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DEPARTMENT OF THE INTERIOR

IN CASES RELATING TO

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DANIEL M. GREENE

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DECISIONS

RELATING TO

THE PUBLIC LANDS

STOCK-RAISING HOMESTEADS—ACT OF DECEMBER 29, 1916

INSTRUCTIONS

[Circular No. 523]

[Reprint of regulations of December 14, 1921 (48 L. D. 485), with amendments of September 9, 1922, Circular 846 (49 L. D. 266); February 18, 1922, Circular 810 (48 L. D. 454); March 30, 1923, Circular 886 (49 L. D. 506); February 1, 1924, Circular 912 (50 L. D. 260); February 2, 1924, Circular 913 (50 L. D. 261), and July 19, 1924, Circular 952 (50 L. D. 580)]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 2, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

The following instructions are issued under the provisions of the act of December 29, 1916, relating to stock-raising homesteads as amended by the act of October 25, 1918 (40 Stat. 1016), act of September 29, 1919 (41 Stat. 287), act of March 4, 1923 (42 Stat. 1445), and the act of June 6, 1924 (43 Stat. 469).

WHAT LANDS SUBJECT TO ACT

1. The Secretary of the Interior is authorized, pursuant to application or otherwise, to designate unreserved public lands in any of the public-land States, but not in Alaska, as "stock-raising lands." This includes ceded Indian lands, unless entries therefor are limited to a smaller area by the acts governing their appropriation; but it does not include lands in national forests. From time to time lists of land thus designated will be sent to the registers and receivers in the districts wherein the land is situated, and they will be advised of the dates when the designations become effective.

2. The lands to be designated are those the surface of which is, in the opinion of the Secretary of the Interior, chiefly valuable for grazing and raising forage crops, which do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that 640 acres are reasonably required to support a family. The classification will be made, so far as practicable, to exclude lands that are not chiefly valuable for grazing and raising forage crops, either because too valuable for such use or too poor for such use. Lands which are capable of producing valuable crops of grain or other food cereal or fruit are not subject to designation, being, if otherwise subject to entry, disposable under the 160-acre or 320-acre homestead law, according to their character. No tract may be designated which contains a water hole, or other body of water, needed or used by the public for watering purposes, and such tracts may be reserved by the President and kept open to the public use under rules prescribed by the Secretary of the Interior. Whether the land will or will not support a family is not guaranteed in any manner by the designation of the land as subject

to this act. The homesteader himself must take the burden of accepting the land designated as of a character that meets the requirements of the law.

Even though designated under the stock raising act, lands within the limits of petroleum reserves are not subject to entry under this act.

FEES AND COMMISSIONS

3. The fee and commissions on all entries under this act are calculated on the same basis as other entries. For a tract of less than 81 acres the fee is $5, and for that area or more it is $10. The commissions, both on making the entry and on submitting final proof, amount to 3 per cent on the Government price ($1.25 or $2.50 per acre, as the case may be) of the land in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, and to 2 per cent in the other States. For example, on an entry for 640 acres in Washington, not within granted railroad limits, and therefore $1.25 land, the payment on making entry would be $34 and on submitting proof would be $24, in addition to testimony fees and publication fees payable to a newspaper.

QUALIFICATIONS FOR ENTRYMEN

4. (*a*) Any person qualified under the general laws to make homestead entry (that is, who has not exercised his right, or who is entitled to restoration of his right under general provisions of law) may make a stock-raising homestead entry for not exceeding 640 acres of unappropriated unreserved 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 right under the homestead laws other than this act, 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.

(*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 incontiguous 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 incontiguous tracts, but not more than one of the tracts may have adjoining it vacant land of the character contemplated by the stock raising act. 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 designated as stock-raising land, may, under the first proviso to section 3 of the act, as amended, make an additional entry for a tract of designated land within a radius of 20 miles from the tract originally entered, and making up therewith an area of not more than 640 acres.

One who has made a stock-raising entry, whether original or additional, is not qualified to make a section 3 additional entry even though he has not obtained the maximum acreage allowed by the stock raising law.

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 incontiguous to the original entry, he must furnish an affidavit that there is no unappropriated, unreserved land contiguous thereto of the character described in the act other than that for which he applies; however, this affidavit will not be necessary if your records show that there is no other vacant contiguous land. The same limitation as to compactness of form will be enforced as with respect to original entries 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.

Where an original or additional entry is made under the general homestead law or the enlarged homestead act for land which at date of filing application to make entry was enterable under the stock raising act and the homesteader finds the physical condition of the land such that he can not comply with the cultivation requirements he will not be granted a reduction in the required area of cultivation. In such cases the homesteader should file application for change of the character of the entry to one under the stock raising act, showing therein the nonadaptability of the land for cultivation; that the land does not contain any water holes, or other body of water needed or used by the public for watering purposes, and his consent to the entry being made subject to the reservation to the United States of all coal and other minerals in the land, together with the right to prospect for, mine, and remove the same. The application of the entryman should be in affidavit form, and the showing therein as to the character of the land should be corroborated by the affidavits of two witnesses.

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.

PROOFS ON ABOVE ENTRIES

7. The entries hereinbefore explained may be perfected by proofs submitted within five years after their dates on a showing of compliance with the provisions of the three year law (act of June 6, 1912, 37 Stat. 123), except that expenditures for improvements must be shown in lieu of the cultivation required by that act. The entryman must show that he has actually used the land for raising stock and forage crops for not less than three years, and that he has made permanent improvements upon the land, having an aggregate value of not less than $1.25 per acre, and tending to increase the value of the land for stock-raising purposes; and at least one-half of the improvements must be placed upon the tract within three years after the date of the entry.

As to residence, this must be continued for three years, subject to the privilege of a five months' absence in each year, divisible into two periods, if desired, but credit on the residence period on account of military service during time of war will be allowed as on other homestead entries; where an entry has been made, additional to a pending entry, or to a perfected entry for a tract, still owned by the claimant, the residence may be had on either of the tracts involved for three years after the additional is allowed, or becomes allowable. In other cases such residence must be on the land additionally entered. It must appear at the time of proof that there is then a habitable house on the land; but it will not be counted in estimating the value of the permanent improvements required to be placed on the tract, as above stated. If the entry comprises two noncontiguous tracts, the residence may be on either.

Where satisfactory final proof is received involving several homestead entries and one or more of the entries involved is under the stock raising act, separate final certificate covering the stock raising entry or entries will be issued in accordance with Circular No. 917.

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 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.

Section 2 of the act of March 4, 1923 (42 Stat. 1445), provides that a person who made a homestead entry for 160 acres or less of land in a national forest which is of the character contemplated by the stock-raising act, who has not submitted final proof upon his existing entry, may make an additional entry under this section of the act for such an area not in a national forest and within a radius of 20 miles from the original entry as, when added to the area of the original entry, will not exceed 640 acres.

(*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 incontiguous to the original claim, in whole or in part, under the same rules set forth in paragraph 5 hereof.

Section 2 of the act of March 4, 1923 (42 Stat. 1445), provides that a person who made a homestead entry for 160 acres or less of land in a national forest which is of the character contemplated by the stock raising act, who has submitted final proof and who owns and resides upon said homestead entry, may make an additional entry for such an area outside of a national forest and within 20 miles of the perfected entry as, when added to the area of the original entry, will not exceed 640 acres.

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.

ENTRIES IN LIEU OF RELINQUISHED LANDS

10. (*a*) Under section 6 of the act a person, otherwise qualified to make homestead entry, who has a perfected or an unperfected homestead entry for less than 640 acres of land which shall have been designated under this act, on which he resides and which he has not sold, and who is unable to make a full additional entry under the provisions of section 3 thereof, for the reason that there is not sufficient available land within the 20-mile limit to afford him the area to which he is otherwise entitled (as above indicated), may make an entry for the full area of 640 acres within the same land district, provided he shall relinquish the original entry, if not perfected, or reconvey the land to the United States, if final certificate has issued therefor.

(*b*) If proof has not been submitted on the original entry he must with his relinquishment furnish his affidavit, corroborated, so far as possible, by two witnesses, showing that at the time of filing application under this act he resided upon the land covered by said entry; that he has not sold, transferred, or conveyed the land or any interest therein, or made a contract or agreement so to do; and that there is not within 20 miles of the land embraced in his original entry a tract of land of the character described in this act of area sufficient to make up, with such original entry, the area he is entitled to enter.

(*c*) If final certificate has issued on the first entry, it must be shown by a certificate from the proper recording officer of the county in which the land is situated, or by satisfactory abstract of title, that the applicant has not transferred any interest in the land sought to be reconveyed and that there are no liens, unpaid taxes, or other encumbrances charged against it. Moreover, reconveyance of the land must be made by deed executed by the entryman, and also by his wife if he be married, in accordance with the laws governing the execution of deeds for the conveyance of real estate in the State in which the land is situated. The deed of reconveyance should accom-

pany the application, but should not be recorded until directed by this office. On acceptance of an application of this character the deed will be returned for recording and refiling in your office before the entry is allowed.

(*d*) Where proof has been submitted, but final certificate has not issued, the relinquishment must be accompanied by an abstract of title or certificate of recording officer, as above specified.

(*e*) Where the former entry for land already designated under this act has not been perfected and is relinquished, you will allow the application for entry under this act, if no other objection appears. Where final certificate has issued on the former entry you will promptly forward the application and accompanying papers for consideration by this office.

(*f*) Where the original entry was pending and is relinquished, the land will become subject to appropriation (if not embraced in a withdrawal) when the new entry is allowed. Where the original entry was patented and is reconveyed, an order for restoration of the land will be made upon receipt of a report that the substitute entry has been placed of record.

(*g*) An application under this provision of the law may be accompanied by petition for designation under the act of the land sought and of the tract covered by the former entry, as hereinafter explained.

(*h*) Proof on an entry allowed under this section is governed by the same rules as though it were an original entry under this act.

(*i*) The fact that an applicant owns more than 160 acres of land, acquired otherwise than through homestead entry, does not exclude him from the privileges granted by this section.

PETITIONS FOR DESIGNATION

11. (*a*) The proviso to section 2 of the act confers a preference right of entry upon a person pursuant to whose petition land has been designated. Any person qualified to make an original or an additional entry under this act may file an application to enter a compact body of unappropriated, unreserved, surveyed public land of the character described, which has not already been designated under this act, accompanied by petition, in duplicate, for the designation of such land and of the tract included in any former entry.

(*b*) He must, when he files said application, pay the regular fee and commissions; and if the tract is ceded Indian land, he must at that time pay that part of its price ordinarily required when entry is made. The entire amount paid will be carried in the "Unearned money" account, and will be repaid by the receiver if the application be not allowed.

(*c*) All petitions for the designation of lands presented on behalf of individual applicants should be filed in the local land office. Individual petitions for designation will not be considered unless they are filed in connection with applications to make entry under the act.

12. (*a*) The petition must be in the form of an affidavit, executed in duplicate, and corroborated by at least two witnesses who are familiar with the character of the land. For convenience in filing it is desired that petitions be prepared on sheets not over 8½ by 11 inches in size with margins of 1 inch on the top and the left-hand side. The petition must contain the name and the post-office address of the applicant, a description by legal subdivisions of all the lands

involved properly listed by entries with the serial number of each former entry. If the application contemplates the making of an original entry under this act, or if the application relates to a contiguous original and additional entry, only one petition need be filed. If, however, the lands which it is desired to have designated are comprised in two noncontiguous tracts, an additional copy of petition should be filed for each such tract.

(*b*) The petition should set forth in detail the character of each legal subdivision included in an application to make entry under this act and in any former homestead entries made under other acts. The information called for may be shown by means of a map or diagram whenever the facts can be advantageously presented thereby. Photographs of the land, where available, are useful in indicating its character and topography, and when presented should be located with reference to the land lines and to the direction in which they were taken. The location of corners of the public survey by which the applicant has determined the situation or legal description of the land should be indicated on the map or stated in the petition. It is believed that the requirements of these regulations as to furnishing a description of the land can properly be met only by a careful examination of the lands by the applicant, preferably assisted by a competent surveyor. Petitions which are deficient will be returned to the applicant for correction, or he may be required to furnish supplemental affidavits concerning matters not discussed or which have not been described in sufficient detail. Care should be exercised in the preparation of petitions, as inaccuracies and omissions will tend to retard action, while false or misleading statements may lead to the rejection of the application.

(*c*) In the preparation of petitions attention should be given to the following considerations:

Surface water supply.—The relation of the lands to surface streams or springs rising on or flowing across or along them should be indicated, and the location of such water supplies should be accurately described with relation to the lines of the public surveys. If there is no surface water on the land, the location of such near-by sources of water supply upon which the applicant relies or which he proposes to use for stock-watering purposes should be described.

Underground water supply.—The location of any well or wells which may be present on the land should be described and information furnished in each instance concerning the depth of well, present depth of water, and yield. If there are no wells on the land, information should be furnished concerning any wells in the vicinity which may afford an indication of the probable depth of water on the lands applied for.

Irrigability.—If any part or parts of the land is irrigated, the location and source of water supply of such areas should be stated and the area irrigated in each legal subdivision indicated. If any portion of the land is under constructed or proposed irrigation ditches or canals, is crossed thereby, or is adjacent thereto, the relation of the lands to such water conduits and the possibility of their irrigation therefrom should be explained. If the lands are situated near or are crossed by streams which might afford a water supply for their irrigation, full particulars should be given as to the quantity of water available for this purpose and as to whether or not it can

be applied to the lands. If artesian wells exist on or near the land or underground water is found under any part of the land at depths of less than 50 feet, the practicability of irrigating the land from underground sources should be fully discussed.

If the applicant has filed a notice of water appropriation or has acquired a right to use water for domestic, stock-watering, or irrigation purposes on the lands under the State law, a copy of such notice of water appropriation or water right should be furnished. Any attempts to irrigate and reclaim the land under the provisions of the desert land act should be described and the reasons for lack of success stated.

Timber and vegetation.—The character of the surface of the land in both the original and the additional entry as it is at the time of application under this act and of the tree and plant growth thereon should be described and the approximate area in each legal subdivision which is of such character that it is included in each of the following general classes should be shown: Lands containing merchantable timber; lands containing timber which is not merchantable; lands covered with mesquite or similar growth; lands covered with sagebrush; open grass lands; lands covered with greasewood and allied plants; rocky wastes; alkali flats; sand dunes; lands in agricultural crops or under cultivation. If none of the above terms are applicable to any portion of the land, details of its character should be furnished. Where timber occurs an estimate of the amount of such timber on each legal subdivision should be made.

Agricultural value.—The acreage in each legal subdivision which is capable of producing agricultural or forage crops by cultivation should be stated by the applicant, as well as the number of acres which have actually been cultivated. If the applicant or his predecessors in interest have made agricultural use of the land in the original entry, the area planted, the kind of crops raised, the yield, and the value should be stated for the last five seasons, or such part thereof as may have been under cultivation.

Grazing value.—The applicant should indicate the grazing character of all the lands involved by describing them as winter, summer, spring, fall, or permanent range. If the land or any part thereof has been used for grazing, the nature and extent of such use should be stated. The applicant should also furnish an estimate of the number of head of cattle or other livestock which, in his opinion, can be maintained on the land throughout the year.

(*d*) The applications for entry, if otherwise allowable and accompanied by petitions for designation which are in all respects regular, will be suspended by you and retained in your office. You will forward the two copies of the petition to this office and to the Geological Survey, respectively. Where defects appear in the petitions—especially (as to additional entries) failure to refer in the petition to the tract originally entered—you will call for supplemental evidence, as in other cases; if this is not furnished, you will forward all the papers to this office for consideration, making proper recommendations in connection therewith. If there are defects in an application, aside from the accompanying petition, you will take action in the same manner as with other defective applications for entry.

(*e*) No other entry of the land will be allowed before the application has been finally disposed of. However, later applications therefor should be received and suspended. If withdrawal of an appli-

cation under this act be filed, you will promptly notify this office thereof, inviting special attention to the pendency of the petition for designation, and will close the case on your records. Prior to final action on the application the applicant's homestead right will be in abeyance, and he will not be entitled to exercise same elsewhere, nor will he be permitted to have two applications under this act pending at the same time.

When designation of all the land involved has become effective you will allow the entry unless the records show that there is possibility of a claim of perferential right for some part of the land under section 8 of the act, in which case the application will remain suspended until the expiration of the preferential right.

Where the land has been designated by the Secretary without deception or fraud on the part of the entryman and the entry has been allowed as a result thereof it will not be subject to contest on a charge that such designation was improperly or erroneously made.

(*f*) If the Geological Survey advises this office that it is unable to classify the land, or some part thereof, as subject to designation, this office will, through the proper local land office, furnish the applicant with a copy of the survey's report and will allow him 30 days within which to file response. At the applicant's option, he may either appeal from the finding to the Secretary of the Interior, alleging errors of law, or he may present further showing as to the facts, accompanied by such evidence as is desired tending to disprove the adverse conclusion reached by the survey.

Such appeal or showing, if filed, will be forwarded by you to this office, whence it will be transmitted to the Geological Survey for further consideration. That bureau will consider the evidence submitted, and if it warrants such action will recommend designation of the land, or, if its conclusion be still adverse, will transmit the record to the Secretary with report. The case will thereafter be considered as having the status of an appeal pending before the Secretary's office.

In cases where the applicant fails to furnish a showing or to appeal from the order of this office requiring him to furnish it within the 30 days prescribed or where the Secretary refuses designation final action will be taken and the case closed by this office on the basis of the designations which may have been theretofore made.

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 themeselves 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. This right may not be defeated by settlement pursuant to an unallowed stock-raising application.

(*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

[1] In adopting this rule on Aug. 29, 1921, the department directed that it was to be effective only from Sept. 1, 1921.

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.

