve copies of this decision on all such persons, if any there be, and also on the company, with notice to them and the company that if all claims based on the patent to the company are not relinquished to the Government, or convincing reasons to the contrary are not shown within thirty days from receipt of such copy and notice, this Department will give further consideration as to the advisability of recommending a suit for such relief as Sandel may then appear to be entitled to.

MATTIE J. BAIRD (ON PETITION).

Decided March 19, 1923.

HOMESTEAD ENTRY—FINAL PROOF—FINAL RECEIPT—PAYMENT—FEES—VESTED RIGHTS—ACT OF MARCH 3, 1891.

The rule that the period of limitation specified in the proviso to section 7 of the act of March 3, 1891, begins to run from the date of the issuance of the "receiver's receipt upon the final entry," is not met by the payment of the required fees and commissions tendered in connection with the submission of final proof where that officer merely places the moneys in his unearned account without issuing receipt therefor.

HOMESTEAD ENTRY—FINAL PROOF—PAYMENT—PATENT—VESTED RIGHTS.

Where purchase money tendered by a homestead entryman in connection with his final proof is subsequently returned to him by the receiver, either at the former's request or with his consent, the entryman is not in a position to demand patent as upon a completed entry.

COURT DECISION CITED AND DISTINGUISHED—DEPARTMENTAL DECISION APPLIED SO FAR AS IN POINT.

Case of *Stockley et al. v. United States* (43 Sup. Ct. Rep., 186; — U. S., —), cited and distinguished; case of *Veatch, heir of Natter, on rehearing* (46 L. D., 496), applied so far as in point.¹

FINNEY, *First Assistant Secretary*:

April 22, 1903, Martin Grace made homestead entry embracing W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 17, T. 32 S., R. 2 E., W. M., Roseburg, Oregon, land district, upon which commutation proof was submitted July 30, 1904, before a United States commissioner. The public notice of intention to submit proof did not properly describe the land and for that reason new publication was required and a new date, January 28, 1905, was fixed for the taking of proof. A certificate

¹ See decision in case of *United States v. Heirs of Elizabeth Suvery and Anton Schafer, transferee*, 49 L. D., 461, in which a portion of *Veatch, heir of Natter, on rehearing*, 46 L. D., 496, is overruled.

by the proof-taking officer states that on the latter date no one appeared to give adverse testimony and that none had been filed with him.

By letter of March 30, 1906, the register of the Roseburg office transmitted the papers to the General Land Office stating that the proof was filed in the office during the incumbency of the former register and receiver and that a special agent had attached thereto his recommendation that final certificate be withheld, and that in accordance with said recommendation the proof was suspended and transmitted without action in regard to correction of any errors or omissions which may appear. A memorandum slip with the record shows that the suspension was for the purpose of making an examination in the field by a special agent.

By letter of November 2, 1908, the Commissioner of the General Land Office held the proof for rejection on the ground that it showed on its face that the residence was insufficient, because not as much as fourteen months of continuous residence was shown. The entry was allowed to remain intact subject to new proof when the entryman could show full compliance with the requirements of law as to residence and cultivation. That decision was declared final on March 5, 1909, and the proof was finally rejected.

August 8, 1910, the entry was canceled for failure to submit satisfactory proof within the statutory period. Shortly after the cancellation of the entry an attorney asked that the case be reopened to permit the necessary proof to perfect title in the estate of James A. Baird, who, it was alleged, purchased the land on August 2, 1907, and who died in the spring of 1909. By letter of September 28, 1910, the Commissioner of the General Land Office after reciting the history of the entry declined to reopen the case. That decision was declared final by letter of May 23, 1911.

February 22, 1919, application was made by Mattie J. Baird, residuary legatee under the will of James A. Baird, deceased, transferee of Martin Grace, asking reinstatement of said entry on the ground that the entry was confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), and it was urged that inasmuch as no protest or contest was pending against the entry at the expiration of two years from final proof and payment, the cancellation of the entry was illegal and void.

Preliminary to action on the said application for reinstatement, the Commissioner called upon the register and receiver for report as to the disposition of the purchase money, reference being made to a notation on the back of the proof papers as follows: "Proof and purchase money filed August 12, 1904." It was further recited that an examination of the abstracts for the month of August, 1904, in the General Land Office did not show such payment. In

reply, the register under date of May 16, 1919, stated that the \$200 purchase money paid in commutation of the Grace entry had been carried in the unearned money account but was returned to the entryman December 3, 1907, as shown by the records of that office.

By decision of June 7, 1919, the application for reinstatement was denied on the ground that the entry was not confirmed as no receiver's receipt was issued on final entry, citing Veatch, heir of Natter, on rehearing (46 L. D., 496). Upon appeal from that action the decision below was affirmed by the Department November 19, 1919, wherein it was in part stated:

There was no receipt given in this case on final entry and the mere payment of moneys in connection with the final proof, which was never accepted, is wholly inadequate to establish any right in a public land claimant and is not sufficient to start the running of the statute.

The record in this case shows that entryman did not comply with the law in respect to residence. Although on its face the final proof might justify such a holding except in respect to residence, a later investigation of this entry shows that claimant did little or nothing with respect to compliance with the law. His residence was insufficient and his cultivation did not show good faith. The land has about two million feet of good timber upon it.

That action became final, but on January 19, 1923, a similar application in the form of a petition for the exercise of the supervisory authority of the Department was filed in behalf of Mattie J. Baird, asking reconsideration of the case in the light of the recent decision of the Supreme Court of the United States in the case of Thomas J. Stockley *et al. v. United States*, decided January 2, 1923 (43 Sup. Ct. Rep., 186), from which certain language is quoted by the petitioner designed to show that it is authority for the claim that the entry here in question was confirmed, and patent should issue under the act of 1891, *supra*, which provides:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

In the instant case, no receipt was issued on final entry and in that regard it is similar to the case of Veatch, heir of Natter, *supra*, wherein the Department said:

Under the practice prevailing at the time Natter's entry was made, moneys tendered with proofs which were defective, insufficient, or which for sufficient reasons were suspended, were frequently carried for indefinite periods as unearned fees and unofficial moneys and eventually either returned to the applicant or applied and receipt issued, as the facts and circumstances warranted.

In the opinion of the Department, neither the letter nor the spirit of the law justifies a ruling that the mere payment of moneys in connection with a final proof which was never accepted and which is totally inadequate to establish any right in a public-land claimant is sufficient to start the running of the statute.

In the Stockley case which is relied on by the petitioner a receipt had issued. This makes a vital difference between the cases, which is not removed nor rendered immaterial by the said decision.

The importance attached to the issuance of the receiver's receipt is shown in the very letter of the statute concerning which the court said:

The plain provision is that the period of limitation shall begin to run from the date of the "issuance of the receiver's receipt upon the final entry." There is no ambiguity in this language and, therefore, no room for construction. There is nothing to construe. The sole inquiry is whether the receipt issued to Stockley falls within the words of the statute. * * * Having submitted to the proper officials proof showing full compliance with the law, and having paid all the fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him. No subsequent receipt was contemplated or required. From the date of the receipt the entry may be held open for the period of two years, during which time its validity may be contested. Thereafter the entryman is entitled to a patent and the express command of the statute is that "the same shall be issued to him."

* * * * *
We are not at liberty to add to or take from the language of the statute. When Congress has plainly described the instrument from whose date the statute begins to run as the "receipt upon the final entry" there is no warrant for construing it to mean only a receipt issued simultaneously with the certificate or one issued after the adjudication on the final proof, which might be—and in this instance was—postponed indefinitely. It was to avoid just such delays for an unreasonable length of time—that is, for more than two years—that the statute was enacted.

* * * * *
* * * However, Stockley, as already shown, did, in fact, make final entry and the receiver did, in fact, issue and deliver his receipt thereon. The case, therefore, falls within the terms of the statute and must be governed by it, unless the receipt be held for naught on the ground that it was issued contrary to the Commissioner's instructions. But the very object of the statute was to preclude inquiry upon that or any other matter, except as provided by the statute, after the expiration of two years from the date of the receiver's receipt.

Nowhere did the court say that the statute applied where the receiver's receipt had not issued. The main reliance of the claimant is on that portion of the decision which quoted with approval from departmental instructions of June 4, 1914 (43 L. D., 322). The said instructions called the attention of field agents to certain departmental decisions involving the confirmatory act referred to. The

object was to acquaint them with the purport of the latest rulings on that much controverted statute, and it was said *inter alia*:

These departmental decisions call attention to the fact that time under the statute of limitation created by the proviso to section 7 of the act of March 3, 1891, runs from the date of issuance of the receiver's receipt upon final entry. There is no doubt that Congress chose the date of the receiver's receipt rather than of the certificate of the register as controlling, for the reason that payment by the claimant marks the end of compliance by him with the requirements of law. It would be manifestly unjust to make the right to a patent dependent upon the administrative action of the register, subjecting it to such delays as are incident to the conduct of public business and over which the claimant has no control. Payment, of which the receiver's receipt is but evidence, is, therefore, the material circumstance that starts the running of the statute, inasmuch as a claimant is and always has been entitled to a receipt when payment is made.

There was no intention in the instructions to go beyond the purport of the decisions referred to, as shown by the fact that the agents were instructed to proceed in accordance with the said decisions. None of the decisions thus mentioned recognized application of the confirmatory statute where the receiver's receipt had not issued, but that identical question was involved in the case of Veatch, heir of Natter, *supra*, wherein the Department noticed the language of the instructions above quoted and held that it had no application in that case where the receipt had not issued.

In the instant case not only did the receipt not issue but neither was the entryman entitled to a receipt under the practice then in force. His proof was insufficient on its face, and showed that title had not been earned by performance of the required residence. In this respect also the case is different from the Stockley case.

Furthermore, the purchase money was returned to the entryman as above cited and has not been repaid. So far as shown, no notice of any adverse claim had been filed in the local land office by the transferee and, therefore, the land officials were justified in dealing with the entryman as though no transfer had been made. Presumably the purchase money was returned in pursuance of instructions of May 16, 1907 (35 L. D., 568), issued under the act of March 2, 1907 (34 Stat., 1245). Section 6 of said instructions in part provides:

Moneys already paid on commutation proofs that are now suspended, reported in the account of unearned fees and unofficial moneys, may be retained in said account until the suspended proofs are finally accepted or rejected; or, pending final action on such proofs, the purchase money shall, upon application, be returned to the depositor, without prejudice to his homestead rights, and the receiver shall, as soon as practicable, advise all such homesteaders of their right to have their money returned.

Having thus accepted repayment of the purchase money, the entryman was no longer in position to claim patent as upon a completed

entry even if he had been theretofore entitled to such claim which in fact he was not, as above shown.

The points repugnant to the claim for issuance of patent as upon confirmation may be summarized as follows: (1) The entryman's final proof did not show compliance with the homestead law, and for that reason alone he was not entitled to receiver's receipt upon final entry. (2) No receipt was in fact issued. (3) The entryman was repaid the money which had been deposited, and this countered any presumption of rights by virtue of the deposit.

Accordingly, the former action denying reinstatement of the entry is adhered to and the petition is denied.

**PROOFS, AFFIDAVITS, OATHS—EXECUTION BEFORE DEPUTY
CLERKS OF COURTS—ACT OF FEBRUARY 23, 1923.**

INSTRUCTIONS.

[Circular No. 884.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 23, 1923.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Section 2294, Revised Statutes, as amended by the act of March 11, 1902 (32 Stat., 63), and the act of March 4, 1904 (33 Stat., 59), was amended by the act of February 23, 1923 (Public No. 435), by inserting a provision that where, because of geographic or topographic conditions, there is a qualified officer nearer or more accessible to the land involved, but outside the county and land district, affidavits, proofs, and oaths may be taken before such officer. Said section as amended reads as follows:

SEC. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone Acts, may in addition to those now authorized to take such affidavits, proofs, and oaths be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in cases where because of geographic or topographic conditions there is a qualified officer nearer or more accessible to the land involved, but outside the county and land district, affidavits, proofs, and oaths may be taken before such officer: *Provided further*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken outside of the county or land district in which the land is located, the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that

it was taken before the nearest or most accessible officer qualified to take such affidavits, proofs, and oaths; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths, he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver shall be as follows:

For each affidavit, 25 cents.

For each deposition of claimant or witness, when not prepared by the officer, 25 cents.

For each deposition of claimant or witness prepared by the officer, \$1.

Any officer demanding or receiving a greater sum for such service shall be guilty of misdemeanor and upon conviction shall be punished for each offense by a fine not exceeding \$100.

All oaths, affidavits, and proofs herein referred to may be made before a duly qualified deputy clerk of court who regularly acts for the clerk and performs the duties of the office in the name of his principal at the county seat. (See Instructions of May 8, 1919, 47 L. D., 145.)

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

**PUBLIC LANDS WITHIN STATE IRRIGATION DISTRICTS—ACT OF
MAY 15, 1922, SECTION 3—CIRCULAR NO. 592, AMENDED.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 26, 1923.

THE DIRECTOR OF THE RECLAMATION SERVICE,
THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Section 3 of the act of May 15, 1922 (42 Stat., 541), provides, in part, as follows:

That upon the execution of any contract between the United States and any irrigation district pursuant to this Act the public lands included within such irrigation district, when subject to entry, and entered lands within such irrigation district, for which no final certificates shall have been issued and

which may be designated by the Secretary of the Interior in said contract, shall be subject to all the provisions of the Act entitled "An act to promote the reclamation of arid lands," approved August 11, 1916: *Provided*, That no map or plan as required by section 3 of the said Act need be filed by the irrigation district for approval by the Secretary of the Interior.

This section is construed as an amendment of the act of August 11, 1916 (39 Stat., 506), in that it makes unnecessary the filing of a map or plan of the district for the approval of the Secretary of the Interior in those cases where the lands within a district are to be reclaimed by the United States Reclamation Service under a contract between the Secretary of the Interior and the irrigation district entered into under the act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof, and in lieu thereof provides for the designation *by the terms of such contract* of the public lands included in such a district where subject to entry and entered lands on which no final certificates shall have been issued, such designation to make the land subject to all the provisions of the act of August 11, 1916, *supra*.

Accordingly, it will not be necessary for a district, under such circumstances, to file formal application for the designation of the land, as provided for in the act of August 11, 1916, *supra*, and the regulations thereunder approved March 6, 1918, Circular No. 592 (46 L. D., 307), but in connection with its negotiations with the Secretary of the Interior for the construction of the irrigation system it should make request for the designation of the lands under the act of August 11, 1916, *supra*, filing a list thereof.

In such a case the contract between the Secretary of the Interior and the irrigation district must contain a description according to the approved plats of survey of the lands within such district, properly subject to designation under said act of August 11, 1916, and the approval of such a contract by the Secretary, unless otherwise stipulated, will have the effect of designating the lands as provided for in said act, and making them subject to all the provisions thereof.

In practice the Reclamation Service will require the district to present a list of the land which it desires to have designated under the act of August 11, 1916 (39 Stat., 506). From this list the Reclamation Service will eliminate tracts which for any reason will not be irrigated (at least to such an extent as to make the irrigable portion more valuable than the whole tract when unreclaimed), by the system as constructed or to be constructed.

These lists should then be referred by the Reclamation Service to the General Land Office with a view to the elimination of any lands not subject to entry (i. e., withdrawn or reserved), whereupon the remaining tracts will be included in the contract between the district and the Secretary of the Interior.

The Director of the United States Reclamation Service will furnish the Commissioner of the General Land Office with two copies of all such approved contracts, together with a blueprint of the map of the district.

From these the Commissioner of the General Land Office will cause proper notations to be made on the records of his office and will also issue the necessary instructions to the local office with a view to the proper notation of their records and the enforcement of the provisions of the act of August 11, 1916, *supra* (Circular No. 592), as to the lands designated.

E. C. FINNEY,
First Assistant Secretary.

LOREN RAY PIERCE.

Opinion, March 27, 1923.

ATTORNEY—CLAIMS—PUBLIC LANDS—SECTIONS 109 AND 113, FEDERAL PENAL CODE.

The prohibition contained in section 109 of the Federal Penal Code, act of March 4, 1909, against the prosecution of "any claim against the United States" has reference to a money demand and does not include claims involving the right and title to public land, but section 113 thereof is more general and inhibits the rendering of any service for compensation in connection with a matter or proceeding before any department wherein the United States is a party or is directly or indirectly interested.

ATTORNEY—OFFICERS—LAND DEPARTMENT—SECTIONS 109 AND 113, FEDERAL PENAL CODE.

The position of captain in the Officers' Reserve Corps is a place of trust and an office within the purview of sections 109 and 113 of the Federal Penal Code, and such officer is, therefore, precluded from practicing for remuneration before the Interior Department or any of its bureaus.

GOODWIN, Assistant Secretary:

Reference is made to your [Loren Ray Pierce, Woodstock, Vermont] letter of February 26, 1923, asking for a ruling on the question of your eligibility for admission to practice as an attorney before this Department in view of the fact that you are a captain in the Officers' Reserve Corps, occasionally detailed for active duty but usually having an inactive status. You refer particularly to section 109 of the Criminal Code, act of March 4, 1909 (35 Stat., 1107), which provides:

Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such

claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both.

Section 113 of the same act provides:

Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

The national defense act of June 3, 1916 (39 Stat., 166), as amended by the act of June 4, 1920 (41 Stat., 759), provided for the organization of an Officers' Reserve Corps. Such officers are appointed and commissioned by the President, except general officers who are appointed by and with the advice and consent of the Senate. The commission runs for a period of five years in time of peace but may be canceled at any time in the discretion of the President. Such officer is entitled to pay and allowance only when on active duty. He is subject to call for active duty at any time and for any period, to the extent provided for by appropriations, but, except in time of national emergency, no such officer shall be required to perform actual duty for more than 15 days during any one calendar year without his consent.

In 29 Op. Atty. Gen., 397, it was held that an Army officer retired from active service, is an officer in the employ of the Government, and so within the prohibition of section 1782, Revised Statutes, which was embodied in section 113 of the Criminal Code. To the same effect have been decisions by the Court of Claims. See 18 Ct. of Cl., 25, and 31 Ct. of Cl., 35. See also 105 U. S., 244.

It was also held (28 Op. Atty. Gen., 131), that a commissioner of deeds for the District of Columbia is an officer of the United States within the meaning of sections 109 and 113 of the Criminal Code and is prohibited from acting as agent or attorney in the prosecution of pension claims against the United States.

Notaries public appointed by the President for the District of Columbia are regarded as officers of the United States, and in order to remove objection to their recognition as attorneys to practice

before the Department legislation was deemed necessary and accordingly Congress passed the act of June 29, 1906 (34 Stat., 622), for that purpose. A similar provision was contained in the act of March 1, 1901 (31 Stat., 822, 844), to relieve members of the National Guard of the District of Columbia from the restrictions of section 5498, Revised Statutes, which was incorporated in section 109 of the Criminal Code.

In view of the rulings referred to, this Department is of the opinion that the position of captain in the Officers' Reserve Corps is a place of trust and an office within the meaning of the sections above quoted. It will be observed that section 109, *supra*, relates only to "any claim against the United States." The activities of this Department include a number of matters not embraced in that term, which has been defined as a money demand against the United States. See 33 Land Decisions 137, wherein it was held that the said term does not include claims involving the right and title to public land.

However, section 113, *supra*, is more general and inhibits such officer from rendering any service for a compensation in connection with any matter or proceeding before any department, etc., wherein the United States is a party or directly or indirectly interested. The inhibition in this section is against receiving compensation for the service specified, and would not apply if the service were performed gratis.

In view of the restrictions and limitations thus imposed, it is apparent that your enrollment as an attorney would confer no practical benefit to you, hence the Department must decline to enroll your name as an attorney, on the ground that you hold an office or place of trust under the Government of the United States.

LAWS APPLICABLE TO THE DISPOSITION OF LANDS CHIEFLY VALUABLE FOR SALT OR SALT SPRINGS.

Opinion, March 27, 1923.

SALINE LAND—MINERAL LANDS—LEASE—CALIFORNIA—WORDS AND PHRASES—STATUTES.

The term "chlorides of sodium" as used in sections 23 and 24 of the act of February 25, 1920, includes ordinary table salt and salt in solution, and lands chiefly valuable for their salt springs or deposits of salt, except in San Bernardino County, California, are subject to exploration and lease under the provisions of those sections.

SALINE LAND—MINERAL LANDS—CALIFORNIA—ACT OF FEBRUARY 25, 1920—STATUTES.

The placer mining laws which were extended to saline lands by the act of January 31, 1901, were repealed in so far as they related to lands of that character by the general leasing act of February 25, 1920, except as to San Bernardino County, California, and except as to valid claims elsewhere existent at the date of the passage of the latter act.

SALINE LAND—MINERAL LANDS—CALIFORNIA—STATUTES.

Lands chiefly valuable for their salines in San Bernardino County, California, and valid claims for saline lands elsewhere that are excepted by section 37 of the leasing act of February 25, 1920, from the operation of sections 23 and 24 of that act, are still subject to disposition under the placer mining laws as extended by the act of January 31, 1901.

BOOTH, *Solicitor*:

My opinion has been requested as to whether the acquisition of lands containing deposits of salt or salt springs in southern California is governed by the placer mining laws or by the leasing act of February 25, 1920 (41 Stat., 437).

I will review as briefly as may be warranted in order to give a clear understanding of the subject the statutes, departmental regulations and decisions pertaining to the disposition of saline lands, that is, lands containing deposits of salt or salt springs.

In the case of *Hall v. Litchfield et al.*, decided March 2, 1876 (Copp's U. S. Mineral Lands, 321), this Department held, following the authority of *Morton v. Nebraska* (21 Wall., 660), that it has been the policy of the Government to reserve salt springs and lands from sale and that there was no authority for their disposal, either as agricultural or mineral lands. Such lands were not disposable under the mining act of May 10, 1872 (17 Stat., 91).

On January 12, 1877, an act was approved (19 Stat., 221), which gave the Secretary of the Interior authority to sell saline lands and salt springs in those States and Territories to which Congress had made grants of salines. That act was the only statute that permitted of the disposal of saline lands until the passage of the act of January 31, 1901 (31 Stat., 745). See *Salt Bluff Placer* (7 L. D., 549), *Southwestern Mining Co.* (14 L. D., 597), and *Territory of New Mexico* (31 L. D., 389), for a detailed discussion of the subject.

The act of January 31, 1901, *supra*, extended the mining laws to saline lands. The text of the act is as follows:

That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer mining claims: *Provided*, That the same person shall not locate or enter more than one claim hereunder.

On February 25, 1920 (41 Stat., 437), the general leasing act was enacted. Sections 23 and 24 of that act authorize exploration for and leasing of "chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium dissolved in and soluble in water, and accumulated by concentration," in lands belonging to the United States, with the exception of such deposits in lands in San Bernardino County, California.

Section 37 of the act of 1920, *supra*, expressly stated that the deposits of the minerals named therein, including sodium, shall be disposed of only in the form and manner provided in the 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."

Section 34 of the act of 1920, *supra*, made the provisions of the act applicable to deposits of the minerals named therein contained in lands disposed of by the United States with reservations of the minerals.

The departmental rules and regulations governing the disposition of sodium deposits under the leasing act are contained in Circular No. 699, approved May 28, 1920 (47 L. D., 529). It is stated in the introductory part thereof that the regulations are applicable to sodium in any of the forms named in the act of 1920. In subdivision (g) of section 2 of the lease form special provision is made for the extraction of sodium in solution.

Attention is called to the fact that neither in the leasing act nor in the regulations issued pursuant thereto has the term "saline lands" or "salt" been used, and that it is not to be supposed that the saline act of January 31, 1901, *supra*, was repealed by implication. Further, attention is directed to the fact that the regulations issued under the general mining laws still include in sections 31, 32, and 33 thereof, "Regulations under Saline Act" and refer to the extension of the mining laws to "saline lands" and "lands containing salt springs, or deposits of salt in any form, etc."

The question as to whether or not the leasing act intended to include ordinary table salt and salt springs can be answered briefly. The act specifically names the various forms of sodium to be covered by it and includes chlorides. Sodium chloride is merely the chemical name used for salt, and it includes ordinary table salt. See Territory of New Mexico (35 L. D., 1). Just recently the Department issued instructions to the Commissioner of the General Land Office with reference to the proper disposition of a State indemnity selection (Santa Fe 045230) and a prospecting permit application (Santa Fe 042499), in which it was held *inter alia* that a permit to prospect for salt may be granted under the leasing act of 1920. See Instructions of February 7, 1923, State of New Mexico and Horace W. Flora (49 L. D., 435). There is no doubt in my mind as to the correctness of that holding. It is obvious to me that both the general leasing act and the sodium regulations of May 28, 1920, *supra*, include lands containing deposits of ordinary salt and salt springs.

Section 37 of the leasing act and sections 31, 32, and 33 of the new mining regulations of April 11, 1922 (49 L. D., 15, 64), are to be construed together. Section 37 directed that the mineral deposits named in the act (including sodium chloride, or salt) shall be disposed of only pursuant to the terms of the act. It therefore repealed all previous acts relating to the disposition of those minerals. However, it excepted valid claims existent at the date of the passage of the act. Consequently such claims containing deposits of salt or salt springs would be governed by the placer mining laws and sections 31, 32, and 33 of the mining regulations would be applicable thereto. But they would not be applicable to other than the excepted class. A note to that effect was attached to the mining regulations of April 11, 1922 (49 L. D., 15, 58).

Both the placer mining law governing the disposition of saline lands and also the leasing act which authorizes the leasing of sodium deposits contemplated that the lands must be chiefly valuable for deposits of that mineral. That is, the lands must contain commercial mineral in commercial quantities. If they do not meet that requirement, they are not to be considered as mineral lands, and are disposable under the nonmineral land laws. This principle is applicable to lands containing salt springs that have no commercial value. See Pagosa Springs (1 L. D., 562); *Morrill v. Margaret Mining Co.* (11 L. D., 563); and Territory of New Mexico (35 L. D., 1).

The foregoing presentment of the law answers the questions raised except as to saline lands in San Bernardino County, California. The leasing act of 1920, in so far as it pertains to deposits of sodium (sections 23 and 24), expressly excepts such deposits in that county. Attention has been directed to the act of October 2, 1917 (40 Stat., 297), an act which authorizes the exploration for and disposition of potassium, excepting, however, lands in and adjacent to Searles Lake. Searles Lake is situated in San Bernardino County. But the act of 1917 has no application to deposits of salt or salt springs. Potassium chloride is not sodium chloride, or ordinary salt. Therefore, neither the act of 1917, nor the act of 1920, nor any other leasing act governs the leasing of saline lands in that county. It follows then that lands in San Bernardino County, chiefly valuable for their deposits of common salt, are still to be disposed of pursuant to the placer mining laws as extended by the act of January 31, 1901, *supra*, and that sections 31, 32, and 33 of the mining regulations (49 L. D., 15, 64) are applicable thereto.

Approved:

E. C. FINNEY,

First Assistant Secretary.

**DESIGNATION UNDER THE ENLARGED AND STOCK-RAISING
HOMESTEAD ACTS OF ENTERED LANDS WITHIN NATIONAL
FORESTS—ACT OF MARCH 4, 1923.**

INSTRUCTIONS.

[Circular No. 886.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 30, 1923.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

By act of March 4, 1923 (Public No. 496), provision has been made whereby the Secretary of the Interior may now designate under the enlarged homestead act and the stock-raising act national forest lands embraced in subsisting or perfected homestead entries of 160 acres or less so that such forest homestead entries may be the basis for additional entries under said acts. The act reads as follows:

That any homestead entryman of one hundred and sixty acres or less of lands which have been or may hereafter be designated or classified by the Secretary of the Interior as subject to entry under the provisions of the Enlarged Homestead Act of February 19, 1909, or June 17, 1910, who has not submitted final proof upon his existing entry, and any homestead entryman who has submitted final proof, or received patent, for such an amount of lands which have been or may hereafter be designated or classified by the Secretary of the Interior as of the character described in said Act, and who owns and resides upon the said homestead entry, where said lands are within a national forest, may make an additional entry for and obtain patent to such an amount of land, of that same character, not in a national forest, and within a radius of twenty miles from said homestead entry, as, when the area thereof is added to the area of the original entry, will not exceed three hundred and twenty acres, and residence upon the original entry shall be credited on both entries; but cultivation must be made on the additional entry as required by said Act. For the purposes of this Act the Secretary of the Interior is authorized to designate as subject to the Enlarged Homestead Acts lands embraced, at the time of such designation, within valid subsisting entries within national forests.

SEC. 2. That any homestead entryman of one hundred and sixty acres or less of lands which have been or may hereafter be designated or classified by the Secretary of the Interior as subject to entry under the provisions of the Stock Raising Homestead Act of December 29, 1916, who has not submitted final proof upon his existing entry, and also any homestead entryman who has submitted final proof or received patent, for such an amount of lands that are of the character described as subject to entry under the provisions of the said Stock Raising Homestead Act, and who owns and resides upon the said homestead entry, where said lands are within a national forest, may make an

additional entry for and obtain patent to such an amount of land of that same character, not in a national forest and within a radius of twenty miles from said homestead entry, as, when the area thereof is added to the area of the original entry, will not 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. For the purposes of this Act the Secretary of the Interior is authorized to designate under the Stock Raising Homestead Act lands embraced, at the time of such designation, within valid subsisting entries within national forests.

2. The intent and purpose of said act is to permit persons holding existing or perfected homestead entries for lands within national forests of a character subject to designation which the applicant owns and on which he resides, to make additional entries for such a quantity of land outside of the national forest and within 20 miles of the original entry as when added to the area of the original entry will not exceed 320 acres, if under section 1 thereof, or 640 acres, if under section 2 thereof.

3. The procedure in making and perfecting an entry under section 1 of this act will be in all respects similar to that explained in paragraphs 43 to 47 inclusive of Circular No. 541, approved January 16, 1922 (48 L. D., 389), covering additional entries under the enlarged homestead acts, the only difference being that at the time of making the entry hereunder after proof on an original entry, the applicant must show ownership of and residence on the land in the original entry, instead of ownership and occupancy, and an additional entry hereunder may be made for land not adjoining that in the original entry. Residence on the original entry may be credited on both entries but cultivation of the land in the additional entry must be as indicated in said paragraph 47.

4. The procedure in making and perfecting an entry under section 2 of this act will be governed by the instructions in paragraphs 8, 9, 11 and 12 of Circular No. 523, approved December 4, 1922. Residence on the original entry may be credited on both entries but stock-raising improvements must be placed on the additional entry equal to \$1.25 per acre.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

CENTERVILLE MINE AND MILLING COMPANY.

Decided February 24, 1923.

MINING CLAIM—ASSIGNMENT—TRANSFEREE.

Mining locations made by individuals who are stockholders in a corporation, embracing lands desired by the latter, with an understanding that the locators would quitclaim to the corporation, which they thereafter did, must be held to have been made not in the interest of the individual locators, but for the sole use and benefit of the corporation and under such conditions the corporation can not include in a single location an area exceeding twenty acres.

MINING CLAIM—PATENT—VALIDITY—EVIDENCE.

Large expenditures upon mining claims made on behalf of a corporation asserting the right to receive patent therefor, although evidencing a lack of bad faith, can not serve to validate locations which are otherwise invalid.

COURT AND DEPARTMENTAL DECISIONS CITED AND DISTINGUISHED.

Cases of *Borgwardt et al. v. McKittrick Oil Company* (130 Pac., 417), and *McKittrick Oil Company* (44 L. D., 340), cited and distinguished.

FINNEY, First Assistant Secretary:

This is an appeal by the Centerville Mine and Milling Company from the decision of the Commissioner of the General Land Office dated September 21, 1921, in which the company's mineral application 010092, under which mineral entry was allowed December 5, 1919, for the Monazite placer mining claims Nos. 6, 9, 24, 25, 31, 32, and 33, embracing an aggregate of 1117.697 acres situate in Secs. 17, 20 and 21, T. 6 N., R. 5 E., B. M., Boise, Idaho, land district, was held for rejection on the ground that the applicant company in answer to charges had admitted the dummy character of the locations.

On December 27, 1920, adverse proceedings were directed against said application on charges in substance (1) that the location of the above claims by Herbert A. Parkyn and seven others was in fact made by the company, a corporation, for its sole use and benefit, through the use of such names with a purpose and intent to secure in violation of section 2331, Revised Statutes, a greater area than might be lawfully included in a single location by one individual or corporation; and (2) that Herbert A. Parkyn *et al.* did not in good faith locate and file location notices for the several claims with the intent that title should be acquired for their separate and several use and benefit but made location pursuant to an unlawful agreement, expressed or implied, whereby the location was made in the interest and for the use and benefit of the company to secure to it the control and apparent possessory right to a greater

area than might be lawfully embraced in a single location by one individual or corporation.

The company in due time filed its answer verified by Mr. S. K. Atkinson, the manager of the corporation. That answer, according to the copy which appears in the record, sets up the incorporation of the company on July 2, 1907, Herbert A. Parkyn and six others being the original directors; the acquirement of the Day and Rossman placer ground near Centerville, Idaho, by the company and the purchase in 1908, from the Oaks Mining Company of placer claims and water rights for \$25,000. The answer then proceeds as follows:

At this time, during October and November, 1909, the placer locations involved herein were made, together with other like locations, covering a combined area of approximately 5,000 acres. The claims purchased from the Oaks Mining Company covered a portion of the land so located, but by reason of the fact that they were largely 20-acre gulch claims, and more or less irregular in shape, and did not conform to the subdivisational survey, the Centerville Mine and Milling Company were advised by the officers of the United States land office at Boise, Idaho, that if it wishes to patent this land under the mining laws, the claims would have to be conformed to the survey lines. Thereupon, the Centerville Mine and Milling Company, having made careful examination of the mineral deposits in the area in question, and found the same sufficiently mineralized, decided to relocate the ground according to legal subdivisions.

Sometime late in 1907, during a visit by J. H. McFarland, one of the officers of the company, to these lands, for inspection purposes, the latter had consulted and retained the legal services of Mr. Maurice M. Myers, an attorney at law, then located at Idaho City, Idaho. After Mr. Atkinson's arrival in 1908, and subsequently during his management of the affairs of the Centerville Mine and Milling Company, he consulted Mr. Myers in all matters of importance concerning the business of the company, and relied implicitly on his legal opinions.

When the necessity arose of relocating the ground covered by the former Oaks Mining Company's holdings, and of enlarging these holdings by original locations to put the operations of the company on a permanent basis, Mr. Atkinson consulted Mr. Myers and placed all the material facts before him. The matter of locating this area in 20-acre tracts, by the company itself, was carefully considered. But the expense of making the locations in 20-acre tracts, and of doing \$500 worth of work on each claim for patent purposes, was found to be so great that it would have been prohibitive, as they then saw it. Then the possibility of locating this land by 160-acre association claims was discussed, and Mr. Myers determined to look into the laws on the subject and advise whether this could lawfully be done. Thereafter, and upon examination of the subject, Mr. Myers advised Mr. Atkinson, in writing, as follows:

"The procedure we should follow in locating this ground is this. We locate the whole tract or such parts as you desire in 160-acre placer locations, using the names of eight of the stockholders of the company as locators. We can use the same or different names in each location, but we will take the names of persons interested in the company, for that will give the locators a real

interest in the ground, and we will not be open to the hazard of using 'dummy' locators. The company itself, if no other objection offered, could make but 20-acre locations the same as an individual; that is, so far as we know. The question whether a corporation has the same right to make a larger location than an individual has never been finally determined, and we will not assume the responsibility of having the matter determined Then the work upon the extension of the ditch to cover this ground will apply as the assessment work on these claims, and here comes in the advantage of making the 160-acre locations instead of smaller ones, for the same amount of annual representation work must be done for the benefit of a 20-acre claim as for the larger claim. And eventually the work on the ditch will go in as \$500 worth of work upon each claim before we are entitled to patent therefor."

Acting in reliance upon this opinion, and believing it to be sound, Mr. Atkinson prepared location notices covering the area in question, using the names of Herbert A. Parkyn, J. H. McFarland, W. C. Johnson, W. C. Locke, H. W. Huttig, S. A. Awsumb, S. K. Atkinson and Stella M. Atkinson, with their several knowledge and consent. None of these persons had any material interest in the claims otherwise than as stockholders of the corporation, and their names were used merely for convenience, for the purpose of locating the area of land desired to be located by the company, and with the intention and understanding that said person would later quitclaim their interests to the company. There was not the slightest thought on the part of any of these persons, nor on the part of any of the officers or directors of the company, that there was anything unlawful in the methods used. The locations were made solely in pursuance of and in reliance upon the aforesaid advice of the company's counsel. None of the facts were concealed, and the location certificates were in due course placed of public record with the county recorder of Idaho City, by Mr. Atkinson.

On or about April 21, 1910, at the request of Mr. Atkinson, the locators conveyed their interests by quitclaim deed to the company, for a nominal consideration, and the deeds were in turn placed immediately of record at Idaho City. Subsequent amended locations were made to more accurately define the lines for patent purposes, and these certificates of location were also placed of record.

The company also alleges an expenditure of over \$138,000 in development, maintenance and protection of the 24 claims included in this and three other mineral applications. It claims a total expenditure of approximately \$250,000 in connection with all of its locations in the vicinity. It is also asserted that although location notices, deeds and all other papers used upon application were before the General Land Office in 1910 and 1912, no question as to the *bona fides* of the company's locations or their alleged dummy character was raised until late in the year 1918. The company prays that the contest charges be dismissed and the mineral applications passed to patent. It appears that after the answer was filed, the company's attorney suggested that the facts be stipulated as set forth in its statement and that the matter be submitted for decision without the taking of testimony. The Commissioner concluded that since the applicant company had expressed a willingness to have the case decided

upon its answer, a stipulation was not necessary and that the matter might properly be adjudicated upon the answer filed. The Commissioner thereupon decided that the company had admitted the dummy character of its locations and the mineral application was held for rejection subject to appeal.

The company has appealed and contends that it was error to hold that the charges were admitted in the answer; to reject the application on the ground of the dummy character of the locations and to find that there was any fraudulent purpose or intent on the part of the locators or applicant company. Counsel asserts that the original claims of the Oaks Mining Company were mainly 20-acre gulch claims and that the new locations were made for the purpose of conforming to legal subdivisions. It is strenuously argued that in view of the company's good faith and large expenditures, even if it did follow erroneous advice and was technically at fault, the claims should not be held bad or the application rejected and that broad, equitable principles should be applied and not harsh technical rules.

With reference to the attempted enlargement of a 20-acre placer claim, the Department has held that such a claim can not by an amended or supplemental location be expanded so as to cover 40 acres or more and that if such be attempted the result will be another and a new location. *Charles H. Head et al.* (40 L. D., 135). See also *Garden Gulch Bar Placer* (38 L. D., 28). The company or the locators can not rely on original 20-acre locations for substantial rights where such 20-acre areas were later included in locations of 160 acres or similar enlarged claims. The later locations under such circumstances must be regarded as new and independent claims. This is true even where the later enlarged location is made for the purpose of conforming to the system of public land surveys. Furthermore, the record submitted does not clearly show that any of the area embraced in the present application was covered by the Oaks Mining Company's claims or other original gulch placers.

Considering the statements contained in the company's answer, the reasonable conclusion to be drawn therefrom is that the locators were acting in the interest and for the use and benefit of the corporation and not for themselves as individuals. No locator had any interest otherwise than as a stockholder in the company. It has been held that a corporation like an individual can include in a single placer location not more than 20 acres. *Igo Bridge Extension Placer* (38 L. D., 281). In the case of the *Coalinga Hub Oil Co.* (40 L. D., 401), the syllabus reads as follows:

A corporation may not lawfully embrace in a single location under the placer mining laws more than twenty acres, either in its own name or through individuals acting in its interest and for its benefit.

That opinion affirmed the decision below in the course of which the Commissioner had stated as follows:

If the necessary money for drilling the well above referred to was advanced by the claimant company, and if location was made by its stockholders or others for its benefit, only twenty acres of the land could properly be located.

Counsel has referred to the California case of *Borgwardt v. McKittrick Oil Co.* (130 Pac., 417), which was cited and followed by this Department in its decision in the *McKittrick* case (44 L. D., 340), and urged that the present case is quite similar to that. The California court in its decision said:

We see no reason to doubt the validity of the locations of defendant's predecessors, made in the year 1899. The 16 locators located the claims solely for their own individual benefit, and not as mere agents for the benefit of some other person or of some corporation in which they had no interest. The defendant corporation, to which it was proposed to transfer the claims, was to be one in which they were to be the sole stockholders each to own one-sixteenth of the stock. As said in appellants' brief: "This is no case of dummy locators lending their names to any person or any corporation for the purpose of permitting it to acquire lands. This is a case of 16 men locating, in apparent good faith, lands within the limit of the amount allowed to them, and adopting a corporate management as an appropriate means of regulating and handling their joint interests, and each retaining, through the agency of the corporation, the exact interest in the land which he acquired under his location."

The *McKittrick* case before the Department involved a placer claim adjoining and similar to the two locations considered by the court. The claim was located on September 19, 1899. The company was incorporated November 16, 1899. The claim was conveyed to the company by deed acknowledged December 2, 1899. Charges essentially similar to those here involved were preferred against the claims. This Department held that there was nothing disclosed which would support the charge that the locations were made for the benefit of any person or persons other than the 16 locators, all of whom could have joined in the making of a location without affecting its validity. It is clearly apparent that the *McKittrick* locations were made for the individual benefit of the 16 associated locators. The company was afterwards organized and to it the claims were conveyed and stock was issued to the locators. There was no purpose or attempt to secure to the corporation illegal or excessive claims. The circumstances there disclosed are essentially different from those here involved.

In the pending case it is expressly conceded that the locators had no material interest in the claims except as stockholders of the corporation, that their names were used merely for convenience for the purpose of locating land desired by the company and that the pur-

pose and understanding was that the locators would quitclaim to the company. They did thereafter upon request execute a quitclaim deed for the recited consideration of \$1. This shows that the locators did not claim or have any personal or individual interest in the locations but that they acted solely on behalf and in the interest of the corporation. That they were stockholders in the company does not materially better their position. The corporation could not locate nor could there be located for it a lawful placer claim exceeding 20 acres in area.

The plea that the parties acted under legal advice and without the slightest thought that there was anything unlawful in the methods pursued, serves to relieve them from the stigma of actual bad faith and fraudulent purpose and intent. The acts performed, however, and the results sought to be attained were unauthorized and beyond the pale of the law. The Ninth Circuit Court of Appeals in the case of Chanslor-Canfield Midway Oil Co. *et al v.* United States (266 Fed., 145), had under consideration an oil placer claim in connection with which the names of the locators were merely used. The court entertained no doubt that there was no willful fraud on the part of the locators. Yet, it was plain that no one of them had any intent of taking up and developing the land. Although guiltless of active, positive fraud, each was charged with the knowledge that he had no rights. The location was declared to be wholly invalid.

The large expenditures claimed on behalf of the company constitute an element for consideration in connection with the asserted absence of any bad faith but such expenditures can not serve to bring within the law the locations which are outside of it. When the numerous oil placer cases are called to mind in which the legality of original locations has been considered and determined, it is difficult to perceive how the Commissioner would have been justified in deciding this case otherwise than he did.

The answer filed by the company and the briefs submitted include in addition to the mineral application hereinabove described, three other applications, namely, 012299, 012513, and 012519, Boise series, which embrace the adjacent ground similarly located. In each of those cases a memorandum decision is rendered.

After attentive and deliberate consideration of this case, the Department is not convinced that the Commissioner erred in finding the locations to be unlawful and in holding the application for rejection. Should this decision become final the mineral application will be rejected and the mineral entry based thereon will be canceled. The decision appealed from is affirmed.

GRAHAM v. METZ.

Decided March 2, 1925.

MILITARY SERVICE—HOMESTEAD ENTRY—RESIDENCE—LEAVE OF ABSENCE—CONTEST—ABANDONMENT.

The act of July 28, 1917, makes military or naval service during time of war by one who had previously made a homestead entry equivalent to the establishment and maintenance of residence for the period thereof, and where such entryman, upon his discharge, lawfully obtains leave of absence, an application to contest on the ground of abandonment will not be entertained until after the lapse of six months from the expiration of such leave.

CONTEST—CONTESTANT—HEARING—REINSTATEMENT—COMMISSIONER OF THE GENERAL LAND OFFICE.

The reinstatement and dismissal of a contest by the Commissioner of the General Land Office, without granting a hearing to the contestant, is not an act in excess of the authority of that official where, a contest having been entertained, it develops that the charge upon which the contest was based does not constitute a cause of action.

FINNEY, *First Assistant Secretary*:

On July 30, 1918, Robert Jackson Metz made homestead entry, serial 013898, for SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29, T. 44 N., R. 78 W., 6th P. M., in the Buffalo, Wyoming, land district. On October 23, 1918, he enlisted in the Army. He was discharged December 18, 1918; enlisted again October 2, 1920, and after having served during his second term of enlistment in Germany, was finally discharged.

The entryman having made application in the autumn of 1919 for leave of absence and for extension of his time to perform cultivation, the General Land Office, October 25, 1919, suspended his entry from June 16, 1919, to December 16, 1919.

On June 16, 1920, Metz filed a second application for leave of absence, in which he alleged that he had established residence on his entry June 3, 1919, and continued to reside thereon until January 20, 1920, that he had erected a habitable house and inclosed a number of acres of the entry with a fence, and had cut 740 posts for further fencing, and that said improvements were reasonably worth \$1,000. He further alleged in his said application for leave of absence that his brother, residing in Colorado, had been disabled while actually engaged in military service in France and by reason thereof was unable to work his land located near Akron, Colorado, and had asked that said applicant come and look after his farm and crop. The leave of absence applied for was granted June 16, 1920, extending from June 15, 1920, to December 15, 1920.

On August 13, 1920, Elmer J. R. Graham filed application to contest Metz's entry, in which he alleged that Metz had never at any time since date of entry established and maintained residence on said land; that for more than one year last past he had wholly abandoned the same; that said land was devoid of settlement, improvements, and cultivation, except as to a small unoccupied shack thereon; and that said entryman's said defaults had not been due to his employment in military or naval service.

It appears from the foregoing statements that, Metz having enlisted in the Army on October 23, 1918, and served under said enlistment until December 18, 1918, this amounted to the establishment of his residence on the entry, and its maintenance during the period of his service, under the act of July 28, 1917 (40 Stat., 248), and that on December 18, 1918, he was, therefore, entitled to five months' leave of absence from that date, or until May 18, 1919. Therefore, his entry was not subject to a charge of abandonment until six months and one day after May 18, 1919; but, as stated, the entry was suspended from June 16, 1919, to December 16, 1919, and was not, therefore, subject to that charge until the expiration of six months and a day from the latter date, or until June 18, 1920; so that this charge, in Graham's application to contest the entry filed August 13, 1920, would not lie, Metz having on June 15, 1920, applied for and been granted a second leave of absence. Also, it will be seen that the charge in said application to contest that the entryman had never established or maintained residence on the land is untrue; his military service having amounted in law to the establishment and maintenance of residence, as stated. Therefore, the application to contest stated no cause for action.

The Commissioner, by his decision of July 21, 1922, here under review made an order recalling and revoking his previous order of January 24, 1921, which had finally canceled Metz's entry and awarded a preference right to apply for said land to Graham, the contestant, which right he had exercised by making homestead entry 019110 for the lands involved, on June 23, 1921. The Commissioner also reinstated and thereupon dismissed the contest proceedings of Graham against Metz and allowed Graham 30 days from notice within which to show cause why his entry 019110, which was held for cancellation, should not be canceled; and held Metz's entry 013898 for reinstatement.