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 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 the receipt of the aforesaid copy of the bond by the entryman or owner of the land no objections are made by such entryman or owner of the land and filed with the register and receiver against the approval of the bond by them, they may, if all else be regular, approve said bond. If, however, after receipt by the homestead entryman or owner of the lands of copy of the bond, such homestead entryman or owner of the land timely objects to the approval of the bond by said local officers, they will immediately give consideration to said bond, accompanying papers, and objections filed as aforesaid to the approval of the bond, and if, in consequence of such consideration by them, they shall find and conclude that the proffered bond ought not to be by them approved, they will render decision accordingly and give due notice thereof to the person proffering the bond, at the same time advising such person of his right of appeal to the Commissioner of the General Land Office from their action in disapproving the bond so filed and proffered. If, however, said local officers, after full and complete examination and consideration of all the papers filed, are of the opinion that the proffered bond is a good and sufficient one and that the objections interposed as provided herein against the approval thereof by them do not set forth sufficient reasons to justify them in refusing to approve said proffered bond, they will, in writing, duly notify the homestead entryman or owner of the land of their decision in this regard and allow such homestead entryman or owner of the land 30 days in which to appeal to the Commissioner of the General Land Office. If appeal from the adverse decision of the register and receiver be not timely filed by the person proffering the bond, the local officers will indorse upon the bond "disapproved" and other appropriate notations, and close the case. If, on the other hand, the homestead entryman or owner of the lands fails to timely appeal from the decision of the register and receiver adverse to the contentions of said homestead entryman or owners of the lands, said register and receiver may, if all else be regular, approve the bond.

The coal and other mineral deposits in the lands entered or patented under the act will become subject to existing laws, as to purchase or lease, at any time after allowance of the homestead entry, unless the lands or the coal or other mineral deposits are, at the time of said allowance, withdrawn or reserved from disposition.

(*b*) Every application to make homestead entry under this act must contain a statement to the effect that the entry is made subject to a reservation to the United States of all the coal or other minerals in the land, together with the right to prospect for, mine, and remove the same; that no part of the land is claimed, occupied, or being worked under the mining laws; and that the land is unoccupied and unappropriated by any person claiming the same under the public land laws other than the applicant. (See Forms 4–016 and 4–016a, Appendix.) The face of final certificates issued on every

homestead entry made under the provisions of this act must bear the following:

Patent to contain reservation of coal and other minerals, and conditions and limitations as provided by act of December 29, 1916 (39 Stat. 862).

There will be incorporated in patent issued on homestead entries under this act the following:

Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove all the coal and other minerals from the same upon compliance with the conditions, and subject to the provisions and limitations, of the act of December 29, 1916 (39 Stat. 862).

Mineral applications and coal-declaratory statements and applications under the coal and mining laws for the reserved deposits disposable under the act must bear on the face of the same, before being signed by the declarant or applicant and presented to you, the following notation:

Patents shall contain appropriate notations declaring same subject to the provisions of the act of December 29, 1916 (39 Stat. 862), with reference to disposition, occupancy, and use of the land as permitted to an entryman under said act.

Like notation will be made by the register and receiver on final certificates issued by them for the reserved mineral deposits disposable under and subject to the provisions of this act.

DRIVEWAYS FOR STOCK

15. The reservation of driveways for stock provided for in section 10 of the act will be considered on application of parties interested, on recommendation of other departments of the Government, or on the reports of agents of this department. Lands withdrawn for driveways for stock or in connection with water holes can not thereafter be entered, and all applications to make entry under this act for land so withdrawn, whether filed before or after the withdrawal, will be rejected.

SETTLEMENT AND IMPROVEMENT PRIOR TO DESIGNATION

16. The act of June 6, 1924 (43 Stat. 469), permits a person who applies to make entry under the stock-raising homestead act for an undesignated tract of land and files therewith a petition for its designation to occupy the land prior to its designation, provided he actually establishes residence on the land and continues to reside thereon during such occupation; and if the petition for designation be denied, the settler may change his application to one under the enlarged homestead act or to one under the ordinary provisions of the homestead law, provided he is qualified to make such an entry.

An applicant who desires to change his application to one under the enlarged homestead act must file in the local office before *final* action is taken on the stock-raising homestead application, a supplemental application on the form prescribed by the Department for making such entries, and, if there be pending a junior application to make entry under any law other than the stock-raising homestead act, the applicant must also file his affidavit, corroborated by two persons, setting forth therein the date when he established actual residence on the land and to what extent the residence was thereafter maintained. The affidavit should describe the legal subdivisions on which residence was maintained and on which the improvements are located. An entry under the enlarged homestead act may not

include two incontiguous tracts, except additional entries may embrace two or more incontiguous tracts if they are contiguous to the original entry.

If the land sought under a change of application has not been designated under the enlarged homestead act, a proper petition for its designation must be filed in accordance with existing regulations.

An entryman under the stock-raising homestead act may claim credit for residence on the land and improvements made after the date of his application and petition for designation.

MISCELLANEOUS PROVISIONS

17. Proofs on entries under this act must be submitted within five years after the dates of their allowance, and no such entry is subject to commutation.

18. Every person applying for entry under this act who has heretofore made entry or entries under the homestead laws must furnish a description thereof or such data as will enable this office to identify it or them.

19. A person who has made entry under section 6 of one of the enlarged homestead acts may make an additional entry under the provisos to section 3 or under section 4 or 5 of this act, provided all be designated as stock-raising land; but he must reside on the land entered under this act or on that originally entered, to the extent required by the three-year homestead 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 must be within 20 miles of the land in such sectioon 6 entry, and it is immaterial as to whether or not the land in the first or original entry is stock raising in character.

21. A section 7 additional entry under the enlarged homestead act on which residence is being maintained may be the basis for an additinal 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.

22. You will not allow, without instructions from this office, any application to contest an entry under the stock raising homestead act where fraud and misrepresentation in securing the designation of the land are alleged. On receipt of such an application to contest, you will transmit the papers to this office by special letter with a request for instructions, making appropriate reference hereto. Such applications to contest will be rejected where it appears, from the records of the department, that the designation of the land was preceded by and based on a field investigation.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

FORM OF APPLICATIONS FOR ORIGINAL ENTRY

4–016

[Form approved by the Secretary of the Interior, Feb. 18, 1921]

DEPARTMENT OF THE INTERIOR

STOCK-RAISING HOMESTEAD ENTRY—ORIGINAL

Serial No._____

United States Land Office_____ Receipt No._____

APPLICATION AND AFFIDAVIT

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

_____, do hereby
(Give post-office address)

apply to enter, under the act of December 29, 1916 (39 Stat. 862), subject to the reservation to the United States of all coal and other minerals in the land, together with the right to prospect for, mine, and remove the same, _____ section _____ township _____, range _____ meridian, containing _____ acres.

I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I _____ citizen of
(Applicant must state whether native born, naturalized, or has filed declaration of intention to become a citizen. If not native born, certified copy of naturalization or declaration of intention, as case may be, must be filed with this application.)
the United States; and am _____; that this
(State whether the head of a family, married or unmarried, or over 21 years of age, and if not over 21, applicant must set forth the facts which constitute him the head of a family.)
application is honestly and in good faith made for the purpose of actual settlement, use, and improvement by the applicant, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement and improvements necessary to acquire title to the land applied for; that I am not acting as agent for any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not, directly or indirectly, made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I have not heretofore made any entry under the timber and stone, desert land, or preemption laws, except as follows: _____
I have not heretofore made a homestead entry except as follows:_____

I further state that the land is not occupied and improved by any Indian; that it does not contain merchantable timber and no timber except_____; is not susceptible of irrigation from any known source of water supply, except the following areas:

_____
(Here give subdivisions and areas of the land, if any, susceptible of irrigation)

and does not contain any water hole or other body of water needed or used by the public for watering purposes; that no part of said land is claimed, occupied or being worked under the mining laws; that said land is unoccupied and unappropriated by any person claiming the same under the public land laws other than myself; that the land is chiefly valuable for grazing and raising forage crops.

_____
(Sign here with full Christian name)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by _____); that I verily believe
(Give full name and post-office address)
affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me at my office in _____
(Town) (County and State)
within the _____land district, this _____day of _____, 192__

_____
(Official designation of officer)

We _____, of _____, and _____, of _____ do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

_____

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by _____); and that said affidavit was duly subscribed
(Give full name and post-office address)
and sworn to before me at _____ this _____ day of _____ 192__

_____
(Official designation of officer)

UNITED STATES LAND OFFICE AT _____,
_____, 192__.

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of December 29, 1916; that there is no prior valid adverse right to the same, and has this day been allowed.

_____,
Register.

UNITED STATES CRIMINAL CODE

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall, willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act Mar. 4, 1909, 35 Stat. 1111.)

FORM OF APPLICATION FOR ADDITIONAL ENTRY

4–016a

[Form approved by the Secretary of the Interior, Dec. 13, 1921]

DEPARTMENT OF THE INTERIOR

STOCK-RAISING HOMESTEAD ENTRY—ADDITIONAL

United States Land Office _____ {Serial No. _____ / Receipt No. _____

APPLICATION AND AFFIDAVIT

I, _____ (Give full Christian name), of _____ (Post-office address), do hereby apply to enter under section _____ (State under which section of act application is filed) of the act of December 29, 1916 (39 Stat., 862), subject to the reservation to the United States of all coal and other minerals in the land, together with the right to prospect for, mine, and remove the same, _____ section _____, township _____, range _____, _____ meridian, containing _____ acres, as additional to my homestead entry No. _____, made _____ at _____ land office for _____ section _____, township _____, range _____, _____ meridian, which I do _____ *now own* and reside upon.

(If the statement is not true, insert "not.") (If under section 3, show qualifications of an original entryman.)

I do solemnly swear that this application is made for my exclusive benefit as an addition to my original homestead entry, and not directly or indirectly for the use or benefit of any other person or persons whomsoever; that this application is honestly and in good faith made for the purpose of actual settlement, use, and improvement; that I will faithfully and honestly endeavor to comply with all the requirements of the law; that I have not heretofore made an entry under the timber and stone, desert land, or preemption laws, except as follows: _____; that I have not heretofore made an entry under the homestead laws (other than that above described) except _____.

I further state that the land applied for is not occupied and improved by any Indian; that no part of said land is claimed, occupied, or being worked under the mining laws; that said land is unoccupied and unappropriated by any person claiming the same under the public-land laws other than myself; that the land now applied for and that embraced in my original entry above described does not contain merchantable timber and no timber except _____; is not susceptible of irrigation from any known source of water supply, except the following areas: _____

(Here give the subdivisions and areas of the land, if any, susceptible of irrigation)

and does not contain any water hole or other body of water needed or used by the public for watering purposes; that the land is chiefly valuable for grazing and raising forage crops.

_____

(Sign here, with full Christian name)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by _____ (Give full name and post-office address)); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office in _____ (Town) _____ (County and State) within the _____ land district, this _____ day of _____, 192____

_____

_____

(Official designation of officer)

We, _____, of _____
and _____, of _____
do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

_____

_____

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by _____); and that said affi-
(Give full name and post-office address)
davit was duly subscribed and sworn to before me at _____
this _____ day of _____, 192____

_____

_____
(Official designation of officer)

UNITED STATES LAND OFFICE AT _____,
_____, 192____

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of December 29, 1916; that there is no prior valid adverse right to the same, and has this day been allowed.

_____,
Register.

UNITED STATES CRIMINAL CODE

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act Mar. 4, 1909, 35 Stat. 1111.)

FORM OF BOND FOR MINERAL CLAIMANTS

4–684

[Form approved by the Secretary of the Interior, Jan. 18, 1917]

Know all men by these presents: That I, _____
(Give full name of principal
of _____, _____ County (or we, _____, of _____, _____ County, _____,
and sureties, and address of each)
and _____, of _____, _____ County, _____, as the case may be), a citizen (or citizens) of the United States, or having declared my (or our) intention to become a citizen (or citizens) of the United States, as principal (or principals), and _____, of _____, _____ County, _____, and _____ of _____, _____ County, _____, as sureties, are held and firmly bound unto the United States of America, for the use and benefit of the hereinafter-mentioned entryman or owner of the hereinafter-described lands, whereof homestead entry has been made subject to the act of December 29, 1916 (39 Stat. 862), in the sum of _____ dollars ($_____), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors, and assigns, and each and every one of us and them, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this _____ day of _____, 19____.

The condition of this obligation is such that, whereas the above-bounden _____ has acquired from the United States the _____ deposits (together with the right to mine and remove the same) situate, lying, and being within the _____ of sec. _____, township _____, range ____, _____ land district, _____, and whereas homestead entry, serial No._____ has been made at _____ land office, of the surface of said above-described land, under the provisions of said act of December 29, 1916, by _____.

Now, therefore, if the above-bounden parties or either of them, or the heirs of either of them, their executors or administrators, upon demand, shall make good and sufficient recompense, satisfaction, and payment unto the said entryman or owner, his heirs, executors, or administrators, or assigns, for all damages to the entryman's or owner's crops or tangible improvements upon said homesteaded land as the said entryman or owner shall suffer or sustain or a court of competent jurisdiction may determine and fix in an action brought on this bond or undertaking, by reason of the above-bounden principal's mining and removing the _____ deposits from said described land, or occupancy or use of said surface as permitted to said above-bounden principal under the provisions of said act of December 29, 1916, then this obligation shall be null and void; otherwise and in default of a full and complete compliance with either or any of said obligations, the same shall remain in full force and effect.

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

_____

Residence_____

_____

Residence_____

(Witnesses should give full names and addresses of each)

_____
Principal
(The principal should sign first)

_____
Surety
Residence_____

_____
Surety
Residence_____

(The principal and sureties should each sign full names and attach seals)

AN ACT TO PROVIDE FOR STOCK-RAISING HOMESTEADS, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated unreserved public land in reasonably compact form: *Provided, however,* That the land so entered shall theretofore have been designated by the Secretary of the Interior as "stock-raising lands."

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate as stock-raising lands subject to entry under

this act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family: *Provided*, That where any person qualified to make original or additional entry under the provisions of this act shall make application to enter any unappropriated public land which has not been designated as subject to entry (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character: That during such suspension the land described in the application shall not be disposed of; and if the said land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal; but no right to occupy such lands shall be acquired by reason of said application until said lands have been designated as stock-raising lands, unless the applicant actually establishes his residence and resides on the land; and until final action on such application, the settler may, if the land be not designated under this act, change his application to one under the enlarged homestead law if such lands be designated thereunder, or to one under the ordinary provisions of the homestead law: *Provided*, That if the settler shall change his application he shall embrace therein the lands upon which his residence and principal improvements are located, and conform to the provisions, limitations, and conditions of the applicable law.

SEC. 3. That any qualified homestead entryman may make entry under the homestead laws of lands so designated by the Secretary of the Interior, according to legal subdivisions, in areas not exceeding six hundred and forty acres, and in compact form so far as may be subject to the provisions of this act, and secure title thereto by compliance with the terms of the homestead laws: *Provided*, That a former homestead entry of land of the character described in section two hereof shall not be a bar to the entry of a tract within a radius of twenty miles from such former entry under the provisions of this act, which, together with the former entry, shall not exceed six hundred and forty acres, subject to the requirements of law as to residence and improvements, except that no residence shall be required on such additional entry if the entryman owns and is residing on his entry: *Provided further*, That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land: *Provided further*, That instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes, of the value of not less than $1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof.

SEC. 4. That any homestead entryman of lands of the character herein described who has not submitted final proof upon his existing entry shall have the right to enter subject to the provisions of this act, such amount of lands designated for entry under the provisions of this act, within a radius of twenty miles from said existing entry, as shall not, together with the amount embraced in his original entry, exceed six hundred and forty acres, and residence upon the original entry shall be credited on both entries, but improvements must be made on the additional entry equal to $1.25 for each acre thereof: *Provided*, That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land.

SEC. 5. That persons who have submitted final proof upon, or received patent for, lands of the character herein described under the homestead laws, and who own and reside upon the land so acquired, may, subject to the provisions of this act, make additional entry for and obtain patent to lands designated for entry under the provisions of this act, within a radius of twenty miles from the lands theretofore acquired under the homestead laws, which, together with the area theretofore acquired under the homestead laws, shall not exceed six hundred and forty acres, on proof of the expenditure required by this act on account of permanent improvements upon the additional entry: *Provided*, That

the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land.

SEC. 6. That any person who is the head of a family or who has arrived at the age of twenty-one years and is a citizen of the United States, who has entered or acquired under the homestead laws, prior to the passage of this act, lands of the character described in this act, the area of which is less than six hundred and forty acres, and who is unable to exercise the right of additional entry herein conferred because no lands subject to entry under this act adjoin the tract so entered or acquired or lie within the twenty-mile limit provided for in this act, may, upon submitting proof that he resides upon and has not sold the land so entered or acquired and against which land there are no encumbrances, relinquish or reconvey to the United States the land so occupied, entered, or acquired, and in lieu thereof, within the same land-office district, may enter and acquire title to six hundred and forty acres of the land subject to entry under this act, but must show compliance with all the provisions of this act respecting the new entry and with all the provisions of existing homestead laws except as modified herein.

SEC. 7. That the commutation provisions of the homestead laws shall not apply to any entries made under this act.

SEC. 8. That any homestead entrymen or patentees who shall be entitled to additional entry under this act shall have, for ninety days after the designation of lands subject to entry under the provisions of this act and contiguous to those entered or owned and occupied by him, the preferential right to make additional entry as provided in this act: *Provided*, That where such lands contiguous to the lands of two or more entrymen or patentees entitled to additional entries under this section are not sufficient in area to enable such entrymen to secure by additional entry the maximum amounts to which they are entitled, the Secretary of the Interior is authorized to make an equitable division of the lands among the several entrymen or patentees applying to exercise preferential rights, such divisions to be in tracts of not less than forty acres, or other legal subdivision, and so made as to equalize as nearly as possible the area which such entrymen and patentees will acquire by adding the tracts embraced in addtional entries to the lands originally held or owned by them: *Provided further*, That where but one such tract of vacant land may adjoin the lands of two or more entrymen or patentees entitled to exercise preferential right hereunder, the tract in question may be entered by the person who first submits to the local land office his application to exercise said preferential right.

SEC. 9. That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and

approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided,* That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this act with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this act.

SEC. 10. That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this act but may be reserved under the provisions of the act of June 25, 1910, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the Secretary may, in his discretion, also withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder and needed for use in the movement of stock to summer and winter ranges or to shipping points, and may prescribe such rules and regulations as may be necessary for the proper administration and use of such lands: *Provided further,* That such driveways shall not be of greater number or width than shall be clearly necessary for the purpose proposed, and in no event shall be more than one mile in width for a driveway less than twenty miles in length, not more than two miles in width for driveways over twenty and not more than thirty-five miles in length, and not over five miles in width for driveways over thirty-five miles in length: *Provided further,* That all stock so transported over such driveways shall be moved an average of not less than three miles per day for sheep and goats and an average of not less than six miles per day for cattle and horses.

SEC. 11. That the Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this act for the purpose of carrying the same into effect.

The above is the act of December 29, 1916 (39 Stat. 862), as amended by the act of October 25, 1918 (40 Stat. 1016), the act of September 29, 1919 (41 Stat. 287), and the act of June 6, 1924 (43 Stat. 469).

AN ACT FOR THE RELIEF OF CERTAIN HOMESTEAD ENTRYMEN

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.

Approved March 4, 1923 (42 Stat. 1445).

BANDH v. HEIRS OF WOODFORD

Decided January 7, 1925

PRACTICE—NOTICE—CONTEST.

Rule 8 of practice is mandatory and contemplates, in service of notice by publication, that proof of compliance with all of the provisions of Rule 10 must be filed within twenty days after the fourth publ cation of the notice, otherwise the contest abates *ipso facto*.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Schmidt* v. *McCurdy* (44 L. D. 568), and *Whalen* v. *Hanson* (47 L. D. 100), cited and applied.

FINNEY, *First Assistant Secretary:*

The Commissioner of the General Land Office has submitted the record in the contest of Sam Bandh against the homestead entry of Fill S. Woodford, and requested instructions as to the proper practice.

The entry was made at the Cass Lake, Minnesota, land office on June 22, 1921, for lot 1, Sec. 22, T. 62 N., R. 24 W., 4th P. M. (9.75 acres). The contest of Bandh was initiated March 5, 1924, the charge being that—

> Entryman died on or about February 5, 1923, leaving no known heirs, dependents, or relatives; that the improvements made by said entryman have not been maintained or kept up since h's death, and that said lands have remained wholly vacant and unoccupied.

Notice of the contest to be served by publication was issued by the local officers. The date of the first publication was August 28, 1924; of the fourth publication, September 18, 1924. Proof of such publication was filed September 20, 1924. On October 15, 1924, there was filed an affidavit of the mailing on September 8, 1924, of a registered letter containing a copy of the notice as published, together with a copy of the contest affidavit, addressed to entryman at his record address, which is also the post office nearest the land, that was returned unclaimed.

On November 5, 1924, the local officers dismissed the contest because it did not appear that a copy of the notice as published had been posted on the land. Under date of December 8, 1924, the Commissioner of the General Land Office advised the local officers that they should have advised the contestant of his right of appeal from the dismissal of the contest. Thereafter an affidavit by contestant was filed, setting forth that a copy of the notice as published was actually posted immediately after the date of the first publication, and an affidavit to that effect mailed to his attorney, but was apparently lost in the mails. He requested that the contest be reinstated with leave to file an affidavit of posting.

Rule of Practice 8 provides:

> Unless notice of contest is personally served within 30 days after issuance of such notice and proof thereof made not later than 30 days after such service, or if service by publication is ordered, unless publication is commenced within 20 days after such order and proof of publication is made not later than 20 days after the fourth publication, as specified in Rule 10, the contest shall abate: *Provided*, that if the defendant makes answer without questioning the service or the proof of service of said notice, the contest will proceed without further requirement in those particulars.

Rule 10:

> Service of notice by publication shall be made by publishing notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and if no newspaper be printed in such county, then in a newspaper printed in the county nearest to such land.
>
> Copy of the notice as published, together with copy of the affidavit of contest, shall be sent by the contestant within 10 days after the first publication of such notice by registered mail directed to the party for service upon whom such publication is being made at the last address of such party as shown by the records of the land office and also at the address named in the affidavit for publication, and also at the post office nearest the land.
>
> Copy of the notice as published shall be posted in the office of the register and also in a conspicuous place upon the land involved, such posting to be made within 10 days after the first publication of notice as hereinabove provided.

In the absence of proof, filed not later than 20 days after the fourth publication of the notice, that all the provisions relative to service of notice by publication had been complied with, and in the absence of an answer on behalf of the heirs, the contest abated.

In *Schmidt* v. *McCurdy* (44 L. D. 568), after quoting Rule 8, the Department held:

> The purpose of this rule is to expedite the orderly administration of the public land laws relating to the initiation of contests, and to prevent delay in the prosecution thereof to the detriment of a junior contestant. Under this rule, upon failure to make proof of service of notice of contest within the time specified, where no answer has been filed, the contest abates *ipso facto*, without the necessity of any action on the part of the adverse party or the local officers.

See, also, *Whalen* v. *Hanson* (47 L. D. 100), wherein it was held:

> Rule 8 of practice is mandatory and has all the force and effect of law. In order for contestant to make proper service by publication it was incumbent upon him to show strict compliance with said rule, which he has failed to do.

The filing of proof on September 20, 1924, that the notice had been published once a week for four successive weeks in a newspaper published in the county wherein the land involved lies did not, in the absence of proof of compliance with the provisions of the second and third paragraphs of Rule 10, prevent the abatement

of the contest. Rule 8 contemplates that proof of compliance with all the provisions of Rule 10 must be filed within 20 days after the fourth publication of the notice, and the Department has never given to the rule any other meaning; otherwise, a contestant could, by publishing the notice and filing proof thereof, but omitting any pretense of complying with the provisions of the second and third paragraphs of Rule 10, defeat the purpose of Rule 8 as defined in *Schmidt* v. *McCurdy*, *supra*.

Contestant failed to comply with the provisions of the second paragraph of Rule 10, the registered notice being mailed on the eleventh day after the fourth publication. Moreover, the affidavit of mailing the notice was not filed until October 15, 1924—more than 20 days after the fourth publication of the notice.

It follows that the application for the reinstatement of the contest must be, and is hereby, denied, without prejudice to Bandh's right, in the absence of any intervening adverse claim, to file a new contest affidavit and proceed anew.

WINDSOR RESERVOIR AND CANAL COMPANY v. MILLER

Decided January 10, 1925

RIGHT OF WAY—RESERVOIR LAND—OIL AND GAS LANDS—PROSPECTING PERMIT.

The approval of a right of way grant for a reservoir site pursuant to the act of March 3, 1891, confers upon the grantee such an estate in the land as to preclude the Department from issuing an oil and gas prospecting permit to another under section 13 of the act of February 25, 1920.

RIGHT OF WAY—RESERVOIR LAND—WATER RIGHT—BOUNDARIES.

The superficial area embraced in a right of way for a reservoir granted by the act of March 3, 1891, is measured and determined by the high-water line as shown by the approved map, and the approval of the map is an adjudication that the whole area within such line is required for the construction, maintenance, and care of the reservoir; further, the grant accords the use of an additional strip 50 feet wide adjoining the marginal limits of the reservoir when the need therefor is established.

RIGHT OF WAY—RESERVOIR LAND—MINERAL LANDS—OIL AND GAS LANDS—LEASE.

A grant of a right of way under the act of March 3, 1891, does not carry with it any right, title, or interest in or to mineral deposits underlying the land, or any right to prospect for, mine, and remove oil or gas deposits, either directly by the grantee or indirectly by a lessee thereof, but the title to such deposits remains in the United States, subject only to such disposition as may be authorized by law.

DECISIONS AND REGULATIONS CITED AND APPLIED.

Cases of *Rio Grande Western Railway Company et al.* v. *Stringham* (239 U. S. 44), *Kern River Company et al.* v. *United States* (257 U. S. 147), *United States* v. *Whitney et al.* (176 Fed. 593), *T. A. Sullivan* (38 L. D.

493), *Grand View Seepage Reservoirs and Ditches* (43 L. D. 317), regulations of June 6, 1908 (36 L. D. 567), and administrative rule of June 24, 1918 (46 L. D. 418), cited and applied.

DEPARTMENTAL DECISIONS OVERRULED.

Cases of *Deseret Irrigation Company et al.* v. *Sevier River Land and Water Company* (40 L. D. 463), *H. H. Tomkins* (41 L. D. 516), and *Dixon* v. *Dry Gulch Irrigation Company* (45 L. D. 4) overruled.

FINNEY, *First Assistant Secretary:*

The above-entitled case involves the question of the authority of the Department to grant a permit, under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon a tract of land occupied by the water of a reservoir constructed in pursuance of a right of way granted under the act of March 3, 1891 (26 Stat. 1095, 1101). The facts in the case are briefly as follows:

The NE. ¼ NE. ¼, Sec. 24, T. 8 N., R. 69 W., 6th P. M., in the Denver, Colorado, land district, is embraced in the selection of the North Poudre Irrigation Company under the act of March 3, 1891, *supra*, the map of location having been filed September 17, 1901, and approved by the Department November 7, 1903. This map shows the land to be embraced in an annex to North Poudre Reservoir No. 8, having a total area of 138 acres, with a depth of 20 feet and a capacity of 1,800 acre-feet. On the map of definite location filed December 28, 1903, and approved by the Department October 11, 1905, the area of the annex is shown to be 175.7 acres, with a capacity of 3,998.3 acre-feet.

On November 20, 1923, Frank C. Miller filed application, under section 13 of the leasing act, for a permit to prospect for oil and gas upon said tract, which is not within any known geologic structure of a producing oil or gas field and appears to be vacant and unappropriated except for the right of way hereinbefore mentioned.

On February 14, 1924, the Windsor Reservoir and Canal Company, successor in interest of the North Poudre Irrigation Company, filed a protest against the granting of a permit to Miller, in which it is alleged that the annex and the main reservoir are connected by an underground tunnel; that the reservoirs are now filled with water to a depth of 39 feet, to be used during the irrigation season of 1924; that the exclusive use of the land is needed and required for reservoir purposes, as it is located in the center of the annex; that during the greater portion of each year the land is submerged many feet in water; that prospecting for oil and gas on the land could not be done without injury to the vested rights of the protestant; that it might result in total destruction of the reservoir

for the purposes for which it was constructed; and that the oil and gas applicant would not be able to mark the corners of the claim, as required by law, on account of the depth of water.

Miller answered the protest, admitting the existence and location of the reservoir. He alleged that water was stored in the reservoir in spring and was used in July and August; that when the water was drawn off only about 10 acres of the whole site were submerged, the remainder being exposed during the greater part of the year; that if a permit were granted he could drill the land even if it were covered in whole or in part by water; that the protest was not made in good faith, as the company had itself executed a lease now held by the Union Oil Company of California.

A copy of said lease was filed with the answer, and from this it appears that the company has leased all its lands in and adjoining the reservoirs and rights of way for ditches and canals, for the development of oil and gas. This lease contains, among others, the following provisions.

> The above and foregoing lease is made upon the express understanding and agreement that said lessee or his assigns shall not drill any well for oil or gas or erect any building, pipe line or appliance in or upon any right of way for any of said canals or ditches above described, nor within the upper contour lines of any of said three reservoirs, except upon the written consent of the lessor hereafter obtained, duly executed and acknowledged, authorizing and permitting the lessee or his assigns so to do. It is understood that the foregoing restriction shall not prevent the lessee from withdrawing oil from beneath said reservoirs and ditches, but is only a limitation on the places where wells may be sunk and pipe lines laid and other structures erected.
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> * * * * * * *
>
> Lessee in conducting its operations shall protect and preserve the ditches and reservoirs of the lessor covered by this lease and the water therein contained, from all damage and pollution of every kind and character whatsoever, and shall not permit any oil to flow into such ditches or reservoirs nor any waters to escape from said reservoirs or ditches by reason of its operations, either during the time of such operations or thereafter. In the event a well is drilled within the upper contour of any reservoir on said land such well, whether it develops into a producing well or is abandoned, shall be so handled, and at its abandonment shall be left in such shape that the waters of said reservoir can not escape there through, and all of the lessee's operations within the upper contour of any of the lessor's reservoirs on said land shall, so far as said operations may in any direct or indirect way affect the capacity or stability of said reservoir or its ability to hold water or the quantity or quality of the water contained or that may thereafter be contained therein, be conducted in accordance with the written plans and specifications previously submitted to lessor and approved by an engineer of its own choosing.
>
> * * * * * * *
>
> It is expressly understood and agreed that the lessee shall be liable in damages to the lessor for any failure on the part of the lessee to protect and

preserve said ditches and reservoirs and the waters therein contained from all damage and pollution of every kind and character whatsoever. The lessee shall also be liable to the lessor in damages for any diminution in the quantity of water stored in said reservoirs or run in said ditches caused by the lessee, his agent or employees, either by breakage of the retaining walls of said ditches or reservoirs, or by holes drilled therein or drilling therein, or in any other manner, and for any and all damages done to the farm lands and crops by reason of his operations.

By decision dated August 13, 1924, the Commissioner of the General Land Office rejected the prospecting-permit application on the ground that the land was not subject to disposition under the leasing act so long as the grant under the act of March 3, 1891, subsisted, citing the cases of *Northern Pacific Railroad Company* v. *Townsend* (190 U. S. 267), and *E. A. Crandall* (43 L. D. 556), as to the nature of the grant for right of way.

Miller has appealed to the Department, and both parties have filed exhaustive briefs and arguments.

In the regulations of June 6, 1908 (36 L. D. 567, 568), under the act of March 3, 1891, the Department says:

> The right granted is not in the nature of a grant of lands, but is a base or qualified fee. The possession and right of use of the lands are given for the purposes contemplated by law, but a reversionary interest remains in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way. All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the land subject to such right of way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. * * * Section 21 of the act of March 3, 1891, provides that the grant of a right of way for a canal, ditch, or reservoir does not necessarily carry with it a right to the use of land 50 feet on each side, but only such land may be used as is necessary for construction, maintenance, and care of the canal, ditch, or reservoir. The width is not specified.

In the case of *T. A. Sullivan* (38 L. D. 493) the Department held that upon its approval of an application for right of way under the act of March 3, 1891, jurisdiction was lost, and it could not thereafter properly approve another and conflicting application. In that case the Department expressed itself as follows:

> The act of March 3, 1891, under which the application of Rogers and Davis was filed and approved, is essentially similar to the act of March 3, 1875 (18 Stat. 482), by which rights of way across the public land are granted to railroad companies, respecting which the Supreme Court has decided that after an application has been approved by the Secretary of the Interior, a vested right is acquired which can not be disturbed by any subsequent action of the Department; that with the approval the title passes, and with the title passes all authority or control of the executive department over the land and over the title which it has conveyed (*Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165).

Applying the rule announced by the Supreme Court in the above-cited case to applications for rights of way under the act of 1891, this Department has held that by the approval of such an application the jurisdiction of the Department is lost, and that any subsequent action taken looking to the cancellation or annulment of the right of way must be by direct action for that purpose; and in the same connection it has been held further that the Department may not properly approve an application subsequently filed which conflicts to a material extent with an approved application under which vested rights have been acquired. (*Allen et al.* v. *Denver Power and Irrigation Co.* (38 L. D. 207).)

A different view appears to have been taken in the cases of *Deseret Irrigation Company et al.* v. *Sevier River Land and Water Company* (40 L. D. 463), *H. H. Tomkins* (41 L. D. 516), and *Dixon* v. *Dry Gulch Irrigation Company* (45 L. D. 4). In the administrative ruling of June 24, 1918 (46 L. D. 418), however, the latter view is not adhered to. The case of *T. A. Sullivan*, *supra*, must be taken as setting forth the law.

The same construction has been given to the acts of March 3, 1875, and March 3, 1891. *United States* v. *Whitney et al.* (176 Fed. 593), *Kern River Company et al.* v. *United States* (257 U. S. 147). In regard to the act of March 3, 1875, the Supreme Court has said (*Rio Grande Western Railway Company* v. *Stringham*, 239 U. S. 44):

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.

The following may be quoted from Lindley on Mines, third edition, section 153, volume 1, page 280:

> The grants of rights of way found in the various railroad acts contain no reservations or exceptions. They are present, absolute grants, subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purposes designated. They are in effect grants of the fee, subject, however, to a reversionary right in the event the land ceases to be used for the purposes for which it was granted. The estate has been characterized as a "limited fee" or a "base fee." No part of the right of way can be alienated without the consent of Congress nor lost by laches or acquiescence. Grants of this character carry with them the implied condition that the lands are not to be used except for the purposes of legitimate railroad operation. No title is acquired to underlying mines, and the land can not be mined for its oil, gas, or other mineral deposits. The extraction of oil or mineral would result in an injury to the reversionary estate.
>
> The railroad company secures the surface and so much of the underlying minerals as may be necessary to support the surface. The obligation to support the surface would of course be mandatory. * * *

The reservation of "mineral lands" found in these acts does not apply to the lands embraced within the right of way limits. This right of way extends to and covers all public lands, whether mineral or not.

If at the time the right of way attaches mineral lands over which the road is to pass are unoccupied, a subsequent location thereof, followed by a patent to the locators, is inferior to the right of way to the company, and must yield to the superior legal title, without resort to a court of equity to set the patent aside.

It is contended on behalf of the appellant that the canal company is not protesting on account of any threatened danger to its reservoir and water supply from prospective drilling operations, because the lease that has been given will not prevent drilling which will have nearly the same dangers; that the company is merely endeavoring to retain the possible oil supply for its lessee and its own attendant advantage; that if the permit is not granted the Government will receive nothing for any oil there may be in the land, as it will be drained off and taken from adjoining privately owned land of the company, even though not taken from wells on the land itself.

The appellant also says:

Permits have been heretofore issued by the General Land Office to applicants to prospect for oil and gas upon lands adjacent to the lands herein involved, said lands also being situate within reservoir sites located under the act of March 3, 1891.

James G. Stephens, Denver Serial 028587, Permit granted February 15, 1924.
Valdo F. Wilson, Denver Serial 028815, Permit granted July 15, 1924.

It is true that permits have been granted as stated and that the tracts appear to be within reservoir sites of this company. In the case of Wilson the company protested as in the present case, but the Commissioner dismissed the protest by decision dated June 5, 1924, and the company did not appeal.

From a careful consideration of the acts of Congress involved and the numerous decisions of the Department and the courts construing these acts, the Department is convinced that such title has passed under the grant of right of way that a permit to prospect for oil and gas upon land situate in a reservoir site can not properly be granted.