Graham has appealed to the Department from the said Commissioner's decision and order; and in his appeal he undertakes to show cause as required, claiming, among other things, that it was error in the Commissioner's decision to grant the relief ordered against

his contest without giving him a hearing. But in view of the fact that the contest stated no cause of action, the Commissioner's decision reinstating Graham's contest and thereupon dismissing it without a hearing, was entirely proper. The Commissioner's decision is, therefore, affirmed.

MURPHY ET AL. v. HOWARD COPPER COMPANY.

Decided March 2, 1923.

MINING CLAIM—PATENT—NOTICE—OFFICERS—DISCRETIONARY AUTHORITY—SECTION 2325, REVISED STATUTES.

Section 2325, Revised Statutes, and the departmental regulations thereunder, requiring the register, upon the filing of a mineral application, to publish notice thereof in a newspaper to be by him designated as published nearest to the land, confers upon that officer discretionary authority in making the designation, and an abuse of that authority will not be imputed where he, through the exercise of his judgment, designates a newspaper of general circulation which, although not published geographically nearest the land, is, by the accessibility, by usually traveled routes, of its place of publication, competent to give the public notice.

DEPARTMENTAL DECISIONS CITED, DISTINGUISHED AND APPLIED.

Cases of Tough Nut and Other Lode Claims (32 L. D., 359), and Northern Pacific Railway Company (32 L. D., 611), cited and distinguished; case of Pike's Peak and Other Lodes (34 L. D., 281), cited and applied.

FINNEY, *First Assistant Secretary*:

Nellie Murphy and J. S. Johnson have appealed from the Commissioner's decision dated September 22, 1922, in which their protest based on the alleged improper publication of notice in the matter of mineral application 047680 by the Howard Copper Company was dismissed for the reason that there was no abuse of discretion on the part of the register in designating the newspaper, the publication made being held proper and acceptable. This action was an affirmation of the conclusions reached by the local officers after a hearing.

On June 10, 1920, the Howard Copper Company filed its mineral application for the Copper Schist Nos. 1, 2, 5, and 6 lode mining claims, Survey No. 3645, situated in unsurveyed Secs. 30 and 31, T. 10 N., R. 2 E., G. & S. R. M., Phoenix, Arizona, land district. On October 6, 1920, mineral entry was allowed. On January 29, 1921, over three months later, Murphy and Johnson filed a protest claiming that the Copper Schist No. 2 lode was covered by their prior and valid claim, the Copper Dyke location. They filed a supplemental protest on February 19, 1921, alleging in substance that the register's notice of the company's application for patent which was published in a Phoenix paper was not published in a newspaper nearest to the claim and they alleged that Prescott was nearer to the

land than Phoenix. April 4, 1921, the Commissioner held that the only ground for protest was the matter of publication and ordered a hearing thereon. Upon appeal the Department on November 18, 1921, affirmed that action. After due notice a hearing was had. On March 10, 1922, the local officers found that there had been no abuse of discretion and that republication of notice should not be required, the then register being the successor to the one under whom the designation of the newspaper was made. The company appealed and the Commissioner's decision here challenged followed.

The record discloses that the notice of the company's mineral application was published in "Dunbar's Weekly," a State-wide publication issued at Phoenix, Arizona, by J. O. Dunbar, editor and proprietor. This paper had a circulation and was read in and about the mining camp of the claims involved. The company's mining locations are situated on Turkey Creek in the Black Canyon mining district about two miles west of a place called Bumblebee. The nearest railroad point is Turkey Creek Station, some seven miles northwest of the claims. Heavy supplies and rail freight go to that point and are hauled over a road to the claims. Bumblebee is on the State highway running between Prescott and Phoenix and about 45 miles from the former and 62 miles from the latter. Some three miles north of Bumblebee is Turkey Turnoff from which a wagon and auto road runs westward to Turkey Station about five miles distant. The only way to reach the claims by wagon or automobile is through Turkey Station. The road distance to the mines from Prescott is 48 miles by way of Blue Bell Road and through Turkey Turnoff about 52 miles, while the distance from the mine to Phoenix over the trail and road is about 64 miles and by road through Turkey Station and Turkey Turnoff about 76 miles. It is stated that the direct air-line distance or geographic distance is 29 miles to Prescott and 54 to Phoenix. The roads to Prescott from the claims are in the mountains and are circuitous with considerable grades. The road south from Bumblebee to Phoenix is direct and mostly over a flat desert country. In the mountains, snows in winter and heavy rains in the summer render the roads impassable at times. The road over the desert to Phoenix is not subject to such inconvenience and high water in the streams delays travel only a few hours at most. In passing over the road between Phoenix and Prescott, Bumblebee is considered the half-way point, particularly with regard to the time required to make the trip. The testimony shows that the elevation of Phoenix is about 1100 feet, at the claims, 2400 feet, on the divide going to Prescott, 5800 feet, and at Prescott, 5350 feet.

The United States mail reaches the vicinity of the mines by the branch railroad coming from near Prescott. The Phoenix news-

papers are sent through Prescott about 137 miles by train and thence on to the mining district over the branch railroad. The testimony shows that there are two newspapers published at Prescott and that Prescott is the county seat of Yavapai County in the southern portion of which the claims are situated. Phoenix is the State capital about four times as large as Prescott and is in Maricopa County to the south.

The Howard Copper Company, as well as three other companies operating claims in that mining district, have their offices at Phoenix. The claims are readily accessible from Phoenix and groceries and light supplies for the mines come out from there over the highway.

The evidence shows that the application for patent was presented at the local land office by the vice president and general manager of the Howard Copper Company. The clerk in charge of mineral applications and the register were present. The official land office map was consulted and the distances measured approximately by the clerk. It was concluded that as well as could be ascertained the claims were about equally distant from Prescott and from Phoenix and by the generally traveled route were more accessible from Phoenix. It was the opinion of the land office that Dunbar's Weekly had a greater circulation and was read more widely. That paper was designated for the publication. The weekly had been theretofore frequently designated for land office notices. According to the evidence, it was read especially by miners and mining people—by miners more than by any other class.

Section 2325, Revised Statutes, provides that the register shall publish a notice that application for patent has been made, for 60 days "in a newspaper to be by him designated as published nearest to such claim." Paragraph 45 of the mining regulations (49 L. D., 15, 71), specifies that the register shall publish notice in a newspaper published nearest to the claim. Paragraph 47 of the regulations reads as follows: "The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land." Section 2335, Revised Statutes, with respect to the notice for hearings as to the character of land provides for publication in terms essentially similar to those contained in section 2325.

The contention on behalf of the appellants is in substance that the law means that publication must be made in a paper published nearest the land by geographic measurements and that no discretion can be exercised by the register except where two or more papers are issued in the same town or equidistant from the land. Counsel have been heard in oral argument and exhaustive briefs have been

filed. On behalf of the protestants the question has been discussed from the historical view point and the reported cases and holdings from the time of the adoption of the mining laws of 1872 to the present have been cited and commented on.

The Department is not persuaded that the statute is iron clad and inflexible and leaves to the register no room for the exercise of his discretion and judgment in designating the medium for publication of notice. To refer for a moment to another feature of the statute the same section requires that the applicant shall post a notice in a conspicuous place on the land. He is not required at his peril to post in the *most* conspicuous place possible. If, in the exercise of good faith and fair judgment, he posts in a place that is conspicuous he comes within the statute. Under section 2334, Revised Statutes, in case of excessive charges for publication the Commissioner of the General Land Office may designate any newspaper published in the land district for the publication of mining notices and may fix the rates to be charged. In such case a possible adverse claimant may not rely upon a newspaper published in proximity to the land.

In the Instructions of August 11, 1909, relating to publication of notices generally (38 L. D. 131-132), it is expressly stated that it is not intended that geographic proximity shall be measured on an air line, but by the length of the shortest and principally traveled thoroughfare between such places and that where a register acts in a reasonable and not manifestly unfair and improper exercise of his discretion his decision will not be interfered with or disturbed.

It is manifest that the language of the statute makes the designation by the register essential. It is equally clear that in selecting the paper that official is required to exercise care, judgment, and discretion. Upon the particular circumstances and facts connected with each application and upon the available data he must act, and when he has made the designation and publication has been completed the selection made, presumptively regular and proper, should not be lightly set aside.

In the case at bar there was no attempt to prove the allegation of fraud or any improper motive on the part of the register. The designation was made after the map was consulted and the situation considered. Nothing arbitrary or capricious was done. The claims were deemed to be nearer, with respect to actual travel and accessibility, to Phoenix than to Prescott. This case is much like the case of Pike's Peak and Other Lodes (34 L. D., 281), which arose in the same land district and in which the Commissioner's decision holding against the register's designation was reversed. There it was expressly stated that the Department did not entertain the view that geographical or air-line measurements should be ap-

plied. It was held the statute contemplated the paper nearest in point of practicable accessibility—nearest by distance over the most nearly direct traversible route. The cases of the Tough Nut and Other Lode Claims (32 L. D., 359), and Northern Pacific Railway Company (32 L. D., 611), were declared not to be parallel or controlling, and it was concluded that no abuse of discretion was shown. The publication as made was sustained. In the Tough Nut case publication was in a Prescott paper at least six miles farther from the claim than the Jerome papers, and the paper selected was at all times owned and published by the then receiver of the local land office. The record strongly suggested, so it is stated in the Pike's Peak case, that the register's judgment was influenced by the receiver's ownership of the paper. In the Northern Pacific case a notice of hearing was published in a paper about 25 miles from the land while there were two papers published about 6 miles away and another about 12 miles distant, in which three latter papers the prior notice of classification was published. There the publication of notice was set aside.

The Department does not deem it essential to enter upon an extended review or analysis of the numerous reported decisions and holdings. At this late day there can be no doubt that the register acting under the statute must exercise judgment and discretion in the designation of a newspaper for the publication of the notice. One of the conditions to be considered is proximity to the claim. Under the regulations, instructions, and decisions the register is not concluded by the mere air-line distances but in reaching his determination should consider the facts and information available in order that the notice may be duly effective. Among other matters to be weighed are accessibility, the usually traveled route, the source of ordinary supplies, and other like matters. When all the facts are considered and when in the exercise of fair judgment a newspaper has been designated which is of general circulation and competent to give the public notice, it can not be said that there has been an abuse of discretion. The evidence in this case clearly brings it within the scope of the above principles.

The plea on the part of the protestants that their claimed property right in the Copper Dyke location will be lost by reason of the alleged improper publication of notice is of little merit. The protest shows that they were and for a number of years have been nonresidents of the State. There is not the remotest suggestion contained in the record that publication of the company's notice in any other paper would probably have advised them or any agent of theirs of the pendency of the mineral application and thereby enabled them to have filed an adverse claim and instituted suit in due time.

Upon the record made the local officers and the Commissioner reached concurring conclusions and held that no abuse of discretion was shown. After examining the evidence and considering the arguments of counsel the Department is convinced that those conclusions should not be disturbed.

The decision appealed from is affirmed.

MURPHY ET AL. v. HOWARD COPPER COMPANY.

Motion for rehearing of departmental decision of March 2, 1923 (49 L. D., 516), denied by First Assistant Secretary Finney, April 24, 1923.

JOHANNES HAMRE.

Decided March 19, 1923.

REPAYMENT—HOMESTEAD ENTRY—RELINQUISHMENT—ACT OF MARCH 26, 1908.

An application for repayment under the act of March 26, 1908, of moneys paid upon a homestead entry canceled on relinquishment prior to the passage of the act of December 11, 1919, must be denied under section 2 of the latter act if filed more than two years after the latter date, regardless of the fact that the land has been reentered by another and patent has not issued.

FINNEY, First Assistant Secretary:

Johannes Hamre has appealed from a decision of the Commissioner of the General Land Office dated September 29, 1922, wherein the Commissioner denied an application for repayment under the act of March 26, 1908 (35 Stat., 48), of moneys paid upon homestead entry, Helena 013128.

The records show that the entry was canceled on relinquishment October 29, 1918, and that application for repayment was filed March 25, 1922.

The Commissioner based his adverse action upon the provisions of the act of December 11, 1919 (41 Stat., 366), which limits the time for filing application for repayment under the said act of March 26, 1908, to two years from date of issuance of patent, rejection of entry, or passage of said act of December 11, 1919.

Upon this appeal it is contended that claimant is not barred by such limitation for the reason that a third party has made entry of said land and patent has not issued to him. Such contention is without merit and is a forced construction of said act as same clearly applies to the issuance of patent to claimant only.

As held by the Commissioner the claim is clearly barred by the limitations of section 2 of the said act of December 11, 1919. The

payment was made prior to the passage of said act and in such case the proviso to said section 2 requires that a request for the payment of such excess must be filed within two years after the patent has issued for the land embraced in such patent or within two years from the passage of said act as to excess payments heretofore made prior to the passage of same. It accordingly follows that it was necessary for Hamre to file his claim on or before December 11, 1921.

The decision, appealed from is affirmed.

SANTA FE PACIFIC RAILROAD COMPANY.

Decided March 27, 1923.

SELECTION—ACT OF APRIL 28, 1904—WORDS AND PHRASES.

By the use of the phrase "of equal quality" in the act of April 28, 1904, it was contemplated that there should be an even exchange, and the equality of the selected and base lands exchanged pursuant to the act must be determined in accordance with the conditions existing at the time of filing the selection.

SELECTION—COAL LANDS—EVIDENCE—ACT OF APRIL 28, 1904.

A coal classification of lands selected under the act of April 28, 1904, and of the base lands relinquished by the selector, which fixes the price of the former greatly in excess of that of the latter, although one of price, is, nevertheless, in the absence of other facts indicative of the comparative quality of the tracts, a difference in quality, unaffected by the mere geographical situation of the respective tracts with reference to a completed line of railway.

RAILROAD GRANT—COAL LANDS—SELECTION—ACT OF APRIL 28, 1904.

The fact that the grant to the Atlantic and Pacific Railroad Company, or its successors in interest, included the coal in the granted lands, does not carry the right in making an exchange of lands under the act of April 28, 1904, to select lands containing coal of greater quantity and superior quality than that contained in the base lands, inasmuch as such selection would be effected upon unequal terms.

COURT DECISION CITED AND DISTINGUISHED.

Case of Santa Fe Pacific Railroad Company v. Fall (259 U. S., 197), cited and distinguished.

FINNEY, *First Assistant Secretary*:

This is an appeal by the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office, of September 5, 1922, holding for cancellation said company's selection, serial No. 016102, filed January 3, 1912, under the act of April 28, 1904 (33 Stat., 556), for the relief of small-holding settlers, of NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 11, T. 31 N., R. 24 E., N. M. P. M., in lieu of SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, T. 15 N., R. 7 W., N. M. P. M., in the Santa Fe, New Mexico, land district.

Said act of April 28, 1904, *supra*, provides that the Atlantic and Pacific Railroad Company, or its successors in interest, after relinquishing to the United States, upon the request of the Secretary of the Interior, any section of its granted lands, any portion whereof had been occupied by a settler for 25 years next before the passage of the act, "Shall then be entitled to select in lieu thereof * * * other sections of vacant public land of equal quality * * * as may be agreed upon by the Secretary of the Interior." [Italics supplied.]

Said base land and said selected land had been withdrawn, for coal classification, from all entry, by the Secretary of the Interior, April 2, 1909, and the base land was also included in coal-land withdrawal No. 1, New Mexico, by Executive order of July 9, 1910. The selected land was restored as coal-land, with its price fixed by the United States Geological Survey at \$250 per acre, by office letter "N" of August 27, 1910; and the base land was restored as coal-land, classified at \$30 per acre, by Executive order of December 30, 1910, and office letter "N" of January 18, 1911; and each tract held such status still on January 3, 1912, when the selection was filed by the railroad company.

On October 4, 1916, the selection was held for cancellation by the Commissioner on the strength of the report of a mineral inspector that the relinquished and selected tracts were not of equal quality, the base tract being second-grade grazing-land, and the selected tract first-class grazing-land, and the coal in the selected tract being greater in quantity and of better quality than that in the relinquished tract.

Upon appeal by the railroad company to the Department, said decision was affirmed, January 13, 1917, and upon such affirmance the selection in due course was canceled and the case closed. But on April 14, 1917, the Department directed that said cancellation (and others specified) be revoked and the cases held "*in statu quo*" for the time being, unless valid adverse rights had attached. This case was accordingly reinstated, May 8, 1918.

On May 29, 1922, the United States Supreme Court held, in the two cases of Santa Fe Pacific Railroad Company *v.* Fall, Secretary of the Interior (259 U. S., 197), arising under this same section, that the railroad company's selection must be canceled or approved according to the facts known at the time of its filing.

This decision having settled the main question raised in connection with said selections, the Commissioner, September 5, 1922, rendered the decisions now under review, again holding the selection for cancellation. The railroad company has appealed to the Department.

The court decision did no more than hold, as stated above, that a selection under said act must be acted upon by the Secretary according to the facts known at the time of the selection—in other words, that the selection must be approved or canceled *as of* the date of the selection, even though actually approved or canceled on a later date, and when further information touching the quality of the lands had come to the Secretary's knowledge.

The sentence quoted, in the brief of the appellant on this appeal from the opinion of Mr. Justice Holmes in giving said decision, relates only to the facts in the case in which the decision was given, and does not militate against the general rule laid down. Applying that rule to the facts in the case here in hand, we note that more than a year prior to the filing of the selection the selected land had been classified and priced by the Geological Survey, at \$250 per acre; while one year prior to said selection the base land had been classified, by Executive order, at \$30, and this difference still obtained when the selection was filed.

This difference was one in price, but that, in the absence of other facts indicative of the comparative quality of the tracts, is a difference in quality. The mere geographical situation of the respective tracts with reference to a completed railway line becomes ineffective to rank them as "of equal quality," when they have been examined, classified and priced, and thereby shown to be of such vastly different qualities.

Neither does the fact that the railroad company's grant gave it the coal in granted lands confer upon it the right, in selecting other lands, not within the terms of the grant, as in lieu of granted lands relinquished under the act of 1904, *supra*, to take lands containing coal if because of its greater quantity and superior quality those lands, including their coal, are not "of equal quality" with the base lands relinquished.

But were the coal to be excluded from consideration and only the surface regarded, the examination had shown that the base was grazing-land of only "second-grade," while the selected was "first-class grazing-land." Here is a difference which, while somewhat indefinite, marks the lands as clearly *not* "of equal quality;" the exchange of the tracts with the Government would not, by its accepting the selection, be effected upon equal terms. An even exchange is what the act of 1904 aims at in its use of the phrase "of equal quality." Such an exchange would not be secured by the selection tendered, and it was therefore properly canceled.

The decision of the Commissioner is affirmed.

RANDBURG SILVER MINING COMPANY v. CALIFORNIA-RAND SILVER, INC., ET AL.

Decided March 29, 1923.

MINING CLAIM—ADVERSE CLAIM—PATENT—CONTEST—LAND DEPARTMENT.

While a suit is pending between an applicant for a mineral patent and an adverse claimant, the Land Department is precluded by section 2326, Revised Statutes, as amended by the act of March 3, 1881, from entertaining a contest by a third party, alleging discovery, against either of the parties litigant on the ground that both had failed to comply with some essential requirement of the mining laws.

FINNEY, *First Assistant Secretary:*

This is an appeal by the Randsburg Silver Mining Company from the decision of the Commissioner of the General Land Office of August 22, 1922, declining to order a hearing on the protest filed by said company April 25, 1922, against the application 07040, filed July 15, 1921, by the California-Rand Silver, Inc., a corporation, for patent to the Uranium Nos. 7 and 10 lode mining claims, survey No. 5480, situated in section 6, T. 30 S., R. 41 E., M. D. M., Independence land district, California, and the adverse claim of R. P. Bray on the basis of the conflicting Silver lode mining claim, filed September 19, 1921, against said application, during the publication period, on which adverse suit was seasonably instituted and is still pending.

The protest of the appellant is based on the charge that neither the applicant nor the adverse claimant had made a discovery within the limits of the ground included in the locations above named, and that the appellant had after the expiration of the publication period discovered mineral within said conflict area and had located a portion of the ground as the Coyote No. 2 lode. The Commissioner's action is predicated on the ground that so long as the adverse suit between the applicant and the adverse claimant is pending the Department is barred by the provisions of section 2326, Revised Statutes, from taking any steps affecting the application until the controversy between the applicant and the adverse claimant shall have been settled by the court having jurisdiction thereof or the adverse claim waived.

The Commissioner's ruling is clearly in accord with the provisions of said section 2326, which prescribes that:

Where an adverse claim is filed during the period of publication, * * * all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

Moreover, it is provided by the act of March 3, 1881 (21 Stat., 505):

That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not

be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

Speaking of the act last cited the Supreme Court, in *Perego v. Dodge*, 163 U. S., 160, 167-8, said:

Its manifest object was to provide for an adjudication in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the land department, and the object of the amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either.

Commenting upon the provisions of said act Snyder, in his work on mines in section 727, says:

The judgment in an adverse suit should be sufficient upon its face to enable the party in whose favor it is rendered to take it to the land office and have patent issued upon it, and to that end it should correctly describe the claim to which the successful party is entitled, including the area in conflict. (*Becker v. Pugh*, 17 Colo. 243, 29 Pac. Rep. 173; *Rosenthal v. Ives*, 2 Idaho, 244, 12 Pac. Rep. 904; R. S. U. S., Sec. 2326.) It should also show the party to be entitled to the area in conflict by virtue of a prior location of his claim and a substantial compliance with all the requirements of the federal and state statutes and local rules. (*McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. Rep. 652.) And all the facts constituting a valid location, such as the citizenship of the party, the discovery of minerals, etc., should be expressly found whether admitted in the pleadings or not. (*Rosenthal v. Ives*, *supra*; *Jackson v. Roby*, 109 U. S. 441; *Lee Doon v. Tesh*, 68 Cal. 43, 8 Pac. Rep. 651; *McGinnis v. Egbert*, *supra*.) Where the case is tried before a jury, the court should give the jury explicit instructions upon all points essential to entitle the successful party to recover in the action. A mere general verdict in favor of either party for the possessory right, as against the other, but not showing that he is entitled to recover by virtue of prior appropriation and compliance with the law, is not sufficient. (*Manning v. Strehlow*, 11 Colo. 451, 18 Pac. Rep. 625; *McGinnis v. Egbert*, *supra*; *Burke v. McDonald*, 2 Idaho, 646, 33 Pac. Rep. 49.) In the last case the reason of the rule is thus stated: If, therefore, a judgment is sufficient which shows only, as in this case, the title to be in the successful party as against his opponent, it might frequently happen that patent would issue to a party who was an alien, or who had never discovered a vein, or in other particulars had failed to comply with the law of congress. (See also *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. Rep. 1019-20; *Craig v. Thompson*, 10 Colo. 517, 16 Pac. Rep. 24; *McCaig v. Bryan*, 10 Colo. 309, 15 Pac. Rep. 413.)

In view of the provisions of the act of 1881, and of what is thus declared to be the duty imposed thereby upon courts, it is manifest that pending adverse suits the Department would in no event be

warranted in entertaining a contest against both parties litigant in such a proceeding on the charge that neither would be entitled to a patent to the area in controversy on the ground that both have failed to comply with some essential requirement of the mining laws.

The decision appealed from is accordingly affirmed.

It is suggested, however, that the appellant might, should he so desire, and any available means for so doing be found, bring the matters alleged in his protest directly to the attention of the court in the pending adverse suit involving the land in question.

CURTIS C. FELTNER.

Decided April 6, 1923.

STOCK-RAISING HOMESTEAD—TIMBER AND STONE ENTRY.

One who has made an entry for the full area permitted by the stock-raising homestead act is thereafter debarred from making a timber and stone entry, or any other form of entry under the agricultural land laws.

FINNEY, First Assistant Secretary:

Curtis C. Feltner has appealed from a decision of the Commissioner of the General Land Office dated January 6, 1923, rejecting his application to purchase under the so-called timber and stone law lot 5, Sec. 3, T. 34 N., R. 108 W., 6th P. M. (34.74 acres), Evanston, Wyoming, land district.

The application was filed June 20, 1922, and was rejected because the applicant had on January 14, 1921, made entry under the stock-raising homestead act for 640 acres in Secs. 28 and 33, said township.

The act of August 30, 1890 (26 Stat., 371, 391), limits the amount of land that can be acquired under the agricultural land laws to 320 acres. At the date of said act, entries under the homestead law were limited to 160 acres, and it was then possible to make a homestead entry for 160 acres and an entry under the timber and stone law, the desert-land law, or the preemption law for 160 acres.

When the stock-raising homestead act was enacted, the act of August 30, 1890, was necessarily modified, and it thereafter became possible for a qualified person who had entered 160 acres under other laws (timber and stone, desert land, or preemption) to make a stock-raising homestead entry for 640 acres. But one who, like Feltner, has made an entry for the full area permitted by the stock-raising homestead act can not thereafter make further entry under any of the agricultural land laws, for the reason that he can not make affidavit that he has not already entered 320 acres.

The decision appealed from is affirmed.

HOMESTEAD ENTRIES UNDER KINKAID ACT—ADDITIONAL ENTRIES.**INSTRUCTIONS.****DEPARTMENT OF THE INTERIOR,***Washington, D. C., April 7, 1923.***REGISTER, UNITED STATES LAND OFFICE,****LINCOLN, NEBRASKA:**

The Commissioner of the General Land Office has forwarded to the Department your letter of March 7, 1923, in which you refer to the departmental decision in the case of Earl A. Mann (49 L. D., 286), and request instructions on the matters hereinafter discussed.

It is apparent from your inquiries that you have heretofore failed to take cognizance of section 2 of the act of March 2, 1907 (34 Stat., 1224), the last phrase of which (referring to the so-called Kinkaid Act) reads as follows: "and all homestead entries hereafter made within the territory described in the aforesaid act shall be subject to all the provisions thereof."

On April 27, 1907 (35 L. D., 542), the Department approved instructions under said act of 1907, but the last word of the quoted phrase was treated as "hereof," resulting in a failure to give proper effect to said section 2. The error was carried into the revised regulations of October 28, 1908 (37 L. D., 225), and the revision of June 7, 1910 (39 L. D., 18). It was not until January 19, 1912, that the Department correctly quoted said section 2, but in the revised regulations approved that date (40 L. D., 369) nothing was said as to the effect thereof. As a result, local officers in the Kinkaid territory allowed entries for 160 acres or less upon payment of less fees and commissions than are provided for by the Kinkaid Act, and the commutation of such entries was permitted. The General Land Office has passed the entries to patent. As such entrymen proceeded under the departmental interpretation of the act of 1907, entries already made for 160 acres or less in the Kinkaid territory will be allowed to proceed to patent as if section 2 of the act of 1907 had not been enacted, but such action will not be treated as conferring on the entrymen any additional rights under the Kinkaid Act.

From and after the receipt hereof by you, you will be governed by the following:

1. All homestead entries (other than entries under the stock-raising homestead act) for lands in the so-called Kinkaid territory will be governed by the provisions of the Kinkaid Act as amended. At the time an application is made, \$14 should be collected as fee and commissions, and at the time of final proof, \$4, without regard to the area embraced in the entry.

2. Section 7 of the act of May 29, 1908 (35 Stat., 465), amended section 2 of the Kinkaid Act so as to bring the right of additional entry of contiguous land under said act up to the date of the amendment; hence, an entry made after March 2, 1907, but prior to May 29, 1908, for less than 640 acres would be proper basis for additional entry under said section 2.

3. A person who, since May 29, 1908, made an entry for land within the territory, of any area, has exhausted his right under the Kinkaid Act, except that, if contiguous lands become vacant, he can amend his unperfected entry to embrace such lands to the limit of 640 acres; or, if the entry has been perfected and embraces less than 160 acres, he can make an additional entry of contiguous land under section 2 of the act of April 28, 1904 (33 Stat., 527), or he can make an additional entry under section 6 of the act of March 2, 1889 (25 Stat., 854), either within or outside the Kinkaid territory. If the additional entry be made for land within the territory, the fee and commissions exacted by the Kinkaid Act must be collected, and the final proof must comply with the provisions of the Kinkaid Act.

4. A person who has, at any time, entered under the homestead laws less than 640 acres *outside* the Kinkaid territory may make an entry under the first proviso to section 3, provided he is not the owner of more than 160 acres of land in the United States acquired under other than the homestead law.

5. A person who made a homestead entry in the Kinkaid territory prior to June 28, 1904, is entitled to the benefits of the first proviso to said section 3, but said proviso can not be invoked by a person who has already had the benefit of the Kinkaid Act.

E. C. FINNEY,

First Assistant Secretary.

EXCHANGE OF PRIVATELY OWNED LANDS IN THE LINCOLN NATIONAL FOREST FOR PUBLIC LANDS ELSEWHERE IN OTERO COUNTY, NEW MEXICO.

INSTRUCTIONS.

[Circular No. 888.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., April 9, 1923.

REGISTERS AND RECEIVERS,

LAS CRUCES AND ROSWELL, NEW MEXICO:

The act of February 14, 1923 (42 Stat., 1245), entitled: "An Act Providing for the acquirement by the United States of privately

owned lands situated within certain townships in the Lincoln National Forest, in the State of New Mexico, by exchanging therefor lands on the public domain also within such State," reads as follows:

That whenever the owner or owners of any privately owned lands, situated within township eighteen south, range eleven east, or townships fifteen, sixteen, seventeen, eighteen, and nineteen south, range twelve east, New Mexico principal meridian, within the county of Otero and State of New Mexico, and within the present boundaries of the Lincoln National Forest, shall submit to the Secretary of Agriculture a proposal for the exchange of said lands for lands upon the public domain situated in the county of Otero and State of New Mexico, and such Secretary shall be of opinion that the acquirement of the same by the United States for national forest purposes would be beneficial thereto, he is hereby authorized and empowered to transmit to the Secretary of the Interior such offer so made to him, together with such recommendations as he may see proper to make in connection therewith, together with a description of the property included in such offer and an estimate of the commercial or other value thereof, intrinsically or otherwise; and if he shall recommend the acquirement of the same by the United States under the provisions hereof, then, and in such event, the Secretary of the Interior shall be, and hereby is, authorized and empowered in his discretion to enter into and conclude negotiations with such owner or owners thereof and in exchange for such designated privately owned lands, and upon conveyance by the owner or owners thereof to the United States by a good and sufficient deed, to cause to be patented to such owner or owners such acreage of nonmineral, non-irrigable grazing lands not suitable for agricultural purposes except for raising grass, situated within the said county of Otero, State of New Mexico, of equal total value, as near as he may be able to determine, to the lands so conveyed to the United States.

SEC. 2. That any lands, conveyed to the United States under the provisions of this Act shall, upon acceptance of the conveyance thereof, become and be a part of such Lincoln National Forest.

SEC. 3. That before any exchange of lands as above provided is effected, notice of such exchange proposal, describing the lands involved therein, shall be published once each week for four consecutive weeks in some newspaper of general circulation in the county in which such lands so to be conveyed to the United States are situated.

You will be governed in your consideration of cases involving land within your respective districts coming within the purview of said act by the SUOISIAOJ of Circular No. 863 (49 L. D., 365), in re consolidation of national forests, dated October 28, 1922, so far as may be applicable.

It will be observed that the selection may be of "nonmineral, non-irrigable grazing lands not suitable for agricultural purposes except for raising grass," situated within said County of Otero, State of New Mexico, of equal total value as near as he may be able to determine to the lands so conveyed to the United States.

Under authority of the title to the act, the exchange is to be made for lands on the public domain. The law requires the Secretary of

Agriculture to submit with his recommendation an estimate of the commercial or other value of the lands offered for exchange. Upon receipt of such recommendation and estimate in the General Land Office, the local office will be advised thereof and proceedings had in accordance with said Circular No. 863. Upon receipt of the formal application in this office examination by the Field Service will be directed with a view to ascertaining the value of the selected land and its worth as compared with the lands relinquished.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

STATE OF ARIZONA AND ARIVACA LAND AND CATTLE COMPANY

Decided April 14, 1923.

SCHOOL LAND—INDEMNITY—SELECTION—MINERAL LANDS—WAIVER—HEARING—INTERVENTION.

Where a State, the real party in interest, waives its right to apply for a hearing and concedes the contention of the United States that the lands selected by it under its school indemnity grant are not subject to such selection because of their mineral character, a lessee from the State, between whom and the United States there is no privity of interest, is not entitled to intervene and demand a hearing involving the character of the lands.

FINNEY, *First Assistant Secretary:*

The Arivaca Land and Cattle Company, lessee from the State of Arizona of lands selected by the State as indemnity under its school land grant, has appealed from the decision of the General Land Office of May 23, 1922, denying its petition to be accorded the status of an intervener and, as such, afforded opportunity, at a hearing, to submit testimony to establish its claim that the land involved (the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ and SE. $\frac{1}{4}$, Sec. 29, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 30, T. 20 S., R. 10 E., G. & S. R. M.) is nonmineral in character.

It appears from the record that the State of Arizona filed selection of these lands on March 12, 1918. By General Land Office letter "FS", dated December 30, 1921, the State was notified that charges had been filed against the validity of the selection on the ground that the land is mineral in character, containing valuable deposits of gold, and was known to be such on or before March 12, 1918, the date the selection was perfected and when the State's right would otherwise have vested.

April 1, 1922, John W. Bogan, president of the Arivaca Land and Cattle Company, as lessee of this and other land from the State,

filed a petition to intervene, denying the mineral character of the land, and requesting opportunity to submit testimony in denial of the charge that the land is mineral in character.

On April 5, 1922, the State, by its Land Commissioner, made reply as follows to the Government's charges:

Comes now the State of Arizona, by the State Land Department, and in the above entitled causes and matters, says:

That it disclaims any interest in the matter of the mineral or non-mineral character of the lands involved therein, and that it is willing to concede to the claims of the United States of America that said lands were mineral in character and known to be such at the time of the filing by the State of its applications to select same as State Lands.

Dated April 5, 1922, Phoenix, Arizona.

By its decision rendered May 23, 1922, it was held by the General Land Office:

Without undertaking to determine whether in any case a lessee would be recognized as a proper party in interest, it appears herein that the period of the lease would expire before the proceedings could reasonably be terminated if hearing were had, and the lease was entered into with full knowledge of and subject to the incomplete title of the State. Under these conditions, and the State, the real party in interest, having waived its right to apply for a hearing, the said company cannot be recognized as having such an interest as to entitle it to a hearing.

The lessee from the State has appealed to the Department from the above decision, and in support of said appeal, as well as appeals in nine other similar cases in which the same parties are interested, a common brief has been filed.

Certain matters appear to the Department determinative of this case, and in its decision it will accordingly confine itself to these. They are as follows:

Such title as the lessee has, if any, is purely derivative, being deraigned from the lessor, the State of Arizona. If *it* received no title, it could convey none.

Following careful examination as to the character of the land as mineral or nonmineral, and whether known to be mineral at the time its rights would have vested, the State's right to the land is challenged upon grounds which, unless disproved, preclude its taking title.

The State, with admitted notice that its title is thus challenged, and with knowledge that in order to obtain patent to the land involved it must refute the charges so made, declines to join issue, and instead formally enters a disclaimer of interest, and announces that it is willing to concede that the lands were known to be mineral in character at the time of the filing by the State of its application to

select. The Department is not informed that the State has indicated in any way its desire or willingness that its name be even formally used by the petitioner in a hearing regarding the character of the land.

The lessee from the State leased therefrom at its (the lessee's) risk. Due examination would have disclosed that the State's claim had not ripened into title, and might never do so.

The Land Department has done nothing which estops it from denying the claim of the lessee, nor was it in any way a party to the lease; privity is lacking.

The Land Department is not acting arbitrarily in this matter. It has no reason to doubt the mineral character of the land.

In the opinion of the Department, the decision appealed from is firmly grounded in the basic principles of the law. It is accordingly affirmed.

ERNEST F. STEMBRIDGE.

Decided April 14, 1923.

REPAYMENT—FEES AND COMMISSIONS—ACT OF DECEMBER 11, 1919.

The proviso to section 1 of the act of December 11, 1919, which prescribed that applications for repayment of purchase moneys and commissions paid in connection with rejected public land entries must be filed within two years from the passage of the act or from the date of rejection, is applicable to the various heirs or distributees of a deceased entryman individually, and the filing of an application by one heir or distributee within the required time does not stay the running of the statute as against the others.

COMPTROLLER GENERAL'S DECISION CITED AND CONSTRUED.

Decision of the Comptroller General (2 C. G. D., 379), cited and construed.

FINNEY, *First Assistant Secretary:*

Ernest F. Stembridge, as one of the heirs of Houston A. Stembridge, has appealed from a decision of the Commissioner of the General Land Office dated December 17, 1922, denying repayment of moneys and commissions paid in connection with timber and stone application, Little Rock 013784.

It appears that the timber and stone application was rejected on relinquishment on July 19, 1920, and the application for repayment was executed August 19, 1922, more than two years after such rejection, and the Commissioner denied the application by virtue of a decision of the Comptroller General, dated December 14, 1922 (2 Comp. Gen. Dec., 379), construing the provisions of the act of December 11, 1919 (41 Stat., 366).

The record discloses that the widow of the entryman filed application for repayment of her portion of the amount involved in due time and that her claim was allowed by the Commissioner. It is contended upon this appeal that the filing of an application by one heir for repayment operates to save the rights of the other heirs and to stop the running of the statute as to the claim of the other heirs. The proviso to section 1 of said act of 1919, requires:

That such person or his legal representatives shall file a request for the repayment of such purchase moneys and commissions within two years from the rejection of such application, entry, or proof, or within two years from the passage of this act as to such applications, proofs, or entries, as have been heretofore rejected.

The Comptroller General held in substance that the plain purpose of this proviso was to limit the time within which requests for repayment of the purchase money and commissions could be filed; that under the law the repayment can be made only upon the request of the person entitled to receive it, and such request can be considered only when filed within the time stipulated in the statute; that, if, upon the death of an entryman, the purchase money and commissions become payable to more than one person as distributees of his estate, payment is authorized to such distributees only as filed a request therefor within the prescribed time. In accord with such decision, it must be held that the filing of an application by one heir within the required time does not prevent the running of the statute with respect to other heirs who fail to make application within the time specified by said act.

It, however, appears from the record that on February 13, 1922, within the prescribed time, Stenbridge made informal application for the payment of this money in the form of a letter from his attorney to the local officers. Such letter should properly have been considered as an application for repayment, but instead of so considering same the local officers treated it as a request for information. It is believed that the interests of justice demand that it should be treated as a request for repayment, and as such the claim would not be barred by the statute.

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

REINSTATEMENT OF CANCELED ENTRIES—PARAGRAPH 8 OF REGULATIONS OF APRIL 20, 1907, GOVERNING RECOGNITION OF AGENTS AND ATTORNEYS BEFORE DISTRICT LAND OFFICES, AMENDED.

INSTRUCTIONS.

[Circular No. 889.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 16, 1923.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Your attention is invited to 15 L. D., 569, in which it was held:

An application for the reinstatement of a canceled entry, while pending, operates to reserve the land covered thereby from other disposition.

Applications for reinstatement of canceled entries must be filed in the proper district land office, and must be executed by the entryman, his heirs, legal representatives, assigns, or transferees, as the case may require. If made by other than the entryman, such petition for reinstatement must fully set forth the nature and extent of petitioner's interest in the land, how acquired, and the names and addresses of any other person or persons who have or claim an interest therein. All petitions for reinstatement should set forth all facts, and state clearly and concisely upon what grounds reinstatement is urged. Such petition must be sworn to before some officer qualified to administer oaths, and having an official seal, or, if sworn to before an officer who does not have an official seal, his official acts must be attested by some proper officer.

Applications for reinstatement of canceled entries executed by agents and attorneys will not be recognized. Your attention is called to the regulations governing the recognition of agents and attorneys before district land offices, approved April 20, 1907 (35 L. D., 534). Paragraph 8 thereof is hereby amended to read as follows:

Every attorney must, either at the time of entering his appearance for a claimant or contestant, or within ten days thereafter, file written authority for such appearance, signed by said claimant or contestant, and setting forth his or her present post-office address. Upon a failure to file such written authority, it is the duty of the register and receiver to no longer recognize him as attorney in the case.

Whenever application for reinstatement of a canceled entry is filed you will transmit same with the next returns to this office, together with report as to the present status of the land involved. Thereafter you will not permit disposition of the land until the application for reinstatement is finally adjudicated. All subsequent applications should be held suspended unless on account of some

special reason you should deem it proper to forward same to this office to be considered in connection with the pending application for reinstatement. If a junior application be forwarded, report should accompany it, setting forth the reasons for which you deemed it advisable to transmit same.

Should an application for reinstatement be filed not conforming to the foregoing, you will promptly advise the party thereof, calling his attention to the defects and allow fifteen days in which to file a proper application. At the proper time you will make report setting forth what action the applicant has taken.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

EXCHANGE OF PUBLIC LANDS IN MONTANA FOR PRIVATELY OWNED LANDS IN THE GLACIER NATIONAL PARK.

INSTRUCTIONS.

[Circular No. 890.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 23, 1923.

CHIEF OF FIELD DIVISION,
HELENA, MONTANA,
SUPERINTENDENT OF GLACIER NATIONAL PARK,
BELTON, MONTANA,
REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES, MONTANA:

The act of February 28, 1923 (42 Stat., 1324), entitled: "An Act To authorize an exchange of lands with owners of private land holdings within the Glacier National Park," reads as follows:

That the Secretary of the Interior, for the purpose of eliminating private holdings of land within the Glacier National Park, is hereby empowered, in his discretion, to obtain for the United States the complete title to any or all of the lands held in private ownership within the boundaries of said park by accepting from the owners of such privately owned lands complete relinquishment thereof and by granting and patenting to such owners, in exchange therefor, in each instance, like public land of equal value situate in the State of Montana, after due notice of the proposed exchange has been given by publication for not less than thirty days in the counties where the lands proposed to be exchanged or taken in exchange are located.

Sec. 2. That the value of all patented lands within said park, including the timber thereon, offered for exchange, and the value of other lands of the United States elsewhere situate, to be given in exchange therefor, shall be ascertained in such manner as the Secretary of the Interior may direct; and

the owners of such privately owned lands within said park shall, before any exchange is effective, furnish the Secretary of the Interior evidence satisfactory to him of title to the patented lands offered in exchange; and lands conveyed to the Government under this act shall be and remain a part of the Glacier National Park.

Applications.—Applications for an exchange under the act must be filed in the local land office having jurisdiction over the land selected, the application describing the land to be conveyed as well as the land selected, according to Government subdivisions. Nothing less than a legal subdivision may be surrendered or selected. The selected land must be entirely within the State of Montana. Selections must be made by the owner of the land relinquished or in his name by a duly authorized agent or attorney in fact, and when made by an agent or attorney in fact proof of authority must be furnished. The application must be accompanied by the necessary relinquishment, abstract of title, affidavits, and fees, as set forth in Circular No. 863, dated October 28, 1922 (49 L. D., 365), entitled: "Consolidation of National Forests," and you will be governed thereby in acting on the applications, noting on your records that the selection is made under the act of February 28, 1923 (Public No. 453).

Action by Register and Receiver.—If a selection appears regular and in conformity with the law and these regulations the selection will be referred by the register and receiver to the chief of field division for field examination of both the selected and the base lands to determine whether or not their value is equal within the meaning of this act, with reference to their characteristics as mineral, prairie, grazing, agricultural, timber, desert land or otherwise, as the case may be, and to submit report with specific recommendation. A representative of the field division will cooperate with a representative of the superintendent of the Glacier National Park in the examination and valuation of the base lands within the Glacier National Park. Should the report of the chief of field division be adverse to the applicant opportunity will be given the party in interest to amend his application to conform with the recommendation of the field division by the register and receiver of the United States land office in which the application was filed.

Publication of Notice.—If the Chief of field division recommends the approval of the exchange and the selection appears regular and in conformity with the law and these regulations, the register and receiver will notify the applicant and require him, within thirty days from receipt of notice, to begin publication of notice of his application in accordance with said Circular No. 863, and in due time to submit proof thereof.

Protests.—Protests will be disposed of as provided in said Circular No. 863.

Action on the Application.—Should no objections appear on your records, you will certify the condition of the record on the application and will promptly transmit the original application and accompanying papers to this office by special letter.

Upon receipt of an application in the General Land Office the same will be examined at as early a date as practicable and if found defective an opportunity will be given the parties in interest to cure the defects, if possible. If the selection appears regular and in conformity with the law and these regulations the selection, with the record, will, in the absence of objections, be transmitted to the Secretary of the Interior with appropriate recommendation.

If the Secretary decides that the application should be allowed, the applicant will be required to have his relinquishment recorded in the manner prescribed by the laws of the State of Montana and to have the abstract of title extended down to and including the date the deed of relinquishment or conveyance was recorded.

If the Secretary be of the opinion that further evidence as to value and character of land involved is necessary, he may institute such inquiry as he may deem advisable.

The Secretary of the Interior may, in the exercise of his discretion withhold his approval from any application made under the provisions of this act although the applicant may have complied with the rules and regulations herein prescribed.

WILLIAM SPRY,

Commissioner, General Land Office.

Concurring:

ARNO B. CAMMERER,

Director, National Park Service.

Approved:

E. C. FINNEY,

First Assistant Secretary.

SUSPENSION OF FINAL PROOFS ON HOMESTEAD ENTRIES TO AWAIT NATURALIZATION OF ENTRYMEN.

INSTRUCTIONS.

[Circular No. 891.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 23, 1923.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

The Commissioner of Naturalization, Department of Labor, has advised this office that it frequently happens that homestead entry-

men who have delayed applying for admission to citizenship until the lifetime of their entries has almost expired have been able to influence hasty action by the courts by stating that unless they secure evidence of naturalization their entries will be canceled.

The Naturalization Service, which objects to favorable action on an application of a foreign-born for American citizenship before the applicant has been instructed in the principles of our Government, is desirous of this office taking such action as will assure homestead entrymen who are acting in good faith that their entries will not be canceled merely because they have not been admitted to citizenship prior to the expiration of the statutory life of their entries.

You are therefore instructed as follows:

Where final proof on a homestead entry has been submitted by a person who has not received a certificate of naturalization, but whose application therefor is pending in court, you will, should such proof be found otherwise satisfactory, advise the claimant that the proof will be suspended to await action on his application for admission to citizenship. The claimant should be also advised that with a certified copy of his certificate of naturalization, when issued, should be filed a new final affidavit and an affidavit, corroborated preferably by his final-proof witnesses, showing what use he has made of the land since the date of the final proof, upon receipt of which, if all be found satisfactory, final certificate will issue.

In the event an entryman seeks time beyond the statutory life of his entry within which to submit final proof, on the ground that he is unable to furnish evidence of his admission to citizenship, you will require him to take the proper steps, within thirty days from notice, looking to the submission of final proof, under penalty of cancellation of the entry, and with such proof to submit a showing as to his citizenship status. Should it be made to appear that an application for admission to citizenship is pending, you will proceed as above directed; if none, you will advise the party that he should at once apply for admission and inform you that he has done so, whereupon the proof, if otherwise satisfactory, will stand suspended for such reasonable time as may be needed to complete the citizenship proceedings, and furnish the evidence specified in the preceding paragraph.

Final proof so suspended should be forwarded with your regular returns with a copy of your letter to the claimant.

In any case where you are in doubt as to the proper course of action, you will forward the papers to this office for consideration, notifying the claimant of your action.

Approved:

E. C. FINNEY,

First Assistant Secretary.

WILLIAM SPRY,
Commissioner.

NORTHERN PACIFIC RAILWAY COMPANY.

Decided April 23, 1923.

RAILROAD LAND—SELECTION—FORT ASSINIBOINE MILITARY RESERVATION—RESTORATIONS—STATUTES.