As has been stated, entries may be allowed for lands to parts of which rights of way for canals, ditches, or reservoirs have attached, but such entries are subject to the rights of way. Obviously, a claimant whose land is crossed by a right of way for a canal may not use, or exercise the right of possession over, the land that is actually necessary for the canal. It is clear that the same rule must apply to one who has been granted a permit to prospect for oil and gas.

In section 19 of the act of March 3, 1891, it is provided—

> That any canal or ditch company desiring to secure the benefits of this act shall * * * file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights shall pass shall be disposed of subject to such right of way.

In its regulations of June 6, 1908, under said act, hereinbefore referred to, the Department requires that (paragraph 10)—

> Field notes of the surveys must be filed in duplicate. * * * The line of survey should be that of the actual location of the proposed ditch and, as exactly as possible, the water line of the proposed reservoir. * * * The maps filed * * * must be strictly conformable to the field notes of the survey.

The extent of the ground occupied by the water of a reservoir, for which a right of way has been granted under this act, must be determined from the high-water line, as shown by the approved map. The approval of the map by the Department is an adjudication that the whole area shown to be within the high-water line of the reservoir is necessary for the construction, maintenance, and care of such reservoir. Furthermore, it may be established by evidence that the grant includes 50 feet outward from the marginal limits of the reservoir. In this connection see the case of *Grand View Seepage Reservoirs and Ditches* (43 L. D. 317), for construction of the provision of section 18, said act, as to the addition of "fifty feet on each side of the marginal limits thereof"; that is, the reservoir, canal, and laterals.

As the land involved is entirely within a reservoir site the Department has no authority to grant a permit to prospect for oil and gas upon the same. The decision appealed from is affirmed.

Apparently the two prospecting permits to which reference has been made were erroneously issued, and action with a view to cancellation of these permits should be taken.

If the canal company has attempted or shall attempt to make any use of the land granted under the approved right of way inconsistent with the terms of the grant, the necessary steps to protect the rights and interests of the Government will be taken by the Land Department.

The act of Congress of March 3, 1891 (26 Stat. 1102), provides that nothing therein shall authorize such a canal or ditch company to occupy such right of way except for the purposes of said canal or ditch. It is made to appear in this record that the Windsor Reservoir and Canal Company has executed a lease, now held by the Union Oil Company of California, in which it is provided that the lessee shall not drill for oil or gas within the upper contour lines of any of the reservoirs except upon the written consent of the lessor.

A grant under said act passes no right, title, or interest in or to any mineral deposits underlying the land, or any right to prospect for, mine, and remove oil or gas deposits, either directly by the grantee or any lessee thereof. The title to such deposits remains in the United States, subject only to such disposition as may be authorized by law.

You will notify the grantee and other parties in interest hereof, and that the Department denies the right of the reservoir and canal company to lease any lands of the United States covered by its reservoir grant for the extraction of oil or gas therefrom, and the right of its lessee, even with the consent of the reservoir company, to drill for and extract oil and gas therefrom, and will take the necessary steps to prevent such trespass, if same shall be attempted.

RULES 8 AND 11 OF PRACTICE, AMENDED

INSTRUCTIONS

[Circular No. 976]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 12, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Your attention is called to the following departmental order, dated January 6, 1925, amending Rules 8 and 11 of Practice:

Consideration of appeals which have recently come before the Department reveals that the provisions of Rule of Practice 8 relative to abatement are not clearly understood. To remove all possibility of controversy, the said rule is amended by the insertion of "service of notice by," to make it conform to the interpretation uniformly given the rule by the Department. (See 44 L. D. 568.) As amended, the rule now reads:

"Unless notice of contest is personally served within 30 days after issuance of such notice and proof thereof made not later than 30 days after such service, or if service by publication is ordered, unless publication is commenced within 20 days after such order and proof of service of notice by publication is made not later than 20 days after the fourth publication, as specified in Rule 10, the contest shall abate: *Provided*, That if the defendant makes answer without questioning the service or the proof of service of said notice, the contest will proceed without further requirement in those particulars."

To require a necessary showing, which has been insisted upon, although not specifically required by the Rules of Practice, Rule 11 is amended by adding a paragraph, as follows:

"Proof of the mailing of notice shall be by affidavit of the person who mailed the notice, attached to the postmaster's receipt for the letter or (if delivered) the registry return receipt."

WILLIAM SPRY,
Commissioner.

ADA L. ADAMS (ON REHEARING)

Decided January 12, 1925

REPAYMENT—LAND DEPARTMENT—JURISDICTION.

The Land Department is without authority to allow repayment under the act of June 16, 1880, of a demand against the Government which is not embraced within its provisions merely because it might be recoverable under a different law before a tribunal with a different jurisdiction.

COURT OF CLAIMS DECISION DISTINGUISHED.

Case of *Nelson* v. *United States* (35 Ct. Cls. 427), cited and distinguished.

FINNEY, *First Assistant Secretary:*

Counsel for the above-named claimant has filed a motion for rehearing of departmental decision of August 6, 1924, denying repayment of moneys paid by claimant's husband in connection with timber and stone entry Glenwood Springs, Colorado, No. 917. In its decision, the Department held that the claim was barred because it was not filed within the limitations of time provided by the act of December 11, 1919 (41 Stat. 366).

It is now contended that repayment is due under the terms of the act of June 16, 1880 (21 Stat. 287), and as authority for such contention the decision of the United States Court of Claims in the case of *Adolph Nelson* v. *United States* (35 Ct. Cls. 427) is relied upon. In that case the claimant made a desert-land entry for land described by reason of a mistake of the surveyor as being in T. 21 N., whereas the land he had improved and intended to enter was in T. 22 N. As soon as the mistake was discovered the claimant applied to correct and amend the entry so as to describe the land he had improved. This application was denied by the Department for the reason that prior to the filing of his entry application the land desired had been embraced in a reservoir withdrawal and was not subject to entry. The claimant thereafter filed application for repayment under the act of 1880, *supra*, which was denied by the Department. He then filed the claim in the United States Court of Claims, which allowed the demand on the theory that the money was paid in mutual mistake of fact and that an action for money had and received would lie. In its decision the court held:

> The court does not mean to hold that the action of the Commissioner of the Land Office and of the Secretary of the Interior was erroneous. An executive officer has a limited statutory authority, and can disburse or refund public moneys only in cases where he is expressly authorized so to do. In this court a cause may be one of legal right, though no executive officer may be empowered to satisfy it. In this case it seems indisputable that the Government in equity and good conscience is bound to refund this money; and in such a case the action for money had and received will lie.

It is clear that the Court of Claims did not attempt to hold that the money was repayable under the act of June 16, 1880, but that it was recoverable under an action for money had and received, impliedly holding that it was not due under said act. The Department is without authority of law to allow repayment under the act of 1880, *supra*, of a demand against the Government which is not embraced within its provisions merely because it might be recoverable under a different law before a tribunal with a different jurisdiction.

The motion for rehearing is denied.

WITBECK v. HARDEMAN (ON RECONSIDERATION)

Decided January 12, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—FEES.

To be entitled to a preference right to an oil and gas prospecting permit under section 13 of the act of February 25, 1920, literal compliance with all the provisions of the governing regulations, which have all the force and effect of law, including payment of the filing fees, is necessary.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *J. Sam Friedman* (50 L. D. 581) cited and applied.

FINNEY, *First Assistant Secretary:*

By decision of April 16, 1924 (50 L. D. 413), the Department held that Jack Hardeman was entitled to a preference right to a permit under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon the NW. ¼ NE. ¼, Sec. 25, T. 21 N., R. 10 W., La. M., Louisiana, by reason of having posted on the land, within 30 days prior to the date of his application, a notice of intention to apply for a prospecting permit. The like application of Albert T. Witbeck was held to have been filed subsequent to the date Hardeman's notice was posted, and was therefore rejected, the decision appealed from being affirmed.

After the date of said decision, Witbeck alleged that the local office at Baton Rouge was guilty of irregularities in connection with the receipt of his application, for which reason final action on the conflicting applications was suspended and an investigation ordered. The report of the investigation has been received, upon consideration of which the Department has concluded that the charges were not sustained.

A petition for the exercise of supervisory authority has been filed on behalf of Witbeck, but action thereon is rendered unnecessary because examination of the record has brought to the attention of the Department sufficient to demand the reconsideration of the appeal.

Witbeck's application is indorsed as filed on November 12, 1923, at 3.30 p. m., while Hardeman's application was filed December 11, 1923, at 3 p. m., in which he set forth:

> I hereby claim preference right to this permit by reason of the fact that on November 11, 1923, I located the land herein mentioned, and erected in the center thereof a monument more than four feet high, and more than four inches square, on which I posted two notices of my intention to apply for this permit, a copy of which is hereby attached.

The copy of the posted notice referred to describes the land as follows:

> Northwest quarter of the northeast quarter (NW. ¼ of NE. ¼) Section twenty-five (25) north Range ten (10) West, Louisiana Meridian, Webster Parish, Louisiana, containing forty (40) acres more or less.

Aside from the failure to incorporate in the posted notice the number of the township, the application was not under oath, and the allegations as to the posting of the notice were not corroborated. Moreover, the required fee was not tendered with the application, and was not paid until December 19, 1923.

In the case of *J. Sam Friedman* (50 L. D. 581), the Department held that as the regulations of March 11, 1920 (47 L. D. 437), do not specify the procedure to be followed as to the payment of the filing fees, the general instructions (Circular No. 616), approved August 9, 1918 (46 L. D. 513), govern. Paragraph 8 of said Circular No. 616 provides that "Where no money is tendered, the application, etc., will be rejected."

Even if Hardeman's application had been under oath and corroborated, and if the posted notice had properly described the land, his failure to tender the required filing fee within 30 days after the date of the alleged posting defeated his claim of preference right. When one asserts a preference right to a prospecting permit, it is necessary that he comply literally with all the provisions of the governing regulations, which have all the force and effect of law.

For the reasons aforesaid, the Department must hold that Hardeman did not properly assert his claim of preference right within the time allowed, and that Witbeck's application is entitled to priority.

The decision of April 16, 1924, is vacated to the extent it conflicts with the views herein expressed, and the decision appealed from is reversed.

WITBECK v. HARDEMAN

Motion for rehearing of departmental decision of January 12, 1925 (51 L. D. 36), denied by First Assistant Secretary Finney, March 5, 1925.

VOELTZEL v. WRIGHT (ON PETITION)

Decided January 24, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—HOMESTEAD ENTRY—LACHES—NOTICE—SETTLEMENT.

Because of delay on the part of a settler to make entry of public land, the intervening of a mere application for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, does not, in the absence of notice thereof, deprive the entryman of any of his rights under his entry.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—ADVERSE CLAIM—SETTLEMENT.

An application for a prospecting permit under section 13 of the act of February 25, 1920, is not an adverse right within the meaning of the law governing settlement claims.

DEPARTMENTAL DECISION CITED AND APPLIED—DEPARTMENTAL DECISION DISTINGUISHED.

Case of *Pace* v. *Carstarphen* (50 L. D. 369), cited and applied; case of *Ada Fletcher* (49 L. D. 204), distinguished.

FINNEY, *First Assistant Secretary:*

A petition for the exercise of supervisory authority has been filed on behalf of Eugene Voeltzel in the matter of his application for a permit under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon (with other lands) lots 7, 8, 9, 10, 12, 13, and 14, Sec. 9, T. 3 N., R. 91 W., 6th P. M. (314.44 acres), Glenwood Springs, Colorado, land district, wherein the Department, by decision of November 24, 1924, affirmed a decision of the Commissioner of the General Land Office dated July 30, 1924, rejecting the application as to the tracts above described and holding that Howard M. Wright was entitled to a preference right under section 20 of the act of February 25, 1920, *supra.*

Counsel for Voeltzel, who has argued the case orally, contends that Wright was guilty of laches in failing to apply to make entry for the land until the lapse of nineteen months after the filing of the plat of survey, and that because of the intervention of Voeltzel's application the delay prevented the application of the doctrine of relation.

The plat of dependent resurvey of the township was filed in the local office on May 15, 1922. Voeltzel's application for a prospecting permit was filed August 11, 1923, and Wright's application to make entry under the enlarged homestead act for lots 3, 7, 8, 9, 10, 12, 13, and 14, said Sec. 9, was filed December 31, 1923. Because of the pendency of Voeltzel's application, Wright's application was forwarded to the Commissioner of the General Land Office, who, under date of March 6, 1924, directed the local officers to notify Wright

that it would be necessary to file a waiver of compensation in accordance with section 29 of the oil leasing act. To this requirement Wright responded with a showing that he established residence on the land on March 2, 1919, and had resided thereon continuously since that date. He explained that the delay in applying to make entry was due to the fact that he was without money to pay the required fee and commissions. The showing accompanied an appeal from the Commissioner's decision of March 6, 1924, but no action on the appeal was taken, because the Commissioner by his decision of July 30, 1924, vacated the decision of March 6, 1924.

Prior to the date of the decision appealed from, to wit, on June 14, 1924, Wright applied for a permit to prospect upon the land. As Lot 3, said Sec. 9, was embraced in Petroleum Reserve No. 61 by Executive order of October 25, 1918, Wright does not contend that he is entitled to a preference right as to said lot.

In the case of *Ada Fletcher* (49 L. D. 204), cited by counsel, the former husband of Mrs. Fletcher on July 22, 1915, applied to make entry under the enlarged homestead act for 320 acres. As the land had been withdrawn and included in a petroleum reserve by Executive order of December 11, 1914, the application was made subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509), as to oil and gas. The application was allowed April 10, 1916, when the designation of the land became effective. The entry was perfected by entryman's widow. On August 18, 1921, Mrs. Fletcher applied for a permit to prospect for oil and gas upon the land, contending that she was entitled to the preference right provided for by section 20 of the act of February 25, 1920, *supra*. In support of her contention she submitted affidavits to the effect that the entryman was actually residing on the land in the summer of 1914, prior to the withdrawal. The Department held that as the land was surveyed at the date of the alleged settlement, but application to make entry had not been filed until a date when it was necessary to make entry, if at all, with the reservation to the United States of the oil and gas content of the land, the case did not come within the provisions of said section 20—

> 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 rights reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; * * *.

In other words, the failure of Mrs. Fletcher's former husband to make entry prior to the withdrawal defeated the rights which he could have acquired had he done everything he could have done toward perfecting an entry for the land prior to the withdrawal—

the test applied to all settlement claims. In the case under consideration it is true that Wright delayed from May 15, 1922, until December 31, 1923, before applying to make entry, but no withdrawal or classification of the land intervened—merely Voeltzel's application for a prospecting permit, which was not an adverse right within the meaning of the law governing settlement claims.

After the filing of the plat of survey and prior to the date of Wright's application to make homestead entry, the latter's claim might have been defeated by a subsequent settler, but not by a mere paper applicant. The records of the local office did not contain any notice of his settlement claim, but his presence on the land, with improvements, was notice to Voeltzel, and while the regulations under the act of February 25, 1920, *supra*, then in force made no provision for the practice in such cases, the latter, in all fairness, should have notified the Land Department, in connection with his application for a permit, of Wright's settlement, whereupon proceedings similar to those outlined in paragraph 12(c) of the regulations could have been taken—i. e., Wright could have been notified of the pendency of Voeltzel's application and of his right to assert a claim of preference right to a permit.

In the preparation of the regulations under the act of February 25, 1920, it was not possible to provide for all of the contingencies which might arise, it being necessary to leave certain possible controversies to individual treatment when they should arise. In the absence of specific regulations covering a case, a controversy must be disposed of in accordance with established principles of justice.

Had Wright been notified of the finding of Voeltzel's application, and that he would be allowed the usual time—30 days—within which to show cause why the permit should not be granted, and Wright had made no response, he would thereby have forfeited his claim to a preference right for a permit. Having failed to give any notice to Wright of the filing of his application, or to advise the Land Department of the settlement on the land, Voeltzel is in no position to demand that the Department declare that Wright forfeited his rights through laches.

In *Pace* v. *Carstarphen* (50 L. D. 369), it was held that when a valid settlement precedes a withdrawal, classification, or report that lands are valuable for the minerals specified in the act of July 17, 1914, *supra*, and the settler initiates a valid entry based upon such settlement, the settler is thereafter to be regarded as an entryman as from the date of settlement, and his rights under the homestead laws will be determined accordingly. If a valid settlement will preserve a settler's rights in the face of a withdrawal, classification, or report that the land is valuable for certain minerals, surely his rights can not be defeated by a mere application for a prospecting

permit, as to which the settler has not been notified. By filing an application for a permit to prospect for any of the minerals named in the act of February 25, 1920, *supra*, a person acquires no right to the land—merely a right to a permit over subsequent applicants who have no preference right recognized by the act.

No reason appearing why the decision of November 24, 1924, should not be adhered to, the petition is denied.

RIGHTS OF WAY FOR THE TRANSPORTATION OF OIL AND NATURAL GAS THROUGH THE PUBLIC LANDS

January 31, 1925

RIGHT OF WAY—PIPE LINES—COLORADO—WYOMING—ACT OF FEBRUARY 25, 1920.

The act of May 21, 1896, granting rights of way through the public lands in the States of Colorado and Wyoming to pipe line companies for the purpose of transporting oil, was repealed and superseded by section 28 of the general leasing act of February 25, 1920.

RIGHT OF WAY—PIPE LINES—COMMON CARRIER—ACT OF FEBRUARY 25, 1920.

Section 28 of the act of February 25, 1920, specifies that pipe lines for conveying oil and gas through the public lands pursuant to rights of way authorized by that act, shall be operated and maintained as common carriers.

RIGHT OF WAY—FEDERAL WATER POWER ACT—FEDERAL POWER COMMISSION—LAND DEPARTMENT—JURISDICTION.

The Federal Water Power Act confers upon the Federal Power Commission the jurisdiction and control over rights of way for power purposes, formerly exercised under the act of February 15, 1901, by the Land Department, except as to projects involving Indian allotments or where the electrical energy is to be developed other than hydraulically.

FINNEY, *First Assistant Secretary:*

Referring to the attached telegram to you [Hon. P. P. Campbell] from Mr. T. J. Flannelly, of Independence, Kansas, which you left with the Commissioner of the General Land Office January 24, 1925, I have to advise you that grants of rights of way for the transportation of oil and natural gas through the public lands, including the forest reserves, where such grants are subsequent to February 25, 1920, may be obtained, if at all, only pursuant to the provisions of section 28 of the act of that date (41 Stat. 437), commonly known as the oil leasing act.

In this connection, I call your attention to the second proviso of said section 28, wherein it is stated in express terms—

> That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas, except under and subject to the provisions, limitations, and conditions of this section.

The act of 1920 is general in its application, and among other things provides that pipe lines for conveying oil and gas shall be constructed, operated, and maintained as common carriers.

In view of the foregoing provisions of said act of 1920, the Department is of the opinion that the act of May 21, 1896 (29 Stat. 127), granting rights of way through the public lands situated in the States of Colorado and Wyoming, to pipe line companies for the purpose of transporting oil, was repealed and superseded by section 28 of the act of February 25, 1920, including that provision of the act of 1896 which conferred upon the grantees thereunder the right to take from the public lands adjacent to the line of said pipe-line material, earth and stone necessary for the construction of the pipe line.

I am inclosing herewith a circular containing the act of February 25, 1920, and the regulations thereunder, also two circulars containing the act of February 15, 1901 (31 Stat. 790) and the regulations thereunder, one providing for canals, ditches, pipe lines, etc., involving the use of water for beneficial purposes, the other for power purposes. You will understand that rights of way for power purposes are now, generally speaking, under the jurisdiction and control of the Federal Power Commission, pursuant to the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063). The Land Department, however, retains jurisdiction for such projects under the act of February 15, 1901, *supra*, where Indian allotments are involved and where the electrical energy involved is developed by steam or is other than hydraulic.

BAILEY v. CANTRELL

Decided February 3, 1925

SETTLEMENT — BOUNDARIES — STOCK-RAISING HOMESTEAD — APPLICATION — PREFERENCE RIGHT — FRAUD.

Failure of a settler to mark the boundaries of his claim can not be pleaded as a defense by another subsequently entering the land whose claim is based solely upon the priority of his application, where it appears that such application is false in a material particular.

ADVERSE CLAIM — SETTLEMENT — LACHES — NOTICE — STOCK-RAISING HOMESTEAD.

One who could have learned of an adverse claim, but avoids notice thereof by failure to examine the land for more than three months before the execution of his homestead application therefor, can not be allowed to profit thereby.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Northern Pacific Railway Company* v. *Morton* (43 L. D. 60), and *Alfred O. Lende* (49 L. D. 305), cited and applied.

FINNEY, *First Assistant Secretary:*

This is an appeal by Oscar T. Bailey from a decision of the Commissioner of the General Land Office dated June 21, 1924, holding, in effect, that his settlement claim did not extend beyond the SE. ¼, Sec. 29, T, 2 S., R. 8 W., N. M. M., Las Cruces, New Mexico, land district.

The material facts are not in dispute.

The land was designated under the stock-raising homestead act on June 24, 1920.

It appears from the record that on Friday, March 9, 1923, at about 2 p. m., said Bailey received a letter from the local office advising him that all of said Sec. 29 except the SE. ¼ SE. ¼, and the NE. ¼ SE. ¼, Sec. 30, said township, were vacant on the records of the local office. At 4 o'clock on the same day he commenced to build a dugout in which he slept that night, and which he completed early the next morning. The next day he made an effort to obtain money for filing fees, but was unable to borrow the money that day. On the following Monday, March 12, he executed an application before a United States commissioner, which was rejected by the local officers when received by them because William B. Cantrell had on March 13, 1923, applied to make entry under the stock-raising homestead act for all the land, which application was allowed the following day.

On April 12, 1923, Bailey filed an application to contest the entry, alleging settlement thereon on March 9, 1923, and since maintained. Testimony was submitted before a designated officer near the land on August 31, 1923, upon consideration of which the register held that Bailey had settled on 40 acres only, and recommended that the contest be dismissed as to all except 40 acres. On appeal, the Commissioner of the General Land Office held that Bailey did establish residence on some part of said Sec. 29 on March 9, 1923, the exact location of which could not be determined from the record. A further hearing was therefore ordered to determine the exact location of Bailey's dugout, fencing, and potato patch. A number of affidavits were filed, upon consideration of which the Commissioner held Cantrell's entry for cancellation as to N. ½ SE. ¼ and SW. ¼ SE. ¼, said Sec. 29, with a view to the allowance to that extent of Bailey's suspended application.

At an early date in the administration of the homestead law the Department established the rule that homestead improvements and settlement upon any part of a technical quarter section constituted notice as to all of the land therein. Later it was ruled that a settlement claim could extend beyond the limits of a technical quarter section provided the settler posted notices conspicuously upon each

legal subdivision or otherwise marked the same in such manner as to clearly indicate the extent of the claim. The act of August 9, 1912 (37 Stat. 267), provided for the recognition of settlement rights to the extent of 320 acres of land designated under the enlarged homestead act, provided the settler "shall have plainly marked the exterior boundaries of the lands claimed as his homestead." In *Northern Pacific Railway Company* v. *Morton* (43 L. D. 60), the Department held that the right of settlement is coextensive with the right of entry; and in the case of *Alfred O. Lende* (49 L. D. 305), it was held that the character of the land governs the area that may be embraced in a settlement claim.

Congress recognized the rule that the right of settlement is coextensive with the right of entry in providing in the stock-raising homestead act that no right under that law could be acquired prior to designation by settlement upon a tract sought as a stock-raising homestead. This provision was later modified. See the act of June 6, 1924 (43 Stat. 469).

In his application to make entry, executed March 13, 1923, Cantrell alleged that the land was "unoccupied and unappropriated by any person claiming the same under the public land laws other than myself," but he admitted on the witness stand that he had not seen the land between December 1, 1922, and July 3, 1923.

So far as Cantrell is concerned, even if Bailey had marked the boundaries of the 640 acres prior to March 13, 1923, it would not have affected Cantrell's action in making entry more than three months after he had last seen the land. Had he examined the land immediately prior to the date of his application—and it was his duty to do so—he would have learned that Bailey had settled thereon and was claiming the entire 640 acres—thus being notified as effectually as if the exterior boundaries had been marked.

One who could have learned of an adverse claim, but avoids notice thereof by a course of conduct which has never been sanctioned by the courts or the Department, can not be allowed to profit thereby.

It was necessary that Cantrell allege in his application that the land was not occupied adversely. It was admitted at the hearing that he had not seen the land for more than three months prior to the date of the execution of the nonoccupancy affidavit, and it is clearly shown that said affidavit was false, though the affiant may not have been aware thereof. Whatever claim of priority he might otherwise have asserted is based solely and nakedly upon the priority of his application, and the Department can not accord any effect to a claim of right based upon a false affidavit.

In view of all the facts, it must be held that Bailey's settlement on March 9, 1923, extended over the entire 640 acres, and that his

failure to mark the boundaries of the claim prior to March 13, 1923, can not be pleaded as a defense by Cantrell, whose action in making entry was in no way influenced by such failure.

For the reasons above expressed, the entry of Cantrell will be canceled and the application of Bailey allowed, the decision appealed from being modified to agree herewith.

BERG v. TAYLOR

Decided February 3, 1925

PATENT—COAL LANDS—RESERVATION—SURFACE RIGHTS—LEASE—LAND DEPARTMENT—COURTS—JURISDICTION.

After the issuance of a patent to public land, with a reservation of the coal contents to the United States, the Land Department retains jurisdiction over the coal deposits only, and controversies afterwards arising between the surface owner and a lessee of the reserved deposits pertaining to the use of the surface must be adjudicated in the courts.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Marathon Oil Company* v. *West, United States, intervener* (48 L. D. 150), cited and applied.

FINNEY, *First Assistant Secretary:*

On October 18, 1923, John Henry Taylor filed application 027307, Dickinson land district, North Dakota, for a coal lease under the general leasing law on lots 6, 7, E. ½ SW. ¼, Sec. 6, T. 129 N., R. 94 W., 5th P. M. On January 12, 1924, said land was segregated as Coal Leasing Unit No. 371, North Dakota No. 38. Notice of offer of said land for lease was advertised February 7 to March 6, 1924. Taylor was the highest bidder for the lease.

On March 1, 1924, Olaf E. Berg filed protest against the issuance of a lease to said lands, claiming that he is the surface owner thereof and that a lease should not issue until the surface rights have been adjudicated and compensated for, or until a sufficient bond has been executed by the lease applicant to indemnify the surface owner for damages that may be sustained.

The Commissioner of the General Land Office upon consideration of the record found that patents for said land had issued, subject to the provisions and reservations of the act of March 3, 1909 (35 Stat. 844), reserving the coal deposits to the United States, and by decision of August 18, 1924, dismissed the protest.

Berg has filed an appeal in which he contends that Taylor has not procured, as required by the act of March 3, 1909, *supra*, the consent of the surface owner nor entered into any recognizance or writing to pay damages to such owner caused by coal mining operations.

The United States has divested itself of title to this land by patents with reservations, under the above-mentioned act, of the coal deposits which belong to the United States and are subject to exploitation under the act of February 25, 1920 (41 Stat. 437).

The Department in the case of the *Marathon Oil Company* v. *West, United States, intervener* (48 L. D. 150), involving a similar question, but a reservation of oil and gas instead of coal, stated:

> The Department is inclined to the view that all rights pertaining to the homestead surface entries can be respected without infringing upon or unnecessarily interfering with the operations of the company in its pursuit of oil upon these tracts. The provisions of the surface act of July 17, 1914 (38 Stat. 509), and those contained in the leasing act of February 25, 1920, *supra*, are not in conflict, but are the complement of each other. From the homestead entries mineral rights and all incidents essential thereto are reserved, while in the lease and permit that may be issued to the mining claimant the rights pertaining to the estate of the surface claimant must be duly respected and protected.
>
> Any question that may arise as to actual possession of any portion of the area, or any possible difficulties between these two claimants, are matters over which this Department has no direct jurisdiction. Those matters must be investigated and adjudicated in the local tribunals having jurisdiction over the parties.

The Department has jurisdiction over the coal deposits only, after patent has issued for the surface. The law provides for the protection of the surface owner and it is his privilege to assert his rights by the appropriate process in the proper forum.

The Commissioner properly dismissed the protest. The decision appealed from is affirmed.

RABER v. SMITH, LEIGHT, INTERVENER

Decided February 3, 1925

CONTEST—STOCK-RAISING HOMESTEAD—RELINQUISHMENT—CONTESTANT—PREFERENCE RIGHT—AFFIDAVIT—NOTICE.

Where, after the initiation of a contest against an entry, the entryman relinquishes before notice of the contest is served upon him, the question as to whether the contestant should be accorded a preference right to enter the land will first be dependent upon the sufficiency of the affidavit of contest.

CONTEST—CONTESTANT—AFFIDAVIT—PREFERENCE RIGHT.

An affidavit of contest which contains charges that are mere statements of conclusions, unsupported by any allegations of fact, is not a good and sufficient affidavit upon which the contestant can predicate any rights under his contest.

FINNEY, *First Assistant Secretary:*

This is an appeal by Donald M. Leight from a decision of the Commissioner of the General Land Office dated November 3, 1924,

rejecting his application to make entry under the stock-raising homestead act for lots 7, 8, 9, 10, 15, 16, 17, and 18, Sec. 2, lots 6, 7, 8, 9, 10, 11, and 12, Sec. 3, T. 57 N., R. 61 W., 6th P. M., Newcastle, Wyoming, land district, as additional to his entry under section 2289, Revised Statutes, for (as amended) lot 10, Sec. 23, said township.

The application was filed July 12, 1924, together with the relinquishment by George W. Smith of his entry under section 1 of the stock-raising homestead act, made February 19, 1920, for the tract above described and lot 5, Sec. 3, said township. It was rejected for conflict with the application of Samuel J. Raber to make entry for all the land embraced in Smith's entry, which application was filed within 30 days after notice of the cancellation of Smith's entry.

The record discloses that on June 18, 1924, said Raber filed an application to contest the entry of Smith, alleging that—

> Entryman has wholly abandoned the above-described land for a period exceeding seventeen months last past; that said absence from the land was not due to his employment in the military or naval service pursuant to an enlistment antedating March 3, 1921; that entryman has failed to comply with the act of December 29, 1916, relative to required improvements to be placed on the land within the first three years.

Proof of service on Smith on June 28, 1924, of notice of the contest was filed July 17, 1924.

In rejecting Leight's application, the Commissioner held that it must be conclusively presumed that the relinquishment was the result of the contest, quoting paragraph 2 of the instructions of April 1, 1913 (42 L. D. 71), as follows:

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

In view of the fact that it did not appear of record when the relinquishment was filed that notice of the contest had been served on Smith, the provisions of the paragraph quoted are not controlling. The controversy is governed by paragraph 3 of said instructions, which directs the practice to be followed if the entry should be relinquished—

> Where a good and sufficient affidavit of contest has been filed against an entry and no notice of contest has issued on such affidavit, or, if issued, there is no evidence of service of such notice upon the contestee.

Under the provisions of said paragraph 3, it must first be determined whether the contest affidavit was "good and sufficient."

The application of Smith to make entry was filed July 27, 1918. The entry was allowed February 19, 1920, and more than four years and four months had elapsed from date of the entry when Raber's contest affidavit was filed. Because of the lapse of time referred to, the charge that "entryman has wholly abandoned the above-described land for a period exceeding seventeen months last past," unsupported by any allegation of fact which negatives the possibility that entryman had completed the period of residence required, did not state a cause of action. Likewise, the charge that entryman "has failed to comply with the act of December 29, 1916, relative to required improvements to be placed on the lands within the first three years" is subject to the objection that it does not appear that contestant was familiar with the requirements of the law in that particular, and hence able to correctly conclude that the law had not been complied with. Even if one-half of the required improvements had not been placed on the land within three years from date of entry, the improvements might have been made at a later date, thus curing the laches before the intervention of a contest charging default in that particular.

Both of the charges set forth in the affidavit of contest are but the statements of conclusions, unsupported by any allegations of fact. In view of which it must be held that Raber can not claim any rights under his contest, and that the application of Leight must be allowed.

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

RABER v. SMITH, LEIGHT, INTERVENER

Motion for rehearing of departmental decision of February 3, 1925 (51 L. D. 46), dismissed by First Assistant Secretary Finney, April 13, 1925.

SEGREGATION BY WATER DEVELOPMENT PERMIT NOT A WITHDRAWAL OF PUBLIC LAND

Instructions, February 6, 1925

WATER PERMIT—WITHDRAWAL—RESTORATIONS—MILITARY SERVICE—PREFERENCE RIGHT.

The segregation of land during the lifetime of a permit to drill or explore for water issued pursuant to the act of October 22, 1919, is not a withdrawal thereof within the meaning of the public resolutions granting preference right of entry to those formerly in the military or naval service of the United States during the world war upon the restoration to entry of public lands theretofore withdrawn from entry.

FINNEY, *First Assistant Secretary:*

I return, without approval, your [Commissioner of the General Land Office] letter addressed to the United States Land Office at

Elko, Nevada, declaring that the SE. ¼, E. ½ NE. ¼, E. ½ SW. ¼, W. ½ NW. ¼, Sec. 20, and E. ½ NE. ¼, Sec. 19, T. 23 N., R. 38 E., M. D. M., will become subject to entry, at a date fixed, under section 2289, Revised Statutes, subject to the preference right granted by Public Resolution No. 20, approved February 14, 1920 (41 Stat. 434), as amended by Public Resolutions Nos. 36 and 79, approved January 21, 1922 (42 Stat. 358), and December 28, 1922 (42 Stat. 1067), respectively.

It appears that on January 17, 1922, the Department granted to Carl Johnson a permit (Elko 04424) under the act of October 22, 1919 (41 Stat. 293), to drill or otherwise explore for water beneath the E. ½ E. ½, Sec. 19, SW. ¼, W. ½ NW. ¼, SE. ¼, E. ½ NE. ¼, Sec. 20, T. 23 N., R. 38 E., M. D. M. (640 acres). The permittee submitted final proof on December 20, 1923, selecting for patent the E. ½ SE. ¼, Sec. 19, and W. ½ SW. ¼, Sec. 20. Final certificate issued December 8, 1924.

The act of October 22, 1919, *supra*, after making provision for the issuance of patent for one-fourth of the land embraced in the permit, provides (section 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.

Section 1 of the act provides that land embraced in a permit "shall not be fenced or otherwise exclusively used by the permittee except as herein provided."

While land embraced in a permit is not subject to entry, the segregation of the land during the lifetime of the permit is not a withdrawal thereof within the meaning of the public resolutions referred to in your letter. The effect of the submission of acceptable final proof by a permittee and the issuance of patent for a portion of the land embraced in a permit is to render the unpatented portion subject to entry only under section 2289, Revised Statutes, and the local officers should be instructed to so note on their records; but there is no justification for granting a preference right of entry to the class of persons named in the said public resolutions.

RECORDS—NOTATION OF CANCELLATION OF OIL AND GAS PERMITS IN ALASKA—CIRCULAR NO. 929, MODIFIED

INSTRUCTIONS

[Circular No. 979]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 12, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES IN ALASKA:

Hereafter the cancellation of an oil and gas permit in Alaska will be made effective on a certain date specified by the letter of cancellation, but no application will be allowed for a period of sixty-two days from and after such date of cancellation.

During this sixty-two day period applications for permits will be received by the proper local land office and held without action, and during the same period a claim may be initiated by locating, marking and posting on the land as provided by section 13 of the leasing act.

All applications filed during said period shall be treated as having been filed at 9 a. m., on the sixty-third day and will be disposed of by a drawing held publicly by you at 12 m. of said sixty-third day.

The successful applicant will be advised of the result of the drawing, but the application will be held suspended until the expiration of six months from date of drawing when if no application based upon proper marking and posting within the sixty-two days following cancellation has been presented, you will allow the successful applicant to complete his application and forward it to this office with your report.

If an application based on proper location, marking, and posting the land within the sixty-two day period is presented within six months from the date of such location, marking, and posting, the applicant thereunder will have prior right to the land and his application will be allowed and that of the successful applicant at the drawing rejected subject to right of appeal. As between two or more applications, timely filed, based on posting the land during the sixty-two day period, priority of posting will determine priority of right to a permit. Attention is also called to Circular No. 966 (50 L. D. 669).