The act of April 18, 1896, which restored to the public domain those lands formerly in the Fort Assiniboine Military Reservation, Montana, and made them subject to disposal under the laws specifically named therein, did not have the effect of reserving the lands from the operation of further legislation, and they became, therefore, upon the passage of the act of March 2, 1899, subject to selection by the Northern Pacific Railway Company.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Northern Pacific Railway Company (37 L. D., 408), cited and applied.

FINNEY, *First Assistant Secretary*:

The Northern Pacific Railway Company has appealed from a decision of the Commissioner of the General Land Office dated October 4, 1922, holding for cancellation as to lots 1 and 2, Sec. 4, T. 27 N., R. 15 E., M. M., Havre, Montana, land district, its selection list under section 3 of the act of March 2, 1899 (30 Stat., 993), filed December 28, 1916.

The Commissioner held that the tract described was opened to specified classes of entries under the act of April 18, 1896 (29 Stat., 95), and that the classes specified did not include the selection list under consideration.

The tract involved was formerly a part of the Fort Assiniboine Military Reservation, created by Executive orders of March 4, 1880, and June 16, 1881. On May 2, 1888, the President modified said reservation and established a post reservation and a hay reservation. The tract here involved was within the limits of the post reservation. By Executive order of October 9, 1891, a portion of the post reservation, including the tract involved, was turned over to this Department for disposal under the act of July 5, 1884 (23 Stat., 103).

By the act of April 18, 1896, *supra*, Congress provided:

That all lands which have been or may hereafter be excluded from the limits of the Fort Assiniboine Military Reservation in the State of Montana shall be open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the town-site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands, and shall not be subject to sale under the provisions of any act relating to the sale of abandoned military reservations: *Provided*, That if the entire reservation be abandoned for military purposes this Act shall not apply to an area one mile square embracing the Government buildings at Fort Assiniboine.

In the case of Northern Pacific Ry. Co. (37 L. D., 408), the Department discussed the act of May 1, 1888 (25 Stat., 133), restoring

lands which were formerly a part of the reservation established for the Gros Ventre, Piegan, and other Indians, the material part of which act is similar to the act of April 18, 1896, *supra*, so far as the class of entries mentioned is concerned. The Department there held:

It can not be said that the act of 1888 operated to reserve the lands. On the contrary, the act was passed for the purpose of releasing the lands from a state of reservation and restoring them to the public domain. The only existing laws applicable to said lands were those mentioned in the act of 1888. At the same time, however, the lands became a part of the unsurveyed public domain, and clearly subject to such further legislation as Congress might see fit to enact.

The act under which the selection was made by the railway company was enacted subsequently to the act of 1896, *supra*, and the tract involved is properly subject to selection by the railway company thereunder.

The decision appealed from is therefore reversed.

APPLICATION OF THE ACT OF JUNE 16, 1880, TO REPAYMENT IN CASES WHERE DOUBLE MINIMUM EXCESS HAS BEEN PAID.

Instructions, April 24, 1923.

RAILROAD GRANT—WITHDRAWAL—VESTED RIGHTS.

A grant of lands to a railroad did not become fixed and attached until the map of definite location had been filed, and until then the mere filing of a map of general route, although followed by a withdrawal, did not impress the odd sections with a double minimum price.

REPAYMENT—ACTS OF JUNE 16, 1880 AND MARCH 26, 1908—STATUTES.

The act of March 26, 1908, the purpose of which was to afford relief in a class of cases wherein repayment was not theretofore authorized, was merely supplemental to and did not repeal or modify the act of June 16, 1880.

REPAYMENT—HOMESTEAD ENTRY—RAILROAD GRANT—WITHDRAWAL.

Repayment may be properly made under the last clause of section 2 of the act of June 16, 1880, to one who paid double-minimum excess upon an entry within the limits of a withdrawal on general route when it is determined upon the filing of the map of definite location that the lands entered are not within the railroad grant.

REPAYMENT—ACTS OF JUNE 16, 1880 AND DECEMBER 11, 1919—STATUTES.

The limitation contained in the proviso to section 2 of the act of December 11, 1919, is applicable to claims for repayment under the last clause of section 2 of the act of June 16, 1880.

FINNEY, *First Assistant Secretary:*

I have before me for consideration your [Commissioner of the General Land Office] memorandum of December 29, 1922, in which you request the views of the Department on the question as to whether

or not repayment may be made under the provisions of the last clause of section 2 of the act of June 16, 1880 (21 Stat., 287), hereinafter referred to as the act of 1880, in cases where double-minimum excess has been paid upon an entry within the limits of a withdrawal on general route of a railroad, map of definite location never having been filed and the railroad never having been constructed.

You call attention to the fact that if such claims can properly be presented under that act, it provides no limitation as to the time within which they can be filed, but that if they can only be prosecuted under section 2 of the act of March 26, 1908 (35 Stat., 48), hereinafter referred to as the act of 1908, they would be barred within the limitations provided in the act of December 11, 1919 (41 Stat., 366), hereinafter referred to as the act of 1919.

The last clause of section 2 of the act of 1880 provides—

In all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

Section 2 of the act of 1908, as amended by the act of 1919, provides—

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives: *Provided*, That such person or his legal representatives shall file a request for the repayment of such excess within two years after the patent has issued for the land embraced in such payment, or within two years from the passage of this Act as to such excess payments as have heretofore been made.

In its interpretation of the last clause of section 2 of the act of 1880 it has heretofore been uniformly ruled by the Department that the proper construction of said section makes the condition at the time of the entry the criterion in determining whether repayment should be made under said section, and that if at such time the land entered was embraced within a withdrawal upon the map of general route of a railroad, the land was properly rated as double-minimum land and repayment was not warranted, notwithstanding the fact that the portion of the grant within which the tract is situated was subsequently forfeited. See Byron Allison (19 L. D., 458); Luretta R. Medbury (25 L. D., 308); James S. Elliott (25 L. D., 309); William F. Brown (35 L. D., 177). The Medbury case, *supra*, was carried to the United States Supreme Court, which upheld the view of the Department. See *Medbury v. United States* (173 U. S., 492, 500). This case, however, can not be considered as decisive of the question propounded by you as in it the map of definite location had

been filed, and it does not appear that the question presented involving repayment under the act of 1880 of excess paid upon an entry within the limits of a withdrawal on map of general route has ever been decided by said court.

The act of 1908 was merely supplemental to the act of 1880, and it was not intended by such act to repeal or modify the earlier act. An appropriation is still being made by Congress to provide for cases arising under such earlier act. The object of the act of 1908 was to afford relief in a class of cases wherein repayment was not theretofore authorized. See Joseph Gibson (37 L. D., 338). Probably in view of the departmental interpretation of section 2 of the act of 1880, claims such as the one here in issue have been presented under the act of 1908 as excess payments and have been so considered and dealt with by the Department. However, in view of recent decisions of the United States Supreme Court, it is my opinion that the departmental construction of section 2 of the act of 1880, heretofore prevailing, should no longer be followed or adhered to. In construing the act of 1908 in connection with the act of July 2, 1864 (13 Stat., 365), involving the grant to the Northern Pacific Railroad, the Supreme Court of the United States in the case of *United States v. Laughlin* (249 U. S., 440), held that the grant to the railroad was one in the nature of a "float" which did not become fixed or attached to any particular land until the map of definite location was filed, and that the filing of a map of general route, although followed by a withdrawal order, did not take the odd sections out of the public domain or exempt them from entry under the preemption or homestead laws prior to the filing and acceptance of the map of definite location.

In applying the rule announced in the *Laughlin* decision as to alternate reserved sections, the Department has allowed repayment under the act of 1908 as to the excess paid thereon upon the theory that until the map of definite location was filed, there was no grant and, therefore, there could be no alternate reserved sections at a double-minimum price. *Thomas Dorman* (47 L. D., 628); *Heirs of Edward B. Baldwin* (47 L. D., 258). When section 2 of the act of 1880 is construed in the light of said decision, it is believed that claims can properly be presented thereunder for allowance of excess paid in cases of a double-minimum charge made by reason of the land being within the limits of a withdrawal upon map of general route. In view of said decision, the last clause of section 2 of the act of 1880 must be considered to mean that when it is determined upon the filing of the map of definite location that the lands entered are not within the railroad grant, repayment is warranted under that section of said act for the excess paid. For example, if the lands

were within the limits of a withdrawal upon map of general route when the entry was made, the railroad might entirely change its route upon the map of definite location and it thereupon would be found that the entry was outside the grant as definitely determined by the map of definite location. Clearly a claimant in such a case would be entitled under the last clause of section 2 of the act of 1880 to a refund of the excess charge. The grant would not take effect until the map of definite location was filed and only then could it be "found" whether or not the entered land was within or without the grant. See also *Nelson v. Northern Pacific Railway Company* (188 U. S., 108).

In respect to the question as to whether or not the limitations of the act of 1919 would apply to such claims, I am of the opinion that same would be barred if not presented within the time prescribed by said act. Claims such as the one in your memorandum have been held by the Supreme Court of the United States to have been properly filed under the act of 1908 (*Laughlin case, supra*).

The act of 1919 specifically limited the time within which all such claims may be presented. It is immaterial that they may have been presentable under another act, the limitation of the act of 1919 being obviously against the claim and not merely against the remedy.

It is not intended by this general discussion to preclude or abridge the right of appeal in any case.

EMANUEL WALLIN (ON PETITION).

Decided April 28, 1923.

HOMESTEAD ENTRY—CONFIRMATION—SELECTION—ACT OF JANUARY 27, 1922.

The act of January 27, 1922, amending section 2372, Revised Statutes, which authorizes the Secretary of the Interior to change, upon voluntary relinquishment, an entry confirmed under the proviso to section 7 of the act of March 3, 1891, but which prior to confirmation had been erroneously disposed of to another, to any tract of unappropriated, nonmineral surveyed public land, confers the privilege upon the one in whom the entry is confirmed; it does not confer a similar privilege upon the defeated claimant.

HOMESTEAD ENTRY—CONFIRMATION—SECRETARY OF THE INTERIOR.

The Secretary of the Interior has no authority under any existing law to grant relief generally to persons who have lost lands embraced in entries erroneously allowed or patented to them by reason of the confirmation of the titles thereto in others.

FINNEY, *First Assistant Secretary:*

The Department is in receipt of a communication praying for relief on behalf of Emanuel Wallin of Spooner, Minnesota, under his patented homestead entry, Crookston 010750, the patent to which

the courts have decreed to be null and void on the ground that the land was embraced in a prior entry, erroneously canceled by the General Land Office, that had been confirmed by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095). The request is being treated in the nature of a petition for the exercise of the supervisory authority of the Secretary of the Interior.

The record discloses that in 1903 Emanuel Wallin and Peter Exstrom settled upon a tract of public land described as lot 1, Sec. 31, T. 161 N., R. 30 W., and lots 3, 4, 7 and 8, Sec. 6, T. 160 N., R. 30 W., 5th P. M. (161.88 acres), Crookston, Minnesota, land district, under an agreement in writing whereunder Exstrom was to make homestead entry and convey a designated portion thereof to Wallin upon receipt of a patent. Exstrom made the entry, submitted commutation proof August 6, 1906, and a final receiver's receipt was issued to him August 17, 1906. Upon learning that the understanding entered into with Wallin was illegal because in contravention of section 2290, Revised Statutes, Exstrom repudiated the agreement and on August 22, 1906, conveyed the whole tract by warranty deed to Rose E. Everett for a named consideration of \$1,500.

On June 14, 1909, the Government instituted adverse proceedings against the entry upon the ground that in making same Exstrom was not acting for his own exclusive benefit, as required by the homestead laws. As a result of the contest the entry was finally canceled December 4, 1911.

On December 4, 1911, the date of the cancellation of the Exstrom entry, William E. Rowe and John E. Everett, the latter being the husband of Rose E. Everett, filed homestead applications which together embraced the whole tract. These applications were allowed by the register and receiver and became entries of record.

On February 17, 1912, Wallin filed a contest against the Rowe and Everett entries, contending that his settlement entitled him to a preference right of entry attaching immediately upon cancellation of the Exstrom entry. Wallin prevailed in the contest and the entries were canceled March 28, 1914, on which date the contestant was allowed to enter the entire tract. He submitted commutation proof June 8, 1915, paying \$202.35, being at the rate of \$1.25 per acre, and fees of \$18.30, making a total of \$220.65. Thereupon final certificate was issued August 16, 1915, and patent January 5, 1916.

Rose E. Everett afterwards brought suit in the State courts with a view to obtaining validation of the conveyance she received from Exstrom in 1906, basing her action on the ground that the Land Department was without jurisdiction to cancel Exstrom's entry inasmuch as adverse proceedings were not instituted by it within two years from the date of the issuance of the receiver's final

receipt. The courts sustained her contention and held that Exstrom's entry was confirmed by section 7 of the act of March 3, 1891 (26 Stat., 1095). Wallin applied to the United States Supreme Court for a writ of certiorari, but that court refused to grant it.

As the matter stands now the Land Department has issued a patent to Wallin and the courts have decreed that the title is in Rose E. Everett. On March 12, 1923, the latter served a notice upon the former to vacate the premises within 30 days.

According to the showing made on his behalf, Wallin, together with his family consisting of a wife and ten children, has continuously resided upon the land for twenty years and by dint of hard work and considerable expenditure of money he has developed the entry from a heavily timbered tract into highly cultivable fields. Nine of his ten children were born on the entry. Aside from the clearing of the land, the improvements consist of a two-story log house 18 by 26 feet, with an addition 12 by 20 feet, sheeted with lumber and papered on the inside; a log barn 30 by 60 feet, plastered, with roof of corrugated, galvanized iron. For the past six or seven years he has had from eight to ten cows, from four to five young stock, two horses, some hogs and chickens. He estimates the value of his improvements to be at least \$6000.

It is further represented that Wallin has been involved in litigation over the entry before the Land Department and in the courts for seventeen years and that the costs thereof have amounted to approximately \$2500; that he has paid out \$301.80 in taxes; that if the decree of the court is enforced he will lose practically all of his improvements and have nothing to show for his faithful endeavors.

A petition signed by seventy-three residents of the community in which Wallin resides has been submitted, stating that the representations made on behalf of Wallin are true and urging that relief be granted to him. The signers are pioneer settlers and prominent business men.

This appears to be a case in which the petitioner has acted in good faith and should be given such equitable consideration as it is within the power of the Department to give. It is not, however, within the power of the Secretary of the Interior to refuse to obey the mandates of the courts. By a decree of court Rose E. Everett becomes vested with the title to the property in controversy. If it were a fact, not intended to be imputed to her herein, that her conduct in taking advantage by virtue of a technicality of the law of her legal right to oust one who had done everything to enrich the property which she seeks to obtain, she herself having done nothing to add actual value thereto, were morally unconscionable

on account of either the benefit to herself or the injury to others, yet this Department could not deprive her of her legal right and compel her to make restitution of the title of the property which she has regained. Even if her conduct in taking home the spoils of her legal victory would be condemned and pronounced wrongful by the honest and fair-minded men in the community in which she lives, nevertheless, unless she is willing to relinquish her title, no one can lawfully compel her to surrender the rights which the courts have bestowed upon her.

On January 27, 1922, Congress passed an act (42 Stat., 359), providing for the adjustment of claims to lands under circumstances such as those presented in the case at bar, where the party who has gained the final advantage is willing to take land elsewhere. Following is the context of that act:

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-six 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.

In the event that Rose E. Everett is willing to relinquish her claim to the land now in the possession of Wallin, she will be permitted to make a selection of a tract of surveyed nonmineral public land upon any part of the public domain that is subject to entry and thereupon a patent will be issued to her. The relinquishment or reconveyance, if made, should be in such form as to relieve the land described in the court decree from any cloud of title.

In the event that Wallin is obliged to yield possession of the land now held by him, the Department is powerless to grant him indemnity for his loss. The Secretary of the Interior has no authority under any existing law to grant relief generally to persons whom the courts have decreed to be merely trustees under patents issued to them by the United States, and notwithstanding however much the Department may be inclined in meritorious cases to be willing to permit ousted patentees to select lands elsewhere in lieu of the lands lost by them, it can not do so in the absence of Congressional legislation. Section 2372, Revised Statutes, as amended by the act of January 27, 1922, *supra*, has no application to such cases.

BEN McLENDON.¹

Decided April 30, 1923.

MEXICAN LAND GRANT—PUBLIC LANDS.

Lands within a valid Mexican grant did not become, under the treaty with Mexico, a part of the public domain of the United States.

SURVEY—MEXICAN LAND GRANT—BOUNDARIES—CONFIRMATION—ACT OF JUNE 4, 1860.

An official plat, upon which are shown the boundaries of a confirmed Mexican grant, based upon a survey made and approved in accordance with the provisions of the act of June 4, 1860, amounts to a final determination that the *situs* of the grant is that shown on the plat.

MEXICAN LAND GRANT—HOMESTEAD ENTRY—COURTS—JURISDICTION.

A duly asserted Mexican grant segregates the land embraced therein until the claim under the grant is extinguished by a court or other tribunal of competent jurisdiction, and its mere existence prevents the allowance of a homestead entry within it, regardless of the question of whether the grant is valid or invalid.

MEXICAN LAND GRANT—PATENT—SECRETARY OF THE INTERIOR.

The issuance of a patent under a duly asserted Mexican grant precludes the Secretary of the Interior from afterwards ignoring the existence of the patent or inquiring into its validity for the purpose of annulling it by his own order.

PATENT—VESTED RIGHTS—DESCENT AND DISTRIBUTION—SECTION 2448, REVISED STATUTES.

The general principle of law that a deed issued to a deceased person is voidable is overcome in the issuance of a patent for public lands by section 2448, Revised Statutes, which declares that in such event title shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee as if the patent had been issued to the deceased person during life.

PATENT—LAND DEPARTMENT—COURTS—JURISDICTION.

The existence of a voidable patent, regular on its face and covering lands subject to disposal under the law upon which it is predicated, prevents the Land Department from assuming any jurisdiction over the patented lands adversely affecting the title prior to the annulment of the patent by a court of competent jurisdiction.

MEXICAN LAND GRANT—HOMESTEAD ENTRY—APPLICATION—COURTS—RESTORATIONS—SECRETARY OF THE INTERIOR.

Lands within a grant, declared invalid by a court of competent jurisdiction, do not become subject to homestead entry, even by one having the preferred status accorded by Congress to discharged soldiers, sailors, and marines, until a time fixed for their opening in an order of restoration issued by the Secretary of the Interior, and an application to make entry filed prior to the prescribed date can not be held suspended to await restoration with a view to conferring any rights upon the applicant.

¹ See decision on petition, page 561.

RESTORATIONS—PATENT—HOMESTEAD ENTRY—MILITARY SERVICE—PREFERENCE RIGHT.

Lands restored to entry upon the annulment of an invalid patent do not become subject to homestead entry generally until the expiration of the preference right privilege accorded by Congress to discharged soldiers, sailors and marines.

PUBLIC LANDS—ADVERSE CLAIM—SETTLEMENT—HOMESTEAD ENTRY.

Public lands in the possession of one who is in good faith asserting ownership of a claim or right under color of title are not "unappropriated" public lands, and are not, therefore, subject to settlement or entry by another under the homestead laws.

PUBLIC LANDS—SURVEY—HOMESTEAD ENTRY—APPLICATION.

Unsurveyed public lands are not subject to homestead entry, and an application to make entry can not be filed prior to their official survey and opening to entry.

FINNEY, *First Assistant Secretary*:

In 1868 a large body of lands in southern California was patented by the United States to Theodocia Yorba under a duly surveyed Mexican grant known as the Rancho Lomas de Santiago, which was confirmed in 1856. These lands are located southeast of and not very far from the city of Los Angeles, and portions of them are said to have been long occupied and possibly rendered very valuable through extensive improvements and intensive cultivation by persons claiming title under that grant.

Very recently a large number of applications to make homestead entries, about 230 or more, embracing possibly about 30,000 acres of the lands within that grant, have been presented by persons, many of whom were evidently acting in concert.

One of these applications, which is numbered Los Angeles 035363 and embraces the SW. $\frac{1}{4}$, Sec. 30, T. 5 S., R. 8 W., S. B. M., was presented in his own behalf by one Ben McLendon, who claims to have personally made very extensive inquiries and investigations at public offices in Washington, D. C., and in many other places as to the status of the title to these lands.

It also appears that McLendon prepared the form of appeal used by other applicants in appeals hereafter mentioned; and in a very earnest oral argument made by him and in a brief he filed in this case he strongly urged that such action be taken as would assure him "and all other entrymen similarly situated, the full measure of all legal advantages provided under the lawful processes of the Department."

Each of these applications was rejected by the register and receiver of the United States land office at Los Angeles on the ground that the tract applied for therein is within and a part of the grant mentioned above and covered by the outstanding uncanceled patent to Yorba. These rejections were sustained by the Commissioner of

the General Land Office in his decision of January 18, 1923, in such cases as were appealed to him, and 158 of them are now before this Department on identical, or practically identical appeals, among which is the appeal of McLendon, now up for consideration, in which he contends that an entry should be allowed under his application because, as he suggests and charges, in effect: (1) That said land is part of an "interstitial space lying between the legal confines of two grants made by the Mexican Government," and is therefore a part of the public domain of the United States and now subject to entry; (2) that the grant mentioned was invalid; (3) that the official and other acts leading up to and culminating in the confirmation of the grant and the issuance of the patent to Yorba were fraudulent; (4) that Yorba died before the patent issued; and (5) that the Commissioner erred in not according him opportunity and time within which to assemble and produce evidence to substantiate his charges.

After a very careful examination and full consideration of all the contentions made in this case, both in the assignment of errors and in argument, and also of the facts disclosed by the record, and other pertinent documents on file, this Department is unable to sustain any of the contentions made in the appeal, and must, therefore, hold that the register and receiver and the Commissioner were correct in their conclusions that entries can not be allowed under any of these applications because of any one of the following reasons:

(a) The tract applied for is embraced by an unrejected Mexican land grant under which a claim was timely presented; (b) the land is covered by an outstanding and uncanceled patent which is in due form, was issued for lands to which such patents could legally have been issued, contains the necessary recitals, and is *prima facie* valid on its face; (c) the Secretary of the Interior has no power to ignore or inquire into and determine the validity of the grant; (d) the issuance of the patent took away from and deprived the Land Department of the power to allow an entry under the application or take any action looking to its allowance; (e) the Secretary of the Interior does not have the power to inquire into or determine the validity of the patent for the purpose of annulling or vacating it by his own order, and he can not ignore its existence; (f) the land can not be restored to, or become subject to entry until after a court of competent jurisdiction shall have set aside the decree of the district court confirming the grant, declared the grant invalid, and canceled and set aside the patent to Yorba; (g) no valid or effective application to enter can be presented until after the land has been regularly opened to entry by an order and under regulations issued by the Secretary

in the manner provided by statute; (h) the land, if it were subject to disposition, must be held to be subject to entry by former service men during the war with Germany for ninety days after it shall have been opened in the manner provided by law; (i) all applications to enter segregated land must be rejected; (j) an entry should not be allowed on McLendon's application under the circumstances disclosed by the record, or on any of the kindred applications until it shall have been satisfactorily shown that the lands are not in the possession of some other person who is claiming title to them through the Mexican grant or under some other color of title or claim of right; (k) these lands have not been surveyed and subdivided into sections and parts of sections and there is no such tract known or shown on the plats of the public land surveys as the tract here applied for.

The correctness of all these statements is so well known and so fully supported by the statutes, the regulations, and numerous adjudications by both this Department and the courts as to justify the affirmation of the decision appealed from in this case without further extending this decision to a greater length, but in view of the importance of the questions involved, the extent and great value of the lands applied for, and the earnestness with which the claims of these numerous applicants are being urged, it is thought best to here give full and extended consideration to all the pertinent questions involved.

The first question to be determined is as to whether this land lies outside of or within the grant mentioned. If it is not within that grant, or any other grant, and merely forms a part of a space six miles wide lying between grants, as is asserted by McLendon, the questions as to the validity of the grant and the patent are immaterial and have no bearing whatever on this case; but the assertion that the land is not within the grant is met and fully overcome by the plat of survey on which the grant was finally confirmed by decree of the United States District Court, before the patent was issued.

That plat shows that the lines which form the southerly and southeasterly boundaries of this grant are the same lines which form a part of the northern boundary of the Rancho San Joaquin and a part of the northwesterly boundary of the Rancho Canada de los Alisos, both of which are confirmed Mexican grants. It furthermore appears from the plat of the survey that practically all the township in which the lands involved in this case are located is entirely within and surrounded by the boundaries of the grant here involved, and has never been surveyed into sections or parts of sections, but is numbered "Tract 38." It also appears

that the south line of that township lies half a mile or more north of the south boundary line of the grant, leaving a considerable area outside of that township and in township 6 south, range 8 west, in which the lands applied for by some of the other applicants mentioned are located. The area mentioned as lying between the township line and the south line of the grant in question is numbered on the plat as "Tract 40."

It must be held that the approval of that plat and the survey on which it was based, amounts to a final determination of the exact *situs* of the land involved, and shows no interstitial space such as McLendon contends exists there.

The plat was approved in 1868, after the passage of the act of June 14, 1860 (12 Stat., 33), section 5 of which, as was stated by the Supreme Court in *Adam v. Norris* (103 U. S., 591)—

required the surveyor-general, whenever a survey of a confirmed Mexican grant had been approved by him, to make a publication of the survey for a prescribed time, which should be held to be notice to everybody of what it included. Any one desiring to contest the correctness of this survey could, on a proper application, have it removed or filed in the District Court of the United States, where the objection to it should be heard and determined, and, if necessary, corrected by a new survey or otherwise. The fifth section of the act then declares that "the said plat and survey, so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States."

The court held in that case that a patent issued on a confirmed grant was conclusive as against the United States and cited with approval the case of *Miller et al. v. Dale et al.* (92 U. S., 473), in which it was held that the approval of a survey, such as the one in the present case, was conclusive as to the location of the land. See also *United States v. Charles Fossatt* (21 How., 445).

In *United States v. Peralta* (99 Fed., 618), it was held that a decree fixing the boundaries of and confirming a Mexican grant—

when unappealed from, and when carried into effect by the issuance of patents by the United States in conformity thereto, became final and conclusive as to such boundaries and the court was deprived of further jurisdiction to modify the same.

Inasmuch as it appears beyond question from the plat referred to that this land is within the grant the dominant question to be considered under this application is the same as that presented under all applications to make entry under the homestead laws, which is as to whether the tract applied for is subject to entry under such an application. Looking to section 2289, Revised Statutes, the only law under which this application could have been presented, to ascertain what lands are subject to entry under the homestead laws we find that Congress declared that only such surveyed tracts as are

"unappropriated public lands" belonging to the United States can be so entered.

This grant was surveyed, confirmed, and patented on an application timely presented under and in the manner prescribed by the act of March 3, 1851 (9 Stat., 631). That act created and provided a special tribunal to inquire into and adjudicate and "settle" the validity of claims asserted under grants such as the one here under consideration. That board was known as the Board of Land Commissioners, and the act also specifically clothed the United States District and Supreme Courts with power to supervise the acts of that board through the exercise of their appellate jurisdiction; and it was on an appeal from that board that the United States District Court entered the final decree of confirmation on which the patent was issued in this case.

If these lands were within a valid grant, that fact prevented them, under the treaty with Mexico, from becoming a part of the public lands of the United States; and while the act mentioned did not in specific terms say that lands within such grants should be withheld from disposal under the public land laws, Congress recognized the fact that they were not "unappropriated public lands" belonging to the Government by declaring in section 13 of the act that—

all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States.

The act of March 3, 1853 (10 Stat., 244), provided for the surveying of the Government lands in California, prescribed methods for their disposal under entries of particular kinds, and to an extent named the classes of lands for which such entries could be made; but in doing so, Congress expressly declared that no entries of any kind should be allowed for any of "the lands claimed under any foreign grant or title."

While it has no direct bearing on the present case, reference may well be here made to the later act of July 22, 1854 (10 Stat., 308), as showing the policy and intent of Congress in dealing with such grants. That act related to lands outside the State of California, and directed the surveyor general to "ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages and customs of Spain and Mexico," and thereafter report his findings thereon to Congress as the basis of prospective action by it looking to the confirmation of "*bona fide* grants." Section 8 of that act declared that "until final action by Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal

by the Government, and shall not be subject to the donations granted by the provisions of this act," for the support of public schools and other purposes.

The effect of the two acts first mentioned above on the question as to whether or not lands to which claims had been asserted under Mexican grants were "public lands" of the United States, was considered and determined by the Supreme Court in the case of *Newhall v. Sanger* (92 U. S., 761), in which the decision was based on facts closely akin and in some respects identical with those in the present case.

In that case a grant of odd numbered sections of *public lands* within certain specified limits in the State of California and elsewhere to certain railroad companies was considered. The ownership of the companies attached to all public lands coming within the terms of the grant on the date on which they filed their maps of definite location opposite such lands. The act making the railroad grant was silent as to lands within Mexican land grants and did not in terms exclude them from its operation. Prior to the filing of the map of definite location by the company involved in that case a claim was asserted to a tract in a certain odd numbered section as a part of a Mexican land grant under the act of 1851, *supra*; and the question presented to the court was whether or not existence of that pending claim at the date of the filing of the map of definite location prevented the ownership of that tract from passing to the company as "public land." The claim was later rejected and the Mexican grant declared to be invalid, but before that action was taken and while the claim of the Mexican grant claimant still was pending, the company filed its map of definite location and the land was formally withdrawn for its benefit by this Department and later patented to the railroad company. The patent thus issued was attacked on the ground that the pendency of the Mexican claim excepted the land from the operation of the grant, and in response to that attack the company urged that its patent should be sustained for the reason that the grant had been rejected prior to the time it was patented.

The court after making reference to and construing the acts of 1851 and 1853, *supra*, declared that the land did not pass under the railroad grant for the reason that it was not public land at the date of the filing of the map of definite location. In defining the words "public lands," the court there stated that they "are habitually used in our legislation to describe such as are subject to sale or other disposal under the general laws."

In considering the question as to the segregating effect of an invalid Mexican grant prior to the final adjudication as to its validity the court used the following language:

* * * It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of Congress, no mode of separating them from those which were valid without investigation by a competent tribunal and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time or rejected.

This is, in our opinion, the true interpretation of the act of 1851. Until recently, it governed the action of the Interior Department upon the advice of the law officers of the government (11 Op. Att'y-Gen. 493; 13 id. 388), and was, at least by implication, sanctioned by this court in *Frisbie v. Whitney*, 9 Wall. 187. No subsequent legislation conflicts with it. On the contrary the excepting words in the sixth section of the act of March 3, 1853, introducing the land system into California (10 Stat. 246), clearly denote that lands such as these at the time of their withdrawal were not considered by Congress as in a condition to be acquired by individuals or granted to corporations. This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means "lawfully" claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudice any claim to be unlawful, but submitted them all for adjudication.

The doctrine thus established fully supports the conclusion that the mere existence of the grant in this case of itself prevents the allowance of an entry under McLendon's application, regardless of the question as to whether or not the grant is valid or invalid, and it will continue to so segregate the land until its confirmation is set aside by some court of competent jurisdiction, and the grant has been declared to be invalid. And this would be true even if a patent had not been issued under the grant.

From this it necessarily follows that McLendon's charge that the grant was invalid does not present an issue which is justiciable in this case, and it must, therefore, be disregarded.

Coming now to the charge that the issuance of the patent was fraudulently procured, and even admitting that the continued existence of the grant does not prevent the allowance of the application, we find that the application was properly rejected for the entirely sufficient reason that the land is included in and completely segregated by a patent which is sufficient on its face, covers lands subject to such patents, contains ample recitals, and is *prima facie* valid. The patent, itself, consequently prevents the land from coming within the class of "unappropriated public lands," such as are enterable under the homestead laws.

McLendon's contention that the patent was without effect because the patentee named therein died before the patent was issued is entirely without merit. While it is undoubtedly true as a general proposition of law that, as he says, a deed to a dead man is voidable, yet the effect of that rule was overcome by section 2448 Revised Statutes, which declares that—

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.

The only theory then on which an entry could be allowed under the present application must be based on the supposition that the Land Department would be justified in either ignoring the existence of the grant and the patent or in suspending the application until after it had by its own act declared the grant invalid and set aside and vacated the patent.

It seems unreasonable to believe that it could be seriously contended in any quarter that this Department, a mere subdivision of the executive branch of the Government, has the power to inquire into, adjudicate, and vacate and annul a decree of confirmation solemnly entered in this case by the United States District Court after the facts have been ascertained and adjudicated by the Board of Land Commissioners to whom Congress committed the power to determine the validity of such grants in the first instance. And this is especially true since there was no existing law at the date of this confirmation which clothed any executive branch of the Government with any power to inquire into or judicially determine the validity of, or any question affecting Mexican grants or to take any other action whatever in relation thereto, except the mere act of surveying the lands embraced within them, and the issuing of patents after the grants had been confirmed. Such a contention is made to appear more unreasonable when it is remembered that the courts in considering the effect of the decrees of confirmation of Mexican claims by the Board of Land Commissioners and the district court, have said that "final decrees, touching the validity of such claims, rendered by these tribunals, are conclusive and final between the claimants and the United States. Such decrees are not open to review in any court."

This was said in the syllabus of the case of *United States v. Benjamin Flint et al.* (4 Sawyer, 42) and other cases.

In the case of *United States v. Throckmorton* (98 U. S., 61), a Mexican grant was attacked on the ground that it had been fabricated in Mexico, after the transfer of California to the United States; that the fraud was concealed from the Government officers and the Board of Land Commissioners and that the confirmation was obtained upon false and perjured testimony. These charges are practically identical with some of the contentions made by McLendon in the argument of this case. In affirming the decision of the District Court in the Flint case, *supra*, and in sustaining the finding of the

Board of Land Commissioners, the Supreme Court stated in the Throckmorton case that—

* * * the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.

The case before us comes within this principle. The genuineness and validity of the concession from the Micheltorena produced by complainant was the single question pending before the board of commissioners and the District Court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.

From this it will be seen that this Department is surely lacking in authority to make any effective declaration as to the validity of the grant and since Congress has, in effect, stated that such grants segregate the land until they are finally declared invalid, it must be held that they are not public lands of the United States in the sense in which those words are used in the homestead laws.

Furthermore, the theory that this Department has the power to take any action looking to the disposal of this land under the homestead laws flies into the face of the well known and established doctrine that the existence of even a voidable patent, regular on its face and covering lands subject to disposal under the laws on which it is based, as was the case in this instance, fully takes away and deprives the Land Department of all jurisdiction to either ignore the patent or cancel it, or to assume or exercise any jurisdiction whatever over the patented lands which would in any way adversely affect the title. The power to take such action resides only with the courts, or, in other words, as was said by the Supreme Court in speaking of the powers of the officers of the Land Department, in *United States v. Schurz* (102 U. S., 378, 402)—

From the very nature of the functions performed by these officers and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away.

In that case the Secretary of the Interior declined to deliver a patent which was thought to have been improvidently and improperly issued, and the Supreme Court sustained the patentee's proceeding in mandamus, and compelled the delivery of the patent on the theory that the courts alone, and not the Secretary, had the power to inquire into and determine the question of the patent's validity or invalidity. A similar holding was made in, and a kindred action was taken by the United States District Court in the case of *LeRoy v. Clayton et al.* (2 Sawyer, 493, 502), which is practically on all fours with the present case. There the Secretary had recalled the patent which had been issued on a Mexican grant confirmed under the act of 1851, *supra*, in 1870, after it had been forwarded to the surveyor general for delivery, and thereafter he rendered a decision holding the patent invalid, and the Commissioner of the General Land Office wrote across its face "**CANCELED BY ORDER OF THE SECRETARY.**"

The court in holding that the Secretary had exceeded his jurisdiction and powers, said:

If there is any ground of mistake, fraud or otherwise, which would justify the repeal, or annulling of the patent of 1870, that object must be accomplished in some direct proceeding in the proper court, taken for that purpose against the patent.

The fact that the Land Department is entirely lacking in jurisdiction over patented lands and has no power to take any action which would in any way impeach a granted title is well illustrated in the case of *Germania Iron Company v. United States* (165 U. S., 379, 385), in which the Supreme Court of the United States considered a case where a patent had been inadvertently and untimely issued to one Thomas Reed during the pendency of a mere motion for a rehearing filed by Orilie Stram, in which she did no more than attack the correctness of a prior departmental decision holding that she had gained no rights under an application to enter filed by her for the land covered by the patent before Reed applied to enter it. When the pendency of the motion was discovered by this Department, after patent had been issued, the Government conceded that the patent had deprived the Land Department of its jurisdiction to even finally dispose of the motion, and brought a suit to have it set aside for the sole purpose of reinvesting the Secretary with power to consider and dispose of Stram's motion. In disposing of that case the court said:

* * * that when through inadvertence and mistake a patent has been wrongfully issued, by which the jurisdiction of the land department over these disputed questions of fact is lost, a court of equity may rightfully interfere and restore such lost jurisdiction, to do which it becomes necessary to cancel the patent.

These very decisive announcements by the courts have been long and uniformly followed in both the published and unpublished decisions of this Department which need not be particularly mentioned here. They fully recognize and sustain the doctrine that the Land Department now has no power to entertain and adjudicate such charges as those made by McLendon, and show beyond question that an entry could not be allowed under his present application.

The only action that this Department could possibly and properly take in this matter at this time would be to recommend to the Attorney General that a suit be brought on behalf of the Government to have the decree of confirmation set aside, the grant declared invalid, and the patent annulled. For that purpose he may order an investigation or a hearing to ascertain whether or not the existing facts and the available evidence would warrant such a recommendation. But inasmuch as the patent in this case was issued more than 55 years ago, the bringing of such a suit in this case would certainly be barred at this time if the statute of limitations has not been tolled by the concealment of culpable fraud; and if, as McLendon suggests, the public records of this Department are the sources from which evidences of the fraud he alleges are to be obtained, it can not be said that there has been a concealment from the Government because the officers by whom such a suit must be recommended must be presumed to have judicially known of the facts constituting that fraud for more than a half century. *Ward's Heirs v. Laborraque* (22 L. D., 229); *McKeand v. Waring et al.* (35 L. D., 147); *United States v. Hancock et al.* (30 Fed., 851). This Department has long declined to recommend a suit in such cases. See *Rancho Laguna de Tache* (4 L. D., 566).

In his argument McLendon strongly urged that this Department cause the lands in this grant to be resurveyed for the purpose of showing that they are outside of the grant and consequently subject to his application; but that request can not be granted because such a resurvey would be ineffective as against the present claimants, even if there is authority for making it.

Under the provisions of the act of 1860, quoted above, the recognition by the court of the plat and survey on which the patent issued in this case operated of itself to vest title "as if a patent to the land so surveyed had been issued by the United States," and the passing of title in that manner deprived the Land Department of jurisdiction to take any action which would affect that title either by resurvey or otherwise.

Aside from that statute stands the long and well-established doctrine that a resurvey of land covered by a patent can not affect the rights of the patentee who takes under a patent based on an original survey.

The courts do not undertake to reform surveys (*United States v. Throckmorton, supra*), and in *United States v. Hancock* (133 U. S., 193, 197), the court said that where a survey has been made in good faith and remains "unchallenged as this has been for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented."

Even admitting that a court of competent jurisdiction would eventually annul the decree of confirmation, declare the grant invalid, and set aside the patent, the rejection of McLendon's application must be sustained because such action by the court would not of itself restore the land to entry (*Sarah V. White*, 40 L. D., 630; *California and Oregon Land Company v. Hulen and Hunnicutt*, 46 L. D., 55), and the land would not become subject to entry until after the Secretary of the Interior issued an order for its opening and prescribed the date and manner in which the application therefor may be presented to and disposed of by the register and receiver, as he is permitted and required to do by the acts of September 30, 1913 (38 Stat., 113); the Joint Resolution of February 14, 1920 (41 Stat., 434); and the regulations issued thereunder which may be found in 43 L. D., 31; 46 L. D., 32, 121; and 49 L. D., 1.

Furthermore, it must be held that McLendon gained no rights under his application, and that the application could not be suspended to await the restoration of the land and be then allowed on the date on which the land might possibly be opened, because Congress declared in the Joint Resolution of 1920, *supra*, that no person should be permitted to make entry of such lands on that date or for ninety days thereafter who had not been honorably discharged from the Army or Navy of the United States, after having served therein as an officer, soldier, sailor, or marine, during the war with Germany. And that would be true in this case even if McLendon had performed the service and received the discharge mentioned, for the reason that, as was said in *Robert R. Biddle's case* (49 L. D., 111, syllabus)—

The preference right privilege accorded by Congress to discharged soldiers, sailors, and marines upon the restoration of withdrawn lands is to be applied impartially and can not be defeated by the filing of an application to make entry prior to the restoration, even though the applicant be one of the preferred class.

For that reason, if for no other, the rejection of McLendon's application must be sustained.

But aside from all these considerations and independent of all the facts mentioned and even if no other obstruction stands in the way of the allowance of entries on these applications, their rejection must be sustained in every one of these cases where it appears that the land applied for is now in possession of some other person who is in good faith asserting ownership of a claim or right under the patent to Yorba, or otherwise. See *Atherton v. Fowler* (96 U. S., 513); *Lyle v. Patterson* (228 U. S., 211); *Gunning et al. v. Morrison et al.* (246 U. S., 208); and *Matthews v. Drummond* (48 L. D., 1).

These decisions fully sustain the practice long enforced by this Department under which it has for many years positively and with emphasis declared that it would not permit an entry to be made by one who is seeking to reap where he has not sown but attempting to acquire for himself the valuable improvements of another through such an entry.

Furthermore, McLendon's application can not be allowed for the reason that the land he has applied for has not been surveyed and subdivided into sections and parts of sections. It is well settled that a homesteader can not present an application to enter lands until after they have been surveyed and opened to entry in the manner prescribed by the laws and regulations mentioned above.

After this very full and careful consideration of all the facts and aspects of this case, and in view of the overwhelming weight of authorities, this Department is constrained to hold that the decisions below were correct, and for that reason the decision appealed from is hereby affirmed.

BEN McLENDON (ON PETITION).

Decided June 7, 1923.

EQUITABLE ADJUDICATION—SECRETARY OF THE INTERIOR—COMMISSIONER OF THE GENERAL LAND OFFICE—HOMESTEAD ENTRY—FINAL PROOF—PATENT.

Under the act of September 20, 1922, which amended section 2450, Revised Statutes, the Secretary of the Interior and the Commissioner of the General Land Office constitute a board with authority to give equitable adjudication in cases involving suspended entries for the purpose of determining whether patents shall issue where a substantial compliance with the governing law is shown by final proofs which are defective because of some error or informality resulting from ignorance, accident or mistake on the part of the entryman.

EQUITABLE ADJUDICATION — JURISDICTION — APPLICATION — HOMESTEAD ENTRY — ENTRY.

A mere pending application to make a homestead entry is not an "entry" within the purview of section 2450, Revised Statutes, as amended by the act of September 20, 1922, and questions relating to its allowance or rejection do not come within the jurisdiction of the Board of Equitable Adjudication.

EQUITABLE ADJUDICATION—HOMESTEAD ENTRY—CONFIRMATION—MEXICAN LAND GRANT—ADVERSE CLAIM.

The confirmation by the Board of Equitable Adjudication of entries in conflict with a duly asserted Mexican grant, the claim under which has never been extinguished, is prohibited by sections 2451 and 2457, Revised Statutes.

EQUITABLE ADJUDICATION — HOMESTEAD ENTRY — JURISDICTION — LAND DEPARTMENT.

The function of the Board of Equitable Adjudication is to give equitable consideration only to those homestead entries which have received as favorable action by the Land Department as the law permits, and it is not within its jurisdiction to consider, on appeal or otherwise, cases in which adverse action amounting to rejection or cancellation has been taken.

CASE DECISION CITED AND APPLIED.

Case of *Hawley v. Diller* (178 U. S., 476), cited and applied.

FINNEY, *First Assistant Secretary*:

On April 30, 1923 (49 L. D., 548), this Department rejected the homestead application, Los Angeles 035363, presented by Ben McLendon to make homestead entry for a certain unsectionized tract of lands within the boundaries of a confirmed and patented Mexican land grant for the numerous and very sufficient reasons fully set out in its decision of that date and the case is now up for consideration on McLendon's petition in which he asks that he be permitted to appeal from that decision to the Board of Equitable Adjudication. This petition can not be granted for the reasons (1) that appeals do not lie from the decisions of the Secretary of the Interior to the board mentioned, and (2) that board has no jurisdiction in cases such as the present one which involves only the rejection of a mere application to enter.

Several acts of Congress (9 Stat., 51; 10 Stat., 258; 11 Stat., 22; 18 Stat., 50; 19 Stat., 244), were carried forward and reenacted in sections 2450 to 2457, inclusive, of the Revised Statutes. Section 2450 as amended by the act of September 20, 1922 (42 Stat., 857; 49 L. D., 323), provides that the Secretary of the Interior and the Commissioner of the General Land Office shall constitute a board and be authorized to give equitable adjudication in cases involving "suspended entries of public lands" and "suspended preemption claims" for the purpose of determining whether "patents shall issue upon the same" in instances where a substantial compliance with the requirements of the law is shown by final proofs which are defective because of some error or informality therein which resulted from ignorance, accident, or mistake on the part of the entryman.

The application involved in this case does not come within the provisions of that statute because in the first place it is a mere pending application to enter and is neither an "entry" nor a preemption claim and has not been suspended and for the further reason that the

application does not embrace "public land" as was clearly shown in the decision complained of.

A mere filing or application such as the one under which McLendon claims does not become, and can not be said to be an "entry" until after it has been approvingly accepted in the proper United States land office and the register has formally endorsed thereon a certificate of the allowance thereof; and even then it would not become such an entry as is confirmable by the board to which this applicant now seeks to appeal because the statute refers only to entries under which defective final proofs have been offered and final certificates have been issued after there has been a substantial compliance with the requirements of the laws under which the entries were allowed and all necessary payments thereunder have been made; or, in other words, as was said by former Acting Secretary Chandler with the approval of the Attorney General in the cases of James H. Taylor (9 L. D., 230, 231), and Elizabeth Richter (25 L. D., 1, 2), the province of the Board of Equitable Adjudication "is confined to entries so far complete in themselves, that, when the defects on which they are submitted have been cured by its action, they pass at once to patent."

But even if an entry had been allowed in this case and final proof had been made and a final certificate had issued thereunder and no other fact stood in the way of its confirmation the Board of Equitable Adjudication could not confirm it because as will be seen from the decision complained of these lands are held under the adverse claims of other persons and section 2451, Revised Statutes, expressly declares that such confirmations must be made without prejudice to the rights of conflicting claims; and section 2457 prohibits confirmation in all cases where the rights of any other claimant or preemptor are prejudiced, or where there is an adverse claim. This rule has been long and strictly enforced as will be seen from *McCarthy v. Darcy* (1 L. D., 78), and *Walker v. Snider* (16 L. D., 524).

Again it is well settled that the Board of Equitable Adjudication has no jurisdiction in this case, either by appeal or otherwise, for the further reason that it was instituted to give equitable consideration in only those classes of cases which have received as favorable a consideration by the Land Department as the law will permit, and it was not given jurisdiction over cases where adverse action amounting to a rejection or cancellation had been taken by the Commissioner of the General Land Office and the Secretary of the Interior. This conclusion is fully sustained by the Supreme Court in the case of *Hawley v. Diller* (178 U. S., 476, 494), where it was held, as stated in the syllabus, that the statutes mentioned above must be "construed and held to apply only to decisions of the land office

sustaining irregular entries, and not to decisions rejecting or cancelling such entries under the general authority conferred upon the Land Department in respect to the public lands."