Circular No. 929 (50 L. D. 387), is modified so far as it conflicts with the regulations herein.

WILLIAM SPRY,
Commissioner.

Approved.
E. C. FINNEY,
First Assistant Secretary.

ABSTRACTS OF TITLE TO LANDS TENDERED AS BASE FOR LIEU SELECTIONS

Instructions, February 13, 1925

FOREST LIEU SELECTION—RELATION.

Upon the approval of a forest lieu selection the title to the base land relates back to the date that the deed of conveyance to the United States was recorded.

FOREST LIEU SELECTION—ABSTRACT OF TITLE—VESTED RIGHTS.

After the conveyance of base land to the United States no subsequent act of the prior holder of the title thereof or of any other person can invalidate the title thus acquired and, unless it appears that prior to the date of selection the Land Department had formally disclaimed title to the base land, a supplemental abstract down to the date of selection should not be required if the abstract on file shows that at the time the deed of conveyance was recorded there were no adverse claims.

DEPARTMENTAL DECISIONS OVERRULED SO FAR AS IN CONFLICT.

Cases of *C. W. Clarke* (32 L. D. 233), *Thomas F. Arundell* (33 L. D. 76), *Mary E. Coffin* (34 L. D. 564), and *A. G. Strain* (40 L. D. 108), overruled so far as in conflict.

FINNEY, *First Assistant Secretary:*

The Department has considered your [Commissioner of the General Land Office] letter of the 8th instant requesting instructions as to whether the unreported departmental decision of July 12, 1923, involving three selections (Cheyenne 033257, 033259, 033260) under the exchange provisions of the act of June 4, 1897 (30 Stat. 11, 36), should be considered as overruling several reported decisions. You state that for more than twenty years last past it has been the practice of your office to require applicants for lieu selections under the acts of June 4, 1897, *supra*, June 6, 1900 (31 Stat. 588, 614), and March 3, 1905 (33 Stat. 1264), to bring their abstracts of title to the lands tendered as base up to the date of their selections, except where the base lands are situated in the State of Arizona, the theory being—

that the recording of a deed purporting to convey lands to the United States and tender thereof to this Department constitute a mere assertion by the applicant of his title to the land and his right to make selection, and that no equitable right to the land vests in the United States until the title has been examined, approved, and accepted.

In support of the theory on which your office has proceeded you cite a paragraph from the case of *C. W. Clarke* (32 L. D. 233), wherein it was stated that it is a necessary deduction from the decision of the Supreme Court in *Cosmos Exploration Company* v. *Gray Eagle Oil Company* (190 U. S. 301), that all equitable right of property in the land relinquished remains in the proponent until the title is examined, approved, and accepted.

The reported decisions referred to by you are the cases of *C. W. Clarke*, *supra*, *Thomas F. Arundell* (33 L. D. 76), *Mary E. Coffin* (34 L. D. 564), and *A. G. Strain* (40 L. D. 108).

The decision of July 12, 1923, was rendered on a petition for the exercise of supervisory authority filed by the selector after your office had required him to furnish a supplemental abstract of title of the base land in each case. The three selections were filed January 2, 1923. The base land was deeded to the United States more than 20 years prior to the date of the selections, and the abstracts of title were brought down to May 20, 1922, October 21, 1922, and October 23, 1922, respectively—approximately the date of the selections. It was because thereof that the Department vacated your requirement, holding—

> The base lands having been conveyed to the United States on the dates named, no subsequent act of the prior holder of the title or of any other person could invalidate the title thus acquired. * * *

It is apparent that the decision of July 12, 1923, did not overrule any prior decision, reported or unreported, but merely relieved the selector from a useless expense and unnecessary delay.

The act of June 4, 1897, *supra*, was repealed by the act of March 3, 1905 (33 Stat. 1264). Prior to the approval of the latter act, large areas within forest reserves had been relinquished to the United States with the intention of taking advantage of the exchange provisions of the act of 1897. Many selections, based on such reconveyances, were pending, and the repeal act of 1905 provided—

> That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

The act of September 22, 1922 (42 Stat. 1017), provides—

> That where any person or persons 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 (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.

The act last above quoted is clearly based on the theory that the deeds of reconveyance recorded prior to March 3, 1905, vested title in the United States, even though a selection based thereon had not been filed. However, it is now well established—notwithstanding some prior decisions of the Department to the contrary—that upon the approval of selections the title of the base land relates back to the date the deed of conveyance to the United States was recorded. This was the purport of the decision of the Supreme Court of the State of Oregon in a suit to vacate various conveyances of school land made by officers of the State.

In view of the foregoing, unless it appears that your office has at some prior date formally disclaimed title to the land tendered as base, it is unnecessary to require a supplemental abstract brought down to the date of the selection if the abstract on file shows that at the date the deed of conveyance was recorded there were no adverse claims. All prior decisions of the Department to the contrary are hereby overruled.

AUTHORITY OF FEDERAL POWER COMMISSION TO GRANT LICENSES FOR POWER PROJECTS IN PORTO RICO

Opinion, February 18, 1925

WATER RIGHT—RESERVATION—FEDERAL WATER POWER ACT.

By the enactment of the Federal Water Power Act, Congress contemplated that all of the waters on the public or reserved lands of the United States which are or may become available for the generation of power should be

reserved and set apart under such conditions as to result in the greatest public good, without regard as to their location within particular territorial limits.

PORTO RICO—TERRITORY—WORDS AND PHRASES.

Porto Rico is not a Territory of the United States within the meaning of that term as it is generally used by Congress in dealing with the Territories.

PORTO RICO—RESERVATION—JURISDICTION.

The reserved lands in Porto Rico and the waters on them are subject to the control of Congress and the legislature of that island has no jurisdiction over them.

PORTO RICO—WATER RIGHT—POWER PROJECTS—RESERVATION—PUBLIC LANDS—FEDERAL POWER COMMISSION—JURISDICTION.

The Federal Power Commission may legally grant licenses for power projects on any of the lands in Porto Rico which belong to and have been reserved by the United States, but it is without that authority with respect to all other lands of that island, inasmuch as they are not "public lands of the United States."

COURT DECISIONS CITED AND APPLIED—OPINIONS OF THE ATTORNEY GENERAL CITED AND APPLIED.

Cases of *Kopel* v. *Bingham* (211 U. S. 468), *Santiago* v. *Nugueras* (214 U. S. 260), *American Railroad Company of Porto Rico* v. *Didricksen* (227 U. S. 145), and *Balzac* v. *People of Porto Rico* (258 U. S. 298), cited and applied; Opinions of the Attorney General (22 Ops. Atty. Gen. 544; 22 id. 546; and 24 id. 8), cited and applied.

EDWARDS, *Solicitor:*

At the suggestion of its Executive Secretary, my opinion has been asked as to whether or not the Federal Power Commission is authorized by law to issue licenses for power projects, or project works in Porto Rico.

The Commission was created and established by the act of June 10, 1920 (41 Stat. 1063), section 4 of which, in its paragraph (d) says that it shall be authorized—

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from, or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories) * * *

From this it will be seen that there are two questions involved in the consideration of this matter: *First.* As to whether Porto Rico is one of the "Territories" of the United States, in the sense in which that word was used in that act? *Second.* Are the lands and waters in Porto Rico any part of the waters and public lands

and reservations of the United States, such as are subject to the jurisdiction of that Commission?

Inasmuch as the principles involved are serious and important, involving as they do the relationship between Porto Rico and our Government, I will give these questions extended consideration.

Of the areas lying outside of the continental limits of, and under the dominion of the United States at the time of the passage of that act there were but two, Alaska and Hawaii, which had been recognized and denominated by Congress as "Territories"; while the others, including Porto Rico, were usually called and generally spoken of as "Insular Possessions," and referred to in the statutes by their proper names only.

As pertinent to both the questions under consideration we find that by the treaty of December 10, 1898 (30 Stat. 1754), Spain ceded to the United States its sovereignty over Porto Rico and also "all buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain."

Prior to that treaty the Crown of Spain was the owner for public use of the proprietary rights in the natural beds or channels of rivers, both navigable and unnavigable, to the extent to which they were covered by ordinarily high waters (22 Ops. Atty. Gen. 546). That title to them, as well as to the "public lands," passed to our Government, and not to Porto Rico (24 id. 8), and were subject to disposal by Congress; but in the absence of a statute conferring such power they could not be disposed of by the Executive Department of the Government (22 id. 544), because by the ratification of the treaty the island passed merely under the legislative power of Congress. The civil Government of the United States did not extend to it immediately and of its own force or at all until Congress prescribed a form of government and either enacted new laws, continued the laws of Porto Rico or extended the laws of the United States. Prior to such enactments it was subject to control and government by the President as Commander in Chief. *Santiago* v. *Nugueras* (214 U. S. 260). Furthermore, the Supreme Court has declared that Porto Rico has never been incorporated into and made a part of the United States, and hence the provisions of our Constitution guaranteeing a trial by jury in all criminal prosecutions do not apply there. *Balzac* v. *People of Porto Rico* (258 U. S. 298); *Santiago* v. *Nugueras* (214 U. S. 260, 265); *Kopel* v. *Bingham* (211 U. S. 468). That Congress has not regarded and treated Porto Rico as a Territory, or as being subject to the provisions of our statutes relating to territories generally, is shown by the fact that it has enacted certain laws as to it, as, for instance, it has declared that appeals and writs of error lie

from its courts to the Supreme Court of the United States "in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States," an enactment that would have been wholly unnecessary if Porto Rico had been a "Territory." Again, territories are represented in Congress by delegates, while the representative of Porto Rico is a resident commissioner.

On April 12, 1900, "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes" (31 Stat. 77), was approved. Section 7 of that act declared that the inhabitants of Porto Rico within certain classes there specified "shall constitute a body politic under the name of 'The People of Porto Rico,' with governmental powers as hereinafter conferred, and with the power to sue and be sued as such." Section 8 continued "the laws and ordinances of Porto Rico" then in force, while section 14 provided "that the statute laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws, * * *."

The act provided for a governor and other customary executive officers, and vested legislative authority in two houses, the upper of which was to be composed of an appointive executive counsel created by the act, and the other to consist of members elected by the people. A judiciary branch was also provided for.

The act declares that the enacting clause of new laws shall read, "Be it enacted by the legislative assembly of Porto Rico," that prosecutions for the violation of penal statutes shall be in the name of "The People of Porto Rico"; and that the official title of the chief executive officer should be "The Governor of Porto Rico." But Porto Rico was nowhere referred to in that act or elsewhere as a Territory; and other than what has been stated above as to corporate name, no name was given to it, except in its provisions relating to its judiciary, where it was said it "shall constitute a judicial district to be called the district of Porto Rico," and as we have seen it is not an integral part of the United States.

On March 2, 1917 (39 Stat. 951), a statute was approved which was entitled "An Act to provide a civil government for Porto Rico, and for other purposes." In the first section of that act it was declared that its provisions "shall apply to the island of Porto Rico and adjacent islands belonging to the United States," and like the act of 1900, it failed to mention Porto Rico as a "Territory," and in this it failed to make the declaration made in the act of April 30, 1900 (31 Stat. 141), approved only eighteen days after the approval of the first Porto Rican act, which was entitled "An Act to provide a government for the Territory of Hawaii," and which in its section

2 says that the area involved "shall be known as the Territory of Hawaii." And it did not contain any declaration even remotely akin to the act of August 24, 1912 (37 Stat. 512), which declared that the area ceded to our nation by Russia in 1867 "shall constitute the Territory of Alaska under the laws of the United States."

The act of 1917 repeated and amplified the provisions of the act of 1900 in so far as it related to the government and internal affairs of Porto Rico, but did not change its political status in so far as the question I am considering is concerned.

Notwithstanding what I have said Porto Rico has been recognized as having some of the attributes of a "Territory."

Section 5287, Revised Statutes, authorizes "the executive authority of any State or Territory" to make requisition upon the executives of other "States or Territories" for the surrender of fugitives from justice, and in *Kopel* v. *Bingham* (211 U. S. 468), it was held that although Porto Rico "is not a Territory incorporated into the United States," its Governor "has the same power that the governor of any organized Territory has to issue such requisitions."

In *American Railroad Company of Porto Rico* v. *Didricksen* (227 U. S. 145), it was held that an act extending the laws relating to the use of safety appliances to "the Territories and the District of Columbia" is operative in Porto Rico.

Coming now to the question as to ownership and control of the waters and public domain in Porto Rico, we find, as has already been pointed out, that that ownership vested in the United States upon the ratification of the treaty with Spain, subject to disposition by Congress, alone; and that no interest in, or control over it passed to Porto Rico by virtue of the treaty.

By section 13 of the act of 1900, *supra*, it was declared—

> That all property which may have been acquired in Porto Rico by the United States under the cession of Spain in said treaty of peace in any public bridges, road houses, water powers, highways, unnavigable streams, and the beds thereof, subterranean waters, mines, or minerals under the surface of private lands, and all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor-works boards of Porto Rico, and all the harbor shores, docks, slips, and reclaimed lands, but not including harbor areas or navigable waters, is hereby placed under the control of the government established by this Act to be administered for the benefit of the people of Porto Rico; and the legislative assembly hereby created shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable.

The act of July 1, 1902 (32 Stat. 731), provided—

> That the President be, and he is hereby, authorized to make, within one year after the approval of this Act, such reservation of public lands and buildings belonging to the United States in the island of Porto Rico, for military,

naval, light-house, marine-hospital, post-offices, custom-houses, United States courts, and other public purposes, as he may deem necessary, and all the public lands and buildings, not including harbor areas and navigable streams and bodies of water and the submerged lands underlying the same, owned by the United States in said island, and not so reserved be, and the same are hereby, granted to the government of Porto Rico, to be held or disposed of for the use and benefit of the people of said island: *Provided*, That said grant is upon the express condition that the government of Porto Rico, by proper authority, release to the United States any interest or claim it may have in or upon the lands or buildings reserved by the President under the provisions of this Act: *And provided further*, That nothing herein contained shall be so construed as to affect any legal or equitable rights acquired by the government of Porto Rico or by any other party, under any contract, lease, or license made by the United States authorities prior to the first day of May, nineteen hundred.

Section 13 of the act of 1900, quoted above, was amended and extended by section 7 of the act of March 2, 1917, *supra*, to read as follows:

That all property which may have been acquired in Porto Rico by the United States under the cession of Spain in the treaty of peace entered into on the tenth day of December, eighteen hundred and ninety-eight, in any public bridges, road houses, water powers, highways, unnavigable streams and the beds thereof, subterranean waters, mines, or minerals under the surface of private lands, all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Porto Rico, all the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not heretofore reserved by the United States for public purposes, is hereby placed under the control of the government of Porto Rico, to be administered for the benefit of the people of Porto Rico; and the Legislature of Porto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable: *Provided*, That the President may from time to time, in his discretion, convey to the people of Porto Rico such lands, buildings, or interests in lands or other property now owned by the United States and within the territorial limits of Porto Rico as in his opinion are no longer needed for purposes of the United States. And he may from time to time accept by legislative grant from Porto Rico any lands, buildings, or other interests or property which may be needed for public purposes by the United States.

From this it will be seen that Congress has not only granted to Porto Rico all its public lands on that island which had not been reserved prior to July 1, 1903, and also all the waters and unnavigable water courses thereon, but it declared that they were to be administered by and that its legislature should have authority to "legislate with respect to all such matters as it may deem advisable." It is therefore evident that Congress did not intend that our Government should dispose of, control, or receive any benefit from such lands, water powers, and streams except from such of them as had been reserved and continued to be needed for its public use, because we find in the act of 1917 a declaration that when reserved lands are no longer used for public purposes they shall be

conveyed to the people of Porto Rico. And that act went even further in its recognition of the ownership of Porto Rico to all public property not reserved when it provided that the President "may from time to time accept by legislative grant from Porto Rico any lands, buildings, or other interests or property which may be needed for public purposes by the United States."

It was evidently the intent of Congress in passing the Federal Water Power Act that all of the waters on its public or reserved lands which are, or may become available for the generation of power, should be reserved and set apart for that purpose under such conditions as would result in the proper use and control of such waters and in the disposition and use of the power in such manner as will result in the greatest public good. The location of such waters within particular territorial limits was not, in my judgment, a controlling factor in the consideration and passage of that act.

These facts, coupled with the further fact that neither the reserved lands in Porto Rico, nor the waters on them are in any way subject to the control of Porto Rico, lead me to the conclusion that Congress did not intend to exclude such lands and waters from the operation of the Water Power Act, regardless of the fact that Porto Rico is not, strictly speaking, a Territory, in the sense in which that word is usually used. To hold otherwise would be tantamount to saying that if that act does not apply to such reserved lands the power facilities on them can never be developed, and the water must go to waste so far as the development and use of power is concerned, because Porto Rico can not control their use for any purpose.

But aside from that consideration we find that the laws of Porto Rico have, in effect, sanctioned the use and control of such waters by the United States, as the mere owner of the land. Section 2387, Revised Statutes and Codes of Porto Rico, declares that "rain water which falls on an estate belongs to the owner of such estate while flowing thereon. He may, consequently, construct within his property reservoirs, dams, cisterns, or ponds for their retention, or employ any other adequate means, provided the public or third persons are not prejudiced thereby."

As to other than rain water, section 2391, id., provides that "waters which rise continuously or intermittently on property belonging to private individuals, or to the State, Provinces, or towns, belong to the respective owner, and may be used and enjoyed by such owner while flowing through such property."

It is well settled that the United States has the same or greater rights and powers of use and control over its property as individual proprietors have over lands privately owned by them.

If the conclusion that the provisions of the Federal Water Power Act relating to the reservation of power sites and their disposition

and control may be applied to the reserved lands in Porto Rico needs the support of precedent it may be found in the fact that lands have been reserved there for national forests under section 23, act of March 3, 1891 (26 Stat. 1095, 1103), which authorizes the President to "set apart and reserve, in any State or Territory, * * * any part of the public lands wholly or in part covered with timber * * *."

If Porto Rico is so far a "Territory" as to justify the creation of forest reserves there, as to empower its governor to make requisitions for fugitives from justice, and as to make the common carrier safety appliance statute operative there, it can not be very well said that the Water Power Act does not apply there because it is not a Territory.

In conclusion I have the honor to inform you that in my opinion the Federal Power Commission may legally grant licenses for power projects, or project works on any of the lands in Porto Rico which belong to and have been reserved by the United States; but it does not have that power as to any other class of lands there because they belong to Porto Rico, and are not "public lands of the United States."

BESSIE CHMEL

Decided February 18, 1925

HOMESTEAD ENTRY—ENTRY—ACT OF MAY 20, 1908.

A purchase of public land under section 5 of the act of May 20, 1908, is not in any sense a homestead entry; it is, however, to be classified as an entry under the agricultural land laws.

FINNEY, *First Assistant Secretary:*

You [Commissioner of the General Land Office] have submitted to the Department an inquiry made by Miss Bessie Chmel as to the area of public land she is qualified to enter under the homestead law, she having purchased 80 acres under section 5 of the act of May 20, 1908 (35 Stat. 169).

While the section referred to provides that purchasers thereunder must have the qualifications of a homestead entryman, the purchase is not in any sense a homestead entry, hence Miss Chmel's right under the homestead law was in no way affected by the purchase. However, as the purchase must be classified as an entry under the agricultural land laws, her rights under those laws—excepting, of course, the homestead law—are satisfied to the extent of 80 acres, leaving her qualified—if she has not made an entry under the timber and stone, desert land, or preemption laws for more than 80 acres, and no entry whatever under the homestead laws—to make entry

for the maximum area allowed by section 2289, Revised Statutes, the enlarged homestead act, or the stock-raising homestead act.

SETTLEMENT WITHOUT RESIDENCE ON UNSURVEYED LAND UNDER THE STOCK-RAISING HOMESTEAD ACT

Instructions, February 19, 1925

STOCK-RAISING HOMESTEAD—SETTLEMENT—RESIDENCE.

Where there is no vacant public land of the character contemplated by the stock-raising homestead act contiguous to a patented entry, one owning and residing upon such an entry may initiate a settlement claim under that act on unsurveyed land within twenty miles without establishing residence thereon, provided that the unsurveyed land has been designated as stock-raising and the land in the patented entry is of the same character.

STOCK-RAISING HOMESTEAD—ADDITIONAL—RESIDENCE.

If a tract of unsurveyed land, incontiguous to the original entry, has not been designated under the stock-raising homestead act, one seeking to make an additional entry thereof under that act can not initiate a claim thereto without establishing residence thereon.

FINNEY, *First Assistant Secretary:*

I have your [Register of the United States Land Office, Las Cruces, New Mexico] letter of January 20 last, addressed to the Commissioner of the General Land Office.

If there is no vacant public land of the character contemplated by the stock-raising homestead act contiguous to his patented entry, a person who owns and resides on such an entry can initiate a settlement claim under the stock-raising homestead act on unsurveyed land within 20 miles without establishing residence thereon, provided the unsurveyed land has been designated as of the character contemplated by the stock-raising homestead act, and provided also that the land in the patented entry has been similarly designated or is subject to such designation; but it is suggested that a person who avails himself of this privilege indicate his claim by doing more than merely posting a notice. If he maintain a fence around the land and keep posted a notice giving the location of his residence and that he claims the land under section 5 of the stock-raising homestead act, other persons will not be misled by the absence of residence thereon.

If the unsurveyed land which your correspondent is interested in has not been designated as stock-raising, he is at liberty to petition the Director of the Geological Survey to recommend its designation, and at the same time request the designation of the land in the patented entry.

If the unsurveyed land has not been designated, the patentee on whose behalf your inquiry was made can not initiate a claim thereto without establishing residence thereon.

QUALIFICATIONS AS TO CITIZENSHIP TO SECURE TITLE TO PUBLIC MINERAL LANDS

Instructions, February 26, 1925

MINING CLAIM—CITIZENSHIP.

Ownership of the stock of a corporation organized under the laws of the United States or of any State or Territory thereof by persons, associations, or corporations not citizens of the United States, does not preclude such corporation from acquiring claims under the mining laws.

SECRETARY'S OPINION CITED AND APPLIED.

Opinion of the Secretary (28 L. D. 178), cited and applied.

FINNEY, *First Assistant Secretary:*

From the report of your [Commissioner of the General Land Office] field agents it appears that an English corporation, known as the Borax Consolidated, Limited, now owns all or practically all the stock of both the Pacific Coast Borax Company and the United States Borax Company through purchases from the former stockholders of the last-named companies, which were incorporated in good faith by citizens of the United States under the laws of California and West Virginia, respectively; and in your letter of January 24, 1925 (Independence 04520), you state—

> This office is of the opinion that so far as the record discloses, the Pacific Coast Borax Company and the United States Borax Company are qualified as to citizenship to secure title to public mineral lands, but in view of the difference of opinion on that point, the opinion of the Department is requested.

An affirmative answer to this question was given in this Department's unpublished decision of March 25, 1918, in the case of *United States* v. *California Trona Company*, and in Secretary Hitchcock's opinion of March 9, 1899 (28 L. D. 178, 180), where it was said:

> * * * a corporation organized under the laws of the United States or of any State or Territory thereof may, under sections 2319 and 2321 of the Revised Statutes, occupy and purchase mining claims from the government, irrespective of the ownership of stock therein by persons, corporations, or associations not citizens of the United States.

CAROLINE COLEMAN

Decided February 28, 1925

PATENT—HOMESTEAD ENTRY—OIL AND GAS LANDS—PROSPECTING PERMIT—WAIVER—LAND DEPARTMENT—JURISDICTION.

Where a limited patent has been issued in pursuance of the act of July 17, 1914, to a homestead entryman who, after making entry, secured a permit to prospect for oil and gas and voluntarily waived the mineral rights in the land in support thereof, the Land Department, in the absence of statutory authority, is without jurisdiction and has no power to accept surrender of the patent and to reissue an unrestricted patent, even though the land be in fact nonmineral in character.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Thaddeus McNulty* (14 L. D. 534) and *Wright-Blodgett Company* (36 L. D. 238) cited and applied.

FINNEY, *First Assistant Secretary:*

November 1, 1917, Caroline Coleman, formerly Vind, made enlarged additional homestead entry Lewistown 041265, for NE. ¼ SW. ¼, Sec. 28, T. 13 N., R. 25 E., M. M.; and in September, 1920, she and John A. Coleman made a joint application for an oil and gas prospecting permit, 045032, on that tract and other lands.

On some date not shown the entrywoman filed her consent "to the amendment of said entry by the insertion therein of the following: Application made in accordance with and subject to the provisions and reservations of the act of July 17, 1914." Indorsements to that effect were made, on dates not given, on both the entry papers and the final certificate issued on proof made after the filing of the application for the permit; and on July 25, 1923, a patent issued which contained a reservation of all minerals in the land to the United States and subjected the tract to the provisions and limitations contained in said act of 1914.

Later the entrywoman filed the application now under consideration, in which she relinquished her rights under the permit and asked that the patent issued to her be canceled and a new and unrestricted one be issued in lieu of it, on the ground that she was induced to join in the application for the permit by misrepresentation that the land probably contained oil or gas, when in fact its characteristics and location so strongly indicated its nonmineral character that she had been unable either to induce others to prospect on it for oil or to secure the means with which she could do so herself.

By its decision of September 24, 1924, the General Land Office denied that application on the ground that the Director of the Geological Survey, to whom it had been referred for consideration, had made a report which in his opinion justified that action.

In her appeal from that decision the entrywoman does no more than to assert that the "Commissioner erred in finding that said lands were mineral in character."

It is needless here to consider that question, because, even if the character of the land is such as to justify otherwise the granting of this application, the application must be denied on the fundamental principle that this Department is without further jurisdiction in the matter and has not the power to grant this request. This patent conforms exactly to the record on which it was based, a record created by the applicant's own act in securing a prospecting permit and by her voluntary waiver filed in its support, without which it would not have been granted, and it is settled that, "when a patent has issued in conformity with the record upon which the right to the patent is predicated, and has been signed, sealed, countersigned, and recorded, the title to the land has passed and the land department is without further jurisdiction over the patent" and "without authority to accept a surrender thereof, for the amendment of the record and reissuance of patent in accordance with the record as amended." *Wright-Blodgett Co.* (36 L. D. 238, 240). *Thaddeus McNulty* (14 L. D. 534).

This rule of the law must have been recognized by Congress when it thought it necessary to pass the act of April 14, 1914 (38 Stat. 335), in which specific authority was given for the issuance of unlimited patents in cases where patents already issued contained reservations of coal under the acts of March 3, 1909 (35 Stat. 844), and June 22, 1910 (36 Stat. 583), and the lands patented were subsequently classified as noncoal.

If a statute was necessary to give the power to issue an unlimited patent in cases where the Government by its own classification and declaration had said that the patented land was nonmineral, certainly the conferring of that power by Congress in cases such as the present one would be required before it could be lawfully exercised.

Again, another insurmountable reason why this request can not properly be granted is found in the fact that this prospecting permit was issued jointly to this applicant and John A. Coleman, and while she has relinquished her rights under it he has not done so.

For these reasons the denial of the application for a new patent is hereby sustained.

LANDS WITHIN PETROLEUM RESERVES EXCEPTED FROM ENTRY UNDER THE STOCK-RAISING HOMESTEAD ACT—CIRCULAR NO. 913, MODIFIED—ACT OF FEBRUARY 7, 1925

INSTRUCTIONS

[Circular No. 983]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 12, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Section 12 of the act of February 7, 1925 (43 Stat. 809), reads as follows:

That existing entries allowed prior to April 1, 1924, under the Stock-Raising Homestead Act of December 29, 1916 (Thirty-ninth Statutes at Large, page 862), for land withdrawn as valuable for oil or gas, but not otherwise reserved or withdrawn, are hereby validated, if otherwise regular: *Provided*, That at date of entry the land was not within the limits of the geologic structure of a producing oil or gas field.

In view thereof, paragraph 2 of Circular No. 913 (50 L. D. 261), approved February 2, 1924, entitled "Land in petroleum reserves not subject to entry under the Stock-Raising Homestead Act," which reads—

As to stock-raising entries heretofore allowed for land within the limits of petroleum reserves, you will, on the submission of satisfactory final proof, forward all papers to this office, without the issuance of final certificate.

is hereby modified to read—

As to entries allowed prior to April 1, 1924, under the Stock-Raising Homestead Act of December 29, 1916 (39 Stat. 862), for land withdrawn as valuable for oil or gas but not otherwise reserved or withdrawn, if otherwise regular, on submission of satisfactory final proof, you will issue final certificate and note on the face thereof "Validated by Sec. 12, act of February 7, 1925." However, if at date of the entry, the land was within the limits of the geologic structure of a producing oil or gas field, you will not issue the final certificate but will forward all papers to this office.

This act does not validate or protect any stock-raising homestead entries allowed after April 1, 1924. You will report such cases, if any be pending in your office, for appropriate action. Care should be exercised in future not to allow any stock-raising homestead entries within the limits of lands withdrawn or designated as valuable for oil or gas, and applications for such lands should be rejected when presented.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

NATIONAL FUEL COMPANY

Decided March 17, 1925

REPAYMENT—ASSIGNMENT—TRANSFER.

No right to recover purchase moneys and commissions under the repayment statutes can be recognized in an assignee of a canceled entry where the purported transfer of the land occurred after the cancellation of the entry became effective.

REPAYMENT—STATUTE OF LIMITATIONS.

Repayment of purchase moneys and commissions subject to refund under the act of March 26, 1908, as amended by the act of December 11, 1919, is barred if not filed within two years from the date of rejection of the application, entry, or proof, where such rejection is subsequent to December 11, 1919, or within two years thereafter where the rejection occurred prior thereto.

DEPARTMENTAL DECISIONS AND INSTRUCTIONS APPLIED—COURT OF CLAIMS DECISION DISTINGUISHED.

Cases of *Mary Ward* (39 L. D. 495), *Helen Serret* (42 L. D. 537), *Dorathy Ditmar* (43 L. D. 104), and paragraphs 35, 36, and 49, instructions of October 25, 1916 (45 L. D. 520), applied; case of *Anthracite Mesa Coal Mining Company* v. *United States* (38 Ct. Cls. 66), distinguished.

FINNEY, *First Assistant Secretary:*

March 19, 1906, Charles L. Thompson made coal entry at the Pueblo, Colorado, land office for the NE. ¼ SW. ¼ Sec. 13, T. 32 S., R. 64 W., 6th P. M., for which payment was made at the rate of $20 per acre, a total of $800.

May 21, 1906, the Suffield Coal Company filed protest against said entry, alleging that the entry was fraudulently made; that the land had no coal value; that the entryman had no funds of his own; and that the purchase money was supplied by other parties in pursuance of an understanding designed to obtain an undue advantage of the protestant who had a tramway across said tract, which was used in connection with mining operations on an adjacent tract. A hearing was ordered on the protest and a date fixed therefor, but after a continuance the protest was withdrawn. However, by letter of January 18, 1908, the Commissioner of the General Land Office required the entryman to file a personal affidavit that the entry was made in his own individual interest and not in the interest directly or indirectly of any other person or persons, citing as authority for such requirement the case of *Jessie E. Oviatt et al.* (35 L. D. 235). Service of notice of that requirement was attempted by the local land officials, who twice sent registered notice to the entryman at his record address, which was in each case returned unclaimed. The entry was, accordingly, canceled by the General Land Office December 4, 1908.

December 28, 1923, the National Fuel Company, claiming as assignee of the entryman, filed application for repayment of the purchase money paid in connection with said entry.

By decision of November 8, 1924, the application was rejected by the Commissioner of the General Land Office and the case is now before the Department on appeal from that action. It was held that the claim could not be entertained for consideration under the act of March 26, 1908 (35 Stat. 48), as amended by the act of December 11, 1919 (41 Stat. 366), because of the two-year limitation in the latter act for filing claims thereunder. It was further held that the claim did not come within the provisions of the act of June 16, 1880 (21 Stat. 287), authorizing repayment "where, from any cause, the entry has been erroneously allowed and can not be confirmed."

It was recited that at the time the entry was allowed, March 19, 1906, there was no regulation requiring the personal affidavit of the entryman such as was required by the Commissioner in his letter of January 18, 1906, in view of the charges made in the protest and in pursuance of the instructions contained in the decision of the Department under date of October 17, 1906, in the Oviatt case, *supra*. It was, accordingly, concluded that the entry could not properly be regarded as having been erroneously allowed, but even if so considered it was further held, the entry could have been confirmed except for the failure of the entryman to comply with the said requirement.

The appeal asserts that the decision appealed from is in direct conflict with the decision of the Court of Claims in the case of *Anthracite Mesa Coal Mining Company* v. *United States* (38 Ct. Cls. 56), wherein repayment was allowed.

The case referred to was quite similar to the instant case as regards the cancellation of the entry, but the state of the law is now different and also there is a vital defect in respect to the qualifications of the present claimant.

The status of the claimant in relation to the entry will first be considered. The abstract of title submitted with the application for repayment shows that the said tract was transferred by warranty deed from the entryman to the Suffield Coal Company on January 4, 1907. That was prior to the cancellation of the entry, and while the protest of the said company against it was pending. The latter company transferred by warranty deed January 26, 1907, the said tract including the tramroad thereon to The Green Canon Coal Company. The latter company by quitclaim deed dated February 15, 1915, transferred the tract with other property to the National Fuel Company, the present claimant, and on the same date The Green Canon Coal Company, a corporation, gave notice of dissolution.

The National Fuel Company was incorporated January 22, 1910, which was after the date of the cancellation of the entry in question. By resolution adopted by the board of directors February 1, 1910, the National Fuel Company was authorized to acquire all of the capital stock and bonds, negotiable securities, obligations, and floating indebtedness of the Parkdale Fuel Company, and the said The Green Canon Coal Company, and in exchange therefor, to issue the bonds and shares of the capital stock of the National Fuel Company in such amounts and in such proportions of stocks and bonds as found necessary to acquire the said property. It is alleged that The Green Canon Coal Company was thus consolidated and merged with the National Fuel Company, but as above shown, that occurred after the date of the cancellation of the entry, and it is not shown that the interests after consolidation were the same as theretofore in respect to this tract.

After the entry was canceled, no rights predicated thereon could be initiated. No rights under the entry remained except the possible repayment claim for the purchase money, and that was not assignable. Section 3477, United States Revised Statutes. No right in the assignee is recognized where the purported transfer of the land was subsequent to the cancellation of the entry. See Secs. 35, 36, and 49 of instructions approved October 25, 1916 (45 L. D. 520). It follows that this applicant is not shown to be qualified to receive the repayment even if the claim were otherwise allowable.

A further question relates to the statute of limitation prescribing the time within which such claim must be filed. By the act of December 11, 1919 (41 Stat. 366), Section I of the act of March 26, 1908 (35 Stat. 48), was amended to read as follows:

> 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: *Provided*, 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 facts of this case bring it clearly within the operation of the above law. The entry was rejected within the meaning of the act. See *Mary Ward* (39 L. D. 495); *Helen Serret* (42 L. D. 537); *Dora-*

thy Ditmar (43 L. D. 104). Accordingly the claim is barred by that act because it was not filed within the prescribed period.

The rejection of the claim is therefore affirmed.

CONSOLIDATION OF NATIONAL FORESTS

INSTRUCTIONS

[Circular No. 863]

[Reprint of regulations of October 28, 1922 (49 L. D. 365), with amendments of February 1, 1924, Circular 918 (50 L. D. 261); February 4, 1924, Circular 919 (50 L. D. 268), and February 14, 1925, Circular 980.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 20, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

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 the 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 exchanges 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.