These considerations fully show that the petition mentioned should be and it is hereby denied.

STATE OF WYOMING v. FRY AND DOYLE.

Decided April 30, 1923.

OIL AND GAS LANDS—PROSPECTING PERMIT—SCHOOL LAND—SELECTION—INDEMNITY—PREFERENCE RIGHT.

A State, not being included among the parties enumerated in the enabling clause of the act of February 25, 1920, is disqualified to take a permit under any section of the act; consequently it is not entitled to the exercise of the preference right to an oil and gas permit accorded by section 20 of that act, inasmuch as that section contemplated that the right should be exercised only by one qualified to take a permit.

FINNEY, First Assistant Secretary.

The State of Wyoming, by the Commissioner of Public Lands, has appealed from the decision of the Commissioner of the General Land Office rejecting the State's application for permit under section 20 of the leasing act of February 25, 1920 (41 Stat., 437).

The records disclose the following facts:

On June 30, 1921, W. B. Fry and C. F. Doyle filed an application at the Douglas land office, Wyoming, for a permit under section 13 of the leasing act. The application included the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 2, T. 34 N., R. 84 W., 6th P. M. Permit has heretofore issued upon the remaining available lands applied for and the application stands suspended as to this tract.

The NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 2, was owned by the State of Wyoming under an indemnity school selection filed December 15, 1909. This tract was included in a petroleum withdrawal by Executive Order of January 30, 1911, and on December 6, 1915, the State consented to the reservation of the oil and gas to the United States under the act of July 17, 1914 (38 Stat., 509). The selection was completed by the filing of a certificate of nonincumbrance of the base land on May 8, 1918, and the selection was approved subject to the foregoing mineral reservation on January 29, 1919.

Pursuant to directions from the Commissioner of the General Land Office in a decision dated September 11, 1922, the applicants, Fry and Doyle, served notice of their application and a warning to exercise any preference right upon the Commissioner of Public Lands for the State of Wyoming. On October 25, 1922, that officer filed an application for a permit under section 20 of the leasing act as agent for the State of Wyoming in response to this notice.

By decision of January 25, 1923, the Commissioner of the General Land Office revoked his action of September 11, 1922, and rejected the State's application, holding that the State was not entitled to a permit under section 20 of the leasing act.

The State contends that it is a patentee within the meaning of section 20 of the act and that there is nothing in the section which deprives the State of the preference right to a permit accorded therein. The State proposes, if granted a permit, to develop the land by operating agreements with corporations and individuals as it does in developing granted lands.

The section of the act on which the appellant relies was interpreted by the Department in the case of Charles R. Haupt (47 L. D., 588, 589), as follows:

* * * section 20 is one of the relief, or remedial sections of the leasing act, which provide methods for protecting the prior equitable claims of those to whom a preference right to prospecting permits and leases is thereby accorded. Said section 20 was manifestly designed to recognize the equities only of persons who had gone upon the public domain and made agricultural entries upon the theory and under the belief that they would obtain unrestricted title to their lands.

The wording and spirit of this section of the act clearly indicate that the right conferred in recognition of equities of nonmineral entrymen is one of preferment—a preference right to a permit over others who may make application for a permit—with respect to the reserved deposits of oil and gas underlying their land. To exercise a preference therefore the entryman or patentee must be qualified to take a permit.

The enacting clause of the leasing act enumerates the parties entitled to acquire interests in the mineral deposits pursuant to said act in the following language:

* * * deposits of coal, phosphate, sodium, oil, oil shale, or gas; and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this act to citizens of the United States or to an association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities.

Congress having expressly named the parties who shall be eligible to acquire interests under the act must be presumed to have excluded all others under the maxim of construction "*Expressio unius est exclusio alterius.*" A State is not among the enumerated parties and must therefore be regarded as disqualified to take a permit under any section of the leasing act.

The Department has uniformly construed section 20 of the leasing act to confer a preference right only upon parties qualified to take a permit. John B. O'Rourke (48 L. D., 215), and Leo O. La Flame (49 L. D., 324).

Nor does it appear on principle that a State should have a preference right to a permit, assuming that its laws would enable it to develop the land in accordance with the leasing act. The equities of a State which made its selection prior to withdrawal of lands for oil or gas, and subsequently was required to consent to a reservation of their deposits to the United States, are not comparable to those of an agricultural entryman when the provisions of section 35 of the leasing act are considered, as Congress, in that section, conferred upon the State a substantial interest in the moneys received from all bonuses, royalties and rentals derived under the act from lands or deposits located within their boundaries.

The Department recognizes, however, the equities of a purchaser from a State under the foregoing conditions; and awards such a transferee a preference right to a permit, if qualified, whenever the selection was completed and transferred prior to January 1, 1918. *Miller and Lux Inc. v. How*, on rehearing (49 L. D., 177). Such a situation is not shown by the record in the case now under consideration.

The records disclose that the State has never paid the filing fee prescribed by the act.

The Department is without authority to issue a permit or lease to a State under the act of February 25, 1920, and finds no error in the action of the Commissioner in rejecting its application.

The decision appealed from is hereby affirmed, the case closed and the records returned to the General Land Office for further action on the application of Fry and Doyle.

RESTORATION TO ENTRY OF LANDS WITHIN THE FORMER OREGON AND CALIFORNIA RAILROAD AND COOS BAY WAGON ROAD GRANTS.

REGULATIONS.

[Circular No. 892.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 2, 1923.

The SUPERINTENDENT OF OPENING AND SALE,
OREGON AND CALIFORNIA RAILROAD AND
COOS BAY WAGON ROAD GRANT LANDS,
REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES,

PORTLAND, ROSEBURG, AND LAKEVIEW, OREGON:

The act approved June 9, 1916 (39 Stat., 218), re-vested in the United States the title to what are known as the Oregon & California

Railroad grant lands; required that such lands, after examination in the field, be classified as class 1, power-site lands; class 2, timberlands; class 3, agricultural lands; provided for the reservation, subject to additional legislation, of lands of class 1; extended preference rights of entry to qualified persons who since December 1, 1913, resided on lands of classes 2 and 3, under the conditions therein prescribed; and authorized the restoration of lands of class 3 under the general provisions of the homestead laws as modified by said act. The lands commonly known as the Coos Bay Wagon Road grant, situated in the counties of Coos and Douglas, in the State of Oregon, have been reconveyed to the United States under the provisions of the act of February 26, 1919 (40 Stat., 1179), and are subject to disposition under the provisions of said act, section 3 of which requires that said lands shall be classified and disposed of in the manner provided by the aforesaid act of June 9, 1916 (39 Stat., 218), and authorizes the purchase by lessees from the Southern Oregon Co. of lands classified as agricultural, not exceeding 160 acres to each person, under terms and conditions therein recited. The act regulating the disposition of lands formerly embraced within the grants to the Oregon & California Railroad Co. and Coos Bay Wagon Road Co., approved June 4, 1920 (41 Stat., 758), extends the preferred right of homestead entry under section 5 of the act of June 9, 1916, and the preference right of purchase or entry under section 3 of the act of February 26, 1919, to lands of class 1, withdrawn as power sites. House Joint Resolution 30, approved January 21, 1922 (42 Stat., 358), gives a preference right of homestead entry to officers, soldiers, sailors, and marines of the World War, upon the restoration to entry of public lands.

Pursuant to the authority of said acts, it is directed that all such lands of class 3 described in the attached list,¹ and all surveyed lands of any class, to which a preference right of homestead entry attached and is still existent, under the provisions of the said acts of June 9, 1916 (39 Stat., 218), February 26, 1919 (40 Stat., 1179), or June 4, 1920 (41 Stat., 758), whether included in such list or otherwise, situated in the Portland, Roseburg, and Lakeview, Oreg., land districts, be restored to entry and settlement under the general provisions of the homestead laws as modified by said acts, and subject to the preference rights conferred upon officers, soldiers, sailors, and marines by H. J. R. 30, approved January 21, 1922 (42 Stat., 358), in the manner hereinafter indicated and not otherwise. If the settlers on lands of class 2 shall not avail themselves of the preferences to which they are entitled, the lands affected thereby shall not be otherwise subject to disposition hereunder. It is further

¹ List omitted.

directed, in conformity with the acts approved February 26, 1919 (40 Stat., 1179), and June 4, 1920 (41 Stat., 758), that lands classified as agricultural, or as valuable for power sites, within the limits of the Coos Bay Wagon Road grant, be subject to purchase by persons who, being citizens of the United States, continuously leased such lands from the Southern Oregon Co., for a period of not less than 10 years prior to February 26, 1919, or who under lease from said company cultivated and placed valuable improvements upon any of said lands.

SECTION 1. EXPLANATION OF WORDS AND TERMS USED HEREIN.—

To avoid repetition, and for a full understanding thereof, the following words and terms, as hereinafter employed, unless otherwise indicated by the context, shall be construed to mean:

“General law”: Section 2289, Revised Statutes, as amended and as modified by the act of June 9, 1916 (39 Stat., 218).

“The proviso”: The proviso to section 5 of the act of June 9, 1916 (39 Stat., 218), as amended and extended by the acts of February 26, 1919 (40 Stat., 1179), and June 4, 1920 (41 Stat., 758), conferring preference rights to make homestead entries, under the conditions and limitations therein provided, upon qualified persons who since December 1, 1913, resided on revested Oregon & California Railroad and Coos Bay Wagon Road lands.

“H. J. R. 30”: House Joint Resolution No. 30, approved January 21, 1922 (42 Stat., 358), giving to discharged soldiers, sailors, and marines a preferred right of entry.

“Minor soldier”: A person under 21 years of age at the date of executing his homestead application, who served in the Army, Navy, or Marine Corps of the United States during the war with Germany, and who was honorably discharged or separated from such service, or was placed in the Regular Army or Navy Reserve, and who did not refuse to perform such service or to wear the uniform thereof. See eighth section of the act approved August 31, 1918 (40 Stat., 955); joint resolution amending said section 8, approved September 13, 1918 (40 Stat., 960); departmental regulations under said section 8, as so amended, of October 9, 1918, Circular 622 (46 L. D., 451); and H. J. R. 30.

“Application”: A homestead application under section 2289, Revised Statutes, as amended, modified, and extended by the acts approved June 9, 1916 (39 Stat., 218), February 26, 1919 (40 Stat., 1179), and June 4, 1920 (41 Stat., 758), on the usual form, and accompanied by all payments required; whether under the general law, the proviso, H. J. R. 30, or by a minor soldier, there must be included therein or be attached thereto a sworn statement executed before an officer authorized to administer oaths in such cases,

setting forth all the facts essential to the allowance of such application.

“Declaratory statement”: A declaration under oath, accompanied by the proper payments, by a person entitled to exercise the right, that he intends to enter the described tract of land under the provisions of the homestead laws. Under sections 2304, 2307, and 2309, Revised Statutes, as amended, an officer, soldier, sailor, seaman, or marine, who served for not less than 90 days in the United States Army or Navy during the Civil War, the Spanish-American War, or the Philippine insurrection, and who was honorably discharged, and if he be dead, his widow if unmarried, and in case of her death or remarriage, his minor orphan children, by guardian duly appointed, may file such a declaratory statement, *either in person or by agent*, and under the provisions of the act of February 25, 1919 (40 Stat., 1161), the officers, soldiers, and nurses of the Army, and sailors, seamen, marines, nurses, and officers of the Navy and Marine Corps of the United States, who served for more than 90 days in the Army or Navy in connection with the Mexican border operations, or during the war with Germany and its allies, may file such declaratory statements in person, *but not by agent*. Particular attention is directed to the fact that the preference rights conferred by the proviso and by H. J. R. 30, can not be supported by declaratory statements, but must be protected or exercised through homestead applications. Such declaratory statements should, therefore, not be filed until the land becomes subject to disposition under the general law.

The words “officers, soldiers, sailors, and marines,” as employed in H. J. R. 30, are generic terms, and embrace privates, seamen, nurses, and all other persons, male or female, who by enlistment or otherwise were regularly enrolled in the Army, Navy, or Marine Corps of the United States, and who could not voluntarily terminate such service, but does not include civilian employees, or officers, nurses, or members of other organizations not so enrolled in the Army or Navy.

SEC. 2. PAYMENTS REQUIRED WITH ALL CLASSES OF APPLICATIONS AND DECLARATORY STATEMENTS.—(a) *Applications*.—A fee of \$5, if the area be less than 81 acres, and \$10, if 81 acres or more; commissions at the rate of 3 per cent on lands at \$2.50 per acre, or a flat rate of 7½ cents per acre, and in addition thereto 50 cents per acre for the area embraced in the application, as first installment of the purchase price of the land, must be paid.

(b) *Declaratory statements*.—There must accompany a declaratory statement, which may be filed after the land becomes subject to disposition under the general law, a filing fee of \$3 and a sum equivalent to 50 cents per acre for the area included in such statement, and if an entry is made pursuant to such statement the fee and commissions

required with other applications must be paid, and the moneys deposited with the declaratory statement as the first installment of the purchase price will be applied.

SEC. 3. EXECUTION AND PRESENTATION OF APPLICATIONS AND DECLARATORY STATEMENTS.—(a) Any application, except that by a minor soldier, must be sworn to by the applicant before the register or receiver of the United States land office for the district in which the land is situated, or before a United States commissioner, or judge, or clerk, of a court of record in the county or land district in which the land is situated, or if, because of geographic or topographic conditions, there is a qualified officer nearer or more accessible to the land involved, but outside the county and land district, the affidavit may be taken before such officer. After an application has been so executed it may be presented to the register or receiver of the proper land office in person, by mail, or otherwise. No person shall have pending more than one application.

(b) Declaratory statements filed in person must be executed before one of the officers and may be filed in the manner indicated for the execution and filing of applications. Where filed by an agent a soldier may execute the power of attorney before any officer of the United States having a seal and authority to administer oaths, but the agent's affidavit must be executed before one of the foregoing officers.

(c) A minor soldier may execute his application before any officer authorized under the laws of the State of Oregon to administer oaths. Among those qualified may be mentioned notaries public or clerks of courts of record in the United States and diplomatic or consular officers of the United States. In connection with the applications of minor soldiers, particular attention is invited to the limitations and conditions attaching to entries made thereunder by joint resolution approved September 13, 1918 (40 Stat., 960), and departmental regulations, Circular 622 (46 L. D., 451).

SEC. 4. PREFERENCE RIGHTS UNDER THE PROVISIO.—(a) *Filing application.*—An application for a preference right of homestead entry under the proviso for either revested Oregon & California Railroad lands or Coos Bay Wagon Road grant lands must be filed at the land office in which the land is situated, on or after 9 o'clock a. m., standard time, June 11, and prior to 4.30 p. m. standard time, June 30, 1923, and unless so filed all rights under the proviso will be forfeited.

(b) *Showing required.*—The prior exercise of the homestead right by any such applicant will be no bar to entry, but with this exception such person must make the same showing required of other applicants under the general law. A person entitled to a preference right under the proviso may enter lands of any class, but entries for lands of class 1 shall be subject to the provisions of section 2 of the act of

June 4, 1920 (41 Stat., 758). The exercise of the right in any case is limited to the quarter section upon which such person has resided. He can not, therefore, embrace in his application lands of more than one quarter section. If the quarter section upon which he has resided contains no more than 1,200,000 feet, board measure, of timber he must enter the entire quarter section. He can not select therefrom the desirable subdivisions and leave unentered any portion thereof. If such quarter section contains more than 1,200,000 feet, board measure, of timber, the right is limited to the tract or lot or lots containing approximately 40 acres upon which the principal improvements of the settler are situated, and he may enter no more. He must file with his application to enter, and make a part thereof, his sworn statement showing that since December 1, 1913, he has resided on the tract applied for at least seven months in each year, and that he has improved the land, and has devoted some portion thereof to agricultural use; and he must describe such improvements and indicate such agricultural use and the area so affected; and where the entry is sought for land containing more than 1,200,000 feet, board measure, of timber on the quarter section he must show that his principal improvements are situated on the tract or lot or lots containing approximately 40 acres applied for. While a preference-right settler under the proviso must protect his rights by an application to enter, and not by filing a declaratory statement, he may, if otherwise entitled thereto, and he has entered the military or naval service of the United States, avail himself of the applicable privileges conferred by chapter 420, joint resolution approved August 29, 1916 (39 Stat., 671), and the acts approved July 28, 1917 (40 Stat., 248), October 6, 1917 (40 Stat., 391), December 20, 1917 (40 Stat., 430), and March 8, 1918 (40 Stat., 440).

(c) *Disposition of application.*—Applications under the proviso will be examined and acted upon by the register and receiver as soon after their receipt as may be. They will be allowed, rejected, or suspended, as the facts may warrant. An application meeting all the requirements herein will be allowed. An application materially defective in substance, or not accompanied by proper payments, or for unsurveyed lands, or for lands the title to which is covered by an outstanding contract, will be rejected. An application accompanied by the proper payments and the showing entitling the person filing it to a preference right, will be suspended if the land embraced therein has not been classified, or the title thereto is in dispute, or is in process of adjudication.

(d) *Final proof.*—After entry, a preference-right claimant under the proviso must comply with the law in the manner required of other entrymen, but he may submit proof at any time when he is able to show that he is entitled to final entry.

SEC. 5. PREFERENCE RIGHTS UNDER H. J. R. 30.—(a) *Units*.—To avoid confusion in the disposition of the applications, and to provide equal opportunity, as far as may be, the lands of class 3 affected hereby have been arranged into units of approximately 160, 120, 80, and 40 acres, respectively, and all persons, excepting those asserting preference rights under the proviso, shall, prior to July 2, 1923, observe such units in filing their applications to enter. No person will be allowed to embrace in his application the lands in more than one unit, nor leave unentered any portion of the unit invaded. A person who, under the law, must restrict his application to less than 160 acres, or who desires to enter a less quantity, must select a unit conforming in area to his qualifications or desires. On and after 9 o'clock a. m., standard time, July 2, 1923, any lands of class three restored hereunder may be entered in the form authorized by the homestead laws, without reference to the units designated herein.

(b) *Presentation of applications*.—Any person qualified under the general law, and who is entitled to exercise the preference right conferred by H. J. R. 30, may, on and after 9 o'clock a. m., standard time, June 11, 1923, execute and present his application to the local office for the district in which the land applied for is situated. Such application will be subject to the rights of the preferred claimants under the proviso and section 11 hereof.

(c) *Showing required*.—Any person seeking to avail himself of the special privileges conferred by H. J. R. 30 must show, either as a part of his application, or by an accompanying statement sworn to before an officer qualified to execute homestead applications hereunder, that he served in the United States Army, Navy, or Marine Corps on and after April 6, 1917, and prior to March 3, 1921. He must give the approximate period of service, and name the unit or units in which such service was performed, and that on (stating date), he was honorably separated or discharged from such service, or placed in the Regular Army or Navy Reserve, and that he did not refuse to perform such service or to 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 Navy 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. If he has lost his discharge or is otherwise unable to secure a copy thereof, he must, in a verified statement, explain fully why such copy was not furnished. A minor soldier must show, in addition to the above, that he was under 21 years of age at the date of the execution of his application.

(d) *Disposition of applications*.—All applications presented hereunder received by the register and receiver on and after 9 o'clock

a. m., standard time, June 11, 1923, and prior to 4.30 p. m., standard time, June 30, 1923, shall be treated as filed simultaneously, and where there is no conflict such application, if in proper form and accompanied by the required payments, will be allowed, on July 2, 1923. If such applications conflict in whole or in part, the rights of the respective applicants will be determined by a public drawing, to be conducted under the supervision of the superintendent of sale, at the United States land offices in which the land is situated, beginning at 10 o'clock a. m., on July 3, 1923, at the Portland and Lakeview land offices, and on July 6, 1923, at the Roseburg land office. The names of the persons who presented the conflicting applications will be written on cards, and these cards shall be placed in envelopes upon which there are no distinctive or identifying marks. The envelopes shall be thoroughly and impartially mixed, and after being mixed shall be drawn one at a time by some disinterested person. As the envelopes are drawn, the cards shall be removed and numbered, beginning with No. 1 and fastened to the application of the proper persons, which shall be the order in which the applications shall be acted upon and disposed of. If an application can not be allowed for any part of the land applied for, it shall be rejected. If it may be allowed for a part, but not for all the land applied for, the applicant shall be allowed 30 days from receipt of notice within which to notify the register and receiver what disposition to make thereof; during such time he may request that his application be allowed for the land not in conflict, and rejected as to the land in conflict, or that it be rejected as to all the land applied for; or he may apply to have the application amended to include other lands which are subject to entry, and to inclusion in his application, provided he is the prior applicant. If an applicant fails to notify the register and receiver what disposition to make of the application, it will be rejected as to all the land applied for. Applications presented on and after 9 o'clock a. m., July 2, 1923, will be received and noted in the order of their filing, and will be acted upon and disposed of in the usual manner, after all such applications presented before that date have been acted upon and disposed of. Applications to enter (except under the proviso) filed within six months from this date, in conflict with unperfected purchase claims under section 11 hereof, will be suspended to await action on such claims.

(e) *Disposition of moneys.*—Moneys tendered with applications on or before June 30, 1923, will be deposited by the receiver of the local land office to his official credit, and promptly accounted for. When a homestead application is allowed in whole or in part, the sums required as fees, commissions, and purchase money will be properly applied, and any moneys in excess of the required amount

will be returned to the applicant. Moneys tendered with applications which are rejected in whole will be returned. If an applicant fails to secure all the land applied for, and amends his application to embrace other lands, the moneys theretofore tendered will be applied on account of the required payment under the amended application. If it is not sufficient the applicant will be required to pay the deficiency, and if it is more than sufficient the excess will be returned. Moneys returned to applicants will be by official check of the receiver. Moneys tendered with applications presented after June 30, will be deposited by the receiver in the usual manner.

(f) *Termination of preference right period under H. J. R. 30.*—The 91-day preference right period authorized by H. J. R. 30 begins on July 2, the first day on which applications thereunder may be allowed, and terminates on September 30, 1923.

SEC. 6. APPLICATIONS UNDER THE GENERAL LAW.—Beginning 9 o'clock a. m., standard time, October 1, lands of class 3 restored hereunder will become subject to disposition under the general law. To the end that the applications and declaratory statements under the general law may be disposed of in an orderly manner, such applications and declaratory statements may be filed in the office of the district in which the land is situated, on and after 9 o'clock a. m., September 20, 1923, and such applications and declaratory statements together with those filed or presented at 9 o'clock a. m., standard time, October 1, shall be treated as filed simultaneously and disposed of in the manner required by section 5 (d) hereof, the drawings, if necessary hereunder, to be conducted at the several land offices beginning at 10 o'clock a. m., standard time, October 3. Applications and declaratory statements under the general law will be rejected if found to conflict with entries or applications under H. J. R. 30 filed prior to October 1. When the lands become subject to entry under the general law, those entitled to preference rights under the proviso or H. J. R. 30, and who failed to avail themselves of such preference rights, may proceed on terms of equality with other qualified persons. Moneys deposited with declaratory statements as part of the purchase price, will, if such declaratory statements are allowed, be retained until such time as entry may be made thereunder, and if no entry be made within the time prescribed by law, such moneys will then be returned.

SEC. 7. SETTLEMENT BEFORE ENTRY.—On and after 9 o'clock a. m., standard time, October 8, 1923, rights to lands of class 3 restored hereunder may be initiated by settlement before entry in the manner recognized by the general provisions of the homestead laws.

SEC. 8. COMPLIANCE WITH LAW AFTER ENTRY—FINAL PROOF.—Section 2301, Revised Statutes, does not apply, and no entry made under the provisions hereof may be commuted. No patent will be

issued until the entryman can show that he has resided on the land for three years in the manner required by the homestead laws and has cultivated a sufficient area thereof to demonstrate his good faith. Such an entryman may apply military or naval service in lieu of such residence to the extent authorized by the homestead laws, and he may otherwise enjoy the privileges accorded to other entrymen under such laws. The act approved February 25, 1919 (40 Stat., 1161), extends the provisions of section 2305, Revised Statutes, touching credit for military service in lieu of residence under the homestead law, to all such service rendered in connection with the Mexican border operations or during the war with Germany and its allies.

SEC. 9. CONTESTS.—Entries hereunder, whether allowed under the proviso, H. J. R. 30, or the general law, will be subject to contest for any reasons affecting their legality in the same manner that has been or may be provided hereafter for other entries under the homestead laws.

SEC. 10. FINAL PAYMENTS.—When final proof is submitted, the entryman must pay final commissions at the rate of 3 per cent on lands sold at \$2.50 per acre and the last installment of the purchase price, to wit, \$2 per acre for the area included in the entry.

SEC. 11. SALES OF AGRICULTURAL AND POWER SITE LANDS, COOS BAY WAGON ROAD GRANT.—(a) *Lessee defined.*—A lessee within the meaning of section 3 of the act of February 26, 1919 (40 Stat., 1179), and the proviso to section 1 of the act approved June 4, 1920 (41 Stat., 758), is one who, being a citizen of the United States, was at the date of the approval of the act holding under lease from the Southern Oregon Co. agricultural or power site lands. Such lessees are of two classes: (1) Those who have for 10 years prior to February 26, 1919, held continuously the leased lands; and (2) those who had cultivated lands while under lease and placed valuable improvements thereon.

(b) *Lands subject to purchase.*—The lessee under the act of February 26, 1919 (40 Stat., 1179), whether claiming under the 10-year clause or under the provision relating to cultivation and improvements, can not purchase lands of classes 1 and 2. He can secure under such act only lands of class 3. The proviso to section 1 of the act approved June 4, 1920 (41 Stat., 758), authorizes a lessee under the act of February 26, 1919 (40 Stat., 1179), to purchase lands of class 1 (power site) where such lands do not contain 300,000 feet of timber on the 40-acre tract; but lands so purchased are subject to section 2 of the aforesaid act of June 4, 1920 (41 Stat., 758), and the patent issued to the purchaser shall so recite. The lessee can not, whether under the act of February 26, 1919 (40 Stat., 1179), or the act of June 4, 1920 (41 Stat., 758), purchase lands containing 300,000 feet of timber on a 40-acre tract. While a lessee may not under any circumstances purchase lands of class 2, he may, if he can make the

showing required of a settler by paragraph *b*, section 4 hereof, exercise his rights as such settler to lands of any class. Where a lessee exercises the right of a settler in strict conformity with paragraph *b*, section 4 hereof, he will not forfeit his right to purchase other lands of classes 1 and 3 in the manner otherwise provided herein.

(*c*) *Area subject to purchase.*—The area that may be purchased by a lessee, whether under the act of February 26, 1919, or June 4, 1920, or both acts, is limited to 160 acres. Where the lease is held by two or more persons, or by a corporation, the purchase must be by the joint owners or by the corporation. The individual members of the firm or association, and the stockholders of the corporation, can not make separate purchases. A single right only exists under the lease, and is limited to 160 acres.

(*d*) *Contiguity of lands.*—Where the lease covers more than 160 acres of contiguous lands subject to purchase, the lessee must select contiguous tracts, but he may take incontiguous tracts where necessary to make up the full quantity of 160 acres.

(*e*) *Tracts partially covered by lease.*—The right to purchase is confined to leased lands, but where the lease covers a part only of a legal subdivision the lessee will be permitted to purchase if more than one-half of such subdivision is included in the lease; otherwise the right of purchase will be denied.

(*f*) *Termination of lease prior to February 26, 1919.*—Where a lease was terminated prior to February 26, 1919, no right to purchase exists, even though such lease may have continued for a period greater than 10 years. Where, after the termination of an old lease, a new lease was given, the lessee holding at the date of the approval of the act will be recognized, provided he is otherwise within the provisions thereof.

(*g*) *Showing required by lessee.*—Any lessee must show that he was a citizen of the United States on February 26, 1919, and that the land was free from adverse settlement claim within the meaning of the second proviso to section 3 of the act of February 26, 1919 (40 Stat., 1179). If he claims under the 10-year clause, he must show that he held the lease for the period mentioned; if under the provision relating to cultivation and improvements he must by affidavit, corroborated by two witnesses, show all the facts with reference to cultivation and improvements necessary to establish his claim.

(*h*) *Preference period for lessee.*—The lessee will be allowed six months from the date hereof within which to complete his proofs and make the required payments, but he must on or prior to June 30 file his application to purchase, with a specific description of the land, not exceeding 160 acres. Such application must be sworn and subscribed to before an officer authorized to administer oaths and using

a seal. In order to avoid confusion, the lessee is urged to file his application at the earliest day practicable.

(i) *Payment.*—The payments required are \$2.50 per acre, and the amount of taxes on the land paid by the Government under the provisions of the act of February 26, 1919 (40 Stat., 1179). Upon request, the register and receiver, United States land office, Roseburg, will advise the lessee the amount necessary to reimburse the Government for taxes paid on the lands included in his application to purchase.

WILLIAM SPRY,
Commissioner.

Approved: May 2, 1923.

HUBERT WORK,
Secretary.

PERMITS FOR FENCING STOCK-WATERING RESERVOIRS.

INSTRUCTIONS.

[Circular No. 893.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 3, 1923.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

The act of Congress approved March 3, 1923 (42 Stat., 1437), amends section 1 of the act of January 13, 1897 (29 Stat., 484), "An Act providing for the location and purchase of public lands for reservoir sites" by inserting at the end thereof, the following new sentence:

The Secretary of the Interior, in his discretion, under such rules, regulations, and conditions as he may prescribe, upon application by such person, company, or corporation, may grant permission to fence such reservoirs in order to protect live stock, to conserve water, and to preserve its quality and conditions: *Provided*, That such reservoir shall be open to the free use of any person desiring to water animals of any kind; but any fence erected under the authority hereof shall be immediately removed on the order of the Secretary.

This act applies only to stock-watering reservoirs which have been or may hereafter be constructed, and due proof of construction filed in the General Land Office.

Any person, company, or corporation, desiring to secure the benefits of this act should file in the local land office an application, under oath, duly corroborated by at least two disinterested witnesses, setting forth such facts as would show that it is necessary to fence such reservoir in order to protect the live stock, to conserve water

and to preserve its quality and condition. There should be filed with such application, and as a part thereof, a plat showing the land embraced in the reservoir as near as may be, the location of the proposed fence with respect to such reservoir, together with all gates or other openings and roadways leading to the same. In no instance, will an application be considered unless said plat shows the location of at least two gates. Said gates shall be so constructed and maintained that they may be, at all times, readily opened and closed by any person desiring to water animals of any kind and such gates shall be so placed as to be readily accessible from the road or roads nearest the reservoir, which roads shall be the ones usually traveled and, where there are no such roads whereby to govern the location of such gates, they shall be so situated as to make the reservoir readily available from the adjacent public or other range; and that there shall be posted on the gates, and elsewhere if necessary, a notice stating that the reservoir is for stock watering purposes, located on public lands and that same is open to the free use of any person desiring to water animals of any kind.

Upon the filing of such an application, it should be considered by the local office as an additional paper in the case and transmitted to this office by special letter under serial number of the reservoir declaratory statement for such action as may be deemed proper.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

ROBERT D. HAWLEY (ON PETITION).

Decided May 5, 1923.

OIL AND GAS LAND.—OKLAHOMA—ACT OF MARCH 4, 1923—STATUTES.

The status of the oil and gas bearing lands south of the medial line of Red River in Oklahoma, being *sub judice*, the act of February 25, 1920, does not of its own force apply to that area, and inasmuch as Congress has enacted special legislation relating thereto contained in the act of March 4, 1923, the provisions of the former act become applicable upon the termination of that status only as prescribed by the latter act.

OIL AND GAS LANDS—PROSPECTING PERMIT—OKLAHOMA—SECRETARY OF THE INTERIOR—ACT OF MARCH 4, 1923.

The act of March 4, 1923, expressly withheld the authority of the Secretary of the Interior to dispose of the oil and gas contents in the lands south of the medial line of Red River in Oklahoma until their *sub judice* status should be terminated and, until a date thereafter fixed by that official as prescribed by the act, an application for a prospecting permit filed by one not basing his claim upon equities recognized by the act must be denied.

COURT DECISIONS CITED AND APPLIED.

Cases of *Newhall v. Sanger* (92 U. S., 761), *Quinn v. Chapman* (111 U. S., 445), and *State of Oklahoma v. State of Texas, United States, intervener* (258 U. S., 574 and 259 U. S., 565), cited and applied.

FINNEY, *First Assistant Secretary*:

Robert D. Hawley has filed a petition for reconsideration of the rejection of his application for a permit under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), by the Commissioner of the General Land Office on March 17, 1923, which rejection received departmental approval.

The record discloses that the application which was rejected was filed in the United States land office at Guthrie, Oklahoma, on January 15, 1923, and amended on January 29, 1923, to include an additional tract. The land applied for is unsurveyed and described by metes and bounds as lying south of the medial line of Red River in Oklahoma, in what would be, if the existing public land surveys were extended, townships 7 and 8 south, range 6 west, I. M.

The decision of March 17, 1923, rejected this application for the reason that the Supreme Court, on May 1, 1922, in the case of the *State of Oklahoma v. State of Texas, United States, intervener* (258 U. S., 574), and by decree of said court of June 5, 1922 (259 U. S., 565), held that the mining laws of the United States, and other land laws do not apply to lands south of the medial line of Red River; and pointed out that Congress, by the act of March 4, 1923 (42 Stat., 1448), provided for the disposition of the oil and gas deposits of the lands south of the medial line of the river, in Oklahoma.

The petitioner submits that the decision of the Supreme Court holding that lands south of the medial line of Red River are not subject to disposition under any of the public land laws of the United States was not essential to the disposition of the case before it and should not be binding upon the Department in passing upon applications for prospecting permits under the leasing act of February 25, 1920, and that the provisions of the act of March 4, 1923, *supra*, extending the provisions of the leasing act of February 25, 1920, *supra*, to lands remaining unappropriated relates only to lands claimed prior to February 25, 1920, which shall not be leased pursuant to the provisions of the later act.

The Department can not concur in such a limited construction of the decision of the court nor of the act of March 4, 1923, *supra*.

The holding by the court that the lands south of the medial line of Red River never were subject to disposal under any of the public land laws must have been made in addition to the reasons expressed by the court, with the fact in mind that the status of this land was *sub judice*, and that until that question was finally determined, the land would not be subject to any form of appropriation under the public land laws. *Newhall v. Sanger* (92 U. S., 761), *Quinn v.*

Chapman (111 U. S., 445). A final decree as to the land in question has not been rendered.

The contention that the act of March 4, 1923, *supra*, is to be construed as authorizing the disposal under the act of February 25, 1920 (41 Stat., 437), of the lands which were claimed prior to February 25, 1920, and upon which expenditures were made, which should remain undisposed of, is an admission that the said act of February 25, 1920, does not apply to such lands of its own force. Had it been the intent of Congress that such act did apply generally to the lands in the south half of the river, no such provision would have been necessary as the lands remaining would, upon the denial of all equitable claims, have at once been subject to its provisions.

Congress recognized the status of the lands south of the medial line of the river as *sub judice* and in section 6 of the act of March 4, 1923, directed that the Land Department should not interfere with the jurisdiction of the Supreme Court. There is nothing in the said act to restrict its operations to the portion of the river bed known as the "Receivership Area" nor was the suit before the court limited to that zone.

The request for the reinstatement of the petitioner's application and its suspension until after May 3, 1923, is a request for a privileged status which must be denied in view of the provision in the act of March 4, 1923, that lands remaining shall be subject to appropriation under the act of February 25, 1920, *supra*, after a date to be set by the Secretary.

The petition is, accordingly, denied.

STATE OF NEW MEXICO v. WEED.

Decided May 5, 1923.

OIL AND GAS LANDS—PROSPECTING PERMIT—SELECTION—NEW MEXICO.

Noncompliance by a permittee with the terms of an oil and gas prospecting permit does not make the lands embraced therein "unreserved, unappropriated" public lands within the meaning of those terms as they are used in section 11 of the act of June 20, 1910, which specified the character of lands that may be selected under that act by the State of New Mexico.

OIL AND GAS LANDS—PROSPECTING PERMIT—SELECTION—RECORDS—ADVERSE CLAIM—SURFACE RIGHTS.

A State selection for lands embraced within an oil and gas prospecting permit can not be allowed prior to the cancellation of the permit and notation of its cancellation upon the records of the local land office, except upon the consent of the selector to take subject to the provisions and reservations of the act of July 17, 1914, and to the right of the permittee to the use of the surface in accordance with the provisions of section 29 of the act of February 25, 1920.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Martin Judge (49 L. D., 171), cited and applied.

FINNEY, *First Assistant Secretary*:

The Commissioner of the General Land Office has transmitted an appeal by the Commissioner of Public Lands for the State of New Mexico, on behalf of that State, from a decision by the register and receiver of the United States land office at Las Cruces, New Mexico, dated January 16, 1922.

The decision appealed from denied the State's selection, filed in the Las Cruces land office on January 14, 1922, as to the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 20, T. 24 S., R. 12 E., which are embraced in a prospecting permit granted to F. W. Weed under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), on February 19, 1921, unless consent be filed by the State to take the land subject to the right of the permittee or a lessee, where rights are based upon this prior permit, to use so much of the surface of the land as is necessary to the prospecting for, extracting and removing of the oil and gas deposits, without compensation for such use, in accordance with section 29 of the leasing act, *supra*.

The State's selection was made under section 7 of the act of June 20, 1910 (36 Stat., 557, 562), for the benefit of the Santa Fe and Grant Counties' railroad bond fund.

The appellant bases its appeal on two points: first, that Weed has forfeited his permit by noncompliance with its terms; second, that the lands covered by the permit were unoccupied, nonmineral public lands of the United States at the time of its selection, and that upon the selection its rights became vested. The appeal, which is under oath, is accompanied by a corroborating affidavit as to the nondevelopment of the land by the permittee.

The question of the nonmineral character of lands embraced in a prospecting permit was passed upon by the Department in the case of William R. Brennan (48 L. D., 108), which held that such land, although not within a designated oil or gas structure, is nevertheless to be treated as valuable for oil and gas, and a subsequent entry can not be allowed unless with a reservation of the oil and gas to the United States and with a waiver of compensation under section 29 of the leasing act of February 25, 1920, *supra*. Instructions to this effect were issued in departmental letter to local land officers, of October 6, 1920, and in regulations of March 11, 1920 (47 L. D., 437, 474).

The appellant apparently relies upon the nondevelopment of the land by the permittee to make it "unappropriated, unreserved" public lands within the meaning of section 11 of the act of June 20, 1910, *supra*, under which it claims.

The segregative effect of an uncanceled permit was fully passed upon in the recent case of Martin Judge (49 L. D., 171) in which

the Department adopted the rule expressed in *California and Oregon Land Company v. Hulen and Hunnicutt* (46 L. D., 55), that—

the orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

While the Martin Judge decision, *supra*, related to applications for permits to prospect for oil and gas upon lands in a subsisting permit, the Department is of the opinion that the same rule must apply to entries or selections under the nonmineral laws where the entryman or selector is unwilling to waive all claims to the deposits described in the subsisting permit and to accept so much of the surface as is not necessary for the successful prospecting for and removal of these deposits.

In so holding the Department does not mean to permit the undue segregation of lands, not essentially mineral, from disposition under the nonmineral land laws, by permittees who have defaulted in the drilling requirements of their permit and will, as stated in the case of *Purvis v. Witt* (49 L. D., 260), avail itself of the assistance of citizens in its disposal of the public lands, where the protest or contest alleges sufficient cause affecting the legality or validity of the claim, not shown by the records or known to the Department, and will in proper cases cancel the outstanding permit. In cases where the lands are not withdrawn or classified as mineral the protestant or contestant may make his entry without a mineral reservation after the cancellation of the outstanding permit, but no preference right of entry is acquired by such successful contest or protest.

The Department, therefore, finds that the only error committed by the register and receiver was in not requiring the State to elect to take the land subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), and to afford the permittee an opportunity to show cause against the allowance, as directed in departmental letter of instructions of October 6, 1920, *supra*.

It appears that the permit issued to F. W. Weed has now subsisted for more than two years and that no showing has been made indicating compliance with its drilling requirements and he will be called upon to show such compliance or diligence sufficient to warrant an extension of time under the act of January 11, 1922 (42 Stat., 356), within fifteen days from notice, on penalty of cancellation of his permit.

The State will be allowed thirty days from notice within which to elect to take the land subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), and subject to the right of

the permittee or lessee to use so much of the surface as is necessary in accordance with section 29 of the leasing act, as directed in the decision appealed from. The permittee will, in such case, be permitted to show cause why the selection should not be allowed under the foregoing conditions. Upon failure of the State to file the consent herein required the selection will be canceled as to the lands in the subsisting permit. In event of the cancellation of the permit and the restoration of the lands on the records of the local office the State may make a new selection without any reservations in the absence of intervening claims.

The decision appealed from is modified as herein directed, and the records returned to the General Land Office.

SCOTT K. SNIVELY (ON PETITION).

Decided May 5, 1923.

SURVEY—SURVEYOR GENERAL—PUBLIC LANDS—SECTION 2396, REVISED STATUTES.

Section 2396, Revised Statutes, contemplated that in the disposal of public lands the official surveys are to govern and that each section or sectional subdivision, the contents whereof have been returned by the surveyor general, shall be held as containing the exact quantity expressed in the return.

SURVEY—RESURVEY—PUBLIC LANDS—REPAYMENT.

Where the evidences of a Government survey are sufficient for identification of the boundaries, differences in the measurements and areas of public lands from those shown in the returns of the official survey alleged by an owner asserting a claim for repayment on the ground of shortage does not afford a basis for resurvey.

FINNEY, *First Assistant Secretary:*

By decision of May 10, 1922, the Commissioner of the General Land Office rejected the application of Scott K. Snively for resurvey of Sec. 12, T. 57 N., R. 85 W., Wyoming, as a basis for repayment of certain alleged excess moneys paid in connection with the coal entry 0174, Buffalo series, for the SE. $\frac{1}{4}$ Sec. 12, made by Hugh E. Snively, October 5, 1908, and coal entry 0788, Buffalo series, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, said section by Jennie E. Snively, February 3, 1909. The case has come before the Department on petition by Scott K. Snively requesting reversal of the action of the General Land Office.

It appears that these entries embraced 160 acres each according to the official plat of survey, and payment was made at the rate of \$30 per acre. It is alleged that there is a shortage of approximately 10 acres in each of the tracts composing the eastern half of the section, making a total shortage of about 60 acres in these two entries. The petitioner herein claims the lands as assignee of the said entrymen.

This same matter was considered by this Department and the request for resurvey was denied under date of March 12, 1910.

In the disposal of public lands the official surveys govern. Section 2396, Revised Statutes, in part provides that all the corners marked in the surveys, returned by the surveyor general, shall be established as the proper corners of sections, or subdivisions of sections which they were intended to designate; that the boundary lines, actually run and marked in the surveys returned by the surveyor general, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned, shall be held and considered as the true length thereof; that each section or subdivision of section, the contents whereof have been returned by the surveyor general, shall be held and considered as containing the exact quantity expressed in such return.

These provisions recognize the fact taught by experience that measurements of lands can not be performed with precise accuracy, and that the work of no two surveyors would exactly agree. While the alleged shortage in the instant case presents a discrepancy of unusual proportion, yet the very purpose of the declarations of law above mentioned, was to obviate inquiry and contention in respect to survey inaccuracies.

The evidences of the Government survey in this case appear to be sufficient for identification of the boundaries, and therefore, no proper case for resurvey is presented. In denying the former application for resurvey the Department stated in part as follows:

It is to be presumed that Congress, in enacting the law above quoted, and this Department in its interpretation, had in mind that the stability of surveys and the title to lands described by reference thereto should be unassailable by parties finding differences in measurements and areas from those returned. In the present case, the evidences of survey are now found with sufficient certainty, to permit the grantees of these lands to determine the boundaries thereof and to deduce therefrom the deficiency in area. It must therefore be held that these evidences were at least as good when entries were made as they are now and there can be no proper complaint that the grantees were not chargeable with the knowledge that the deficiencies then existed.

Recognition of right to resurvey and repayment in this case would establish a most far-reaching precedent because it would afford a basis for a similar claim by anyone who had purchased Government land and found the area short of that indicated by the plat of survey. And yet the Government would have no sort of basis for claim to further payment in those cases of patented lands where there was an excess of acreage over that paid for in harmony with the survey returns at the time of disposal. Doubtless the wise purpose of the law was to forstall and preclude vexatious disputes as to the actual area of lands disposed of according to the survey returns,

If such transactions were not made final, controversies would be constantly arising concerning patented lands and resurveys and re-adjudications would be interminable.

The petition is accordingly denied.

PROOFS, AFFIDAVITS AND OATHS—ACT OF FEBRUARY 23, 1923.¹

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 7, 1923.

REGISTER AND RECEIVER,
PHOENIX, ARIZONA:

I am in receipt of your letter of April 27, 1923, requesting an interpretation of section 2294, Revised Statutes, as amended by the act of February 23, 1923 (42 Stat., 1281).

Before its amendment, this section required that proofs, affidavits and oaths be made before one of the officers named therein *in the county* in which the land is located unless made before such an officer, outside the county but within the land district, nearer to or more accessible from the land involved. The proviso authorizing the use of a nearer or more accessible officer, though outside the county, reads in part as follows:

That in case the affidavits, proofs, and oaths, hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs and oaths *in the land districts* in which the lands applied for are located. * * * [Italics supplied.]

As amended by the act of February 23, 1923, that part of the section reads:

That in case the affidavits, proofs and oaths hereinbefore mentioned be taken outside of the county *or land district* in which the land is located, the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take such affidavits, proofs, and oaths * * *. [Italics supplied.]

The italicized words in the amendment are added thereby, and the italicized words in the proviso as it was before the amendment have been eliminated.

¹ See Circular No. 894, page 586.

The effect of the change, in its relation to the first proviso, added by the amending act, is to permit the proofs, affidavits, and oaths to be executed before a qualified officer within the boundaries of either the county or the land district, or outside both the county and land district upon a proper showing that the officer so acting was, because of topographic or geographic conditions, nearer or more accessible to the land.

It follows that in a State comprising a single land district, such affidavits, proofs and oaths may be made before any such qualified officer in the State.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

EXECUTION OF PROOFS, AFFIDAVITS AND OATHS—SUPPLEMENTAL INSTRUCTIONS—ACT OF FEBRUARY 23, 1923.

INSTRUCTIONS.

[Circular No. 894.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 8, 1923.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

By office letter of May 7, 1923 (49 L. D., 585), to the register and receiver at Phoenix, Arizona, approved by the First Assistant Secretary of the Interior, it was held that the proofs, affidavits, and oaths mentioned in section 2294, Revised Statutes, as amended by the act of February 23, 1923 (42 Stat., 1281), may be executed before a qualified officer within the boundaries of either the county or land district in which the land is located, without any showing as to the nearness or accessibility of such officer, or outside both the county and land district upon a showing by affidavit, satisfactory to the Commissioner of the General Land Office, that the officer so acting was, because of topographic or geographic conditions, nearer or more accessible to the land. Reference is had to Circular No. 884, dated March 23, 1923 (49 L. D., 497).

You will be governed accordingly.

WILLIAM SPRY,
Commissioner.

QUINN v. NORTHERN PACIFIC RAILWAY COMPANY.

Instructions, May 10, 1923.

RAILROAD GRANT—LIEU SELECTION—SURFACE RIGHTS—ACT OF JULY 1, 1898.

The act of July 1, 1898, authorizing the adjustment of disputes arising out of conflicting claims of settlers and the Northern Pacific Railway Company to lands within the latter's grant, warrants the making of selections by the company under the acts providing for surface entries.

DEPARTMENTAL DECISIONS CITED AND DISTINGUISHED.

Cases of Northern Pacific Railway Company (45 L. D., 155, and 48 L. D., 573), cited and distinguished.

FINNEY, *First Assistant Secretary*:

I have given careful consideration to your [Commissioner of the General Land Office] letter of March 10, 1923, in which it is requested that you be advised whether the Northern Pacific Railway Company is entitled to a surface patent, under the act of March 3, 1909 (35 Stat., 844), to the land involved in the above entitled case, selected by it under the act of July 1, 1898 (30 Stat., 597, 620), and subsequently embraced in a coal land withdrawal.

It is suggested by the papers accompanying your request for instructions that the opinion obtains in your bureau that in holding that the company is entitled, under its selection, to a patent for the tract in controversy with a reservation to the United States of the coal deposit, the Department, in its decision of October 17, 1922, unreported, has overlooked the rule laid down in Northern Pacific Railway Company (45 L. D., 155), and Northern Pacific Railway Company (48 L. D., 573).

In the case first cited, it was held that the act of March 3, 1909, *supra*, in no wise amended or modified the act of July 2, 1864 (13 Stat., 365), and the joint resolution of May 31, 1870 (16 Stat., 378), making the grant to the Northern Pacific Railroad Company; and, specifically, that the grant was not *abridged* by the act of 1909.

In the second case cited, the Department held that the act of July 17, 1914 (38 Stat., 509), did not amend or modify the grant to the company; specifically, that the grant was not *enlarged* by the act of 1914.

These two cases thus lay down the rule that the scope and extent of a railroad grant are to be determined by the terms of the act making the grant; and that the rights of the company thereunder are not diminished or enlarged by an act, general in its terms, which, neither expressly nor by any proper implication, evidences a purpose to affect a prior special law under which vast rights have accrued.

In the case of *Quinn v. Northern Pacific Railway Company*, the Department, in its said decision of October 17, 1922, passed upon a selection under the act of July 1, 1898, *supra*, as to which the acts

making the railroad grant were pertinent in a historical sense only, as the source of the company's title or claim of right to land relinquished by it under the direction of the Secretary of the Interior. The act of July 1, 1898, as to selections, made whether by the company or by settlers, is clearly one of the many laws enacted by Congress to remedy hardship or to advance some public interest, real or supposed, by granting what are popularly denominated lieu or scrip rights. Each of these acts has been interpreted and administered in the light of its own provisions, and there is nothing in the act of July 1, 1898, *supra*, that induces the belief that selections filed under its terms are essentially different from selections under other lieu acts that have been held to be within the purview of the acts providing for surface entries.

UNITED STATES v. CENTRAL PACIFIC RAILWAY COMPANY (ON REHEARING).

Decided May 12, 1923.

MINING CLAIM — RAILROAD GRANT — ADVERSE CLAIM — EVIDENCE — BURDEN OF PROOF.

Proof in a proper proceeding of the inclusion within the limits of a lode mining claim, made in good faith and based upon a sufficient discovery, of an area comprising part of an odd-numbered section within the primary limits of a railroad grant, establishes *prima facie* or presumptively the mineral character of such area, and unless that presumption be overcome by satisfactory evidence that the area in conflict is not mineral in character it must be held to be excepted from the operation of the grant.

FINNEY, *First Assistant Secretary*:

This is a motion for rehearing filed by the Central Pacific Railway Company challenging the correctness of the departmental decision of February 23, 1923, in the above-entitled case to the extent that it holds that so much of lot 6, Sec. 15, T. 31 N., R. 43 E., Elko land district, Nevada, included in the company's list No. 9, serial 03802, as is embraced in the Gold Flake and Seal lode mining claims is mineral in character and for that reason excepted from the grant to the company made by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 365).

The said lot 6 is within the primary limits of the company's grant and the list covering the same was filed in the local office October 30, 1919. May 19, 1920, the Commissioner of the General Land Office directed the institution of proceedings against the list on the charge that that lot together with other subdivisions embraced in the list, was mineral in character. From the evidence adduced at the hearing had on said charge the Commissioner by decision of August 15, 1922, found said lot to be mineral in character in its entirety and for

that reason held the list for rejection as to that subdivision. On appeal from that action the Department in the decision here complained of after making a finding favorable to the company as to the greater portion of lot 6, said:

But said lot 6 is partly covered by a few hundred feet of the northerly parts of two other claims, the Gold Flake and the Seal, whose length lies mostly in Sec. 22 on the south, where their discovery points are, and from which samples were taken, the assays whereof, according to the testimony of the Government witnesses, show the values that stamp the areas of said claims as mineral in character. No evidence of any weight showed mineralization of the ends of said claims lying within the boundaries of said lot 6. But the location of said claims having been made prior in time to the railway company's selection of said lots, as granted nonmineral land, the entire area of the claims, if any part of them is mineral in character, must be classified as mineral ground. Their location amounts to a segregation of their entire area as acquirable under the mining laws and not enterable under the laws relative to the disposition of non-mineral public lands, or selectable under grants of such lands. The area of such claims, from the time of their location, became no longer open to selection under a grant of nonmineral lands, provided such area, an indivisible unit, was found on an issue to be, as to any part thereof, of a character to which the grant did not apply. This principle is that governing a case in which the Department has given precedence to a mineral location over a later homestead settlement, in conflict with an end of the former, although the conflict area was not shown to be by itself mineral in character.

It is urged in the motion that the decision complained of overlooked the fact that the said lot 6 is within the primary limits of the grant opposite the portion of the line of road which was definitely located on April 26, 1868, and, being free from any valid claim or right then existing inured to the company under its grant unless mineral in character. It is further urged that the Department in said decision erred (1) in holding and finding that, because the Gold Flake and Seal lode mining claims had been located prior to the company's selection of said lot 6 as granted nonmineral land, so much of said claims as extend into that subdivision must be classified as mineral, even though the evidence was insufficient to establish the mineral character of lot 6; (2) in holding that, because parts of a located lode mining claim are found to be mineral in character, a mineral character must necessarily be impressed upon certain other parts thereof in conflict with a railroad grant, as to which the evidence was insufficient to establish their mineral character; (3) in holding that the company's grant did not apply and attach to that portion of lot 6 included within the limits of the Gold Flake and Seal lode mining claims as the same were extended into lot 6; (4) in not holding and finding that the company's right to all of lot 6, attached as of the date of the grant, and that the entire lot must pass to the company under its grant except as to such parts thereof as may be found to be mineral in character; (5) in adjudicating any part of lot

6 to be mineral in character after finding and holding that the evidence is insufficient to establish the mineral character of said lot.

Upon a reconsideration of the case the Department is of opinion that the decision complained of went too far in holding as it did in effect that the mere fact that a part of an odd-numbered section lying within the primary limits of a railroad grant and also included within the exterior lines of a lode mining claim located between the date of the definite location of the line of road and the date of the listing of the tract by the railroad company, based upon a discovery made outside the conflict area, operates conclusively to except the conflict area from the grant, irrespective of its character with respect to materials. *Northern Pacific Railroad Co. v. Allen et al.* (27 L. D., 286).

The true rule is, as has been held by the Department, that proof, in a proper proceeding of the inclusion within the limits of a lode mining claim, made in good faith, and based upon a sufficient discovery, of an area comprising part of an odd-numbered section within the primary limits of a railroad grant, which area, if mineral in character, would be subject to appropriation under the mining laws of the United States, establishes *prima facie* or presumptively the mineral character of such area, and that unless that presumption be overcome by satisfactory evidence that the conflict area is not mineral in character, it must be held to be excepted from the operation of the grant.

Supporting this rule is the decision of the Department in *Sweeney v. Northern Pacific Railroad Co.* (20 L. D., 394), which case involved the character of land included in seven lode mining claims located, it appears, in an odd-numbered section within the primary limits of the grant to the defendant company, wherein the Department, on page 395, said:

* * * The record shows, however, that these locations were made in conformity with the United States Statutes and the local rules and regulations of the district. This being so, it must be presumed that the land is mineral in character, for the reason that a discovery of mineral is required before a claim can be legally located, and the presumption of the Department is that all the requirements of the law were complied with in the making of said locations. (*Northern Pacific Railroad Company v. Marshall*, 17 L. D., 545; *State of Washington v. McBride*, 18 L. D., 199.) The burden of proof was therefore upon the railroad company to show that the land was not mineral in character, and it having failed to do this, the application, so far as the mineral character of the land is concerned, should have been received.

In *Walker v. Southern Pacific Railroad Company* (24 L. D., 172), which involved two lode mining claims in conflict with an indemnity selection by the company in 1885, the Department, on page 174, said:

* * * Although the best evidence of Walker's alleged location of said mining claims—duly certified copies of the location notices—was not filed, the

testimony is ample to show that such locations existed, that of the Green Mountain having been made in 1891, and of the Lucky Boy in 1892. No objection was made to the admission of this testimony.

The presumption then was, at the date of the hearing, that these locations had been made conformably to law and that the land was mineral in character. This was a rebuttable presumption, but until overthrown by competent and sufficient evidence it fixed the burden of proof upon the defendants (*Sweeney v. Northern Pacific R. R. Co.*, 20 L. D., 394).

It is true that the two cases last cited were overruled by the decision in *Magruder v. Oregon & California Railroad Company* (28 L. D., 174), in so far as they were based upon the theory that a certificate of location of a mining claim upon land returned by the surveyor as agricultural is sufficient evidence that the land is mineral in character to cast the burden of proving the contrary upon one who asserts its agricultural character, but the overruling decision in no wise disturbed the other proposition therein stated, namely, that a valid discovery within the limits of a mining location gives rise to the presumption that the entire area within the limits of the claim is mineral in character and that that presumption would prevail in the absence of evidence sufficient to establish the contrary.

In *Star Gold Mining Company* (47 L. D., 38), the Department, on page 42, said:

The statute, Sec. 2320, R. S., contemplates that a claimant will locate not exceeding 1,500 feet along the discovery vein or lode. It is to his interest to so locate. In connection with a mining location there arises a presumption, essentially one of fact, that the located vein extends throughout the length of the claim. The claimant is not only entitled to the discovered vein but to all other veins, lodes, and ledges apexing within the free ground included in the surface location. Sec. 2322, R. S. Even where it may be demonstrated that the discovery vein deviates materially from a central course through the claim, the location as originally staked and marked in good faith will stand.

The same principles apply with respect to the land involved in the motion under consideration. Each of the two herein above named claims in conflict with the grant was found by the Department to have been based upon a legal discovery of mineral and to have been laid longitudinally along a vein or lode whose course at points where it is exposed outside the conflict but within the limits of the claim, was in the direction of the conflict area, the *prima facie* mineral character of such claim being thus established.

The evidence adduced on behalf of the railroad company falls far short of rebutting the presumption arising from the facts found by the Department.

There is no suggestion in the case that either of the claims was not laid along the discovery vein, or that there was any fault or other disturbance or change in formations that would break or ter-

minate the vein at any point to the south of the north end of the claim, or otherwise preclude its extension throughout the entire length of the claim. It must, therefore, be held that the entire area in question is shown by the record to be mineral in character, and that for that reason is excepted from the operation of the grant to the company.

The decision complained of, as thus modified, is adhered to, and the motion denied.

LEASING OF LANDS WITHIN RESERVATIONS CREATED FOR THE BENEFIT OF THE NATIVES OF ALASKA.

Opinion, May 18, 1923.

ALASKA—SCHOOL LANDS—RESERVATION—INDIAN LANDS—STATUS OF NATIVES.

By article III of the treaty of March 30, 1867, under which the Territory of Alaska was ceded to the United States, and by subsequent acts providing for their education and support, Congress has recognized the natives of Alaska as wards of the Federal Government, thus giving them a status similar to that of the American Indians within the territorial limits of the United States.

ALASKA—SCHOOL LANDS—RESERVATION—SECRETARY OF THE INTERIOR—LEASE—SUPERVISORY AUTHORITY.

While there is no specific statute relating to the subject, yet the inherent power conferred upon the Secretary of the Interior by section 441, Revised Statutes, to supervise the public business relating to the Indians, includes the supervision over reservations in the Territory of Alaska created in the interest of the natives and the authority to lease lands therein for their benefit.

EDWARDS, *Solicitor*:

By the Executive order of February 27, 1915, the President "withdrew from disposal, and set apart for the use of the Bureau of Education" 25,000 acres, including both land and water, surrounding the village of Tyonek near the north end of Cook Inlet in Alaska.

The primary object of this reservation was to enable your Department through the Bureau of Education to maintain a school and otherwise care for, support and advance the interests of the aboriginal natives who are practically the only inhabitants of the village mentioned, and who support themselves mainly through hunting, trapping, and fishing. In view of the fact that these natives live in an isolated locality and are remote from any place where they can readily and advantageously dispose of their fish, the officers of the Bureau of Education have concluded that it would be both wise and helpful to induce the installation and maintenance of a salmon cannery at or near the village.

There can be no doubt but that such a plant would be very beneficial to the natives because it would not only furnish them employment in and about the cannery itself but would encourage them to more extensively engage in fishing since the superintendent in charge of the schools for the Eskimos, Aleuts, and other aboriginal people, all of whom I shall hereafter refer to as natives, has reported in a telegram addressed to the Bureau of Education that a "small cannery on the reserve means eight to twelve thousand dollars to village. Without it sale of salmon will net them two or three thousand dollars" only.

In furtherance of this helpful object, the superintendent has entered into negotiations with Joseph A. Magill "for the erection of a cannery and for fishing privileges within the reserve for the period of five years," and by his letter of April 4, 1923, addressed to this Department, the Commissioner of Education asks—

Information is desired from the Department as to whether or not the Commissioner of Education is authorized to issue to Mr. Magill a permit to operate a cannery and to fish within said reserve, conditioned on the execution of a lease between Mr. Joseph A. Magill and the Tyonek Native Store.

In response to your request for my opinion on the question thus presented, I have the honor to inform you that in my judgment you are authorized by law to enter into such a lease, either through the Commissioner of Education or otherwise; but that the lease should not be made by the native store.

In view of the fact that this question has not heretofore, in so far as I am informed, been submitted for consideration, I deem it advisable to look into the principles on which this opinion is based at some length.

While there is no statute which in express terms authorizes the granting of such leases, I am of opinion that the power to grant them exists as an incident to, and a necessary aid in the execution of other powers and the performance of other duties which have been directly conferred by statute.

The fundamental consideration underlying this question is the fact that these natives are, in a very large sense at least, dependent subjects of our Government and in a state of tutelage; or in other words, they are wards of the Government and under its guardianship and care. The relations existing between them and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States to whom I shall hereafter refer as American Indians.

Article III of the treaty under which Alaska was ceded to the United States (15 Stat., 539), conferred citizenship on all the in-

habitants of the ceded territory "with the exception of the uncivilized tribes" therein, and declared that they "will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to the aboriginal tribes of that country."

In the beginning, and for a long time after the cession of this Territory Congress took no particular notice of these natives; has never undertaken to hamper their individual movements; confine them to a locality or reservation, or to place them under the immediate control of its officers, as has been the case with the American Indians; and no special provision was made for their support and education until comparatively recently. And in the earlier days it was repeatedly held by the courts and the Attorney General that these natives did not bear the same relation to our Government, in many respects, that was borne by the American Indians. (16 Ops. Atty. Gen., 141; 18 *id.*, 139); *United States v. Ferueta Seveloff* (2 Sawyer U. S., 311); *Hugh Waters v. James B. Campbell* (4 Sawyer U. S., 121); *John Brady et al.* (19 L. D., 323).

With the exception of the act of March 3, 1891 (26 Stat., 1095, 1101), which set apart the Annette Islands as a reservation for the use of the Metlakahtlans, a band of British Columbian natives who immigrated into Alaska in a body, and also except the authorization given to the Secretary of the Interior to make reservations for landing places for the canoes and boats of the natives, Congress has not created or directly authorized the creation of reservations of any other character for them.

Later, however, Congress began to directly recognize these natives as being, to a very considerable extent at least, under our Government's guardianship and enacted laws which protected them in the possession of the lands they occupied; made provision for the allotment of lands to them in severalty, similar to those made to the American Indians; gave them special hunting, fishing and other particular privileges to enable them to support themselves, and supplied them with reindeer and instructions as to their propagation. Congress has also supplied funds to give these natives medical and hospital treatment and finally made and is still making extensive appropriations to defray the expenses of both their education and *their support*.

Not only has Congress in this manner treated these natives as being wards of the Government but they have been repeatedly so recognized by the courts. See *Alaska Pacific Fisheries v. United States* (248 U. S., 78); *United States v. Berrigan et al.* (2 Alaska Reports, 442); *United States v. Cadzow et al.* (5 *id.*, 125), and the unpublished decision of the District Court of Alaska, Division No. 1, in the case of *Territory of Alaska v. Annette Islands Packing Company et al.*, rendered June 15, 1922.

From this it will be seen that these natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians; and this conclusion is supported by the fact that in creating the territorial government of Alaska and vesting that territory with the powers of legislation and control over its internal affairs, including public schools, Congress expressly excluded from that legislation and control the schools maintained for the natives and declared that such schools should continue to remain under the control of the Secretary of the Interior.

Turning now to a closer consideration of the question before me, and looking to the extent of the powers of the executive branches of the Government, we find ample justification in the following facts and statutes for my opinion that the lease here in question may be executed under your supervision.

Section 465, Revised Statutes, declares that "the President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs."

Section 441, Revised Statutes, in defining the powers and jurisdiction of the Secretary of the Interior says that he "is charged with supervision of public business relating to the following subjects:

* * * * *

Third. The Indians * * *;" and by section 7 of the act of January 27, 1905 (33 Stat., 616, 619), Congress declared that "the education of the Eskimos and Indians in the District of Alaska shall remain under the direction and control of the Secretary of the Interior;" that schools for them "shall be provided by annual appropriation" made by Congress, and that these natives "shall have the same right to be admitted to any Indian boarding school as the Indian children in the States and Territories of the United States" have.

In later acts, Congress went further and made and is still making appropriations "to enable the Secretary of the Interior, in his discretion and under his direction, to provide for the education and support of the Eskimos, Aleuts, Indians, and other natives" of Alaska. (See 42 Stat., 552, 583 and similar former acts.) And it is also well worthy of note in this connection that the Bureau of Education is charged with the immediate duty of executing the laws relating to the education and support of these natives, under the supervision of the Secretary of the Interior, as will appear from the fact that the appropriation just mentioned for their education and support is included with other items in the funds appropriated and set apart by Congress for the support of the activities of that Bureau;

and furthermore that the act of July 1, 1918 (41 Stat., 1367, 1406), specifically authorized the Commissioner of Education to sell male reindeer and invest the proceeds in the purchase of female reindeer for distribution by him among the natives who had not been supplied with those animals.

The objects for which this reservation was created were, therefore, largely the same as those which induced the creation of the Annette Islands Reservation, *supra*, concerning which Mr. Justice Van Devanter said in *Alaska Pacific Fisheries v. United States*, *supra*, "the purpose of creating the reservation was to encourage, assist and protect the Indians in their efforts to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life."

In 1874 Attorney General Brewster in considering this question of reservations stated that—

The regulation of the relation of the Government with these tribes is a great public interest, and their settlement upon reservations has been considered a matter of great importance. Indeed it has been the settled policy of the Government for many years. * * * may well be regarded as a measure in the public interest and as for a public use. Congress has in numerous acts of legislation recognized it as such. (17 Ops. Atty. Gen., 258, 260.)

In *Grisar v. McDowell* (6 Wall., 363, 381), the Supreme Court recognized the fact that the President had, in the absence of an express statute, the incidental power to create reservations where the lands reserved were needed for the carrying out of some public duty imposed by statute, and said—

From an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

And both the Attorney General and the courts have recognized the fact that that power extends to the creation of Indian reservations as well as reservations for other public purposes. See *Alaska Pacific Fisheries v. United States*, *supra*; *United States v. Leathers* (Fed. Cas. No. 15581), and 17 Ops. Atty. Gen., 258.

The making of this reservation was, therefore, justified by the law and the facts relating to the needs of the public service, and having been created for the well known and generally recognized purpose of segregating these natives from otherwise contaminating and hurtful influences, and to enable the Bureau of Education to aid them in advancing towards civilized life and complete self-support by instructing and encouraging them to engage in useful pursuits, this Bureau may use or permit the reserved land to be used in any reasonable manner and for any reasonable purpose which will advance the interests of the natives, provided it does

not undertake to make such a disposition of them as will eventually embarrass the Government's title. For that reason the proposed lease may be entered into.

This conclusion is in harmony with and has the support of the decision of the highest court of Alaska in the case of the Territory of Alaska *v.* Annette Islands Packing Company, *supra*.

That case involved the question as to the power of the Secretary of the Interior to grant a lease on Annette Islands similar to the one here involved, and the court held that he "had power, as the authorized agent of the Indians residing on the Annette Islands Reservation, as well as under his general authority, to enter into lease."

It will be observed from the language quoted from the letter of the Commissioner of Education that he has in mind a lease "between Mr. J. A. Magill and the Tyonek native store," in which all the adult males of the Tyonek native families are said to be shareholders.

In my opinion the lease should be made by you or by some officer of the Bureau of Education at your designation subject to the subsequent approval of the Secretary of the Interior, and not by the native store, and the proceeds of the lease should be disposed of for the benefit of the Indians.

Approved:

E. C. FINNEY,

First Assistant Secretary.

**TEMPORARY WITHDRAWALS PENDING RESURVEYS TO PREVENT
HOMESTEAD SETTLEMENTS—INSTRUCTIONS OF JANUARY 19,
1923 (49 L. D., 413), MODIFIED.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May, 19, 1923.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

I am returning herewith a proposed Executive order submitted with your letter of May 3, 1923, providing for temporary withdrawal of certain townships under the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497).

It is stated that the townships mentioned have been examined relative to the necessity for a resurvey and that it is found that the majority of the original corners are lost and there is an overlap extending through three of the townships. Also that the original

plats are utterly defective in representing areas and conditions as they really exist.

The proposed order is drawn in accordance with instructions of January 19, 1923 (49 L. D., 413), which directed that when it has been determined that it is necessary to resurvey a township in a State where the desert-land law is operative, the land should be withdrawn by Executive order from all forms of appropriation except settlement under the homestead law until the plat of resurvey has been filed in the local land office.

That order was designed to obviate the effect of the Supreme Court decision in the case of *Cox v. Hart* rendered December 11, 1922 (43 Sup. Ct. Rep., 154; 260 U. S., —), which held that lands in townships suspended for resurvey have the status of unsurveyed lands and that desert-land claims may be initiated thereon under the act of March 28, 1908 (35 Stat., 52).

To allow the initiation of such claims during the process of resurvey would seriously embarrass the Land Department in the equitable adjustment of existing claims, and therefore it was deemed necessary to withdraw the land from appropriation until the resurveys were completed. An exception was made, however, in case of homestead settlement.

Further consideration of the said instructions has convinced the Department that no exceptions should be made; but that in such cases the land should be withdrawn from homestead settlement as well as all other forms of appropriation. The same reasons which make it necessary to prevent the initiation of desert-land claims apply in respect to homestead settlements. Experience in adjudication of conflicts arising under resurveys has shown the evil effects of allowing settlers to further confuse the situation by making settlement in townships where the existing claimants are in controversy and doubt respecting the lines of their holdings. Such settlements become a source of embarrassment in making equitable adjustments by way of amendment of existing entries or conformation to the lines of the resurvey. No new claim should be allowed to be initiated until the lines have been definitely reestablished.

The said former instructions are modified to agree herewith and you are directed to formulate the withdrawal order accordingly.

In this connection it may be added that it is the desire of the Department that lands be not withheld from appropriation longer than necessary to accomplish the object of the withdrawal, and that withdrawals for the purpose of resurvey be not made long in advance of the commencement of the contemplated resurvey.

E. C. FINNEY,
First Assistant Secretary.

FORT ASSINNIBOINE ABANDONED MILITARY RESERVATION—
EXTENSION OF TIME TO MAKE PAYMENTS—ACT OF JANUARY
6, 1921.

INSTRUCTIONS.

[Circular No. 899.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 3, 1923.

REGISTER AND RECEIVER,
HAVRE, MONTANA:

It has been brought to the attention of this office that notices are being sent out by you to all holders of Fort Assinniboine Abandoned Military Reservation lands, in which they are notified to make payment within thirty days or appeal to this office, or in the event they fail to make payment or appeal, then their entries will be held for cancellation.

The above reservation was opened to homestead entry in 1916, under the provisions of the act of February 11, 1915 (38 Stat., 807), section 4 of which reads as follows:

That entrymen upon said lands shall, in addition to the regular land office fees, pay the sum of \$1.25 per acre for said land, such payments to be made as follows: Twenty-five cents per acre at time of making entry and 25 cents per acre each and every year thereafter until the full sum of \$1.25 per acre shall have been paid: *Provided*, That for a period of six months subsequent to the date on which the lands are opened to settlement, entrymen upon said lands shall, in addition to the regular land office fees, pay the sum of \$2.50 per acre for said land, such payments to be made as follows: Fifty cents per acre at the time of making entry, and 50 cents per acre each and every year thereafter until the full sum of \$2.50 per acre shall have been paid. In case any entryman fails to make annual payments, or any of them when due, all right in and to the lands covered by his entry shall cease; and any payments theretofore made shall be forfeited and the entry canceled, and the land shall be again subject to entry under the provisions of the homestead law at the price fixed therefor by the former entry; but in all cases the full amount of the purchase money must be paid on or before the offer of final proof.

When the time for payment of the purchase price under this act arrived it was found that the financial condition of the holders was such that they were unable to meet the payments on their lands when they became due. In order to relieve the situation the act of January 6, 1921 (41 Stat., 1086), was passed, which provided that any persons who entered under the act of February 11, 1915, could obtain an extension of time for one year from the anniversary of the date of the entry last preceding the passage of the act, within which to pay all of the installment then due, or any part of the preceding install-

ment where payment has not been made, by paying interest at the rate of five 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 proviso to 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 further period of one year, by paying interest thereon at the rate of five per centum per annum.

The second proviso to said act empowers the Secretary of the Interior in his discretion to extend the payment for a further period of one year.

The communications received in this office state that a great hardship will result to the holders if no extension of time is authorized by this office, as they are unable to borrow money from any source to meet the payments due, which condition is ascribed to the successive droughts during the past six years. This present state of financial distress and failure of crops is similar to the conditions which prevailed when the time for payment under the act of February 11, 1915, arrived, and which prompted the passage of the act of January 6, 1921.

Under the present law the time is fixed for the payment for these lands and in the absence of further legislation this office is without authority to grant an extension of time in which to make payment, but it is believed by this office that Congress having once come to the relief of these homesteaders by granting an extension of time, the people should be given another opportunity to again present a petition to Congress for a further extension of time in which to make payment. With this belief in mind, this office, therefore, directs that when the time for payment has arrived on any homestead entry within the Fort Assinniboine Abandoned Military Reservation, and when payment has not been made after due notice to the entryman, you will not report the entry for cancellation to this office but instead, you will notify the entryman that he will be permitted within thirty days from receipt of notice to file an affidavit in your office, corroborated by the affidavits of two other persons, stating the reason why he is unable to make payment, and when he expects he will be able to do so.

The affidavits will then be transmitted by you to this office for consideration and if the affidavits furnished justify a suspension of the entry, the entry may be suspended for such period as may be found necessary, not exceeding one year, to enable the entryman to

make payment. However, in no case, will the entryman be excused from submitting final proof on his entry within the statutory period because of his failure to complete final payment.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

HIGSAW v. HEIRS OF McCOY.

Decided May 18, 1923.

CONTEST—AFFIDAVIT—HOMESTEAD ENTRY—WIDOW; HEIRS; DEVISEE—DESCENT AND DISTRIBUTION—WORDS AND PHRASES.

Section 2291, Revised Statutes, prescribes a course of descent of an entryman's homestead rights in which his widow, if there be one, is given a separate status by being accorded preferment over all other persons upon whom the law might cast descent; therefore, an affidavit of contest charging "that the heirs, if any, are unknown," is fatally defective, in that the term "heirs" as used in the statute does not include "widow."

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Moody v. Myers* (45 L. D., 446) cited and applied.

FINNEY, *First Assistant Secretary*:

This is an appeal by Kelsey R. Highsaw from the decision of the General Land Office of October 11, 1922, in the above-entitled case, which decision held the contest affidavit of said Highsaw defective, and required the filing of an amended affidavit as a condition to allowing the contest to proceed.

The land involved is the N. $\frac{1}{2}$, SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 25, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, sec. 26, T. 14 N., R. 2. E., B. H. M., Bellefourche, South Dakota, land district, entry being allowed under the stock-raising homestead law, on June 24, 1918, following application and petition for designation filed by John R. McCoy on January 17, 1917. In his application, McCoy stated that he was unmarried.

Highsaw's contest affidavit (omitting parts not here material) reads as follows:

That said entryman never established or maintained residence on said land from the date of entry to the date of his death, which occurred about three years ago; that the entryman's heirs, if any, are unknown; that since the death of the said entryman no one has resided upon, improved or cultivated the said land or made any use thereof, but that the same has been wholly abandoned from the date of entry to the present time.

The General Land Office, in the decision here appealed from, overruled the action of the local officers and held the contest for dismissal upon the following stated grounds:

The homestead law provides that in case of the death of an entryman, final proof may be submitted by his widow, or in case of her death, by entryman's heirs or devisees. If the deceased entryman left a widow surviving him, she should be made the party defendant and the contest should be addressed to her alone.

The contest affidavit being defective as shown above, the case is remanded.

The contest affidavit is silent as to whether or not the entryman was survived by a widow, or what efforts, if any, were put forth to ascertain this, or whether a widow is now living. The absence of *heirs* is stated, but this does not necessarily negative the existence of a widow, and, under the homestead law, this omission is a matter of the utmost importance, since the statute (see section 2291, Revised Statutes) prescribes a course of descent of the entryman's homestead rights in which his widow, if there be one, is mentioned apart from "heirs," and given a separate status by being accorded preferment over all other persons upon whom the law might cast the descent.

In the case of *Moody v. Myers* (45 L. D., 446), *Moody* filed contest affidavit reading as follows:

That said entryman, James J. Myers, died on December 31, 1915, and at the time of his death left no heirs at law surviving him or no heir at law and for that reason the entry lapsed at his death and the land is now unoccupied, unappropriated public land of the United States subject to homestead entry.

The Department held that *Moody* must make the charge of his contest affidavit more definite and certain; that "he should be required to amplify his charge so as to clearly and definitely aver that there is no surviving widow, heir, or devisee;" and directed that should he fail to do this, his application to contest be dismissed.

The General Land Office, in the instant case, was correct in holding *Highsaw's* affidavit of contest insufficient, and its decision is accordingly affirmed.

CHARLES S. GREEN.

Decided May 22, 1923.

HOMESTEAD ENTRY—RESIDENCE—LAND DEPARTMENT—ACT OF FEBRUARY 25, 1919.

The provision contained in the act of February 25, 1919, reducing, for climatic conditions, the minimum residence of a homestead entryman to five months in each year for a period of five years, is mandatory and does not confer upon the Land Department authority to accept less than the length of residence specified in the act.

FINNEY, *First Assistant Secretary*:

This is an appeal by Charles S. Green from a decision of the Commissioner of the General Land Office dated October 24, 1922, rejecting the final proof submitted March 10, 1922, in support of homestead entry 010352, made October 4, 1918, under the enlarged homestead act for the N. $\frac{1}{2}$, Sec. 34, T. 35 $\frac{1}{2}$ S., R. 32 $\frac{3}{4}$ E., W. M., within the Burns, Oregon, land district.

The facts are stated in the decision appealed from and need not here be repeated. It appears that the day before the decision complained of was rendered there was received at the General Land Office a duly certified copy of Green's certificate of naturalization. There appears to be no doubt that Green would have been entitled to credit for residence on the land prior to the date of the present entry, had it been sufficient to satisfy the law. The question in the case is thus narrowed down to this: Is a residence of four months and five days each year for five years on a homestead sufficient to fulfill the requirements of the homestead law as affected by the act of February 25, 1919 (40 Stat., 1153)?

In the appeal there are several specifications of error, but only one requires consideration, viz:

1. In holding that the decision, 42 L. D., 143, which did allow absence from entries on account of climatic conditions does not apply in this case.

Prior to the enactment of the three-year act (June 6, 1912, 37 Stat., 123), the homestead law was not construed specifically to require actual residence upon the land for a defined period each year. But the three-year act contemplates and requires the maintenance by entrymen of actual residence upon the land entered for at least seven months a year for three years.

It was clearly by reason of hardships that became apparent under the application of the three-year act that the act of February 25, 1919, *supra*, was passed. It must be assumed, however, that Congress was fully cognizant of the conditions in cases where extreme leniency had been shown and what was needed for those who could not comply with the three-year act. Nevertheless, in the act of February 25, 1919, it is specifically provided that *not less than five months' residence shall be in each year*. There is nothing left to the discretionary power of the Department.

If four months and five days in place of five months could be accepted in this case, why not four months in another case, then three and a half, and so on? There is no authority for accepting this proof, and the decision appealed from is affirmed.

RELEASE OF LIENS FOR WATER CHARGES UNDER FEDERAL IRRIGATION PROJECTS—ACT OF MAY 15, 1922—APPROVED FORMS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
RECLAMATION SERVICE,
Washington, D. C., May 29, 1923.

THE HONORABLE

THE SECRETARY OF THE INTERIOR:

To secure payment to the United States of water charges under Federal irrigation projects, the act of August 9, 1912 (37 Stat., 265), reserves a lien in patents and water-right certificates. The act of May 15, 1922 (42 Stat., 541), provides for a release of this lien in cases where the lands involved have been brought within an irrigation district, and the district and the United States have made a contract providing for payment of water charges by the district through taxation.

The second proviso to section 2 of the act of May 15, 1922, reads as follows:

That before any lien is released under this act the Secretary of the Interior shall file a written report finding that the contracting irrigation district is legally organized under the laws of the State in which its lands are located, with full power to enter into the contract and to collect by assessment and levy against the lands of the district the amount of the contract obligation.

For your consideration there is inclosed a form of Report on Status of Irrigation District, intended to meet the requirements of the proviso above quoted.

The first proviso to section 2 of the act of May 15, 1922, reads as follows:

That no such lien so reserved to the United States in any patent or water-right certificate shall be released until the owner of the land covered by the lien shall consent in writing to the assessment, levy, and collection by such irrigation district of taxes against said land for the payment to the United States of the contract obligation.

For your consideration there is inclosed a form of Consent by Owner that Lands May be Taxed under Irrigation District, intended to meet the requirements of the first proviso to said section 2.

As to the release by the United States of liens under water-right applications, and as to the Government's assent to the release by water users' associations of liens under stock-subscription contracts, the most practical way to handle such cases is by blanket instruments executed by the Secretary. But as to the release of liens reserved by the act of August 9, 1912, individual instruments seem

to be required by the act of May 15, 1922. These will be large in numbers, and it is therefore suggested that authority to execute same should be delegated.

For your consideration there is inclosed a form of Release of Lien, intended to be used for the release of liens reserved by the act of August 9, 1912, and to be executed by the Director of the Reclamation Service.

It is recommended:

1. That the Department approve as to form the following:

(a) Report on Status of Irrigation District;

(b) Consent by Owner that Lands may be Taxed under Irrigation District; and

(c) Release of Lien.

2. That as to lands respecting which the Secretary has made the report referred to in 1 (a) and the owner has executed and delivered the consent referred to in 1 (b), the Director of the Reclamation Service be authorized to execute and deliver the release referred to in 1 (c).

F. E. WEYMOUTH,
Acting Director.

Approved June 1, 1923,

HUBERT WORK,

Secretary.

Form approved by
Department of the Interior,
June 1, 1923.

DEPARTMENT OF THE INTERIOR,
RECLAMATION SERVICE.

Irrigation Project.

REPORT ON STATUS OF IRRIGATION DISTRICT.

Pursuant to the provisions of Section 2 of the Act of Congress approved May 15, 1922 (42 Stat., 541), I hereby find and report that the _____ Irrigation District is legally organized under the laws of the State of _____, in which its lands are located, with full power to enter into the contract, dated _____, 192—, between the United States and said district, and to collect by assessment and levy against the lands of the district the amount of the contract obligation.

Made, and filed in the records of the Department of the Interior, at Washington, D. C., this _____ day of _____, 192—.

Secretary of the Interior.

Form approved by
Department of the Interior,
June 1, 1923.

DEPARTMENT OF THE INTERIOR,
RECLAMATION SERVICE.

— Irrigation Project.

CONSENT BY OWNER THAT LANDS MAY BE TAXED UNDER IRRIGATION DISTRICT.

Pursuant to the provisions of Section 2 of the Act of Congress approved May 15, 1922 (42 Stat., 541) the undersigned hereby consent— to the assessment, levy, and collection by the — Irrigation District of taxes against lands of the undersigned, for the payment to the United States of the obligation in favor of the Government arising under the contract dated — 192—, between the United States and said district, which lands are described as follows: (Describe lands).

Dated at —, this — day of — 192—.

(Acknowledgment under State law.)

Form approved by
Department of the Interior,
June 1, 1923.

DEPARTMENT OF THE INTERIOR,
RECLAMATION SERVICE.

— Irrigation Project.

RELEASE OF LIEN.

Whereas, the following-described lands lie within the above-named project and within the — Irrigation District, to-wit: (Describe lands); and

Whereas, under contract, dated — 192—, between the United States and said district, the latter has obligated itself to pay to the United States the water charges under said project against said lands; and

Whereas, the owner of the lands, by instrument dated — 192—, has consented to the taxation of same by the district for the purpose of paying said charges;

Now, therefore, pursuant to the provisions of Section 2 of the act of May 15, 1922 (42 Stat., 541), and under authority conferred upon the Director of the Reclamation Service by the Secretary of the Interior, June 1, 1923, the lien reserved to the United States under the act of August 9, 1912 (37 Stat., 265) in the (patent or water-right certificate) relating to said lands, dated — and recorded in book — of deeds at page — of the records of the county recorder of — County, is hereby released.

Dated at Washington, D. C., this — day of — 192—.

Director, Reclamation Service.

(Acknowledgment under State law.)

WILLIAM D. McAMIS.

Decided June 8, 1923.

HOMESTEAD ENTRY—PATENT—SURVEY—PLAT.

It is immaterial whether tracts included in a homestead entry are described in a patent according to the legal subdivisions as shown upon the plat of record at the time the entry was made, or as lots according to a plat of a subsequent dependent resurvey made for the purpose of reestablishing the location of the monuments of the original survey, but it is preferable that they be described in accordance with the latter inasmuch as they are the latest designations and bring to attention the correct data.

HOMESTEAD ENTRY—PATENT—SURVEY—PLAT—EVIDENCE.

The conformation of a patent issued for homesteaded lands to a plat of a dependent resurvey made for the purpose of reestablishing the location of the monuments of the original survey, upon which the acreage is shown to be less than that described upon the plat of record at the time the entry was made, is not a ground for reformation of the patent, inasmuch as the acreage described in a patent is a question of fact and must yield when the boundaries of the tract have been determined by competent survey.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Gazzam v. Phillips* (20 How., 372), *Southern Pacific Railroad Company v. Bruns* (31 L. D., 272), and *McKittrick Oil Company v. Southern Pacific Railroad Company* (37 L. D., 243), cited and applied.

FINNEY, *First Assistant Secretary*:

On January 11, 1921, patent 789747 issued to William D. McAmis for lots 5, 9, 11, 12, 13 and 14, Sec. 15, T. 55 N., R. 64 W., 6th P. M., Wyoming, containing 229.40 acres.

The patent was delivered to McAmis and on June 30, 1922, he returned it to the register and receiver, with an application that the patent be canceled and a new one issued describing the land as the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, said section. He alleges that his entries had been made and that he had earned title to the land prior to the resurvey. He urged that patent should issue describing the land according to the plat of survey of record when the entries were made. The application was accompanied by a certificate from the county clerk that no patent for the land had been filed.

The Commissioner of the General Land Office, upon consideration of the application, held that the patent, issued in accordance with the plat of survey, was for the land of McAmis's entries and that no injustice had been done by conforming his entries to the resurvey and issuing patent in accordance therewith, and by decision of July 25, 1922, denied the application and returned the patent for delivery. McAmis has appealed.

It appears that McAmis made homestead entry 0797, Newcastle land district, Wyoming, on October 14, 1908, for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$,

S. $\frac{1}{2}$ SW. $\frac{1}{4}$, said Sec. 15, containing 160 acres, and on May 12, 1913, he made additional enlarged homestead entry 09300 for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, said Sec. 15, containing 80 acres. On September 29, 1913, McAmis submitted final proof on the combined entry. Final certificate issued October 3, 1913.

On July 15, 1913, the township was suspended because of a pending resurvey and remained suspended until December 15, 1915. The township plat approved July 28, 1883, showed McAmis's entries to contain 240 acres. The resurvey disclosed that that was error and that they contained only 229.41 acres. The resurvey was not a new survey to supersede the old survey. It was a dependent resurvey. Its purpose was to reestablish the location of the monuments of the original survey.

McAmis contends that he had earned title and had performed all the requirements of the homestead law and regulations prior to the suspension for resurvey and that his patent should be issued in accordance with the plat then in force.

He might have performed all the requirements of the law and regulations except the showing of compliance. However, the question is not material. Patent was issued in accordance with the plat of 1883, but the resurvey disclosed that certain tracts did not contain 40 acres each as had been shown by the plat. The boundaries of said tracts remained the same. On resurvey those tracts were designated as lots and notation made as to the correct area.

It is not material whether the tracts be designated as lots or by legal subdivisions as applied for. The boundaries and the areas remain the same. It is preferred that they be designated as lots because they are the latest designations and bring to attention the correct data relative thereto. The statement of the acreage of a tract is a question of fact and must yield when the boundaries of the tract have been determined by competent survey. See *Southern Pacific R. R. Co. v. Bruns* (31 L. D., 272); *McKittrick Oil Co. v. Southern Pacific R. R. Co.* (37 L. D., 243). See also *Gazzam v. Phillips* (20 How., 372).

The Commissioner's decision is affirmed.

ARSENE J. MARTIN.

Decided June 8, 1923.

OIL AND GAS LANDS—MINERAL LANDS—HOMESTEAD ENTRY—SURFACE RIGHTS—VESTED RIGHTS—PATENT—FEES AND COMMISSIONS.

The Government has the right to classify entered lands as prospectively valuable for minerals at any time prior to the vesting of an equitable right to a patent for both the surface and the mineral deposits therein, and such

a vested right is not acquired until the entryman has done everything required by law toward earning title, including payment of fees and commissions.

FINNEY, *First Assistant Secretary*:

This is an appeal by Arsene J. Martin from the decision of the Commissioner of the General Land Office, dated March 21, 1923, which required him to consent to the amendment of his homestead entry for the E. $\frac{1}{2}$, Sec. 25, T. 33 N., R. 3 W., M. M., Great Falls, Montana, land district, so as to reserve the oil and gas deposits to the United States.

Appellant made his entry under the enlarged homestead law on April 24, 1916. He served in the war with Germany and on January 24, 1921, filed final proof affidavits pursuant to the provisions of the act of March 1, 1921 (41 Stat., 1202).

Proof was suspended on March 21, 1923, because the fees and commissions prescribed were not paid and because of pending applications for permits under section 13 of the leasing act of February 25, 1920 (41 Stat., 437) filed on June 8, 1922, by May E. Dillabaugh and Anna B. Grau. On March 28, 1923, appellant paid the required fees and commissions.

The Commissioner proceeded in accordance with section 12(c) of departmental regulations, approved March 11, 1920 (47 L. D., 437), and required appellant to consent to a reservation of the oil and gas deposits in the land in view of its classification by the Director of the Geological Survey, in reports dated March 9 and 10, 1923, as having prospective value for oil and gas.

Appellant's claim is that he made final proof on January 23, 1923, and that as the lands had not been classified at that time by the Geological Survey, the burden is upon the Government to establish that said lands were known to be mineral in character on that date.

A vested equitable right to a patent for both the surface and mineral deposits in public land is not acquired until an entryman has done everything required by law toward earning title. Such a vested equitable interest is necessary to deprive the Government of its right to classify entered lands as prospectively valuable for minerals.

Payment of fees and commissions is a necessary act toward earning title and, as disclosed by the record, the lands had been reported as having prospective oil and gas value prior to payment by appellant.

It is noted that appellant filed consent to the amendment of his entry to make it subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), shortly before filing his appeal. His entry will be amended to make it subject to the provisions of said act

as to oil and gas and he will be allowed 15 days from notice within which to exercise his preference right to a permit.

The Commissioner's decision is affirmed, the case closed and the records returned to the General Land Office.

SCHNEIDER v. FORSTER.

Decided June 8, 1923.

OIL AND GAS LANDS—WITHDRAWAL—PROSPECTING PERMIT—HOMESTEAD ENTRY—SURFACE RIGHTS—PREFERENCE RIGHT.

One who makes a surface entry under the act of July 17, 1914, for lands embraced at time of entry within a petroleum withdrawal is not entitled to a preference right to an oil and gas prospecting permit under section 20 of the act of February 25, 1920.

HOMESTEAD ENTRY—MORTGAGE—MONTANA—ASSIGNMENT—PURCHASER—OIL AND GAS LANDS.

Under the laws of the State of Montana a mortgage is merely a lien upon the property mortgaged, and a mortgagee who purchases at foreclosure sale a homestead covered by his mortgage is not, prior to such purchase, entitled to claim as an assignee within the purview of section 20 of the act of February 25, 1920.

FINNEY, *First Assistant Secretary:*

On April 21, 1923, the Commissioner of the General Land Office denied the claim of William G. Schneider to a preference right to a permit under section 20 of the leasing act of February 25, 1920 (41 Stat., 437), for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, T. 32 N., R. 34 E., M. M., Glasgow, Montana, land district, and held for rejection his application for such permit. Schneider has appealed from this decision.

The records disclose that Schneider's application for permit, which was filed on January 18, 1923, conflicted with an application under section 13 of the leasing act filed by J. H. Forster, on August 9, 1922.

Schneider claims a preference right to a permit as the owner of surface rights in the land. He acquired title by a sheriff's deed of foreclosure made February 5, 1923, as purchaser at a sheriff's sale held on February 4, 1922, of lands mortgaged to him by a homestead entryman, Walter C. Hoyer.

Hoyer filed his homestead application and entry was allowed on April 4, 1917. At that time the lands were withdrawn for oil and gas by Executive order of January 9, 1917, and his application was made in accordance with and subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509).

One of the conditions precedent to a preference right under section 20 of the leasing act is that the entry must have been made for lands "not withdrawn or classified as mineral at the time of entry."

The entryman, therefore, acquired no preference right to a permit, and consequently, appellant could not secure one as an assignee.

Appellant did not acquire any title, legal or equitable, until purchase at the sheriff sale, on February 4, 1922, by virtue of the laws of the State of Montana, which provide that a mortgage is a mere lien upon the property mortgaged. He did not, therefore, take by assignment prior to January 1, 1918, as is prescribed in section 20 of the leasing act, and for this additional reason did not have a preference right to a permit as against Forster, a prior applicant.

The Commissioner's decision is affirmed and the case closed.

ELIZABETH J. LAURENCE.

Decided June 11, 1923.

SCHOOL LAND—RECLAMATION—WITHDRAWAL—RESTORATIONS—VESTED RIGHTS—ARIZONA.

A reclamation withdrawal existent at the date of the grant made to the State of Arizona by section 24 of the act of June 20, 1910, of certain designated sections of public lands for school purposes, does not defeat the operation of the grant, as to lands subsequently restored from the withdrawal, but the right of the State attaches to surveyed lands within the specified sections immediately upon their restoration from the withdrawal, if the State has not selected indemnity therefor.

SCHOOL LAND—DESERT LAND—RECLAMATION—WITHDRAWAL—RESTORATIONS—ARIZONA—VESTED RIGHTS.

The right of the State of Arizona which attaches to surveyed school lands immediately upon their restoration from a reclamation withdrawal, can not be defeated by the initiation of a desert-land claim subsequently to the date of the restoration.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of State of Washington *v.* Lynam (45 L. D., 593), cited and applied.

FINNEY, *First Assistant Secretary:*

Elizabeth J. Laurence has appealed from the decision of the Commissioner of the General Land Office dated December 12, 1922, rejecting her desert-land application, filed December 17, 1921, for the S. $\frac{1}{2}$, Sec. 2, T. 10 S., R. 23 W., G. and S. R. M., within the Phoenix, Arizona, land district.

The township was surveyed in 1874. It was withdrawn for reclamation purposes on July 2, 1902, and a portion thereof, including section 2, was restored from the withdrawal on October 22, 1915, the land restored being opened to settlement on January 3, 1916, and to entry on February 2, 1916.

The Commissioner held that although the land involved did not pass to the State of Arizona at the time of the passage of the act of June 20, 1910 (36 Stat., 557), on account of the withdrawal, the land

did pass to the State upon the restoration from the withdrawal, as no indemnity had been asked for under the acts making such provisions. In support of the decision the case of *State of Washington v. Lynam* (45 L. D., 593), and the unreported case of *Lester L. Sidwell*, decided by the Department May 20, 1922 (Phoenix 049851, A-2845), are cited.

In the appeal counsel for the applicant presents the arguments that the grant to the State of Arizona was one *in presenti*, and since it could not take effect on account of the withdrawal the State had the right to select indemnity land; that section 24 of the act of June 20, 1910, granted sections 2, 16, 32, and 36 to the State, and where the same had been sold, reserved or otherwise appropriated or reserved gave the State the right to indemnify itself by selecting other lands; that said act did not grant the State the right to elect whether to indemnify itself by selecting other lands or to await the possible future restoration of the land from the then existing reservation or other appropriation, except in the case of inclusion in a national forest. It is contended that the case of *State of Washington v. Lynam*, *supra*, is no authority on the question involved, because that was a case of a school section in place within a national forest, and that the unreported case cited is no authority because it was based on the reported case which was no authority on the point. Counsel further calls attention to specific instances where portions of sections 2 and 32 were embraced in entries on June 20, 1910, but on subsequently becoming vacant were not held to pass to the State of Arizona. From this he argues that there is no authority for holding that the State could await the restoration from a reclamation withdrawal and then take school land in place.

The first part of section 24 of the act of June 20, 1910, reads as follows:

That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, 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, and Acts amendatory thereof or supplementary thereto, 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.

Section 2275 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), reads in part as follows:

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 sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. * * * *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

It is obvious that the acts of Congress so fully and clearly answer the contentions of counsel for the applicant that no further discussion is necessary. The decision appealed from is affirmed.

JOHNSON v. PATTEN.

Decided June 15, 1923.

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—HOMESTEAD ENTRY—ALIEN—CITIZENSHIP—SECRETARY OF THE INTERIOR—STATUTES.

AN alien who has declared his intention of becoming a citizen of the United States, being eligible to make a homestead entry, was not excepted by section 20 of the act of February 25, 1920, from the class of entrymen to which the award of the preference right to an oil and gas prospecting permit was accorded by that section, and the Secretary of the Interior may, in pursuance of the general power conferred upon him by section 32 of that act, hold the preference right privilege of an alien entryman in abeyance to await action upon his final citizenship papers.

DEPARTMENTAL DECISIONS CITED, CONSTRUED AND APPLIED.

Case of State of Wyoming *v.* Fry and Doyle (49 L. D., 564); cited and construed; Case of Charles R. Haupt (47 L. D., 588; 48 L. D., 355), cited and applied.

FINNEY, *First Assistant Secretary*:

This is an appeal by Thomas Johnson from the decision of the Commissioner of the General Land Office, dated April 12, 1923, rejecting his application for a permit under section 20 of the leasing act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas

upon E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, E. $\frac{1}{2}$ NE $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 14, T. 29 N., R. 2 W., M. M., Great Falls, Montana, land district.

The land described is embraced in an original homestead entry made by Johnson on May 27, 1916, and an additional homestead entry made on August 11, 1917. The land was not withdrawn, classified, or reported as valuable for oil or gas until March 25, 1922, when such a report was made by Eugene P. Patten, who filed an application for a prospecting permit, pursuant to section 13 of the leasing act.

Upon receipt of a report from the Director of the Geological Survey that the geologic conditions existing under the land were such that opportunity for prospecting should not be denied, the Commissioner called upon appellant to file consent to a reservation of the oil and gas deposits to the United States or to show cause why such consent should not be required and to exercise his preference right to a permit by filing application therefor.

Appellant has not procured his final citizenship papers and on May 27, 1922, he was granted until April 1, 1924, within which to perfect final proof on his entries by filing evidence of his naturalization. It appears that his petition for naturalization filed in the district court on August 29, 1921, was dismissed for the reason that appellant was not a resident of the county in which he made his declaration, and that he filed a new declaration of intention to become a citizen on March 14, 1922.

On November 29, 1922, appellant filed his consent to a reservation of the oil and gas deposits to the United States and his application for a permit, in the exercise of the preference right referred to by the Commissioner. The application was rejected because appellant is not a citizen of the United States, as prescribed by the leasing act, and this appeal was filed.

Appellant asks that his application be suspended until he can become naturalized, or, in the alternative, that he be given an opportunity to prove, at a hearing, that the lands are not prospectively valuable for oil or gas.

Congress in enacting the leasing act limited its benefits to citizens of the United States, and in granting a preference right to a permit in section 20 of said act, merely conferred a preference and did not enlarge the classes enumerated as qualified to hold prospecting permits. *State of Wyoming v. Fry and Doyle* (49 L. D., 564). It is clear, therefore, that appellant may not now receive a prospecting permit.

In section 20 of the leasing act Congress recognized the equities of persons who, in good faith, had made agricultural entries upon

the public domain under a belief that they would ultimately receive title to both the surface and mineral deposits of the land entered, and were subsequently required to consent to a reservation of the oil and gas deposits to the United States. Charles R. Haupt (47 L. D., 588; 48 L. D., 355).

Congress must be presumed to know existing laws, and to have known, at the passage of the leasing act, that entries might legally be made by aliens who had declared their intentions to become citizens of the United States, and that such entries had been made under the precise conditions stated in section 20 of said act as precedent to the preference right conferred therein, and nothing appears indicating an intent to deny them the benefit of it.

The act is silent as to when the preference right shall be exercised. Determination of that question was left to the Department under the general power given in section 32 of said act to prescribe rules and regulations and to do all acts necessary and proper to carry out and accomplish the purposes of the act.

The Department feels bound, in view of the apparent intent and purpose of section 20, to permit aliens who have made entries under the conditions prescribed in said section to make application for prospecting permits in the exercise of the preference conferred therein and to suspend action on such applications until final citizenship papers are acquired. To hold otherwise would penalize *bona fide* entrymen for delay incident to the administration of the naturalization laws, and would deny them, in effect, the equal protection of the law.

An applicant for a permit under section 13 of the leasing act for lands entered by an alien under the conditions prescribed in section 20 of the act, acquires no right superior to that of such entryman, and if said entryman elects, after due notice, to file application for a permit claiming a preference under said section 20 of the act, action upon both applications will be suspended as to such lands until the entryman acquires his final citizenship papers or his entry is canceled because of his failure in that respect.

Final action upon permit applications by Johnson and Patten will be suspended until October 1, 1924, unless Johnson becomes naturalized prior thereto.

The Commissioner's decision is modified to conform to the view herein expressed and the records returned to the General Land Office for the action herein directed.

WILLIAM P. FINLEY.

Decided June 21, 1923.

COAL LANDS—PROSPECTING PERMIT—POWER SITES—WITHDRAWAL.

A permit to prospect for coal under section 2 of the act of February 25, 1920, upon lands within a power site withdrawal, may be granted subject to such conditions as will adequately protect the power interests in the lands, where the feasibility of their development for power purposes has not been determined and such development, if any, is likely to be postponed for many years.

FINNEY, *First Assistant Secretary*:

This is an appeal by William P. Finley from the decision of the Commissioner of the General Land Office of May 18, 1921, rejecting to the extent of the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4, lot 11, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 5, lots 9, 19, Sec. 6, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, T. 5 N., R. 92 W., and lot 7, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 31, T. 6 N., R. 92 W., Colorado, his Glenwood Springs application 019858 filed under section 2 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for coal upon said lands for the reason that they are included within Power Site Withdrawal No. 121, created by Executive order of July 2, 1910, and, therefore, not subject to disposition under said act.

In connection with the appeal, the applicant declared his willingness to take a permit under such conditions as would safeguard the Government's interests in case the lands hereinabove described, or any portion thereof should be needed for use in power development. Pending consideration of the appeal the Department by letter of May 24, 1923, requested a report from the Federal Power Commission as to the advisability of issuing a coal permit covering said lands subject to conditions such as those suggested by the appellant. In response the said Commission reported that—

The lands described in your letter are located in the upper part of the Juniper Reservoir Site on Yampa River. This reservoir site has a possible value as a storage reservoir for both water power and irrigation. In so far as I am aware the feasibility of the reservoir site has not been fully determined and in any event the reservoir is unlikely to be developed for many years. In the meantime it would appear appropriate that any coal resources underlying the reservoir site should be prospected and developed, and that a prospecting permit may be issued subject to such conditions as will adequately protect the power interests in the lands.

In view of the report of the Commission the Department sees no reason why a permit covering said land may not be issued, all else being regular, under conditions analogous to those incorporated in paragraph 10, as amended by the instructions of August 7, 1922 (48 L. D., 628), of permits issued under the oil leasing provisions of the act of 1920. It is, therefore, so ordered and the decision appealed from is modified to accord herewith.

GOSHORN v. ROUNDS.

Decided June 21, 1923.

CONTEST—HOMESTEAD ENTRY—ABANDONMENT—MILITARY SERVICE.

An affidavit of contest against a homestead entry charging abandonment is insufficient if it fails to negative the fact that the entryman is in the military service of the United States pursuant to an enlistment antedating March 3, 1921, and where it is shown that the homesteader is in such service, no authority exists for making a distinction that the entryman's service is "voluntary."

CONTEST—HOMESTEAD ENTRY—RESIDENCE—MILITARY SERVICE.

A contest against a homestead entry on the ground of failure timely to establish residence is prematurely initiated and should be dismissed where the statutory period of the entry has not expired and it is shown that the entryman is in the military service of the United States pursuant to an enlistment antedating March 3, 1921.

FINNEY, *First Assistant Secretary*:

George J. Goshorn has appealed from a decision of the Commissioner of the General Land Office dated November 4, 1922, dismissing his contest against the homestead entry of Cyrus J. Rounds.

The entry involved was made on May 8, 1917, under the act of February 19, 1909 (35 Stat., 639), and subject to the provisions and reservations of the act of June 22, 1910 (36 Stat., 583), for lots 1, 2, 3, 4, 6, 7, 8, 9, and 10, Sec. 1, T. 8 S., R. 47 E., M. M., containing 313.20 acres, within the Miles City, Montana, land district. On January 3, 1922, Goshorn filed application to contest the entry, charging in substance that the entryman had abandoned the land for a period of more than six months from March 3, 1921; that he had never resided on the land as much as seven months in any one year; and that he could not within the lifetime of the entry make the necessary seven months' residence, giving him full credit for two years of military service. More particularly the charges were made—

That the said entryman filed on the said land on May 8, 1917, and thereafter enlisted in the U. S. Army and during the recent World War and so long as said entryman was not voluntarily absent from the said entry, he was entitled to constructive residence but since March 3, 1921, voluntarily remained in the U. S. Army and has neither lived on the said entry nor has any member of his family ever resided thereon or cultivated any portion thereof at all.

* * * * *

That the said absence from and since March 3, 1921, was not due to service by the said entryman in the U. S. Army, Navy or Marine Corps during the World War or any other war in which the United States was engaged but is due to the voluntary service of the said entryman in the U. S. Army during times of peace.

The local officers allowed the contest and issued notice for personal service. In due time the entryman answered showing that he was in the Army and asking that the contest be dismissed. The request

for dismissal was denied and hearing was ordered. At the appointed time the contestant was present with witnesses, submitted affidavits in support of the charges made, and filed a motion that a default be entered. This motion was sustained by the register and receiver and they forwarded the record to the General Land Office with recommendation that the entry be canceled.

Upon taking up the case for consideration the Commissioner ascertained from the War Department, by a report dated September 13, 1922, that the entryman had been in the Army since August 31, 1917, and that on July 1, 1920, he was appointed Captain in the Regular Army, which commission he held at the time of the report. The Commissioner then reversed the decision of the local officers and dismissed the contest, holding that the same was prematurely brought because there yet remained four months of the statutory period of the entry in which the entryman might establish residence on the land and apply for a suspension of action to enable him to fulfill the requirements of law. This conclusion was based upon his (Commissioner) letter to the entryman dated February 21, 1922, and having the approval of the Department, in which it was stated that if the commission as Captain antedated March 3, 1921, and if he, on or before May 8, 1922, terminated his military service and established actual *bona fide* residence on the land, an application to suspend action on the entry to enable him to fulfill the requirements of the law would be considered, and that otherwise the entry would be canceled upon the expiration of its statutory life.

The Commissioner further directed that if his decision should become final the entryman should be required to show cause why his entry should not be canceled because of the expiration of the statutory period.

On the appeal, which is in the form of a corroborated affidavit, the contestant alleges that the entryman has never established residence on the land or placed any improvements thereon. He contends that as it was shown by the affidavits submitted on May 17, 1922, at the hearing, that the entryman had not at that time established residence on the land the Commissioner should have ordered cancellation of the entry.

The application to contest should not have been allowed. In paragraph (c) of Circular No. 750, approved April 16, 1921 (48 L. D., 78), under the act approved March 3, 1921 (41 Stat., 1359), treating the war as having ended, it is provided:

* * * Notwithstanding the present legislation, an affidavit of contest on the ground of abandonment must negative the fact that the homesteader is in 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.

The contestant, in his application to contest, in so many words admits that the entryman is in the Army under an enlistment antedating March 3, 1921, but seeks to qualify by alleging that the entryman's service is "voluntary." There is, however, no authority for making such distinction and the contest allegations were not sufficient.

The decision appealed from is affirmed.

In the record there is found a letter from the register to the Commissioner dated September 6, 1922, making inquiry relative to this case and calling attention to the fact that the additional homestead entry of Rounds had been canceled under another contest by said Goshorn.

It appears that on May 26, 1922, Goshorn filed application to contest additional stock-raising homestead entry 038694 of Rounds made February 14, 1921, for lots 11, 14, 15, 16, and SW. $\frac{1}{4}$, said Sec. 1, on the following charges:

Cyrus J. Rounds has never established residence on original entry No. 038691 on which this additional is based, nor upon his additional entry, and that his absence was not due to service in the U. S. Army, Navy, Marine Corps, nor any branch thereof, under any enlistment antedating March 3, 1921, but to voluntary reenlistment in the Army of the United States in time of peace.

This contest was allowed and notice thereof was served on the entryman on June 8, 1922. He did not answer and thereafter a hearing was held under Circular No. 815, approved March 22, 1922 (48 L. D., 594). The local officers transmitted the record by letter dated August 16, 1922, recommending cancellation, and on August 30, 1922, the Commissioner canceled said additional entry and closed the case, although the contest against the original entry was then pending in the General Land Office.

It does not appear that the Commissioner gave any consideration to the register's letter of September 6, 1922. It is shown that on December 4, 1922, Goshorn made additional stock-raising homestead entry 052317 for the land that was embraced in the additional entry of Rounds.

It is obvious that Goshorn's contest against the additional entry was wholly void and that the cancellation was unwarranted. That entry must be reinstated and the additional entry of Goshorn must be canceled. If the original entry of Rounds shall be canceled because of the expiration of its statutory life that will not cause cancellation of his additional entry.

JOSEPH L. MALEY.

Decided June 21, 1923.

APPLICATION—HOMESTEAD ENTRY—FINAL PROOF—MILITARY SERVICE—SOLDIERS AND SAILORS—ACT OF MARCH 1, 1921.

The act of March 1, 1921, which amended section 2294, Revised Statutes, by permitting incapacitated discharged soldiers, sailors and marines of the United States who served during the war with Germany to submit proofs upon homestead entries initiated by them prior to November 11, 1918, outside of the land district or county in which the lands are located, did not contemplate making any relaxation of the previously existing law with reference to the execution of initial applications to make entry.

FINNEY, *First Assistant Secretary:*

On October 26, 1922, Joseph L. Maley, residing at Duluth, Minnesota, filed petition in the local office at Glasgow, Montana, praying that a rule be made allowing him to execute, at his present place of residence, his application to make entry under the stock-raising law as additional to his patented entry (Glasgow 048172), upon which final proof was submitted October 25, 1921, under the act of March 1, 1921 (41 Stat., 1202; 48 L. D., 54), basing his petition upon the ground that he is an incapacitated ex-soldier.

The Commissioner of the General Land Office, by decision dated November 29, 1922, denied the petition upon the ground that there is no authority for the execution of an application outside of the land district, or county, in which the land is situate, from which action Maley has appealed to the Department.

Appellant bases his request to be allowed to execute such application to make additional entry upon the ground that at different times he has been a patient in the United States Veterans' Hospital at Minneapolis, Minnesota, having undergone several major surgical operations since making final proof, and because of disability arising therefrom, is still unable to return to his homestead in Montana. It is urged in his behalf that the land he intends to apply for is subject to entry, and the request for the rule to execute the application at Duluth, Minnesota, is made to prevent its appropriation by another; that the land patented is not sufficient to enable one to make a living at either farming or stock-raising, and that an additional entry to make out a full section is therefore necessary; that having offered acceptable evidence of incapacity as an ex-soldier, under the act of March 1, 1921, *supra*, at the time final proof was submitted upon his original entry, he should now be permitted to execute such application for additional entry outside of the Glasgow land district, because of such incapacity.

Section 2294 of the Revised Statutes provides as follows:

That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemp-

tion timber-culture, desert-land, and timber and stone Acts may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; * * *

The final proof executed outside of the land district by appellant under the act of March 1, 1921, *supra*, is within the provisions of that act, but, as stated by the Commissioner, there is nothing in the act, either express or implied, which would excuse an incapacitated ex-soldier from complying with the law in the matter of executing an application to enter public lands. By the provisions of said act of March 1, 1921, Congress saw proper to relax the rule with respect to incapacitated ex-soldiers and permit the execution of final proofs outside of the land district in which the land is located. But because Congress did this, it would not justify the Department in holding that the rule may be relaxed with respect to the execution of applications. The very fact that an act of Congress was thought necessary to permit incapacitated ex-soldiers to execute final proofs elsewhere than in the land district or county where the land is located is persuasive of the view that Congress considered said section 2294 of the Revised Statutes mandatory in its operation, and that the Land Department was without authority to relax its requirements in that respect.

The reasons for relaxation of the rule with respect to the execution of final proofs in aid of incapacitated ex-soldiers, would not justify relaxation of the rule as to the execution of initial applications. In the matter of final proofs, the public land claimant, as required by the homestead laws, must show expenditure of time, labor, and money in improving and cultivating the land, and the fruit of his labor should not be denied him because of technical defects,—hence, the right of equitable adjudication in the consideration of final proofs. But as to initial applications, Congress evidently did not include relaxation of the rule in that particular in the act of March 1, 1921, *supra*, for the reason that it would not be conducive to orderly administration, in that it would permit segregation of the public land upon a showing of physical disability by any qualified applicant residing in any section of the country, which would necessarily result in much confusion in the administration of the public land laws.

The Department is therefore of the opinion that it is without authority to allow the rule prayed for, and the decision appealed from is accordingly affirmed.

HEIRS OF EMMA C. WHITE.

Decided June 21, 1923.

HOMESTEAD ENTRY—RESIDENCE—LACHES—CONTEST—WIDOW; HEIRS; DEVISEE.

Laches in establishing residence upon a homestead entry within six months from date of entry may be cured by the establishment of residence prior to knowledge of a contest, and, where upon the death of an entryman those succeeding to the entry show that the entryman was not in default at the date of his death, the fact that there had been a previous default as to maintenance of residence is not ground for cancellation.

FINNEY, First Assistant Secretary:

This is an appeal by the heirs of Emma C. White from a decision of the Commissioner of the General Land Office holding for cancellation her original and additional homestead entries.

It appears that on May 23, 1916, at the Douglas, Wyoming, land office, Miss White made entry under the enlarged homestead act for lot 7, SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 6; lots 1, 2, 3, 4, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 7, and lot 1, Sec. 18, T. 31 N., R. 74 W., 6th P. M., and on January 2, 1917, applied to make an additional entry under the stock-raising homestead act for N. $\frac{1}{2}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ and W. $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 6, said township, which application was allowed on August 26, 1919.

The death of entrywoman occurred in November, 1918. Final proof on the combined entries was submitted by the heirs on December 28, 1920, and final certificate issued February 1, 1921. On April 10, 1922, the Commissioner of the General Land Office directed proceedings against the entries on the charge that the entrywoman "did not establish and maintain a residence on the land." A hearing was had before the local officers, who recommended that the proceedings be dismissed. By decision dated October 5, 1922, the Commissioner of the General Land Office refused to adopt the recommendation of the local officers, and held the entries for cancellation, finding from the evidence submitted that the entrywoman had not resided on the land as required by law from the time of establishing residence in July, 1916, until her death. An appeal on behalf of the heirs has been filed.

As stated by the Commissioner, the facts are not disputed. Entrywoman established residence on the land on July 3 or 4, 1916, and continued to reside thereon until September, excepting for two or three weeks during the haying season, when she was at her father's place. In September, 1916, she began teaching school, and continued

to do so until June 8, 1918. She spent the summer vacation of 1917 on the land. During the school terms she spent Friday and Saturday nights on the land. Residence was maintained on the land during the summer of 1918, except during the haying season of about two or three weeks, and on September 20, 1918, she entered the employ of a bank at Douglas, Wyoming, and remained in its employ until November 9, 1918, when she was stricken with influenza, from which she died. During the period of this employment she lived in Douglas but spent the week-ends on the land. During 1918, 30 acres were broken and sowed to grass seed. The remainder of the land was used for grazing purposes.

The Commissioner held, in effect, that the final proof submitted by the heirs was unacceptable because of the second proviso to section 2291, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat., 123), which reads 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.

Prior to June 8, 1918, when entrywoman ceased teaching school and resumed residence on the land, her residence had not been such as could be accepted to sustain final proof, being for less than seven months each year. But having resumed residence on the land in June, 1918, and having maintained practically continuous residence until September 20, 1918, she was entitled to be absent thereafter for five months. She died less than two months after leaving the land; hence it must be held that for more than five months prior to her death she had complied with the law.

The Department from an early date has uniformly held that an entryman who had failed to establish residence on the land within six months from the date of entry could cure his laches by establishing residence prior to knowledge of a contest against the entry. Since the enactment of the so-called three-year homestead law on June 6, 1912, the Land Department has on numerous occasions reiterated said rule. In view of the rule thus established, the proviso heretofore quoted must be held to mean that those succeeding to the entry must show that the entryman was not in default at the date of his death, and that they have since complied with the law, except that they are relieved from any requirement of residence upon the land.

It clearly appearing that Miss White was not in default at the date of her death, having cured her laches in June, 1918, the final proof is acceptable.

The decision appealed from is reversed, and the entries will be approved for patenting.

HELPHREY ET AL. v. COIL.

Decided June 23, 1923.

PUBLIC LANDS—SETTLEMENT—ENTRY—OCCUPANCY.

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.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Atherton v. Fowler* (96 U. S., 513), *Harvey v. Holles* (160 Fed., 531), and *Aztec Land and Cattle Company v. Tomlinson* (35 L. D., 161), cited and applied.

FINNEY, First Assistant Secretary:

On November 19, 1921, Frank C. Coil made homestead entry 012540, Spokane, Washington, land district, for lot 6, Sec. 14, T. 39 N., R. 33 E., W. M., containing .40 of an acre.

On January 23, 1922, John P. Helphrey, Abe Frei, and Arthur B. Hadley filed contest against the entry, alleging that it was not made in good faith for a home; that the land is unfit for homestead purposes, and that it is used by the contestants for trade and business, and has been so used for 20 years. Notice thereof was served on the entryman and answer filed. A hearing was held June 13, 1922, before a designated officer at Republic, Washington, at which all parties were present with counsel.

The record was certified to the register and receiver who, upon consideration thereof by decision of August 11, 1922, held that the land was public land subject to homestead entry at date of entry, and that it is suitable for agricultural use such as raising hogs and chickens, and recommended the dismissal of the contest. The contestants appealed.

The Commissioner of the General Land Office found that the land is not adaptable to agricultural use, and that it has been used for urban purposes and that the contestants had equitable rights therein, and by decision of January 13, 1922, reversed the decision of the register and receiver and held the entry for cancellation. The entryman has appealed.

The land in conflict is a strip of land about 590 feet long, with a maximum width of about 60 feet, lying between the Kettle River and the west boundary of the town site of Curlew, Washington. The official plat of survey does not show the land to be part of the town site but the town site plat shows the lots thereof as extending

through the land to the river's edge. The sewers of the town extend through it to the river.

The contestants and the entryman all have valuable improvements wholly or partly on the land, consisting of a store, warehouse, barn, and hotel. It is clearly shown by the evidence that the land has been used for town site, trade, and business, for at least 20 years. The Department in the case of *Aztec Land and Cattle Company v. Tomlinson* (35 L. D., 161), held that (syllabus)—

the land department has jurisdiction to determine the equitable as well as the legal rights of parties claiming interests in public lands, and it is the duty of that department to recognize equities such as are recognized by the courts.

Lands actually appropriated to urban uses are not subject to homestead entry.

The entryman contends that the contestants are and have been unlawful users and trespassers on public land and have no standing in equity.

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).

The land here involved was not subject to homestead entry. The entry was properly held for cancellation.

The Commissioner's decision is affirmed.

MARTIN WOLFE.

Decided June 23, 1923.

OIL AND GAS LANDS—PROSPECTING PERMITS—SECRETARY OF THE INTERIOR— WORDS AND PHRASES.

The word "authorized" as used in section 13 of the act of February 25, 1920, is to be construed as clothing the Secretary of the Interior with discretionary authority in the granting of oil and gas permits under that section.

STATUTORY CONSTRUCTION.

Congress is presumed to know existing laws and, unless a clear intent to abrogate them appears in a statute, it must be construed in harmony with them.

OIL AND GAS LANDS—PROSPECTING PERMITS—RECLAMATION—WITHDRAWAL— PUBLIC LANDS—SECRETARY OF THE INTERIOR.

The Secretary of the Interior has discretionary authority under section 13 of the act of February 25, 1920, to deny an application for an oil and gas prospecting permit embracing lands within a reclamation withdrawal, which, though owned by the United States, have been dedicated to purposes

authorized by law, if the permit may not be granted except at the risk of serious impairment or perhaps complete loss of their use for the purpose to which dedicated.

FINNEY, *First Assistant Secretary*:

This is an appeal by Martin Wolfe from the decision of the Commissioner of the General Land Office, dated March 22, 1923, which rejected his application for a permit under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 35; NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 34; NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$, Sec. 33; NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$, Sec. 32, all Sec. 31, T. 32 N., R. 32 E., M. M., in the Glasgow, Montana, land district.

This application was rejected by the Commissioner upon the recommendation of the Director of the Reclamation Service, who reported that the land was below or within one quarter mile of the flow line of the constructed Nelson reservoir, and that prospecting operations would constitute a menace to the water supply of the Milk River Project.

It is urged by appellant that the lands involved are "lands owned by the United States" within the meaning of section 1 of the leasing act, and that the Department is without authority to reject his application although it did, in fact, constitute such a menace. Affidavits are submitted purporting to establish that prospecting operations may be so conducted as to constitute no menace to the water supply of the project.

Appellant's argument is confined to the question of the authority of the Department to exclude lands withdrawn for reclamation purposes from the operations of the leasing act. No such general action has been taken by the Department. On the contrary permits have been issued for lands within reclamation withdrawals.

The question here involved is whether the Department has authority to deny an application for a permit to conduct prospecting operations upon lands which, though owned by the United States, have been so dedicated to other purposes, authorized by law, as to render them unavailable for prospecting for oil and gas except at the risk of serious impairment or perhaps the complete loss of their use for the purpose to which they have been dedicated.

Section 13 of the leasing act provides a means whereby prospecting operations may be carried on upon improved areas of the public domain. In the first clause of that section of the act discretionary power is vested in the Department in the following words:

That the Secretary of the Interior is 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 * * *

This authority is conferred in addition to general authority given in section 32 of the leasing act, "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act."

In conferring specific authority in section 13 of the act in addition to the general authority in section 32, Congress must have intended thereby to confer special discretionary power. Otherwise the specific grant is superfluous.

It is to be observed that in section 13 of the act the Secretary is "*authorized*" to grant permits. In its ordinary meaning "*authorized*" is permissive in character, not imperative, and has only been held to be mandatory in the construction of public statutes when a certain condition exists. This condition can be well expressed in the language of the lord chancellor in Blackwell's case, 1 Vern. 152, as quoted in Vol. II of Lewis' Sutherland Statutory Construction, p. 1146. In construing permissive words of almost identical meaning with "*authority*," it was said:

The words "it shall be lawful" confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.

The conditions stated above have existed in the leading cases wherein the word "*authorized*" has been held to have a mandatory import, and in all other cases the word has been construed to retain its ordinary permissive character.

Consideration of the scope of section 13 of the act makes it at once apparent that a special power to regulate is necessary to an orderly administration of the public land laws, and that discretionary power to grant or deny a license to prospect was intended to be conferred upon the Department.

That section of the act authorizes the granting of licenses to qualified parties to prospect for oil and gas upon the public domain wherever the lands are not known to contain oil and gas deposits in commercial quantities.

There is excepted from the general operations of the act in section one, lands within the Appalachian Forest Reserve, lands withdrawn for naval or military purposes and lands in national parks. Such exceptions limit the issuance of prospecting permits under section 13, as well as under the other sections of said act, but they do not constitute the absolute limit.

Congress is presumed to know the existing laws and unless a clear intent to abrogate them appears in the statute, it must be construed

in harmony with them in accordance with the ancient maxim of the law *interpretare et concordare leges legibus est optimus interpretandi modus*. There are many instances, not included in the four classes excepted in section 1, where lands "owned by the United States" have been withdrawn for special purposes which would be utterly useless if prospecting operations were commenced therein. Reservoirs for the supply of water to the residents of the District of Columbia cover lands of the United States, not reserved or withdrawn for any of the purposes excepted in the leasing act. Likewise there are bird reserves, fisheries withdrawals, and numerous other withdrawals for special purposes, none of which come within the excepted provisions of the leasing act, and none of the laws under which they were withdrawn contain any express power to exclude prospecting operations.

The purpose of conferring in section 13 of the act special authority to prescribe the rules and regulations under which prospecting permits might be granted, and to deny applications for permits, is apparent when it is considered that all of the remaining sections of the act, which authorize prospecting operations confer such right in connection with or in lieu of rights acquired under *preexisting* laws.

The necessity for the authority to determine when and upon what conditions permits could be issued upon the broad class of lands designated as "owned by the United States" leaves no doubt as to the intent of Congress in conferring such authority in section 13 of the act.

The right to regulate is, to a degree, admitted by appellant, who has expressed a willingness to furnish a bond in the sum of \$5,000, which sum is the amount generally required in cases where lands are withdrawn for reclamation purposes and are within an irrigable area, but not within the flow line of a reservoir.

The showing made in support of appellant's claim that prospecting operations would not constitute a definite menace refers to saving of oil or gas, or salt water but ignores the possibility of the striking of gas with such pressure as would render the control referred to impossible. While such occurrences are not the rule the Department feels charged with a duty to deny prospecting permits for lands within the Nelson reservoir upon which it has expended \$700,000, and which is the source of irrigation for 19,000 acres of land which would be seriously injured by any contamination of the water supply. Until drilling elsewhere in the vicinity has established the probable character of the oil and gas deposits, if any, which might underlie the land and the dangers to the project can be accurately determined, it is not deemed proper to authorize drilling operations therein.

In denying appellant's application the Department is not depriving him of any vested right, nor is it excluding him from the benefits

of the leasing act. His application is for a license, a thing which, from its very nature, may be denied by the owner, or trustee of the land to which the special use shall relate, and the authority, and, indeed, the duty, to deny such license in "necessary and proper" cases was specifically conferred upon the Department in section 13 of the leasing act.

The decision of the Commissioner is therefore affirmed and the case closed.

LANGWITH v. NEVADA MINING COMPANY.

LEMAIRE v. NEVADA MINING COMPANY.

Decided June 27, 1923.

MINING CLAIM—ADVERSE CLAIM—DILIGENCE—APPLICATION—LACHES—PATENT.

Where a senior locator of a lode mining claim, through lack of diligence or vigilance, or from any other cause, fails timely to file an adverse claim against an application for patent made by a conflicting junior locator, the former will not be permitted to urge as a valid objection to the issuance of a patent to the latter that the only discovery on the claim is that made by the senior locator.

MINING CLAIM—EVIDENCE.

Assay certificates, purporting to show the mineral values of samples taken from a lode mining claim, when not supported by the testimony of the assayer or properly connected with the samples, are to be treated merely as hearsay evidence and entitled to but slight consideration in the determination of questions relating to discovery.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Case of *Lavagnino v. Uhlig* (198 U. S., 443), *Wight v. Dubois* (21 Fed., 693), *American Consolidated Mining and Milling Company v. DeWitt* (26 L. D., 580), and *Mutual Mining and Milling Company v. Currency Company* (27 L. D., 191), cited and applied.

FINNEY, First Assistant Secretary:

On May 20 and 21, 1920, the Nevada Mining Company filed applications for patent, Elko series 03982, 03983, and 03984, for the October, May Day, Dart, and January lode mining claims, respectively, situate in Secs. 15, 16, 21, 22, T. 31 N., R. 43 E., M. D. M., Nevada. Final certificates issued November 29, 1920.

On August 26, 1920, Joseph A. Langwith filed an adverse claim against application 03982 and an adverse claim against application 03983, and on the same day and date Henry R. Lemaire filed an adverse claim against application 03983 and an adverse claim against application 03984.

These claims were rejected by the local officers because they were not filed within the statutory period of publication, and upon prosecution of several successive appeals the action of the local office was affirmed by the Department. The adverse claims, however, were

recognized as stating sufficient grounds of protest to institute proceedings on the several charges therein contained, to the effect that no valuable discovery of mineral had been made upon the claims. Thereupon the protestants, above named, filed corroborated protests against the applications embracing the October, May Day, and Dart lodes. These protests were consolidated by stipulations, and hearing was held thereon before the local officers, who, after consideration of the testimony adduced, recommended the dismissal of the protests. This action was affirmed by the Commissioner of the General Land Office, and the case now comes before the Department on appeal.

Twenty-two specifications of error have been assigned, a number of such specifications being the same in substance. It is unnecessary to consider them in detail as they for the most part are based on a conception of law, as shown by the evidence adduced and the arguments and authority cited in the briefs, that questions involving the sufficiency of the compliance by the applicants with the mining laws of the State of Nevada, and other questions that might have been properly raised in an adverse suit, under sections 2325 and 2326, Revised Statutes, could be injected into, and determined in, protest proceedings.

Section 2325 provides:

* * * At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

The nature of the right conferred by this section is set out in the case of *Wight v. Dubois* (21 Fed., 693), cited and applied in 22 L. D., 624. The court said in the first cited case that—

I think all that it covers is the right to anybody to come in, and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if the terms have in fact been complied with. He does not appear as a party asserting his own rights; but if we may, so to speak, parallel these proceedings with those in a court, such an objector appears as an *amicus curiae*,—a friend of the court,—to suggest that there has been error, and that the proceedings be stayed until further examination can be had.

The decisions of the Department have been in accord with the views above expressed. In *Mutual Mining and Milling Co. v. Currency Co.* (27 L. D., 191) it was held that (syllabus)—

A charge that the discovery on which a mineral application rests is upon ground covered by a prior valid subsisting location raises an issue that must be settled in the courts, under the proper statutory adverse proceeding, and on failure to so present such charge it can not be entertained by way of protest against the issuance of patent.

Paragraph 53 of the mining regulations (49 L. D., 15, '72) prescribes the grounds for such protests as follows:

At any time prior to the issuance of patent protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Such protest can not, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit.

Applying the law and regulations above set forth to the several protests under consideration the only essential matters tending to show that the mineral applicants had failed to comply with the law are as follows:

1. That the claimants made no discovery of valuable mineral in the rock in place on the several claims involved.
2. That the development work done on the Marion lode, and claimed to have been done for the common benefit of the claims in question and other claims, did not tend to develop the claims in question.

The record does not disclose a serious attempt to sustain the second allegation. On the contrary, the protestee established by a preponderance of evidence that such work did redound to the benefit of the claims here in dispute.

It remains then to consider the testimony in support and denial of the first allegation as above formulated.

The record shows that the claims protested conflict with certain lode mining locations claimed by one or more of the protestants. The protestants admit that within the conflicting areas, that is, within the bounds of the October, May Day, and Dart lodes, a sufficient discovery of mineral had been made before the applications were filed; but contend that these discoveries were made by the protestants on their own location and that they constitute the only valid discoveries within the bounds of the claims protested. Certain of the witnesses for the protestants also testified that they had examined the rock and material in the so-called discovery cuts of the protestee, and that there was not there disclosed any ledge, lode, or vein of mineral-bearing rock in place, and the indications of mineral therein were not such as to justify further prospecting or development. Samples were taken by Mr. Jones, who qualified as a mineralogist and geologist, and analyzed under his observation, and no showing of mineral of value appears on the assay certificates that

he verified. The protestants' witnesses, however, testified that they observed iron stains in the rock in these cuts, attributing such stains to surface weathering of the iron content in the shale and as not indicative of or connected with valuable mineral deposits on the land. Witness Chagnon for the protestant deposed to knowledge of mineral showings elsewhere on the Dart and May Day claims outside the area in conflict.

The protestee's witnesses testified to the presence of these iron stains in the so-called discovery shafts and insisted that such stains were in fractures or fissures in the shale, and certain of its experts who deposed to considerable experience in examining and developing near by mining ground, attributed this oxidation to the action of ascending mineralized waters through the fractures in the rock; that similar indications, particularly on the Marion claim, had by development work been shown to be connected with valuable deposits at depth, and for that reason these seams, though thin, occurring in a character of shale resistant to fracture, were of sufficient significance to justify following with the expectation of developing valuable deposits of gold, silver, and copper in an underlying lime formation or on the contact of the lime and a conglomerate formation.

Witness Hogle, a witness who deposed to having been in charge of the protestee's business and work stated in effect that it had been disclosed by the workings on the Marion claim, where some \$40,000 to \$50,000 worth of ore was mined, that the deposits pinched down when they struck the shale, and the same knife-blade appearances were exhibited in the fissures there in the shale as appeared in the cuts in the shale on the claims in question, and for that reason he had ordered the shafts sunk on such surface indications.

Protestee's witnesses were also of the opinion that these showings of iron stain were mineralized. Assay certificates were introduced, claimed to show the results of assays of samples taken from these seams, showing slight values in gold, silver, and copper. These documents, however, are entitled to slight consideration as they were not supported by the assayer's testimony or properly connected with the samples and are merely hearsay. Witness Hogle also testified that at the time the applications in question were filed he was cognizant of the discoveries on each of the claims made by the protestants.

After a review of the mass of conflicting testimony in this case it can not be stated with confidence that a ledge, lode, or vein of mineral in place was disclosed in any of the discovery cuts made by the protestee. The Department, however, is of the opinion that the protestants failed to establish by a preponderance of evidence that a discovery of mineral was not made by the protestee in such cuts on each of said claims. But aside from this inquiry it is not disputed

that a valuable discovery has been made within the limits of each claim in question, of which applicants were fully cognizant at the time the patents were applied for. The Department, therefore, can not agree with the contention made in the protestants' brief that such applicants can not avail themselves, under the conditions shown in this case, of such discoveries. In the case of *Lavagnino v. Uhlig* (198 U. S., 443, 455) the court, after quoting section 2326, United States Revised Statutes, said:

This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought, he may abandon such rights and cause them in effect to enure to the benefit of the applicant for a patent by failure to adverse, or, after adverseing, by failure to prosecute such adverse.

The case of *American Consolidated Mining and Milling Co. v. DeWitt* (26 L. D., 580, 581) developed facts similar to those in this case. That case stated:

March 27, 1895, the American Consolidated Mining and Milling Company filed a protest alleging that the Maryland is not a valid mining location, in that the discovery therein was on the Orbit lode claim, a prior and subsisting location, and not upon unappropriated public land; that the Orbit vein is the only one discovered within the limits of the Maryland; that a large part of the improvements and labor upon the Maryland claim were placed there by lessees of the protestant under a lease of the Orbit, and were not placed there by the applicant for the Maryland patent nor by his grantors; and that a large part of the Maryland is within the Orbit, which is the property of the protestant under a prior location.

* * * * *

Whether the ground, which includes the Maryland discovery is a part of the Maryland, or a part of the Orbit, and whether the Maryland is the superior claim to the ground in conflict, are questions which were open to determination by adverse proceedings in the local court and which are now determined adversely to protestant's contention, by reason of its failure to adverse the Maryland application (Section 2325, R. S.).

It seems well established from the decision cited that where a senior mining locator through want of diligence or vigilance, or from any other cause, fails to timely file his adverse claim against an application for patent made by a conflicting junior locator, he can not urge as a valid objection to the issuance of such patent that the only discoveries on the claims applied for are those made by such senior locator.

Protestants also assign as error the refusal by the local office to grant a new trial, which action was affirmed on appeal. The

motions and other papers pertaining to this objection have been examined, and the Department is of the opinion that no sufficient showing was made that evidence had been newly discovered material to the issue. In consonance with the views above expressed the decision of the Commissioner must be and is hereby affirmed.

HEIRS OF BAKER v. CENTRAL WYOMING OIL AND DEVELOPMENT COMPANY ET AL. (ON PETITION).

Decided June 29, 1923.

OIL AND GAS LANDS—LEASE—PAYMENT—LAND DEPARTMENT—JURISDICTION.

Neither the leasing act of February 25, 1920, the departmental regulations issued thereunder, nor the terms of leases granted pursuant thereto, confer upon or reserve to the Land Department, after the delivery and acceptance of an oil and gas lease, any jurisdiction to determine what disposition shall be made of proceeds derived from oil and gas development operations on leased lands and remaining in the hands of lessees after the payment of the royalty due the United States.

OIL AND GAS LANDS—LEASE—PAYMENT—COURTS—JURISDICTION.

The provision contained in section 31 of the act of February 25, 1920, to the effect that an oil and gas lease may provide for the resort to appropriate methods for the settlement of disputes or for remedies for breach of specific conditions thereof, has particular reference to issues arising between the lessor and the lessee, but disputed questions relating to the disposition of proceeds accruing from drilling operations and remaining after the payment of royalties to the United States, come exclusively within the jurisdiction of the courts.

FINNEY, *First Assistant Secretary:*

This is a petition filed by Mary J. Baker, Gertrude Baker Phillips, and E. J. Baker, jr., claiming as the heirs of E. J. Baker, deceased, praying that the Department change and correct, or cause to be changed and corrected, certain alleged "assignments of lease and declarations of interests" so that the same will "declare the interest of and set over to the heirs of E. J. Baker, deceased," as of August 19, 1920, a 1½ per cent royalty of all oil or gas remaining after first deducting royalties payable to the United States under certain leases granted by the Department pursuant to the provisions of section 18 of the act of February 25, 1920 (41 Stat., 437), covering the NW. ¼, Sec. 24, T. 40 N., R. 79 W., 6th P. M., Douglas land district, Wyoming.

The said leases embracing the above-described area are numbered 026272-a and 026272-b, and were granted in January, 1921, to respectively the Central Wyoming Oil & Development Company, for the W. ½, said quarter section, and the Wyoming Associated Oil Corporation for the E. ½ thereof, as of August 19, 1920, the date of the

filing of the application therefor. The lease application seems to have been based primarily, if not exclusively, upon two asserted oil placer mining locations, one alleged to have been made in 1907, by E. Percy Palmer and seven others, and the other prior to February 9, 1910, by William G. Henshaw and seven other persons, although the application recited the ownership by the lease applicants of a conflicting claim which is denominated the Shail, located January 8, 1887, by Jack (Martin) Ashcraft, E. J. Baker, and six other persons.

The petition here under consideration was filed in the Department June 4, 1923, and alleges that title to an undivided one-eighth interest in the said Shail oil placer mining claim has ever since the date of its location been outstanding of record in the said E. J. Baker, now deceased, and his heirs, the petitioners; that on the basis of the asserted ownership by Emile Richardson of the interest of E. J. Baker in said claim Richardson was, with the approval of the Department, assigned by the lessees a royalty of $1\frac{1}{4}$ per cent of all oil and gas produced from said land and remaining after the deduction of royalties due and payable to the United States under the leases; that Richardson has never had title to the said undivided one-eighth interest of Baker in the Shail oil placer mining claim, but that the same remained continuously in Baker from the date of the location to the time of Baker's death, and since Baker's death has at all times been in the petitioners; that therefore the petitioners and not Richardson are entitled to receive the said $1\frac{1}{4}$ per cent royalty now being paid to Richardson under the said assignments. The petition seeks to have the assignments to Richardson, or the leases, so modified as to require the said $1\frac{1}{4}$ per cent royalty paid to the petitioners as the sole and exclusive owners of the Baker interest in the Shail claim, such payments to be based upon production of oil and gas upon the land from and after August 19, 1920, the date the said leases became effective.

The petition as hereinbefore shown was not filed until more than two years after the granting of the leases embracing the area in question. The Department finds nothing in the leasing act, the regulations issued thereunder, or the terms of leases granted pursuant thereto that confers upon or reserves to the Department, after the delivery and acceptance of an oil and gas lease, any jurisdiction to determine what disposition shall be made of proceeds derived from oil and gas development operations on leased lands and remaining in the hands of lessees after the payment of the royalty due the United States, or to exercise any control whatsoever over such remaining proceeds. That the leasing act did not contemplate the exercise of such jurisdiction by the Department is plainly indicated by the terms of section 31 of the act, which provides for the forfeiture and cancellation of leases thereunder for failure on the part

of lessors to comply with the provisions of the act or the general regulations promulgated under the act and in force at the date of the lease only by an "appropriate proceeding in the District Court of the United States for the district in which the property, or some part thereof, is located." It is true that the said section also declares that the lease may provide for the resort to appropriate methods for the settlement of disputes or for remedies for breach of specific conditions thereof. But aside from the fact that this provision would seem to have referred solely to issues that might arise between the lessor and the lessee, there is nothing in the terms of leases granted under the act that permits the Department to determine and adjudge what disposition should be made of proceeds accruing from drilling operations and remaining after the payment of royalties to the United States. It is clear, therefore, that whatever remedies the petitioners are entitled to under the facts recited in the petition must be sought in the courts and not in the Land Department which clearly has no jurisdiction over such controversies.

The petition is accordingly dismissed.

LUMAN, TRANSFEREE OF OSBORN.

Decided June 29, 1923.

DESERT LAND—ADJUSTMENT TO SURVEY—REGISTER AND RECEIVER.

Where a desert-land entry has been allowed for unsurveyed lands with descriptions in terms of a future survey, failure of the claimant, upon the filing of the plat of survey in the local United States land office, to adjust his claim to the survey should not be held a ground for cancellation of the entry, but, upon default in making such adjustment, the local officers will make the adjustment themselves.

FINNEY, *First Assistant Secretary:*

On August 14, 1901, Robert L. Osborn made a desert-land entry for unsurveyed lot 1, Sec. 19, T. 39 N., R. 108 W., and surveyed NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 13, T. 39 N., R. 109 W., 6th P. M., within the Lander, Wyoming, land district. Final proof was submitted August 14, 1905. By letters dated February 16, 1907, and August 5, 1907, the Commissioner of the General Land Office directed that the entryman be required to furnish certain data relative to his water right and as to the area of the entry. On October 7, 1907, the entryman filed a relinquishment as to the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, said Sec. 13. All the land involved was withdrawn for forestry purposes on January 29, 1903, and is still so withdrawn.

A plat of survey of part of T. 39 N., R. 108 W., including Sec. 19, was filed in the local office on July 14, 1915. From this it appears that lot 1 contains 36.07 acres and is contiguous to the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, said

Sec. 13. By letter dated March 4, 1918, the Commissioner directed that the entryman be required to furnish an affidavit explaining why he did not submit final proof within four years from the date of entry. It was stated that 30 days from notice would be allowed for the filing of such affidavit; or to appeal, and that in default of any action within the time allowed the entry would be canceled without further notice. The local officers were also instructed to—

require the entryman to make application to adjust his entry to the plat of survey, proceeding in accordance with paragraph 32 of circular No. 474, and in due time report.

On May 21, 1918, the local office transmitted evidence of service of said decision and reported that no action had been taken. It appears that a registered letter was received for by Robert D. Murphy as agent for Robert L. Osborn, on March 18, 1918. By letter dated December 26, 1918, the Commissioner canceled the entry and closed the case.

On February 7, 1922, Abner Luman, as transferee of the entryman, filed an application for reinstatement of the entry as to lot 1, Sec. 19, T. 39 N., R. 108 W., and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 13, T. 39 N., R. 109 W. His application is in the form of an affidavit in which he alleges that Osborn transferred his rights, shortly after making final proof, to John W. Hay, who in turn made a conveyance to the affiant; that Osborn has left that part of the State and his present address is unknown; and that the affiant did not until recently know of any requirement made or of the cancellation of the entry.

By a decision dated April 19, 1922, the Commissioner held that the requirement as to the showing regarding time of submitting final proof was erroneous; that the entryman could not be required to adjust to surveyed land, and that the cancellation as to the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 13, was therefore erroneous; that the cancellation was proper as to lot 1, Sec. 19. The entry was reinstated as to the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 13, but reinstatement was denied as to lot 1, Sec. 19, it being stated that the cancellation was proper and that a forest withdrawal had intervened. It was also directed that Luman be required to file record evidence of conveyance to him. On May 13, 1922, Luman filed an appeal to the Department from the Commissioner's decision.

On October 12, 1922, Luman filed an application, addressed to the Commissioner, for reinstatement of the entry as to the relinquished tract in addition to lot 1, Sec. 19. He stated, among other things, that Osborn had disappeared and could not be found; that he, Luman, did not believe that Osborn ever received notice of the Commissioner's decision of March 4, 1918; and that the person who received for the registered letter to Osborn had no authority to do so.

On November 28, 1922, Luman filed an abstract of title to lot 1, Sec. 19, T. 39 N., R. 108 W., and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 13, T. 39 N., R. 109 W., from which it appears that Osborn conveyed said lands to John W. Hay on May 17, 1909, and that Hay conveyed the same lands to Abner Luman on November 13, 1922, by quit-claim deed. The Commissioner transmitted all the papers to the Department on appeal January 27, 1923.

It was not shown that Osborn received any notice of the decision holding the entry for cancellation, nor was it shown that Murphy had any authority to receipt for the registered letter to Osborn. Under the circumstances, it is held that the entry was not properly canceled as to any part.

It appears that the final proof has been found complete and satisfactory and that the full purchase price has been paid. The entry will accordingly be reinstated as to lot 1, Sec. 19, also, and final certificate will be issued.

The application for reinstatement as to the relinquished tract is not regularly before the Department, but in passing it may be noted that Luman has not shown any interest whatsoever therein. Osborn did not make any transfer of that tract to Hay, and the latter did not convey the same to Luman. That application is consequently rejected.

It may be well at this point to call attention to an unwarranted practice of the General Land Office. In cases of this nature desert-land entries should not be canceled for failure to adjust. The regulations under the desert-land laws do not so provide. In the circular of November 3, 1909, relating to Applications and Selections For and Filings and Locations Upon Unsurveyed Lands (38 L. D., 287), rule 3 reads as follows:

The address of the claimant must be given, and it shall be the duty of the register and receiver, upon the filing of the township plat in their office, to notify him thereof, by registered letter, at such address, and to require the adjustment of the claim to the public survey within thirty days. In default of action by the party notified the register and receiver will promptly adjust the claim and report their action to the General Land Office.

Where desert-land entries have been allowed for unsurveyed lands with descriptions in terms of future surveys the same procedure as above pointed out should be followed when the plats of survey are filed. If the descriptions are by metes and bounds, with reference to monuments, a different procedure may be necessary, and in such case the entryman, or other party in interest as shown of record, may be required to adjust under penalty of forfeiture.

BENEDICT v. CASTILLO.

Decided June 30, 1923.

CONTEST—CONTESTANT—HOMESTEAD ENTRY—ALIEN—CITIZENSHIP—EVIDENCE—BURDEN OF PROOF.

A contest against a homestead entry, based upon the charge that the entryman was disqualified to make the entry because he was an alien, must be dismissed unless the contestant, upon whom is cast the burden of proof, substantiates the charge by convincing evidence.

FINNEY, First Assistant Secretary:

Esther Benedict has appealed from a decision of the Commissioner of the General Land Office dated January 23, 1923, dismissing her contest against the additional entry under the stock-raising homestead act made by Luis Castillo on March 2, 1922, for SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{2}$, Sec. 25, T. 23 S., R. 14 E., G. & S. R. M., Arizona.

The contest was initiated April 21, 1922, on the charge that entryman—

is not a citizen of the United States, nor has he declared his intention of becoming a citizen of the United States, and is therefore ineligible to acquire title to public lands of the United States.

Testimony was submitted before a designated officer at Nogales, Arizona, commencing on June 29, 1922, and on July 21, 1922, before the local officers, who by decision of August 21, 1922, recommended that the contest be dismissed.

The burden of proof was on contestant to substantiate her charge by convincing evidence. She failed to produce any evidence which would warrant the cancellation of the entry. The fact that entryman was baptized by a priest at Imuris, Sonora, Mexico, does not establish that he was born in Mexico. Moreover, a satisfactory explanation was made by entryman's godfather as to the reasons for the baptism occurring outside the church parish where he was born.

Entryman had been told by his parents that he was born in Arizona, and during the World War he registered under the selective service law as an American citizen. Being a married man with three children, he was given a deferred classification and was not called for service.

In her appeal, contestant contends that the Commissioner should have found that she was residing on the land at the date on which Castillo applied to make the entry in question, and that the land was therefore not subject to entry.

Testimony was introduced to the effect that John A. Benedict and his family, of which contestant is a member, had resided on the land since June 17, 1920. Inasmuch as Castillo's application to make the entry in question was filed January 17, 1919, the rights of said Bene-

dict as a settler on the land were junior to those of the applicant, and any right which the former might have acquired through such settlement terminated upon the designation of the land and the allowance of the entry in question. All testimony relative to said Benedict's occupation of the land should have been excluded, the only question involved being the citizenship of entryman.

The Commissioner correctly summarized the evidence. His decision is affirmed.

CHIPPEWA AGRICULTURAL LANDS, MINNESOTA.

INSTRUCTIONS.

[Circular No. 898.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 20, 1923.

REGISTERS AND RECEIVERS,

CASS LAKE, CROOKSTON, AND DULUTH, MINNESOTA:

I inclose herewith a schedule [schedule omitted] showing by land districts certain Chippewa lands, comprising 9,402.72 acres in the former Chippewa of the Mississippi, Winnibigoshish, Leech Lake, Deer Creek, Pigeon River, Bois Fort, Red Lake, and White Earth Reservations ceded under the act of January 14, 1889 (25 Stat., 642), which lands are to be disposed of to homestead entrymen and settlers in accordance with the provisions of section 6 of the act of January 14, 1889 (25 Stat., 642); section 4 of the act of May 23, 1908 (35 Stat., 268), as construed by Rule 5 of the regulations adopted May 17, 1910 (38 L. D., 594), by these regulations, and as modified by Public Resolution No. 29 of February 14, 1920, as amended by Public Resolution No. 36, approved January 21, 1922 (see Circular No. 822, 49 L. D., 1); and to town site entrymen under the laws applicable thereto as provided in the act of February 9, 1903 (32 Stat., 820), as follows:

2. *Preference right of ex-service men.*—The land shall be subject to entry only under the homestead laws, by ex-service men of the war with Germany, except as modified by the provisions of paragraphs 3 and 5, under the terms and conditions of said public resolutions and the regulations issued thereunder as set forth in said Circular No. 822 for a period of 91 days, beginning with the ninety-first day from the date hereof. They will be allowed to file their applications during the period of 20 days prior to the date fixed for opening the lands, and such applications should be accompanied by an affidavit showing whether or not there is a settler on the land.

3. *Rights of settlers.*—Section 4 of the act of May 23, 1908 (35 Stat., 268), provides that all lands in any of the Winnibigoshish, Cass Lake, Chippewa of the Mississippi, or Leech Lake Indian Reservations not included in the national forest created by said act, theretofore classified or designated as agricultural lands, are declared to be open to homestead settlement, and on May 17, 1910 (38 L. D., 594), a rule No. 5 was adopted relative to the opening of the lands in said reservations from which the timber has been removed. Pursuant to a request from the Indian Office notice that any "cut-over" lands in said reservations described in the accompanying schedule are subject to settlement has not been given by the superintendent of logging, as provided in said regulations. The Indian Office proceeded to allot the unopened cut-over Chippewa lands or lands ready to be opened. It was found, however, that several tracts were covered by settlers, and the Indian Office thereupon waived the right to allot these lands to Indians in favor of the white settlers.

Reports reaching the General Land Office indicate settlement on the following tracts described in the schedule by the parties mentioned, viz: Lots 6, 7, sec. 23, T. 147 N., R. 25 W., John H. Kevlin, of Mack, Minn.; NE. $\frac{1}{4}$ sec. 35, T. 147 N., R. 31 W., Richard Roller; NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ S. $\frac{1}{2}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ sec. 10, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{2}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, sec. 11, T. 146 N., R. 31 W., said to be settled on by Ed. Larson, Albin Carlson, Joe Johnson, and men by name of Perrault and Rogholt; SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ sec. 1, T. 148 N., R. 26 W., Henry C. Heite; lot 6, sec. 14, N. $\frac{1}{2}$ NE. $\frac{1}{4}$ sec. 23, T. 147 N., R. 31 W. The reports received suggest that other lands than those described are covered by settlements.

There is no authority for any such settlement, except on the Winnibigoshish, Cass Lake, Chippewa of the Mississippi, and Leech Lake Reservations. All the lands in the Cass Lake district are in these reservations, except the land in T. 62 N., R. 25 W., which is in the Deer Creek Reservation. No right of settlement of the lands in the former Pigeon River, Deer Creek, White Earth, Red Lake, and Bois Fort Reservations is given by law, and no such rights will be recognized as existing prior to the date fixed in these regulations. This applies to all the lands in the Crookston and Duluth districts, as well as to T. 62 N., R. 25 W., in the Cass Lake district.

Settlers on the Winnibigoshish, Cass Lake, Chippewa of the Mississippi, and Leech Lake Reservations described in the schedule, who settled on the land prior to April 1, 1923, will be allowed to make their entries within the 91-day period allowed ex-soldiers of the World War with Germany. Similarly, with such ex-soldiers, for a period of 20 days prior to the opening of such lands to soldiers' entry,

they will be allowed to execute and file their applications, and thereafter you will proceed in accordance with Rule No. 16, said Circular No. 822.

All applications by settlers must be accompanied by the affidavit of the applicant, duly corroborated, setting forth the date of settlement and what improvements have been made on the land. If settlement prior to April 1, 1923, is not shown, you will reject the application.

4. *General public.*—After the 91-day period fixed in paragraphs numbered 2 and 3, during which ex-service men and settlers are entitled to make entry, any of said lands remaining unentered will be subject to appropriation under applicable laws by the general public, in accordance with said Circular No. 822. Subsequent to March 31, 1923, 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.

5. *Lands already entered.*—The following tracts, described in the schedule, were inadvertently allowed to be entered, and the entries will not be disturbed, viz: SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ sec. 17, T. 145 N., R. 25 W., entered by Sarah E. Kichey, October 25, 1921, Cass Lake H. E. 012308, in accordance with an office letter stating that the land was vacant and subject to entry; NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ sec. 16, T. 156 N., R. 41 W., entered by Ludovic M. Larson, February 16, 1910, Crookston H. E. 05086, on which final certificate issued May 24, 1913, and the same was suspended by the Department April 29, 1916, pending the opening of the land; NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 23, T. 147 N., R. 31 W., entered by Emma J. Brockway, widow of A. G. Brockway deceased, H. E. 011543, Cass Lake, F. C. dated April 23, 1923.

6. *Homestead qualifications.*—Homestead applicants for Chippewa lands must possess the necessary qualifications required in the case of ordinary homestead entries. Second and additional entries will be allowed under the laws and instructions governing such entries for public lands.

7. *Payments.*—Each settler is required, by the act of January 14, 1889, to pay for the lands settled upon the sum of \$1.25 for each acre, such payment to be made in five equal annual installments.

The usual fee and commissions must be paid at the time of original entry and when the commutation or final payment and proof are made. You will not collect any payment for lands in excess of 160 acres embraced in an entry when the original entry is allowed, as the payment for such excess area will be included in the whole amount required to be paid in installments. (See instructions of August 17, 1901, 31 L. D., 72, and September 6, 1901, 31 L. D., 106.)

Under section 8 of the act of May 20, 1908 (35 Stat., 169), entrymen for lands in the former Red Lake Reservation will be required to pay a drainage charge of 3 cents per acre. In all entries made for the lands you will note on the application and receipt the following: "Subject to act of May 20, 1908." (See 36 L. D., 477.)

The right of commutation under section 2301, Revised Statutes, is extended to ceded Chippewa lands by the act of March 3, 1905 (33 Stat., 1005), and in case of commutation you will require the entryman to pay the final homestead commissions in addition to the purchase price of the land, \$1.25 per acre. (See 33 L. D., 551.)

8. *Right to construct dams.*—The disposal of the following tracts is subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, as provided in the act of June 7, 1897 (30 Stat., 62, 67), viz: Lot 3, sec. 9, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$; lot 4, sec. 10, T. 146 N., R. 26 W., S. $\frac{1}{2}$ S. $\frac{1}{2}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 31, T. 142 N., R. 27 W., S. $\frac{1}{2}$ NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 28, T. 142 N., R. 28 W.; lot 9, sec. 6, T. 147 N., R. 28 W.; lot 6, sec. 31, T. 148 N., R. 28 W.; lot 1, sec. 28, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 29, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 34, T. 144 N., R. 31 W., SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 30, T. 146 N., R. 31 W.; lots 5, 6, sec. 14, lot 5, sec. 15, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 22, N. $\frac{1}{2}$ NE. $\frac{1}{4}$ sec. 23, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 26, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ sec. 27, T. 147 N., R. 31 W.

9. *Canadian boundary.*—Lot 1, sec. 27, T. 164 N., R. 36 W., will be disposed of subject to the President's proclamation of May 3, 1912 (37 Stat., 1741), reserving 60 feet on the Canadian boundary and setting the same apart as a public reservation.

10. *Lands erroneously sold for drainage.*—The following tracts are reported to have been sold by the State authorities under the act of May 20, 1908 (35 Stat., 169), viz: Lots 6, 8, sec. 13; lots 5, 6, sec. 14; lot 5, sec. 15, T. 147 N., R. 31 W., S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 23, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 24, T. 157 E., R. 33 W.; lots 3, 5, sec. 6, lots 2, 3, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 7, S. $\frac{1}{2}$ SW. $\frac{1}{4}$ sec. 8, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$ sec. 17, T. 159 N., R. 34 W.; lots 1, 2, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ sec. 1, T. 159 N., R. 35 W., SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ sec. 24, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$ sec. 25, T. 160 N., R. 35 W.

The sale of these lands prior to the date of opening to entry is not recognized by this office. Section 1 of the act of May 20, 1908 (above cited), provides in part as follows:

That all lands in the State of Minnesota, when subject to entry, and all entered lands for which no final certificates have issued, are hereby made and declared to be subject to all of the provisions of the laws of said State relating to the drainage of swamp or overflowed lands for agricultural purposes * * *

The lands above described have never previously been subject to entry, and, therefore, were not subject to sale under the law cited.

11. Notices for publication, as required by said section 6 of the act of January 14, 1889, have been forwarded to the newspapers in which they are to be published. You will post a copy of said notice in your office.

WILLIAM SPRY,
Commissioner.

Approved June 20, 1923.

E. C. FINNEY,
First Assistant Secretary.

STATE OF IDAHO v. DILLEY.

Decided July 5, 1923.

SETTLEMENT—SCHOOL LAND—SELECTION—INDEMNITY—WITHDRAWAL—SURVEY—RESTORATIONS.

A settlement upon public lands, withdrawn at date of settlement, is valid against everyone except the United States, and, where one settles, prior to survey, upon withdrawn lands embraced within a school section, the right of such settler to make entry upon approval of the survey and vacation of the withdrawal is paramount to the right of the State under its school land grant.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *McInnis et al. v. Cotter* (15 L. D., 583), and *Kinman v. Appleby* (32 L. D., 190), cited and applied.

GOODWIN, *Assistant Secretary:*

At the Boise, Idaho, land office on October 25, 1920, George W. Dilley applied to make a homestead entry for lot 9, Sec. 26, lot 3, Sec. 35, and lot 9, Sec. 36, T. 2 N., R. 4 W., B. M. (21.26 acres), filing therewith a showing as to his right to make a second entry under the act of September 5, 1914 (38 Stat., 712). By decision dated May 4, 1921, the Commissioner of the General Land Office returned the application for allowance, and it was allowed May 9, 1921.

Commutation proof was submitted June 24, 1921, but final certificate was withheld because the State Board of Land Commissioners of the State of Idaho had filed a protest against the issuance of a final certificate as to lot 9, Sec. 36.

By decision dated November 4, 1922, the Commissioner of the General Land Office held the entry for cancellation as to lot 9, Sec. 26, and lot 9, Sec. 36, because the E. $\frac{1}{2}$, Sec. 26, and W. $\frac{1}{2}$, Sec. 36, said township, were on December 22, 1903, included in a withdrawal under the second form of withdrawal authorized by the act of June

17, 1902 (32 Stat., 388), in connection with what was then known as the Boise Valley Project. Entryman has appealed.

By order entered June 11, 1923, the withdrawal of lot 9, Sec. 26, and lot 9, Sec. 36, was vacated.

The land embraced in Dilley's entry is an island in the Snake River; and it was surveyed, on Dilley's request, on November 18, 1919, as lot 9, Sec. 26 (11.52 acres), lot 3, Sec. 35 (5.38 acres), and lot 9, Sec. 36 (4.36 acres).

Under the provisions of section 5 of the reclamation act as amended by the act of August 13, 1914 (38 Stat., 686), only lot 3, Sec. 35, was subject to settlement on February 15, 1919, when Dilley established residence on the island. Residence was thereafter continuously maintained.

Although settlement on a portion of the island was prohibited by the act under which the withdrawal was made, the settlement was valid as to everybody except the United States. (*McInnis et al. v. Cotter*, 15 L. D., 583; *Kinman v. Appleby*, 32 L. D., 190.) The withdrawal having been vacated, and Dilley having settled on the land prior to its survey in the field, his right to make entry for the 4.36 acres in the school section can not be denied. The protest of the State is therefore dismissed; its remedy is the selection of indemnity under sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796).

The decision appealed from is reversed, and the commutation proof accepted.

EXCHANGE OF PRIVATELY OWNED LANDS WITHIN THE RAINIER NATIONAL FOREST FOR GOVERNMENT LANDS WITHIN OTHER NATIONAL FORESTS IN THE STATE OF WASHINGTON.

INSTRUCTIONS.

[Circular No. 900.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 11, 1923.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES,

State of Washington:

The act of December 20, 1921 (42 Stat., 350), entitled

"An act Authorizing exchanges of lands within the Rainier National Forest, in the State of Washington," reads as follows:

That the Secretary of the Interior be, and he is hereby, authorized in his discretion to accept on behalf of the United States title to any lands not in

Government ownership within the Rainier National Forest if, in the opinion of the Secretary of Agriculture, such lands are chiefly valuable for national-forest purposes, and in exchange therefor may issue patent for not to exceed an equal value of Government land within any National Forest within the State of Washington, or the Secretary of Agriculture may permit the grantor to cut and remove an equal value of national-forest timber in any national forest in the State of Washington, the values in each instance to be determined by the Secretary of Agriculture and to be acceptable to the owner as fair compensation. Timber given in such exchanges shall be cut and removed under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands conveyed to the United States under this act shall, upon acceptance of title, become parts of the Rainier National Forest.

You will be governed in your consideration of cases involving lands within your respective districts coming within the purview of said act by the provisions of Circular No. 863 in re consolidation of national forests dated October 28, 1922 (49 L. D., 365), so far as may be applicable.

GEORGE R. WICKHAM,
Acting Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

COAL PROSPECTING PERMITS WITHIN RECLAMATION PROJECTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., July 12, 1923.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

I have considered your letter of June 16, 1923, in the case above indicated (N-Montrose 015957), requesting instructions as to the action to be taken for the protection of lands and the improvements thereon embraced within a reclamation project, where application has been made for a permit to prospect land within such project for coal under section 2 of the act of February 25, 1920 (41 Stat., 437), and the Commissioner of the Bureau of Reclamation has advised that injury may be caused to the lands, improvements, waterworks, and water supply within such project in the course of prospecting and incidental mining operations under such permit and recommends that special stipulations and a special bond be required of the applicant to protect the interests of the United States and the property of those claiming under it.

In reply you are advised that in this case, and others exhibiting similar conditions to those above stated, where the Commissioner of

the Bureau of Reclamation makes like recommendations, you will incorporate into the proposed prospecting permit, if otherwise subject to allowance, the following additional requirements.

6. To use all reasonable precautions to prevent the flow of polluted waters to the injury or destruction of lands, improvements, reclamation works, or water supply within the _____ Reclamation Project; to reimburse the United States, its successors or assigns, for all damage to the reclamation works and water supply that may be caused by the permittee by reason of the use of the land within said project for coal prospecting and mining operations; to carry out, at the expense of the permittee, all reasonable orders of the Secretary of the Interior relative to the prevention of injury or destruction by the permittee of the lands, improvements, reclamation works, or water supply within said project.

7. To furnish and maintain, during the period of this permit, a bond with qualified corporate surety, in the sum of \$2,000, conditioned against the failure of the permittee to reimburse the United States, its successors or assigns, in damages, for any and all loss or injury resulting from the failure by the permittee to comply with the requirements of paragraph 6 hereof.

The bond in such cases should be in the form prescribed for oil and gas permits (Form 692d), except where the words oil and gas occur therein the word "coal" should be substituted.

These regulations do not obviate the necessity of furnishing an additional bond to reimburse entryman for damage to crops and improvements, where such bonds may be properly required, and the regulations now followed in such cases shall continue in force.

ROY AXTELL.

Decided July 12, 1923.

ADDITIONAL ENTRY—ENLARGED HOMESTEAD—APPROXIMATION—ACT OF FEBRUARY 20, 1917.

Under the act of February 20, 1917, which provides that one qualified to make an additional entry under the preexisting laws may double the quantity in entering land of the character subject to entry under the enlarged homestead act, one is not precluded from making an additional entry of a tract of land because one-half of its area, together with the area previously entered exceeds 160 acres, if the excess is but slight; the rule of approximation is not applicable to such case.

STATUTES—ENTRY—WORDS AND PHRASES.

In the statutes relating to entries of public lands the expressions "not more than 160 acres," "one-quarter section," and "not to exceed one-quarter section," are to be construed to mean approximately 160 acres.

FINNEY, *First Assistant Secretary*:

Roy Axtell has appealed from a decision of the Commissioner of the General Land Office dated January 23, 1923, which is as follows:

Reference is had to your (register and receiver, Glasgow, Montana) letter of May 22, 1922, relative to the right of the above named party to make entry, under the act of February 20, 1917, of the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, T. 23 N., R. 39 E., M. M., containing 40 acres, which has not yet been designated under the enlarged homestead act.

The records show that patent issued to Axtell on September 17, 1920, under section 2291, Revised Statutes, for lot 1, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 20, lot 3, Sec. 21, T. 23 N., R. 39 E., 143.52 acres.

The rule of approximation as applied to public land entries is merely a rule of administrative expediency and is not a matter of right. The right of entry accorded by the act of February 20, 1917, is for:

"Such an area of public land as will, when one-half of such area is added to the area of the lands to which he has already obtained title, not exceed one-quarter section," and one who has made entry for 143.52 acres is not entitled to invoke the rule of approximation to take an additional entry under the said act for 40 acres and so acquire an aggregate of 183.52 acres.

It is the opinion of this office that inasmuch as Axtell has acquired title to 143.52 acres and is not therefore entitled to enter approximately 40 acres under the 160-acre homestead law, he is not qualified to make an entry for any area under the act of February 20, 1917. Therefore, application 059531 for such additional entry now pending in your office, is hereby rejected, subject to the applicant's right of appeal * * *.

It is clear that had there been a subdivision containing 20 acres adjoining Axtell's original entry he could have included such tract in his application originally or he could have entered the same subsequently.

The rule of approximation does not appear to be involved in this case. The act of February 20, 1917 (39 Stat., 925), very plainly provides that one qualified to make an additional homestead entry under the old laws may double the quantity in entering land of the character subject to entry under the enlarged homestead act. Axtell can not be said to apply for a total of 183.52 acres under the old act, but for 163.52. The Department has so repeatedly held that where the statutes contain expressions such as "not more than 160 acres," "one quarter section," or "not to exceed one quarter section," these must be construed to mean approximately 160 acres, that no citations are necessary.

In the present case Axtell would be held to have entered 163.52 acres, according to the old law, should he be allowed to make entry as now applied for. He would be required to pay for an excess of 3.52 acres.

The Department is of the opinion that Axtell is entitled to make entry in accordance with his application, provided the land shall be designated as subject to entry under the enlarged homestead act.

The decision appealed from is therefore reversed.

IRA TOWNSEND ET AL.

Decided July 12, 1923.

STOCK-RAISING HOMESTEAD—ADDITIONAL—APPLICATION—PREFERENCE RIGHT.

A suspended application to make a stock-raising homestead entry for lands not subject to entry at the time of filing, but which becomes allowable prior to the placing of record of an original entry by another, confers a right upon the applicant to enter the lands applied for superior to the preference right to make an additional stock-raising entry for adjoining lands accorded by section 8 of the act of December 29, 1916.

FINNEY, *First Assistant Secretary*:

On June 18, 1920, Ira Townsend filed application 021937 to make an original stock-raising homestead entry of the SE. $\frac{1}{4}$, Sec. 11, lots 1, 2, 7, 8, 9, Sec. 14, lots 3, 4, 5, 6, 9, 10, 11, 12, Sec. 13, T. 9 S., R. 4 W., M. M., containing 621.47 acres, within the Helena, Montana, land district. He also filed a petition for designation of the land under said act.

Plat of survey of Secs. 13 and 14, said township, was filed in the local office on June 29, 1920, in accordance with the provisions of the public resolution of February 14, 1920 (41 Stat., 434). The land in Secs. 13 and 14 became open to general entry on September 1, 1920. Sec. 11 was surveyed in 1872.

On September 14, 1920, Andrew Husband made homestead entry 022052, under section 2289, Revised Statutes, for lots 1, 2, 7, 8, Sec. 13, said township, and on September 24, 1920, he filed application 022198 to make an additional stock-raising homestead entry for lots 6, 9, 10, and 11, said Sec. 13, together with petition for designation.

Designation of all the land involved became effective June 27, 1921. Townsend's application was allowed on October 18, 1921, and at the same time Husband's application was rejected for conflict. Husband appealed upon the grounds that the records of the local land office did not show that the lands had been designated as subject to entry under the stock-raising homestead law; that Townsend's application should have been rejected because it was filed and suspended nearly three months before the general opening, there being no showing that he was a veteran of the World War; that the application of Husband, which was regularly and properly filed, was consequently entitled to precedence; that Husband settled on the land embraced in his original entry before the plat of survey was filed and presented his application to make original entry on July 14, 1920; that his application was allowed on September 14, 1920, by reason of his allegations of settlement; and that upon the allowance of the original entry, "his rights thereunder, which would include his right to exercise a preference right of entry for adjoining land under section 8 of the act of December 29, 1916 (39 Stat., 862),

related back to the time of his settlement, and for that reason his application should be held as superior to that of Townsend."

By decision dated October 18, 1922, the Commissioner of the General Land Office affirmed the action of the local officers. He states:

Husband had no rights under which to claim any preference right until the 14th of September, 1920. It appears that Townsend's application was already filed. In order for Husband to have any preference right he must have had a homestead entry of record when Townsend filed his application.

At the time Townsend filed his application the land was not subject to entry by him as he does not show he was entitled to preference right under Public Resolution No. 29, but his application was not rejected, it having been allowed to remain suspended until it became allowable, and as it became allowable (township plat having been filed June 29, 1920), before Husband filed his additional homestead application it is thought to be inequitable under the instructions contained in 47 L. D., 150, to thereafter accord Husband preference right to the land in conflict under section 8 of the stock-raising act.

Townsend's attorney filed timely notice of appeal from the Commissioner's decision and subsequently he has stated in writing that he does not intend to file any brief on appeal, but wishes the case to be considered on the brief filed with the appeal from the action of the local officers.

The Department is thoroughly in accord with the views expressed by the Commissioner. Husband had no preference right. While it was irregular to receive and suspend Townsend's application as was done, Husband is not in a position to complain. It is entirely a matter between the Government and Townsend and in the absence of any valid intervening right the irregularity does not call for cancellation of the entry.

The decision appealed from is affirmed.

McCLANE v. SCOTT.

Decided July 20, 1923.

STOCK-RAISING HOMESTEAD—ADDITIONAL—AMENDMENT.

One who has made an additional entry under section 5 of the stock-raising homestead act is not qualified either to make a further additional entry under that act or to enlarge the additional entry by amendment, if he does not own and reside upon his original entry.

FINNEY, First Assistant Secretary:

This is an appeal which presents for determination the question whether one holding an entry under section 5 of the stock-raising homestead act can enlarge the entry by amendment at a time when he no longer owns and resides on the original entry.

At the Roswell, New Mexico, land office on October 16, 1922, Lillie McClung Scott was allowed to make entry under the stock-raising

homestead act for lot 4, Sec. 7, lots 3 and 4, Sec. 18, T. 9 S., R. 11 E., N. M. M. (158.32 acres), as additional to her perfected entry under the enlarged homestead act for N. $\frac{1}{2}$, Sec. 18, T. 8 S., R. 11 E., N. M. M. (258.88 acres). On January 8, 1923, Mrs. Scott applied to amend the additional entry by adding thereto lots 3 and 4 and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 3, T. 9 S., R. 10 E., N. M. M., setting forth in a supplemental affidavit executed February 26, 1923, that when she applied to make the additional entry she owned and resided on her original entry, and that she still owns one subdivision of the original entry (lot 1, Sec. 18, T. 8 S., R. 11 E., N. M. M.).

On January 11, 1923, George W. McClane applied to make entry under section 1 of the stock-raising homestead act for E. $\frac{1}{2}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 34, T. 8 S., R. 10 E., and lots 3 and 4 and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 3, T. 9 S., R. 10 E., N. M. M. (559.60 acres). The local officers advised McClane that his application was suspended to await action on Mrs. Scott's prior application to amend. McClane appealed, contending that Mrs. Scott's application to amend should be rejected because she no longer owned and resided on her original entry. By decision dated March 31, 1923, the Commissioner of the General Land Office held that the application to amend was allowable. McClane has appealed to the Department.

McClane has shown by certified copies of the various papers that by warranty deed executed March 4, 1920, and recorded the same day, Mrs. Scott transferred to O. Z. Finley the land embraced in her original entry; that on September 11, 1922, said Finley transferred the tract, with other land, by warranty deed to Lois H. Fuller, who by quit-claim deed executed February 23, 1923, transferred lot 1, Sec. 18, T. 8 S., R. 11 E., N. M. M., to Mrs. Scott.

It thus appears that when Mrs. Scott filed her application to amend she no longer owned and resided on her original entry, but subsequently acquired one subdivision thereof.

The Department has held (48 L. D., 38) that the making of an additional entry under either section 4 or section 5 of the stock-raising homestead act does not necessarily exhaust one's rights under said sections, but that further additional entries may be made 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.

Mrs. Scott was not limited to an application to amend. Had she been qualified, she could have applied to make a further additional entry under section 5 for the tract involved. But she was not qualified to make such an entry, and can not be allowed to secure

by amendment what she could not secure through a further additional entry.

The application to amend is therefore rejected, the decision appealed from being reversed.

EMMA R. HUME ET AL.

Decided July 24, 1923.

REPAYMENT—WIDOW; HEIRS; DEVISEE—ACT OF DECEMBER 11, 1919.

An application for the repayment of moneys paid in excess of lawful requirement filed by one of the heirs of a deceased entryman on behalf of all of the heirs prior to the expiration of the two-year limitation contained in the act of December 11, 1919, is sufficient to stop the running of the statute as to the share of each heir, and the subsequent filing of separate applications on behalf of the heirs individually after the expiration of the two-year period will not be deemed a cause for its denial.

FINNEY, First Assistant Secretary:

November 28, 1921, Grant E. Hunt, one of the heirs of Doctor F. Hunt, applied for repayment of the amount paid in excess of lawful requirement on preemption entry No. 638, now 012547, Spokane, Washington, for the N. $\frac{1}{2}$ SE. $\frac{1}{2}$ and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22, T. 17 N., R. 44 E., W. M., made by Doctor F. Hunt August 17, 1881, payment being made at the rate of \$2.50 per acre whereas the lawful price was \$1.25 per acre.

In connection with the said application for repayment the names and addresses of all of the heirs were furnished. Preliminary to action on the case the General Land Office forwarded application blanks to all of the heirs named for formal application by each of them, and in October, 1922, the heirs filed separate applications.

Upon consideration of the case the Commissioner of the General Land Office by decision of May 22, 1923, required certain additional evidence by Grant E. Hunt for completion of the record with view to allowance of his proportionate share of the excess payment. This requirement appears to have been complied with. In the same decision it was held that the applications by the other heirs, namely, Emma R. Hume, Syria A. Hunt, Frank M. Hunt, Thomas J. Hunt, and Lucy J. Hill were barred by the act of December 11, 1919 (41 Stat., 366), as they had not filed within two years from the date of the act as required thereby. For this reason said applications were rejected and appeal from that action has brought the case before the Department for consideration.

In support of the appeals affidavits have been furnished by each and all of the said heirs to the effect that the first application filed by Grant E. Hunt was made for all of the heirs and at their re-

quest, and that the supplemental applications were executed as a result of the action of the General Land Office in transmitting blanks for formal applications to complete the record. It is therefore contended that the application filed by one of the heirs for all of them prior to the expiration of the two-year period of limitation was sufficient to stop the running of the statute as to the share of each one.

The Department is fully convinced of the correctness of this contention. There can be no reasonable doubt that the first application was for the benefit of all the heirs. The application was for the whole amount of the excess, and the several heirs entitled to share in its distribution were named. These facts, supplemented by the affidavits of each of the other five heirs that the application was made in their behalf and at their request, well support the contention that the claim as a whole, comprised of the shares of the respective heirs, was filed within proper time.

Accordingly the action complained of is vacated and the case remanded for further appropriate action.

LINDGREN v. SHUEL.

Decided July 24, 1923.

HOMESTEAD ENTRY—OCCUPANCY—COLOR OF TITLE.

The fact that an occupant of public land is not qualified to make a homestead entry is not sufficient to modify the rule that land in the actual possession and occupancy of one under color of title or claim of right is not subject to entry by another.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Atherton v. Fowler* (96 U. S., 513), *Lyle v. Patterson* (228 U. S., 211), *Krueger v. United States* (246 U. S., 69), *Denee v. Ankeny* (246 U. S., 208), *Jones v. Arthur* (28 L. D., 235), and *Burtis v. State of Kansas et al.* (34 L. D. 304), cited and applied.

FINNEY, *First Assistant Secretary*:

On March 30, 1917, at the Sterling, Colorado, land office, George Bunting made homestead entry for NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 7, T. 2 S., R. 42 W., 6th P. M. The entry was canceled November 17, 1921, on the contest of Irving O. Shuel, who charged that Bunting had never resided on the land. On December 1, 1921, said Shuel filed a waiver of his preference right under the contest, and on the same day Flora Shuel, formerly Swartwood, applied to amend her additional entry under the stock-raising homestead act, made November 10, 1921, for SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 18, said township, to embrace the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, said Sec. 7. By decision dated April 22, 1922, the Commissioner of the General Land Office held that the application

to amend would be allowed provided the subdivision were later designated under the stock-raising homestead act. The designation of the subdivision became effective on September 5, 1922.

In the meantime, a protest against the allowance of the application to amend was filed by H. E. Lindgren. Later, a corroborated affidavit by Lindgren was filed, setting forth that he had resided on the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, said Sec. 7, for the last four years; that in April, 1918, he purchased the Byrd Ranch, consisting of about 1,520 acres, which surrounds the subdivision in controversy; that the improvements of said ranch are located on the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 7; that he did not know until about eight months after the purchase of the ranch that the improvements were located on said subdivision; that at the time of buying the ranch he was informed there was a vacant 40-acre subdivision; that the contract of sale provided he was to receive the relinquishment of the subdivision, and that at the date of the sale of the ranch Bunting was serving in the United States Army. The improvements on the subdivision are said to consist of a house, chicken sheds, cow sheds, corn crib, and granary, all the buildings being of a substantial character.

By decision dated November 8, 1922, the Commissioner of the General Land Office required Mrs. Shuel to show cause why her amended entry should not be canceled as to NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 7. An appeal to the Department has been filed.

The claim of Lindgren that he was occupying the land is not disputed by Mrs. Shuel, who contends that the protestant, not being qualified to make a homestead entry, is not entitled to any relief whatsoever.

It is well settled that land in the actual possession and occupancy of one under color of title or claim of right is not subject to entry by another. *Jones v. Arthur* (28 L. D., 235), *Burtis v. Kansas* (34 L. D., 304), *Atherton v. Fowler* (96 U. S., 513), *Lyle v. Patterson* (228 U. S., 211), *Krueger v. United States* (246 U. S., 69), *Denee v. Ankeny* (246 U. S., 208).

The fact that Lindgren is not qualified to make a homestead entry is immaterial. He must be accorded an opportunity to acquire the tract under some other appropriate law.

The decision appealed from is affirmed.

LINDGREN v. SHUEL.

Motion for rehearing of departmental decision of July 24, 1923 (49 L. D., 653), denied by First Assistant Secretary Finney, September 10, 1923.

WAGNER v. COFFIN ET AL.

Decided July 24, 1923.

OIL AND GAS LANDS—PROSPECTING PERMIT—ADVERSE CLAIM—NOTICE—RECORDS—AMENDMENT.

Where an application for a permit under section 13 of the act of February 25, 1920, is filed in good faith for lands shown by the records of the local land office to be free from conflicting claims, such application constitutes a bar to the amendment of subsisting permit applications, although based upon location notices posted upon the land, if there was no apparent error in those applications when filed.

OIL AND GAS LANDS—PROSPECTING PERMIT—NOTICE—ADVERSE CLAIM—AMENDMENT—PREFERENCE RIGHT.

A location notice, posted as prescribed by section 13 of the act of February 25, 1920, has a segregative effect for a period of thirty days only, and when an application for a permit is filed the application becomes the notice to all applicants that the land described therein is adversely claimed and can not be amended after the expiration of the thirty-day period to conform to the description posted, in the presence of a *bona fide* intervening claim.

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—NOTICE.

Neither the act of February 25, 1920, nor the departmental regulations issued pursuant thereto make distinction between surveyed and unsurveyed lands as to preference rights initiated under section 13 of the act by the posting of location notices, except that greater particularity is required in the descriptions of lands of the latter class.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Spindle Top Oil Association v. Downing *et al.* (48 L. D., 555), cited and applied.

FINNEY, *First Assistant Secretary*:

This is an appeal by Frederick A. Wagner from the decision of the Commissioner of the General Land Office, dated February 2, 1923, which rejected his application for a permit under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for certain lands in the Salt Lake City, Utah, land district to the extent of its conflicts with applications for permits under said act, filed by R. Clare Coffin and H. C. Bretschneider.

The records show the following facts:

On June 7, 1922, R. Clare Coffin filed an application for permit under section 13 of the leasing act for unsurveyed land in southeastern Utah described as follows:

From a point of beginning which is rock monument S. 45° W. 10 feet from this monument, thence $\frac{1}{4}$ mile west, thence $\frac{1}{2}$ mile north, thence $1\frac{1}{2}$ miles west, thence $\frac{1}{2}$ mile north, thence $\frac{1}{2}$ mile east, thence 1 mile north, thence 1 mile east, thence $\frac{1}{2}$ mile north, thence 1 mile east, thence 2 miles south, thence $\frac{1}{2}$ mile west, thence $\frac{1}{2}$ mile south, thence $\frac{1}{2}$ mile west to the point of beginning.

If the public land survey were protracted from the southwest corner of Twp. 40 S., R. 23 E., and each township and section in said protracted survey

were integral, the lands herein described would include the following legal subdivisions: The SW. $\frac{1}{4}$, the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 2, S. $\frac{1}{2}$ and S. $\frac{1}{2}$ N. $\frac{1}{2}$ of Sec. 3, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 4, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 5, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 8, all of Sec. 9, all of Sec. 10, W. $\frac{1}{2}$ of Sec. 11, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 14, NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 15, N. $\frac{1}{2}$ N. $\frac{1}{2}$, Sec. 16, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 17, all in township 41 S., R. 12 E. of the S. L. M.

The above description by legal subdivision is only approximate and for the convenience of the Register of the Land Office.

The point of beginning lies 21.90 miles west and 14.99 miles north of a mile post on the Utah-Arizona boundary line marked "Utah-Arizona 215 M."

The applicant Coffin averred posting of notice of intention to apply for a permit on May 14, 1922, and filed a copy of this notice. The notice contained a description of the lands by metes and bounds identical with that given as the first paragraph of the description in his application which is quoted herein but did not show the location of said land with reference to the public land surveys.

On June 4, 1922, Coffin furnished an amended statement of the approximate legal subdivisions, describing them as "The SW. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 2, the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 3, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 4, E. $\frac{1}{2}$, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 9, all of Sec. 10, W. $\frac{1}{2}$, Sec. 11, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 14, NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 15, N. $\frac{1}{2}$ N. $\frac{1}{2}$, Sec. 16, T. 41 S., R. 12 E., of the S. L. M."

On June 9, 1922, H. C. Bretschneider filed an application for prospecting permit on lands described in his application as follows:

From a point of beginning which is a rock monument N. 65° E. 15 feet from this monument, thence $\frac{1}{2}$ mile south, thence $\frac{1}{4}$ mile west, thence 1 mile south, thence 1 $\frac{1}{2}$ miles west, thence $\frac{1}{2}$ mile north, thence $\frac{1}{4}$ mile west, thence 1 $\frac{1}{2}$ miles north, thence 2 miles east, thence $\frac{1}{2}$ south, thence $\frac{1}{4}$ east to the point of beginning, embracing 2480 acres more or less.

If the public land survey were protracted from the southwest corner of Twp. 40 S., R. 23 E., and each township and section in said protracted survey were integral, the lands herein described would include the following legal subdivisions:

The SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, of Sec. 15, S. $\frac{1}{2}$, S. $\frac{1}{2}$ N. $\frac{1}{2}$ of Sec. 16, SE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 17, NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ of Sec. 20, all of Sec. 21, W. $\frac{1}{2}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 22, N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 27, N. $\frac{1}{2}$ N. $\frac{1}{2}$, Sec. 28, Twp. 41 S., R. 12 E., of the S. L. M.

The location of the point of beginning was shown by the description in the surety bond filed with the application to be 21.90 miles west and 14.99 miles north of a mile post on the Utah-Arizona boundary line marked "Utah-Arizona," indicating that the same location monument was used by Coffin and Bretschneider.

The applicant Bretschneider filed a copy of a notice of intention to apply for a permit which he stated was posted on the land on May 17, 1922. The description of the land given in this notice was by

metes and bounds and was identical with that given in the first paragraph herein quoted from his application.

On July 27, 1922, Frederick A. Wagner, the appellant, filed an application for a prospecting permit under section 13 of the leasing act in which he described the land desired as follows:

W. $\frac{1}{2}$; W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 1; E. $\frac{1}{4}$, Sec. 2; E. $\frac{1}{2}$, Sec. 11; E. $\frac{1}{2}$; SW. $\frac{1}{4}$; S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 14; SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15; E. $\frac{1}{2}$ NE. $\frac{1}{4}$; SW. $\frac{1}{4}$ NE. $\frac{1}{4}$; SE. $\frac{1}{4}$, Sec. 22, and all Sec. 23, T. 41 S., R. 12 E., S. L. Mer., containing an area of 2560 acres. That said tract is as compact as may be because it is the only available land subject to application, there being no available lands either on the east, west, or south, because of prior appropriations.

That a metes and bounds description of said lands is as follows, viz:

Beginning at the NE. cor. of the tract (which is located $30\frac{1}{2}$ miles west of the SW. cor. of Township 40 S., R. 18 E., S. L. Mer.) and running thence W. $\frac{1}{2}$ mile; S. $2\frac{1}{4}$ miles; W. $\frac{1}{2}$ mile; S. $\frac{1}{2}$ mile; W. $\frac{1}{4}$ mile; S. $\frac{3}{4}$ mile; E. $1\frac{1}{2}$ miles; N. 3 miles; E. $\frac{3}{4}$ mile; N. $\frac{1}{2}$ mile; W. $\frac{1}{4}$ mile; N. $\frac{1}{2}$ mile to the place of beginning, being unsurveyed lands.

At this time the records of the local land office indicated no conflict, as to the approximate legal subdivisions claimed by the three applicants. However, on November 16, 1922, resident counsel for Coffin and Bretschneider filed applications to amend the descriptions of the land desired, to embrace the land located in the field and described in the notices posted on the monument erected on the land.

In these applications it was stated that an error was made in determining the distance from the location monument erected in the field to the 215th mile post on the Utah-Arizona boundary, which mile post is the point on the public land survey to which their descriptions are tied. The amended descriptions state that the monument lies 20.938 miles west and 14.557 miles north of said mile post.

The changed description made the probable legal subdivisions covered by Coffin's application the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 2; S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 10, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, E. $\frac{1}{2}$, Sec. 11, W. $\frac{1}{2}$, Sec. 12, NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 13, E. $\frac{1}{2}$, NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 15, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 23, T. 41 S., R. 12 E., S. L. M., thus conflicting with Wagner's application as to the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 2, E. $\frac{1}{2}$, Sec. 11, E. $\frac{1}{2}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 23.

Under the amended description Bretschneider's application covers the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 15, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 16, E. $\frac{1}{2}$, Sec. 21, all Sec. 22, W. $\frac{1}{2}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 26, N. $\frac{1}{2}$, N. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 27, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 28, T. 41 S., R. 12 E., S. L. M., and conflicts with the application by Wagner as to the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 22, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, W. $\frac{1}{2}$, Sec. 23.

The Commissioner in his decision of February 2, 1923, rejected Wagner's application as to the land shown to be claimed by Coffin and Bretschneider under their amended descriptions.

The appellant does not claim that the location notices were not posted upon the monument as alleged by Coffin and Bretschneider nor does he deny that the said monument is in fact located at the point claimed by them. His claim is that the notices of location alleged by the adverse claimants are invalid because posted by a third person who is not shown to have had antecedent authority to post such notices and that his application filed while the records of the local land office did not reveal any adverse claim to the land now sought by them, is a bar to the amendment of their applications to include said land.

Appellant's application was not filed until more than thirty days after the location notices were posted and after applications were filed by Coffin and Bretschneider, and the question whether there was sufficient antecedent authority for the posting of such notices need not now be considered as the only effect of such notice is to entitle the locators to preference rights to permits for a period of thirty days.

It is urged by the applicants Coffin and Bretschneider that as the lands are unsurveyed the rule with respect to their location and description differs from that governing surveyed land.

There is no distinction made by section 13 of the leasing act, as regards preference rights initiated by posting of notice of intention to apply for permits, between surveyed and unsurveyed land, nor does the Department perceive any. The act and the regulations by the Department require greater care in describing unsurveyed land, recognizing the increased possibility for the initiation of adverse claims through error.

The question herein presented is whether applicants who posted notices describing the land with sufficient definiteness to enable persons reading the notices to determine the boundaries of the land desired and within thirty days after posting filed applications describing lands other than those described in the location notices, may amend their applications to embrace the land described in their notices although part of the land is covered by an application filed subsequently to their filings, by an applicant who did not post a location notice.

The Department must hold that such amendment can not be allowed.

A location notice has a segregative effect as against other applicants for a permit for a period of thirty days only, and unless application for a permit is filed by the locator within that period, the right is extinguished. When an application for permit is filed, said application then becomes the notice to all claimants that the land is

adversely claimed. The location notice is then valuable only as indicating what was intended to be described in the application and can not vest any preference in the locator, where, through his own fault, he has caused lands other than those described in said notice to be segregated on the records of the local land office by filing an application containing an erroneous description.

In the case now before us there was no apparent error in the descriptions given by Coffin and Bretschneider. The approximate legal subdivisions, while not essential, and furnished, as stated, for the convenience of the local officers, were such legal subdivisions as would have been segregated by those officers under the metes and bounds description given in their applications. There was nothing of record to charge appellant with notice that these prior applicants were claiming land which he applied for.

Nor can it well be said that, having elected to make application without examining the land, he made such application subject to the claims of *any* person who had posted notice of intention to apply for a permit covering the lands which he found to be open and unappropriated upon the records of the land office. Such a rule would extend the effect of a location notice beyond the thirty-day limit prescribed by the statute and there is nothing in the leasing act which requires an applicant under section 13 of said act to go upon or examine the land desired to be prospected before making application for a permit (*Spindle Top Oil Association v. Downing et al.*, 48 L. D., 555).

The Department finds that the rule must be that wherever an application for permit under section 13 of the leasing act is filed in good faith for lands shown by the records of the local land office to be free from conflicting claims such application constitutes a bar to the amendment of subsisting applications, although based upon notices posted upon the land, where there was no apparent error in said applications at the time they were filed.

The decision of the Commissioner is reversed, the case closed and the records returned to the General Land Office.

LILLIE M. KELLY.

Decided July 25, 1923.

HOMESTEAD ENTRY—SURFACE RIGHTS—PATENT—OIL AND GAS LANDS—RESERVATION—PRACTICE—RES JUDICATA.

Where a restricted patent was issued upon a homestead entry under the act of July 17, 1914, reserving the oil and gas contents in accordance with the departmental practice then obtaining, and the action is long acquiesced in by the patentee, the matter is *res adjudicata*, and a petition to reopen the case will not be entertained, though a different practice than that originally in force prevails.

HOMESTEAD ENTRY—SURFACE RIGHTS—PATENT—OIL AND GAS LANDS—RESERVATION—PRACTICE—COURTS—PREFERENCE RIGHTS.

Decisions of the United States Supreme Court declaring erroneous established practices of the Land Department in disposing of public lands with reservations of oil and gas will not be given retroactive effect in other cases in which final adjudications have been made and acquiesced in by the parties adversely affected and especially where Congress has recognized their equities by granting them preference rights to permits or leases.

ESTOPPEL—OFFICERS—COURTS.

The rule of estoppel by adjudication is applicable to the administration of the laws of the United States by its executive officers to the same extent as it is to the final determination of controversies in the courts.

COURT DECISION CITED AND DISTINGUISHED—DEPARTMENTAL DECISIONS CITED AND APPLIED.

Case of *Stockley v. United States* (260 U. S., 532), cited and distinguished; cases of *Mee v. Hughart et al.* (23 L. D., 455), and *State of California, Robinson, transferee* (48 L. D., 384), cited and applied.

FINNEY, *First Assistant Secretary*:

Lillie M. Kelly, patentee of the NW. $\frac{1}{4}$, Sec. 20, T. 28 S., R. 27 E., M. D. M., Visalia, California, land district, as heir of Margaret A. Pulliam, who made homestead entry of said land on December 18, 1909, has appealed from the decision of the Commissioner of the General Land Office, dated October 13, 1922, which denied her application for the reissuance of patent without a reservation of the oil and gas deposits to the United States, on the ground that the lands were known to be mineral at the date of final proof.

The land was unwithdrawn for oil or gas when homestead entry was made but was included in Petroleum Reserve No. 18, by Executive order of January 26, 1911. Final proof was submitted and the receiver's receipt upon final entry issued July 25, 1913. No action was taken until October 11, 1915, when the Commissioner rendered a decision advising the entrywoman that the patent, if issued, would contain a reservation of the oil and gas deposits to the United States unless application was made for a classification of the land as non-mineral. The entrywoman had died prior to this decision, and service was not properly made upon appellant until January 17, 1916. No action was taken and restricted patent issued to her on August 11, 1916.

On April 30, 1921, the patentee applied to surrender the restricted patent and requested the issuance of an unrestricted patent in lieu thereof. This application was denied by the Commissioner on October 1, 1921, but the appellant was allowed to apply for a hearing at which she would assume the burden of proving that the lands were not known to be valuable for oil and gas at the date of final proof. This action was taken for the reason that no election

to accept a restricted patent had been required as was held necessary in the case of George W. Ozbun (45 L. D., 77).

A hearing was had and in the decision from which this appeal was filed the Commissioner reversed the decision of the local officers that the lands were not known to be mineral in character at the date of completed final proof, and cited the ruling of the Department in the case of Columbus C. Mabry (48 L. D., 280), that lands which have been withdrawn as mineral are presumptively mineral in character, and when shown to be such at a later date, knowledge of that fact must be held to relate back, at least as far as the date of their classification as such.

It appears, however, that action adverse to the entry was not initiated by the Commissioner until more than two years after issuance of the receiver's receipt upon final entry, and the appellant claims that inquiry as to the mineral character of the land is precluded by virtue of section 7 of the act of March 3, 1891 (26 Stat., 1095). The decision of the Supreme Court of the United States in the case of Thomas J. Stockley *et al.* v. United States, decided January 2, 1923 (260 U. S., 532), is cited as controlling.

In the Stockley case land in Louisiana was entered by Stockley under the homestead law on November 13, 1905. On December 15, 1908, this land, among other tracts, was withdrawn from all forms of appropriation by an order of the President. The withdrawal order was expressly made "subject to existing valid claims." Stockley complied with the provisions of the homestead law and on January 16, 1909, filed final proof, paid the required fees and commissions and obtained the receiver's receipt therefor. Final certificate did not issue. On March 17, 1910, he leased the land to an oil company which later discovered oil. On February 17, 1912, contest was ordered by the Commissioner on a charge that the land was known to be mineral in character at the date of completed proof. The Department affirmed the decision of the Commissioner holding that the lands were of known mineral character as charged, and allowed Stockley to elect to accept patent with a reservation of the oil and gas to the United States (44 L. D., 178, 180). Stockley declined and his entry was canceled. Suit was brought by the United States to quiet title, to enjoin all interference with the land and for an accounting for all oil and gas removed from the land. Stockley claimed a vested right to an unrestricted patent under section 7 of the act of March 3, 1891 (26 Stat., 1095), which was recognized by the court in its decision of January 2, 1923.

A fundamental distinction is to be observed in considering the facts in the two cases. In the Stockley case there was no acquiescence, by the entryman, in the finding of the Department that the

lands were valuable for oil and gas, and patent was not issued. In the case now under consideration the heir of the entrywoman received due notice of the charge by the Department that the lands were mineral in character and acquiesced in the charge by her failure to respond and her subsequent acceptance of the patent with a reservation of the oil and gas to the United States. Five years later she petitioned for the issuance to her of an unrestricted patent on the ground that she was not accorded the privilege of electing to accept a limited patent held to be essential to the administration of the act of July 17, 1914 (38 Stat., 509), in the Ozbun case. Prior to this request the Director of the Geological Survey, in July, 1920, included said land within the boundaries of the known geologic structure of the producing Kern River oil field, as defined pursuant to the leasing act of February 25, 1920 (41 Stat., 437), which authorized the leasing of such reserved deposits.

The procedure followed by the Commissioner in advising the entrywoman that restricted patent would issue, in default of cause shown to the contrary, was in accordance with the regulations then existing, and having become final by virtue of the patent issued and accepted the matter was *res adjudicata* at the time of appellant's petition for an unrestricted patent, and the action of the Commissioner in ordering a hearing was erroneous.

The rule of stoppel by adjudication is fundamental in the law, and is recognized as essential to the orderly administration of the laws of the United States by its executive officers as well as to the final determination of controversies in the courts (23 Cyc., 1222). It has been applied by the Department throughout the administration of the public land laws. *Higgins v. Wells* (3 L. D., 21), *Mary C. Stephenson* (11 L. D., 232), *State of Kansas* (5 L. D., 243), *Gamon v. Weaver* (26 L. D., 333), *Lacey v. Grondorf et al.* (38 L. D., 553). The Department has held that a decision made in accordance with the practice prevailing at the time it was rendered, if accepted by the parties affected as final, will not be reopened for the reason that the practice then prevailing has subsequently been held erroneous by the Supreme Court. *Mee v. Hughart et al.* (23 L. D., 455), *State of California, Robinson, transferee* (48 L. D., 384). In the case of *Mee v. Hughart et al.*, *supra*, the situation was similar to that under consideration, except that the claimant had not acquiesced in the holding of the Department for the long period which elapsed before appellant, Kelly, applied for an unrestricted patent.

The leasing act of February 25, 1920, provided for the disposal of reserved deposits of oil and gas, and accorded to entrymen, who made their entries prior to the withdrawal of said land and were subsequently required to accept title to the surface only, preference

rights to prospecting permits and leases for the reserved deposits in the lands entered.

The Department, in the interest of orderly administration of claims properly presented and diligently prosecuted, pursuant to the public land laws, must decline to give the Stockley decision, and other decisions affecting established practices of the Department, retroactive effect where final action has been taken and title has passed from the Government by patent, certification, or approval prior to the date of said decisions, and particularly where, as in this case, five years have elapsed without protest or objection on the part of the patentee, and Congress has, by the leasing law, recognized the equities of said patentee by giving her a preference right to a permit or a lease.

Any other rule would work endless confusion in the administration of the public land laws, prejudice the rights of diligent claimants, and reward the laches of a claimant who neglected to make timely claim of Departmental error.

The decision of the Commissioner is modified to conform to the views herein expressed and the case is closed.

MERCANTILE TRUST COMPANY.

Decided July 31, 1923.

MEXICAN GRANT—SURVEY—BOUNDARIES.

It is not appropriate to consider after a lapse of many years whether the survey of the boundaries of a Mexican grant was accompanied with the nicest discrimination, or the highest wisdom, and such survey will not be disturbed on account of inaccuracies where it accomplished the purpose of establishing the boundaries with approximate and reasonable accuracy.

SWAMP LAND—SURVEY—CALIFORNIA.

The fact that an area of land in the State of California, returned by the surveyor as swamp, included a small area of high land, is not sufficient to necessitate a subdivisive survey thereof in order to confer title upon the State, if the area as a whole, characterized as swamp, is in fact land of that class.

COURT DECISION CITED AND APPLIED.

Case of United States *v.* Vallejo (68 U. S., 658), cited and applied.

FINNEY, *First Assistant Secretary:*

January 31, 1861, patent was issued on the Tulucay Rancho in California for 8,865.58 acres, based on plat of survey approved September 3, 1859. The said rancho was claimed under a Mexican grant which was confirmed by the board of private land claims and the district court. The plat of survey shows the west boundary of the grant in T. 5 N., R. 4 W., M. D. M., to follow the meander of the

bordering Napa River with the exception of courses one to five, which in part follow the edge of the lowland or marsh, called tide marsh. This marsh is clearly delineated on the plat as an area lying between the Tulucay Rancho and the Napa River. On the township plat of survey, approved December 7, 1863, the marsh area above mentioned is shown as given on the survey of the Tulucay Rancho and is included in the area of swamp and overflowed lands.

It appears that the State of California sold the said tide marsh or swamp lands, and the vendee applied for a patent under the swamp-land grant. By decision of February 11, 1921, the General Land Office held that the State appeared to be entitled to the lands either as tide lands under its right of sovereignty or as swamp lands under the swamp-land grant. It was concluded that the description of the lands by the survey was that of tide lands rather than swamp lands. The case came before the Department on petition by the claimants under the State transfer, and by letter of November 10, 1921, to the General Land Office it was directed that steps be taken to determine the true character of the lands, either by hearing before the surveyor general or by field examination. Following that order a hearing was had before the surveyor general, and as a result of the testimony submitted the surveyor general concluded that the area generally was not tide lands but more properly to be considered as swamp lands; that an area of about 62 acres of high dry land exists between the river and the Tulucay Rancho survey, which in his opinion was vested in the owners of the adjacent rancho.

By instructions of November 11, 1922, the General Land Office held that the survey of the Tulucay Rancho should not be disturbed and directed subdivisinal survey of the said marsh area outside the survey of the Tulucay Rancho. The Mercantile Trust Company has appealed from the latter action by the General Land Office and objection is made to the order for subdivisinal survey of the area designated as marsh. It is contended that the high land belongs to the Tulucay Rancho, and that the west line of the grant should be resurveyed and the line between the low and the high land clearly established. It appears that this company claims to own the greater part of the said 62 acres of high land as a portion of the adjacent rancho, and that it also claims all of the swamp lands by transfer from the State.

The evidence at the hearing shows that the surveyor, in running the west line of the Tulucay grant, did not follow with exact preciseness the edge of the marsh, but that he crossed both marsh and dry land, perhaps to avoid frequent change of course necessary to follow minutely the very edge of the marsh at all points. In fact a close reading of the calls of the original survey discloses that he

did not report having followed the edge of the marsh at all places on the courses in question. He calls for the edge of the marsh on course one, but from station two to five he gives merely courses and distances, and at the end of course five he reached "to end of marsh on left bank of Napa River." From that point he proceeded up the left bank of the river. It is shown that about 132 acres of marshland in three separate tracts were included in the survey of the grant and that about 62 acres of dry land were included in the area marked tide marsh and referred to on the plat as included in the area of swamp and overflowed lands.

A complete description of the said Mexican grant is not found in the available records, but from the recitals in the patent, which has been examined, it appears that the confirmation was not for definite and precise boundaries, but called for an area of two square leagues within the boundaries called for in the said grant. Since this survey and patent have stood for about 60 years, it is too late to reopen the title by process of resurvey. If this survey were reopened on the theory contended for that the grant was intended to follow the precise edge of the marsh, the same principle would require elimination of the 132 acres of marsh from the grant and would produce quite irregular lines and change the area of the grant. The survey accomplished the purpose of division of the high land from the low land with approximate and reasonable accuracy, and, as stated by Justice Miller in *United States v. Vallejo* (68 U. S., 658), in this class of cases a large discretion must necessarily be left to the surveyor, and it is not appropriate to consider whether the survey was accompanied with the nicest discrimination, or the highest wisdom.

The only further question is as to the necessity for a subdivisinal survey to determine whether there would be a subdivision of high land which would not pass to the State under the swamp grant. As above mentioned, the township plat of 1863 adopted the Tulucay grant survey as showing the segregation of the high land from the low land, or so-called tide marsh, and this area was included in the area of swamp land returned. No sufficient reason is now seen to disturb that segregation, and the characterization of that area may be fairly interpreted as a description of swamp land, especially as the recent inquiry shows, with the minor exception mentioned, that it is of that character. At least the survey returned it as land inuring to the State, whether tide or swamp, according to precise terminology, and it was sold by the State as swamp land.

In view of this condition the Department is of opinion that patent should issue to the State for the area west of the Tulucay grant survey, courses one to five, and west of Sec. 35, shown on the township plat as tide marsh or swamp land.

Section 2488, Revised Statutes, in part provides:

It shall be the duty of the Commissioner of the General Land Office, to certify over to the State of California as swamp and over-flowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States.

* * * * *

In segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land.

Even if a subdivisional survey were made it appears that at least some of the subdivisions thus formulated, embracing portions of high land, would pass to the State under the rule stated in section 2481, Revised Statutes, that a legal subdivision, the greater part of which is wet and unfit for cultivation, shall be classed as swamp land. But inasmuch as the plat of 1863, as above interpreted, represents the area in question as swamp land, the State should be given evidence of title to the whole area, and no subdivisional survey is deemed necessary for that purpose.

As thus modified the decision appealed from is affirmed.

EDWARD B. MILLER.

Decided July 31, 1923.

REPAYMENT—STATUTES—ACT OF DECEMBER 11, 1919.

A departmental construction, afterwards set aside because erroneous, which held that a certain class of claims was not subject to the repayment law, does not stay the running of the two year limitation prescribed for the presentation of repayment claims under the act of December 11, 1919.

FINNEY, *First Assistant Secretary:*

Edward B. Miller has appealed from the decision of the Commissioner of the General Land Office, dated April 19, 1923, denying repayment of the fee paid in connection with his application for oil and gas prospecting permit, Visalia 08747, California.

The records disclose that the application was finally rejected by Commissioner's letter "N," October 12, 1920, and the claim for repayment was filed on March 28, 1923, more than two years after the rejection of said application. For that reason the Commissioner correctly held that repayment is barred by the act of December 11, 1919 (41 Stat., 366).

Claimant urges that at the time his application was rejected, under the rulings of the Commissioner then in force, he could not recover the moneys involved and therefore did not file application therefor within the two-year period from such rejection provided for in said

act of December 11, 1919, yet such ruling was later set aside by the Department and repayment allowed in similar cases, and that the limitation should not begin to run against his claim until such later ruling was put in force.

Such contention can not be sustained as the law is positive in its terms. It was claimant's duty to file his request for repayment within the time provided by said act regardless of the departmental construction thereof and the excuses advanced for his failure to do so present no valid reason for the allowance of his claim.

The decision appealed from is affirmed.

CLEMMMA E. MOTZ.

Decided July 31, 1923.

COAL LANDS—PREEMPTION—ACT OF JUNE 22, 1910.

The act of June 22, 1910, entitled "An Act To provide for agricultural entries on coal lands," although not specifically including preemption entries among the classes of entries allowable under the act, contemplated that the allowance of that class of entries should be permitted.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Bililik Izhi v. Phelps* (46 L. D., 283), and *Martha Head et al.* (48 L. D., 567), cited and applied.

FINNEY, First Assistant Secretary:

By its decision of May 18, 1923, the General Land Office held Clemma E. Motz's preemption entry, Montrose 014263, on which a final certificate was issued, for cancellation on the ground that the land entered had been classified as coal land and entries of that kind do not come within the character of entries which are permitted on such lands by the act of June 22, 1910 (36 Stat., 583).

No appeal was taken from that action, probably for the reason that the Commissioner in closing his decision made the following statement:

If no action is taken by the entryman during the time allowed him (for appeal), final action will not be immediately taken against this entry, but the case will be transmitted to the Department for consideration as to the advisability of recommending to Congress that the entryman be permitted to acquire title to the lands under the entry, subject to the provisions and reservations of the act of June 22, 1910 (36 Stat., 583).

Subsequent to the date of that decision the entryman filed a statement in which he said among other things:

That this affiant needs said lands for grazing purposes and hereby waives all right to the coal under said lands subject to the provisions and reservations of the act of June 22, 1910.

The case is now before this Department on the Commissioner's report for "consideration as to the advisability of recommending to Congress that legislation be enacted" for the purpose of bringing entries of this class within the provisions of the act of June 22, 1910.

While it is true that the act mentioned in terms authorizes the appropriation of classified coal lands under the homestead laws, the desert-land laws, and certain classes of selections and does not specifically include preemption entries, it is believed that entries of this latter class come within the spirit of that act and may be allowed under it.

Preemption entries evidently come within the purpose and intent that Congress had in enacting that law, which is entitled "An Act To provide for agricultural entries on coal lands," and there is nothing in the act or elsewhere to justify the conclusion that Congress intended to exclude preemption entries.

In the case of *Bililik Izhi v. Phelps* (46 L. D., 283), this Department announced the doctrine that the act of 1910 should not be given a narrow construction and limited to the particular methods of acquiring title there specified, for it was held in that decision that an Indian allotment, which is not mentioned in the act, came within its provisions, and the correctness of that holding has been steadily recognized since that decision was rendered. In speaking of that decision this Department said in allotment circular of March 24, 1921, that:

It was (there) 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.

That doctrine was further recognized by the Department in its allotment instructions of January 24, 1922 (48 L. D., 525), and also in *Martha Head et al.* (48 L. D., 567).

The reasoning which supports the recognition of an Indian allotment as coming within the act of 1910 applies with equal, if not greater force to the preemption entry and in the opinion of this Department justifies the issuance of a patent in the present case if there are no other controlling reasons to the contrary.

For these reasons the Commissioner's decision is hereby set aside and the case is remanded for further and appropriate action along the lines here indicated.

RED RIVER SYNDICATE (ON PETITION).

Decided July 31, 1923.

OIL AND GAS LANDS—EQUITY—OKLAHOMA—ACT OF MARCH 4, 1923.

The act of March 4, 1923, providing for the disposition of oil and gas deposits in lands of the United States south of the medial line of Red River in Oklahoma did not contemplate the recognition of any equities asserted under the leasing act of February 25, 1920, but only those persons who were claiming and possessing lands in that area, in good faith, under color of some legal right, and had made *bona fide* expenditures in development of the lands for oil and gas with reasonable diligence prior to February 25, 1920, are entitled to equitable consideration.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of State of Oklahoma *v.* State of Texas, United States, intervener (258 U. S., 574), and Robert D. Hawley, on petition (49 L. D., 578), cited and applied.

FINNEY, *First Assistant Secretary*:

There has been filed by the Red River Syndicate, as agent for the Texas-Strike Claim, a petition for the exercise of supervisory authority in the matter of an application by said syndicate, as agent, for a lease of certain lands in the south half of the bed of Red River in the Guthrie, Oklahoma, land district, filed pursuant to the act of March 4, 1923 (42 Stat., 1448).

The petition is for the recognition of an application made by the principal for a permit, pursuant to section 19 of the leasing act of February 25, 1920 (41 Stat., 437), in determining the equities of said petitioner under the later act. The application under the general leasing act was finally rejected on March 6, 1923, with departmental approval, in view of the holding of the Supreme Court in the case of State of Oklahoma *v.* State of Texas, United States, intervener, in its decision of May 1, 1922 (258 U. S., 574), that the public land laws of the United States did not apply to the lands in the bed of Red River in Oklahoma, and pointed out that Congress had provided for the disposition of the oil and gas deposits in lands south of the medial line of the river in the act of March 4, 1923, *supra*.

It is urged in support of this petition that the act of March 4, 1923, did not provide a new method of disposing of the reserved deposits in the south half of Red River but was intended to hold in abeyance valid applications initiated under the prior act until the determination of the equities of certain claimants who were in possession of certain of the lands prior to the passage of the leasing act.

It is further urged that appellants, although having had possession of the land for a time, prior to the passage of the leasing act, having elected to recognize the United States as owner of the lands

and made an uncontested application for a permit under the leasing act, are to be regarded as having superior equities over all other parties who claimed title either from the State of Oklahoma or Texas.

The application of the leasing act of February 25, 1920, *supra*, to lands south of the medial line of Red River was considered by the Department in the case of Robert D. Hawley, on petition (49 L. D., 578). In that case Hawley appealed from the rejection of his application for a permit pursuant to section 13 of the leasing act, claiming, as does the petitioner herein, that the leasing act of February 25, 1920, applied to the lands in the south half of Red River, and that applications filed prior to the act of March 4, 1923, should be suspended only and, after adjudication of the equitable claims provided for in said act, should be permitted to proceed to permit or lease.

In denying Hawley's claim it was pointed out that the status of the lands in the bed of Red River was *sub judice* at the passage of the leasing act, and that they continue to occupy such status. Under those conditions valid applications could not be initiated until the control of the area passed from the jurisdiction of the court to the Department. The Supreme Court doubtless considered this fact when it stated in its decision on May 1, 1922, that neither the mining laws, nor, indeed, any of the public-land laws, applied to the lands in the bed of Red River. In section 6 of the act of March 4, 1923, Congress directed that the Land Department should not interfere with the jurisdiction of the Supreme Court, thus indicating that the provisions of the act of February 25, 1920, are to be applied to these lands only in so far as this later act provided that they should.

It is also apparent from the provisions of the act of March 4, 1923, that only those persons who were claiming and possessing lands in the south half of the river bed, in good faith (which means under color of some legal right), and had made *bona fide* expenditures in development of said lands with reasonable diligence, *prior to February 25, 1920*, may receive equitable consideration in the awarding of permits or leases pursuant to said act. No claims based upon possession or applications filed after that date can vest any rights in the claimants, and valid applications pursuant to the leasing act can only be made, as provided in the act of March 4, 1923, after a date to be set by the Secretary after the Supreme Court has surrendered its jurisdiction.

The petition is denied and the records returned to the General Land Office for consideration of the equities shown to exist by virtue of possession and development prior to February 25, 1920.

JACOB TERRELL.

Decided July 31, 1923.

HOMESTEAD ENTRY—SURFACE RIGHTS—VESTED RIGHTS—PATENT—OIL AND GAS LANDS—WITHDRAWAL—FEES.

A homestead entryman does not acquire a complete equitable title in entered lands until he has done everything required by law toward earning title, including payment of lawful fees and commissions, and if, at any time prior thereto, the lands are included within a petroleum withdrawal he must, unless he proves that the lands are in fact nonmineral, consent to take a restricted patent as provided by the act of July 17, 1914, or suffer cancellation of his entry.

HOMESTEAD ENTRY—SURFACE RIGHTS—VESTED RIGHTS—PATENT—OIL AND GAS LANDS—WITHDRAWAL—BURDEN OF PROOF.

Where a homestead entry has been included within a petroleum withdrawal prior to the vesting of complete equitable title, the entryman, in order to establish his right to an unrestricted patent, must, if his application for reclassification be denied, assume the burden of proof and show that the lands are in fact nonmineral in character, and the determination of that fact must be made as of the date upon which the entryman performed the last act required of him by law toward earning title.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Irwin v. Wright et al.* (258 U. S., 219), *State of Wyoming et al. v. United States* (255 U. S., 489), and *Cleveland Johnson* (48 L. D., 18), cited and applied.

FINNEY, *First Assistant Secretary*:

At the Glasgow, Montana, land office on June 25, 1903, Jacob Terrell made homestead entry for SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, T. 32 N., R. 34 E., M. M. (160 acres), subject to the provisions of the reclamation act of June 17, 1902 (32 Stat., 388). Final proof of compliance with the ordinary provisions of the homestead law was submitted August 22, 1908, which proof was accepted by the Commissioner of the General Land Office on January 18, 1909. By departmental order of October 18, 1919, the land was released from the reclamation withdrawal, and, the final commissions being paid on May 10, 1922, final certificate issued that day.

By Executive order of January 9, 1917, the land was included in Petroleum Reserve No. 53. Because thereof, the Commissioner of the General Land Office, by decision dated February 17, 1923, required entryman to file his consent to take patent containing the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas, or to file an application for the reclassification of the land as nonmineral, together with a showing of the facts upon which is founded the knowledge or belief that the tract was not known to be valuable for petroleum or gas on October 18, 1919,

the date on which the land was restored from the reclamation withdrawal. Said decision further held that in the event an application for reclassification was filed and denied, a hearing would be held, if desired, at which the burden of proof would be upon the entryman to show that the land was not known to be valuable for petroleum or gas on October 18, 1919. An appeal to the Department has been filed.

It is contended by counsel that the mineral character of the land should be determined as of the date entryman submitted satisfactory final proof, and that when the reclamation withdrawal was revoked the rights of the entryman were the same as though a withdrawal had never been made.

It can not be seriously contended that, upon the revocation of the reclamation withdrawal, nothing further was required of entryman, for final certificate could not properly issue until the final commissions were paid. It was not until May 10, 1922, that the final proof was completed by the payment of the final commissions, and prior to that date, while the entryman could assign all or a portion of the land, under the provisions of the act of June 23, 1910 (36 Stat., 592), he had no title, either legal or equitable (*Irwin v. Wright et al.*, 258 U. S., 219).

The release of the land from the reclamation withdrawal relieved the entryman from making the further showing required by the reclamation act, and made it possible for him to immediately complete the final proof by paying the final commissions. Upon such payment being made, entryman secured an equitable title to the land. Prior thereto, the land had been included in a petroleum reserve, and under paragraph 11 of the regulations of March 20, 1915 (44 L. D., 32, 37), the entryman must take patent with a reservation or sustain the burden of showing at a hearing, if one be ordered, that the land was not believed or known to be valuable for oil or gas on May 10, 1922. (*Cleveland Johnson*, 48 L. D., 18; *State of Wyoming et al. v. United States*, 255 U. S., 489.)

Modified to agree with the foregoing, the decision appealed from is affirmed.

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43. The act of February 20, 1917, extended the right to make an additional entry under the enlarged homestead acts to one who has obtained title under the general provisions of the homestead law to less than one quarter section of undesignable land, and one who has acquired title to a quarter section, certain subdivisions of which are within a national forest and, therefore, undesignable, while the remainder is of the character contemplated by the enlarged homestead acts, is entitled to its benefits..... 263

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54. The purpose of section 8 of the stock-raising homestead act was to confer upon those who occupy their homesteads a preference right to contiguous land, regardless of whether patent had or had not issued, and it becomes necessary to look to sections 4 and 5 of the act to determine the nature of the occupation required. 245

55. The terms "existing entry," and "original entry," as used in section 4 of the stock-raising homestead act, mean one and the same thing; that is, an entry upon which final proof has not been submitted. 245

56. One asserting the right to make an original entry under section 1 of the stock-raising homestead act because qualified to make an additional entry under section 2 of the Kinkaid Act by reason of having made an entry in the so-called Kinkaid territory prior to May 29, 1908, which he still owns and occupies, or because qualified to make an additional entry under sections 7 of the enlarged homestead acts or under section 6 of the act of March 2, 1889, must show that he is not the

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1. A purchaser relying upon a Government patent issued in accordance with the official plat of survey at date of entry and a departmental ruling which held that the patent carried title to lands added to the original survey by accretion, is such holder under color of title, although not in actual occupancy of the land, as to possess equities creating a claim which affords an obstacle to the allowance of a forest lieu selection, if the lands are indeed public lands.....	253	
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4. Instructions of May 29, 1923, release of liens for water charges under Federal irrigation projects, act of May 15, 1922.....	604	
5. Where one who has entered into a contract to purchase privately owned lands, title remaining in the vendor, files water-right application and makes payments on account of the construction or building charge, and all rights of the vendee under the contract are reacquired by the vendor, the latter is entitled to receive credit for such payments and to complete the same upon showing proper qualifications to acquire and hold, notwithstanding that the transfer was the result of voluntary action instead of foreclosure proceeding, provided, however, that if the original vendor is not so qualified he must within two years from reacquisition of the land, dispose of such excess holding as directed by paragraph 76 of the departmental regulations of May 18, 1916.....	155	
6. The provision of the act of March 31, 1922, which affords relief to settlers on reclamation projects with reference to operation and maintenance charges, simply relaxes the requirements of section 6 of the act of August 13, 1914, by permitting the Secretary of the Interior, in his discretion, to furnish irrigation water, during the time specified therein, to landowners or entrymen who are in arrears for more than one calendar year, and nothing contained therein authorizes the extension of time for the payment of such charges....	301	
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1. The purchase of a relinquishment together with the improvements of one who had made an unrestricted homestead entry does not vest in the purchaser any rights that will interfere with the allowance of an oil and gas prospecting permit under section 13 of the act of February 25, 1920, pursuant to an application that was pending when the relinquishment was executed.	186	
2. A purchaser of a relinquishment executed during the pendency of an oil and gas prospecting permit application by one who had made an unrestricted homestead entry will be allowed to make a surface homestead entry only, and then only upon his consenting to the use by the permittee of so much of the surface of the land without compensation to the nonmineral entryman as shall be needed in extracting and removing the mineral deposits.....	186	
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2. An application for an oil and gas prospecting permit under the act of February 25, 1920, is a filing of the character contemplated as within the scope of the provisions of the repayment act of March 26, 1905.....	344	
3. The rule, long and consistently adhered to by the Department, that where an application or filing under the public land laws is held for rejection for partial conflict, or other		

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reason, except fraud, the applicant is privileged, prior to allowance of the claim, to withdraw the application <i>in toto</i> without prejudicing his right under the act of March 26, 1908, to repayment of all fees and commissions tendered in connection therewith, is applicable with equal force and effect to applications for oil prospecting permits under the act of February 25, 1920.....	344
4. The act of February 25, 1920, made no provision for forfeiture of moneys paid in connection with prospecting permit applications, nor did it directly or indirectly repeal or modify any provisions of the general repayment statutes then in force and effect.....	344
5. The word "earned" as used in paragraph 31 of the oil and gas regulations, approved March 11, 1920, is not to be construed as barring the right to repayment under the general repayment laws, of fees and commissions paid in connection with applications for oil and gas prospecting permits under the act of February 25, 1920.....	344
6. The special repayment provision in section 2 of the act of March 3, 1885, is applicable to reimbursement of full as well as partial payment made by a purchaser of Umatilla Indian lands after failure to obtain title because of inability to fulfill other requirements of the act, if the land has been resold and the purchase price paid by the subsequent purchaser.....	479
7. An application for repayment under the act of March 26, 1908, of moneys paid upon a homestead entry canceled on relinquishment prior to the passage of the act of December 11, 1919, must be denied under section 2 of the latter act if filed more than two years after the latter date, regardless of the fact that the land has been reentered by another and patent has not issued.....	521
8. The proviso to section 1 of the act of December 11, 1919, which prescribed that applications for repayment of purchase moneys and commissions paid in connection with rejected public land entries must be filed within two years from the passage of the act or from the date of rejection, is applicable to the various heirs or distributees of a deceased entryman individually, and the filing of an application by one heir or distributee within the required time does not stay the running of the statute as against the others.....	533
9. The act of March 26, 1908, the purpose of which was to afford relief in a class of cases wherein repayment was not theretofore authorized, was merely supplemental to and did not repeal or modify the act of June 16, 1880.....	541
10. Repayment may be properly made under the last clause of section 2 of the act of June 16, 1880, to one who paid double-minimum excess upon an entry within the limits of a withdrawal on general route when it is determined upon the filing of the map of definite location that the lands entered are not within the railroad grant.....	541

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11. The limitation contained in the proviso to section 2 of the act of December 11, 1919, is applicable to claims for repayment under the last clause of section 2 of the act of June 16, 1880.....	541
12. An application for the repayment of moneys paid in excess of lawful requirement filed by one of the heirs of a deceased entryman on behalf of all of the heirs prior to the expiration of the two-year limitation contained in the act of December 11, 1919, is sufficient to stop the running of the statute as to the share of each heir, and the subsequent filing of separate applications on behalf of the heirs individually after the expiration of the two-year period will not be deemed a cause for its denial.....	652
13. A departmental construction, afterwards set aside because erroneous, which held that a certain class of claims was not subject to the repayment law, does not stay the running of the two-year limitation prescribed for the presentation of repayment claims under the act of December 11, 1919.....	666

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Reservoir Lands.

See *Stock-Watering Reservoir*, 1.

Residence.

See *Contest*, 11; *Desert Land*, 1, 2; *Final Proof*, 5; *Homestead*, 23, 28, 34, 36, 42, 46; *Military Service*, 3; *Soldiers and Sailors*, 1.

Res Judicata.

See *Estoppel*, 1; *Homestead*, 30, 31, 49, 50.
 1. The Department will apply the doctrine of *res adjudicata* and refuse to reopen a case in which there has been a final determination by it that a patent, issued on an entry in accordance with the official plat of survey existing at date of entry, conveyed title to adjoining lands added by accretion, where another subsequently attempts to set up a claim to a part of the land involved with the view to defeating the title asserted by purchasers who relied upon the validity of the patent..... 253

Restorations.

See *Homestead*, 1, 3, 4, 5, 47; *Indian Lands*, 1, 2, 3, 5; *Military Service*, 1; *Oregon and California Railroad Lands*, 1; *Preference Right*, 1, 2; *Private Claim*, 2; *School Land*, 14, 15; *Selection*, 10; *Settlement*, 5.
 1. Lands restored to entry upon the annulment of an invalid patent do not become subject to homestead entry generally until the expiration of the preference right privilege accorded by Congress to discharged soldiers, sailors, and marines..... 549

Revised Statutes.

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Right of Way.

See *Indian Lands*, 19, 20.

1. By the weight of authority in the United States, one who signs and acknowledges a deed, though his name be omitted from the body of the instrument, makes the deed his own, and becomes bound in the premises conveyed, but even if that rule did not prevail in the State of Oregon, any defect resulting from such omission is cured by statute..... 187

2. In the necessary construction, maintenance, and operation of canals and other structures upon a right of way conveyed to the Government for reclamation purposes, the United States is not liable for the value of loss of the land conveyed or for general damages resulting from the use of the easement..... 188

3. Lands covered by a canal or other structures constructed by the Reclamation Service for reclamation purposes, and lands made non-irrigable thereby are not properly a part of an irrigation unit, and one who has paid construction charges thereupon is entitled to credit or reimbursement therefor..... 189

Riparian Rights.

See *Navigable Waters*, 1; *Purchaser*, 1; *Res Judicata*, 1.

1. The question as to how far the title of a riparian owner extends is one to be determined by State law, and in Louisiana while the State has by legislation granted to owners of adjoining lands, accretions, and relictions found and added imperceptibly on the edge of rivers or running waters, yet the State has not, with the exceptions mentioned, resigned to riparian proprietors the rights inuring to it as a sovereign power..... 453

Saline Land.

See *Mineral Lands*, 1.

1. Entries, selections, or locations can not be allowed for lands valuable for deposits of chloride of sodium, or salt, inasmuch as there is no provision of law under which a reservation of such mineral to the United States may be made..... 435

2. The term "chlorides of sodium" as used in sections 23 and 24 of the act of February 25, 1920, includes ordinary table salt and salt in solution, and lands chiefly valuable for their salt springs or deposits of salt, except in San Bernardino County, California, are subject to exploration and lease under the provisions of those sections..... 502

3. The placer mining laws which were extended to saline lands by the act of January 31, 1901, were repealed in so far as they related to lands of that character by the general leasing act of February 25, 1920, except as to San Bernardino County, California, and except as to valid claims elsewhere existent at the date of the passage of the latter act..... 502

4. Lands chiefly valuable for their salines in San Bernardino County, California, and valid claims for saline lands elsewhere that are excepted by section 37 of the leasing act of February 25, 1920, from the operation of sections 23 and 24 of that act, are still subject to disposition under the placer mining laws as extended by the act of January 31, 1901..... 503

School Land.

See *Alaska*, 1, 2; *Indian Lands*, 17, 18; *New Mexico*, 2; *Oil and Gas Lands*, 30, 35; *Settlement*, 3, 5.

1. Where the school grant to the State of Utah under section 6 of the enabling act of July 16, 1894, presumptively attached on January 4, 1896, the date of its admission, as to lands then identified by the Government survey, and the question of the vesting of title is subsequently put in issue on the ground that the land contains deposits of coal, the burden of proof is on the contestant to show that the land was of known coal character on the latter date..... 212

2. In order to except lands from the school grant to the State of Utah, it must be shown that at the date the grant presumptively attached the known conditions were such as to engender the belief that the land contained coal of such quality and quantity as would render its extraction profitable and justify expenditures to that end..... 212

3. In determining whether or not a tract of public land was known to be valuable for its coal deposits at the date of the admission of Utah to statehood, proof of its character is not limited to actual discoveries within its boundaries, but whatever is relevant and bears in any degree on the question of its known character at that time, such as adjacent disclosures and other surrounding or external conditions, is admissible as evidence.. 212

4. A coal application filed under section 2347, Revised Statutes, for lands, the presumptive title to which has been at all times since statehood and still is in the State of Utah under its school land grant, is merely an application to contest the right of the State to the lands in question, and does not confer upon the applicant any right which, upon a decision against the State, can constitute a valid claim within the purview of the saving clause of the act of February 25, 1920..... 213

5. Section 2275, Revised Statutes, as amended, which imposes upon the Secretary of the Interior, in the adjustment of the school land grants of the several States, the duty 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, has reference only to lands in place, and no authority is conferred thereby to determine by protractions alleged losses of school

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lands within such reservations occasioned by reason of natural deficiency or loss.....	314
6. The question whether or not the title to designated school sections upon survey thereof vests in a State, is to be determined as of the date of the acceptance of the plat by the Commissioner of the General Land Office, and not the date of its approval by the surveyor general.....	341
7. The designation by a State of lands within a specific school section as the basis of its selection of other lands as indemnity, and its failure to oppose the entry and patenting of the lands so assigned estops it from subsequently asserting title to the base lands.....	341
8. While a State is not entitled to indemnity under its school land grant because the lands in place are of an inferior quality, yet where its place lands are "hedged in," even by subsequent acts of the Federal Government, so that they become practically useless for school purposes, the right of the State to select indemnity lands elsewhere arises.....	377
9. The term "indemnity" as used in the statutes granting lands to the States for school purposes implies compensation for losses actually sustained by failure to receive designated sections in place, and not a right to select lands elsewhere because those in place happen to be of inferior quality.....	377
10. A vested right does not attach under an indemnity school selection until all of the requirements of the law and the authoritative regulations thereunder have been fulfilled, and where the land is withdrawn and included within a petroleum reserve before such fulfillment, the selector must either agree to accept a restricted patent as provided by the act of July 17, 1914, or assume the burden of proof and show that the land is in fact nonmineral in character.....	436
11. Where an indemnity school selection, imperfect when filed, is perfected at some subsequent time, the selector can not invoke the doctrine of relation with the view to creating a complete equitable title as of the date of the filing of the selection, and thereby defeat the operation of an intervening withdrawal.....	436
12. An indemnity school selection, canceled upon the neglect of the selector to comply with the law and governing regulations, will not be reinstated on the ground that at the time of its cancellation the selector was entitled to receive at least a restricted patent, if, as the result of that neglect, another was permitted to acquire an adverse claim and make substantial expenditures of time and money in placing valuable improvements upon the land.....	436
13. Where a State, the real party in interest, waives its right to apply for a hearing and concedes the contention of the United States that the lands selected by it under its school indemnity grant are not subject to such selection because of their mineral character, a lessee from the State, between whom and the United	

States there is no privity of interest, is not entitled to intervene and demand a hearing involving the character of the lands.....	631
14. A reclamation withdrawal existent at the date of the grant made to the State of Arizona by section 24 of the act of June 20, 1910; of certain designated sections of public lands for school purposes, does not defeat the operation of the grant, as to lands subsequently restored from the withdrawal, but the right of the State attaches to surveyed lands within the specified sections immediately upon their restoration from the withdrawal, if the State has not selected indemnity therefor.....	611
15. The right of the State of Arizona which attaches to surveyed school lands immediately upon their restoration from a reclamation withdrawal, can not be defeated by the initiation of a desert-land claim subsequently to the date of the restoration.....	611

Scrip.

See *Lieu Selection*, 2.

1. The provision of the act of December 28, 1876, which directed the issuance of a certificate of location to the legal representatives of Samuel Ware, authorizing them to locate said certificate on "any land in what was Missouri Territory, subject to sale," contemplated that "Missouri Territory" was to be restricted to the territory as organized into counties, that is, to the area now embraced within the States of Arkansas and Missouri.....	146
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Secretary of the Interior.

See *Land Department; Alaska*, 2; *Coal Lands*, 5; *Equitable Adjudication*, 1, 2; *Homestead*, 20; *Indian Lands*, 16, 22; *Oil and Gas Lands*, 9, 20, 21, 37, 42; *Patent*, 1; *Private Claim*, 2; *School Land*, 5; *Selection*, 3.

Selection.

See *Coal Lands*, 2, 3; *Forest Lieu selection*, 1; *Homestead*, 15, 19, 60; *Montana*, 1; *National Forests*, 1, 2, 4, 5; *New Mexico*, 2; *Oil and Gas Lands*, 14, 35, 38; *Railroad Grant*, 1, 6; *Railroad Land*, 1, 2, 3, 4; *Saline Land*, 1; *School Land*, 7, 10, 11, 12, 13; *Settlement*, 5.

1. Where, in a proceeding against a railroad selection alleging the existence of mineral, all the evidence as to the character of the land relates only to that portion of the tract which is included within the limits of a lode location, the located area, if found to be mineral in character, should be separated by segregation survey; the remainder of the subdivision lotted, and the selection sustained against the charge to the extent of the nonmineral lands outside of the location.....	303
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2. A railroad selection filed pursuant to the act of April 23, 1904, for land in lieu of other land relinquished by the selector constitutes a contract which is, in theory of law, an immediate obligation the moment that the base land is relinquished at the request of the

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Secretary of the Interior, if the conditions of the statute are met, the validity of the selection to be determined in accordance with the conditions existing at the time it was made.....	408		
3. While the validity of a railroad selection filed under the act of April 28, 1904, is to be determined as of the date of the filing of the selection, if the conditions of the statute are met, yet the Secretary of the Interior is authorized, sufficient reasons being made to appear, to make subsequent inquiry directed to the ascertainment of whether or not the base and selected tracts were of known inequality at the date of selection.....	408		
4. A railroad selection filed under the act of April 28, 1904, for lands classified as coal lands and appraised at the minimum price at date of selection is valid if the base lands, relinquished at the request of the Secretary of the Interior, were classified and appraised as coal lands at the minimum price prior to date of selection, or, if not so classified and appraised, they were subsequently ascertained to be of quality at least equal to coal lands of the minimum price.....	408		
5. The filing of a railroad selection pursuant to the act of April 28, 1904, and in accordance with departmental regulations, when accepted by the local officers, effects a segregation of the land covered thereby, which, during its pendency, precludes the acquisition of rights by a subsequent coal applicant, and a protestant against such selection is a mere protestant without interest....	408		
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