The act of March 20, 1922, was amended by the act of February 28, 1925 (43 Stat. 1090), by adding thereto the following section:

SEC. 2. Either party to an exchange may make reservations of timber, minerals, or easements, the values of which shall be duly considered in determining the values of the exchanged lands. Where reservations are made in lands conveyed to the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the sur-

face of the land as may be deemed necessary by the Secretary of Agriculture; where mineral reservations are made in lands conveyed by the United States it shall be so stipulated in the patents, and that any person who acquires the right to mine and remove the reserved deposits may enter and occupy so much of the surface as may be required for all purposes incident to the mining and removal of the minerals therefrom, and may mine and remove such minerals upon payment to the owner of the surface for damages caused to the land and improvements thereon: *Provided*, That all property, rights, easements, and benefits authorized by this section to be retained by or reserved to owners of lands conveyed to the United States shall be subject to the tax laws of the States where such lands 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, as a rule nothing less than a legal subdivision may be surrendered or selected. An exception to this rule may be made only where in the opinion of the Secretary of Agriculture and the Secretary of the Interior such exception would be advantageous to the Government. 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 conveyed, 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 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. *Fees.*—Fees must be paid by the applicant at the rate of $1 each to the register and receiver for each 160 acres, or fraction thereof, of the base lands surrendered and conveyed to the Government.

7. *Publication and posting.*—Within 30 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. 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. 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 30 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 60 days from receipt of notice within which to file the relinquishment 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 of 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, 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 subsequent 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,
Commissioner.

Approved:

E. C. FINNEY,
Acting Secretary of the Interior.

W. M. JARDINE,
Secretary of Agriculture.

EXCHANGE OF LANDS WITHIN THE SANTA BARBARA GRANT FOR TIMBER WITHIN NATIONAL FORESTS, NEW MEXICO—ACT OF JANUARY 12, 1925

INSTRUCTIONS

[Circular No. 993]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 21, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES IN NEW MEXICO:

The act of January 12, 1925 (43 Stat. 739), entitled—

An Act Providing for the acquirement by the United States of privately owned lands within Taos County, New Mexico, known as the Santa Barbara grant, by exchanging therefor timber, or lands and timber, within the exterior boundaries of any national forest situated within the State of New Mexico—

reads as follows:

That the Secretary of the Interior be, and he hereby is, authorized in his discretion to accept on behalf of the United States title to all or any part of privately owned lands, situated within the Santa Barbara grant, located within the county of Taos, State of New Mexico, if in the opinion of the Secretary of Agriculture public interests will be benefited thereby, and the lands are chiefly valuable for national forest purposes, and in exchange therefor 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 and acceptable to the grantor as a fair compensation. Timber given in 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.

SEC. 2. That lands offered for exchange hereunder and not covered by public land surveys shall be identified by metes and bounds surveys and that such surveys and the plats and field notes thereof shall be made by employees of the United States Forest Service and approved by the United States Surveyor General.

SEC. 3. That any lands conveyed to the United States under the provisions of this Act shall, upon acceptance of the conveyance therof, become and be a part of Carson National Forest.

SEC. 4. That before any exchange of lands for timber 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.

By proclamation of January 23, 1925, the lands, known as said "Santa Barbara grant," were included within the boundaries of said Carson National Forest.

You will be governed in your action upon applications for exchanges under said act by the regulations contained in Circular No. 863 (49 L. D. 365), entitled "Consolidation of National Forests," modified, however, in accordance with the provisions of section 2 of the act.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
Acting Secretary of the Interior.
W. M. JARDINE,
Secretary of Agriculture.

EXTENSION OF TIME FOR PAYMENTS ON FORT PECK INDIAN LANDS—ACT OF MARCH 4, 1925

INSTRUCTIONS

[Circular No. 986]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 24, 1925.

REGISTERS AND RECEIVERS,
GLASGOW AND GREAT FALLS, MONTANA:

The act of March 4, 1925 (43 Stat. 1267), provides—

That all persons who have made homestead entries, being actual settlers within the boundaries of the Fort Peck Indian Reservation, are hereby granted an extension of time for payment of one-half the amount, including principal and interest due and unpaid on their homestead entries until the 1st day of November, 1925, and for payment of the other half until the 1st day of November, 1926; all such amounts to bear interest until the payment dates, at 5 per centum per annum: *Provided*, That upon failure to make complete payment of either installment by any such persons the entry shall be canceled and the land revert to the status of other tribal lands of the Fort Peck Indian Reservation.

SEC. 2. All such persons who have abandoned residence on and cultivation of their entries, and who are in arrears in any amounts, are hereby required to make payment in full of both principal and interest on or before the 1st day of November, 1925: *Provided,* That all delinquent amounts of both principal and interest shall draw interest at the rate of 5 per centum per annum until paid: *Provided further,* That upon failure to make full and complete payment of both principal and interest on or before the 1st day of November, 1925, said entry or entries shall thereupon be canceled and the land revert to the status of other tribal lands of the Fort Peck Indian Reservation.

1. For the information of entrymen, attention is called to the fact that beginning May 1, 1925, all business now handled by the Glasgow office will be handled by the land office at Great Falls, Montana. Until and including April 30, 1925, payments required by the act should be made to the receiver of the land office at Glasgow, and on and after May 1, 1925, they should be made to the register of the land office at Great Falls.

2. The act is construed to require the payment of interest on the principal which was due and unpaid on March 4, 1925, at the rate of 5 per centum per annum from the maturity of the unpaid amounts and for the period of the extension, and to require the payment of interest on the interest which was due and unpaid on said date at the said rate from the date of the passage of the act and for the period of the extension.

3. Section 2 of the act is construed to include persons who have submitted satisfactory proof and who have abandoned residence on and cultivation of their entries. It is further construed not to relieve any entryman from the necessity of complying with the three-year homestead law in the matter of residence, cultivation, and improvements, proof of which compliance must be made within the time allowed for the completion of the payments.

4. An entryman who on March 4, 1925, was an actual settler on the land embraced in his entry may pay one-half of the principal which was due and unpaid on March 4, 1925, on or before November 1, 1925, and the other half on or before November 1, 1926, with interest on both halves as indicated in paragraph 2 hereof.

5. An entryman who on March 4, 1925, was not an actual settler on the land embraced in his entry is required to pay the total amount which was due and unpaid on March 4, 1925, with the required interest on or before November 1, 1925.

6. Notices showing the total amount of principal and interest heretofore paid under each entry, together with the amount of principal which was due and unpaid on March 4, 1925, and the amount of interest required, computed under both sections of the act, will be prepared in this office and sent to the local office for service by registered mail. A copy of the notice, together with a copy of this letter, should first be sent to the entryman at his record address, and if

service is not obtained at that address a further notice should be directed to the entryman at the post office nearest the land. This office will use the utmost care in preparing these notices in order that they may correctly show the amounts due, but before final certificate is issued the local officers will check the amount shown in the notice with the local office records in order to verify the figures given.

7. One who claims the right to make payment under section 1 of the act as an actual settler, must show by affidavit, corroborated by the affidavits of two persons, the facts relative to his settlement. The affidavit must show whether on March 4, 1925, he was actually residing upon the land embraced in his entry, and whether on that date he had his home upon the land to the exclusion of a home elsewhere.

8. The provisions in the act that upon the failure of an entryman to complete his payments as required the entry shall be canceled and the land revert to the status of other tribal lands of the Fort Peck Indian Reservation will be strictly observed, and entries for which payments are not made as required will be canceled without notice to the entryman other than the notice advising them of the amounts due.

9. Upon payment being made, the local officers will so report to this office and if payment is not made they will so report as soon as possible after November 1, 1925. Where payment is made under section 1 of the act, the local officers will make further report upon the completion of the payments and if payments are not made as required they will so report as soon as possible after November 1, 1926.

10. Where payments are made as required, where satisfactory proof of residence, cultivation, and improvements has been submitted, and in the absence of objection shown by the local office records, the register will issue final certificate without special instructions from this office.

11. The act is supplemental to the acts of March 2, 1917 (39 Stat. 994), and December 11, 1919 (41 Stat. 365). See Circulars Nos. 544 (46 L. D. 75), and 667 (47 L. D. 335). Payments maturing after March 4, 1925, must be made as indicated in Circular No. 544.

12. Any entryman may, if he so desires, file a relinquishment of a portion of his entry and apply to have the money heretofore paid applied on the part retained (46 L. D. 282).

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

EXTENSION OF RELIEF TO INDIANS ON RAILROAD GRANT LANDS IN ARIZONA, CALIFORNIA, AND NEW MEXICO—ACT OF JANUARY 29, 1925

INSTRUCTIONS

[Circular No. 987]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 26, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES,
ARIZONA, CALIFORNIA, AND NEW MEXICO:

The act of Congress approved March 4, 1913 (37 Stat. 1007), made these provisions:

That the Secretary of the Interior be, and he is hereby, authorized in his discretion to request of the present claimant under any railroad land grant a relinquishment or reconveyance of any lands situated within the States of Arizona, New Mexico, or California passing under the grant which are shown to have been occupied for five years or more by an Indian entitled to receive the tract in allotment under existing law but for the grant to the railroad company, and upon the execution and filing of such relinquishment or reconveyance the lands shall thereupon become available for allotment, and the company relinquishing or reconveying shall be entitled to select within a period of three years after the approval of this Act and have patented to it other vacant nonmineral, nontimbered, surveyed public lands of equal area and value situated in the same State, as may be agreed upon by the Secretary of the Interior, provided that the total area of land that may be exchanged under the provisions of this Act shall not exceed three thousand acres in Arizona, sixteen thousand acres in New Mexico, and five thousand acres in California.

The act of April 11, 1916 (39 Stat. 48), extended the provisions of the act of March 4, 1913, for a period of two years from and after March 4, 1916, and provided that the total area which might be exchanged thereunder should not exceed 10,000 acres in Arizona, and 25,000 acres in New Mexico.

The act of June 30, 1919 (41 Stat. 3, 9), further extended the provisions of the basic act for a period of one year from and after March 4, 1919.

September 21, 1922 (42 Stat. 994), Congress again extended the period to March 4, 1923.

January 29, 1925, an act of Congress was approved (43 Stat. 795), which reads as follows:

That all of the provisions of an Act entitled "An Act for the relief of Indians occupying railroad lands in Arizona, New Mexico, or California," approved March 4, 1913, and amended by the Act of April 11, 1916, and the Act of June 30, 1919, be and the same are hereby extended to March 4, 1927: *Provided*, That the provisions of this Act shall apply only in cases where it is shown

that the lands were actually occupied in good faith by Indians prior to March 4, 1913, and the applicants are otherwise entitled to receive such tracts in allotment under existing law, but for the grant to the railroad company.

Do what you can, without expense to the Government, to spread information of the passage of this act.

Promptly transmit to this office all Indian allotment applications filed under the act of March 4, 1913, as now extended. When they are received here the procedure outlined by Circular No. 533, approved March 12, 1917 (46 L. D. 44), will be followed.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

NOTICE OF LISTINGS UNDER RAILROAD AND OTHER PUBLIC-LAND GRANTS—PUBLICATION

INSTRUCTIONS

[Circular No. 988]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 28, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

On and after this date notice of all listings by States, railroad, or wagon-road companies, other corporations or individuals, their successors or assigns, of any lands within the primary or granted limits of a grant made to aid in the construction of railroads, wagon roads, canals, river improvements, etc., and which inure or pass to the grantee or its successor or assigns under the terms of the acts making the grants or any amendment thereof, and of all selections of lands within the limits of such grant, either primary or indemnity, an indemnity for lands lost or excepted from the grant under the terms of the acts making the same, must be given by publication in a newspaper of general circulation in the county wherein the lands are located, the paper to be designated by the register, or official performing the duties of register.

Notices for publication will be prepared at the time of acceptance of the selections, and will be transmitted by registered mail to the proper individual or official of the State, Territory, or corporation, for publication in the paper or papers designated, and a copy of

such notice shall also be posted by the register, or official performing the duties of the register, in a conspicuous place in his office and remain so posted until the expiration of time allowed for the submission of proof of publication.

To save expense, two or more lists or selections may be embraced in one publication when it may be done consistently with the requirement of publication in a newspaper of general circulation in the county where the land is situated.

The published notice will be by the largest legal subdivisions where consolidation is possible, care being taken to avoid repetition of numbers of sections, townships, and range. The base lands are not to be included in the notice published.

Proof of publication will be the affidavit of the publisher or foreman of the designated newspaper that the notice (a copy of which must be annexed to the affidavit) was published in said newspaper once a week (if a weekly paper) for five consecutive issues; if in a semiweekly paper for nine and if in a daily paper for thirty consecutive issues.

The proof of publication of notice must be filed with the register within ninety days after receipt of notice for publication and will be forwarded by the register to the General Land Office with a report as to whether protest or contest has been filed against any list or selection, and if protest or contest is filed the same shall accompany the report. Failure by the individual or official of the corporation, State, or Territory to furnish proof of publication within the time limited will be cause for the rejection of the selection, upon report by the register of such failure accompanied with evidence of the receipt by the parties of the notice for publication.

During the period of publication, or any time thereafter, and before final approval and certification, the local officers may receive protest or contest as to any of the tracts applied for and transmit the same to the General Land Office.

Where lands sought to be selected are alleged, by way of protest, to be mineral, or where applications for patents therefor are presented under the mining laws, or are otherwise adversely claimed, proceedings in such cases will be in the nature of a contest and will be governed by the rules of practice in force in contest cases.

Notice of all other applications for lands in exchange for or in lieu of lands which inured to the grantee, its successors or assigns, under the acts making the grant, or amendments thereof and the exchange or right to select in lieu of which was authorized by a remedial or special act must be published in accordance with the provisions of circulars of February 21, 1908 (36 L. D. 278), or November 3, 1909 (38 L. D. 287), unless specific provision is made

for publication of notice of exchange or lieu selections under a specific act or by a specific or special circular or regulation relating to such act in which case such circular or regulation will control.

In all cases publication of notice must be made under one or the other of the above provisions, whether or not it was required heretofore and any ruling to the contrary is hereby revoked.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

GUY EARNEST MERRELL

Decided March 30, 1925

STOCK-RAISING HOMESTEAD—ADDITIONAL—AMENDMENT—RESIDENCE—RELATION.

Where one who made an additional entry under the stock-raising homestead act, being otherwise qualified, was unable to secure the maximum area permitted by reason of the nonavailability of other lands, he may, if lands afterwards become available, enlarge his additional entry by amendment so as to make up the full amount to which he was originally entitled, notwithstanding that at the time of amendment he did not own or reside upon the original entry, inasmuch as the amendment when allowed relates back to the date of the additional entry.

DEPARTMENTAL INSTRUCTIONS APPLIED.

Paragraph 15, regulations of July 10, 1915 (44 L. D. 181), and paragraph 6, regulations of January 2, 1925 (51 L. D. 1), applied.

FINNEY, *First Assistant Secretary:*

At the Clayton, New Mexico, land office on January 24, 1916, Guy Earnest Merrell made entry under the enlarged homestead act for (as later amended) N. ½ SE ¼, N. ½ SW. ¼, Sec. 8, and SE. ¼, Sec. 7, T. 17 N., R. 26 E., N. M. M. Final proof was submitted January 20, 1920, and patent issued July 28, 1920.

On January 24, 1920, said Merrell applied to make entry under the stock-raising homestead act for SW. ¼ NW. ¼ and NW. ¼ SW. ¼ (or lots 2 and 3), Sec. 18, said township. The application was allowed January 5, 1921. On May 1, 1924, entryman applied to enlarge the additional entry by adding thereto SE. ¼ SW. ¼ and SW. ¼ SE. ¼, Sec. 19, T. 19 N., R. 27. E., N. M. M.

By decision dated August 9, 1924, the Commissioner of the General Land Office held that the application to amend could not be allowed unless Merrell was able to show that on May 1, 1924, he owned and resided on his original entry. Entryman has appealed.

The two subdivisions which entryman is seeking to secure by amendment were not subject to entry when the additional entry was

made, being embraced in an entry made by one, Million, since canceled.

The additional entry was applied for at a time when Merrell owned and resided upon his original entry. The additional entry is therefore governed by the provisions of section 5 of the stock-raising homestead act. The fact that Merrell did not reside upon his original entry when he applied to amend the additional entry is immaterial. While he is not qualified to make a further additional entry, the application to amend is allowable under the provisions of paragraph 6 of the regulations (Circular No. 523) under the stock-raising homestead act as revised January 2, 1925 (51 L. D. 1), and the amendment will become effective, by relation, as of the date of the additional entry—January 5, 1921. See paragraph 15 of the regulations of July 10, 1915 (44 L. D. 181, 186).

The decision appealed from is modified to agree with the foregoing, and the application to amend will be allowed in the absence of objection not now appearing. The attention of the entryman should be directed to the fact that the statutory life of the additional entry as amended will expire January 5, 1926.

MINNESOTA DRAINAGE LAWS—PROCEDURE AFTER EXPIRATION OF PERIOD OF REDEMPTION—CIRCULARS NOS. 470 AND 969, AMENDED

INSTRUCTIONS

[Circular No. 989]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 1, 1925.

REGISTERS AND RECEIVERS,
CASS LAKE, CROOKSTON, AND DULUTH, MINNESOTA:

Paragraphs 22 and 23 of Circular No. 470 (45 L. D. 40), are amended to read as follows:

22. To avoid confusion, misunderstanding, and conflict of rights, it is hereby provided that no right of redemption referred to in section 6 of the act can be acquired by settlement on or application for lands subject to entry after the hour and date fixed for their sale. You will suspend all applications for lands advertised for sale under said act received on or subsequent to the date of sale until after the statement of sale provided in section 4 of the act is received, unless the applicant shall show by affidavit duly corroborated that he settled on the land in good faith prior to the beginning of the sale for the purpose of securing a home and not for the purpose of defeating the rights of a purchaser at the sale. If the statement referred to shows that the land was actually sold at the sale in question, the application in question will remain suspended until after the expiration of 90 days from the date

of sale to give the purchaser an opportunity to make entry for the land. Should the purchaser not make entry, the homestead application may then be allowed. If the statement does not show a sale of the land or it was bid in by the State, the homestead application may be allowed. Payment of drainage charges will not be required and you will formally notify each applicant making a three-year homestead entry where the land has been sold for delinquent drainage charges and evidence of redemption has not been furnished, the amount of taxes assessed against said land and of any tax certificates outstanding thereon, and you will file with the application a carbon copy of said letter. The homestead entryman will be required to comply with the homestead law in the matter of residence, improvements, and cultivation.

23. After the expiration of 90 days from the date of sale, the lands will be subject to ordinary homestead entry, in which case residence, improvements, and cultivation are required, or to entry under the act of May 20, 1908, which does not require such compliance with the homestead law.

The last paragraph of Circular No. 969 (50 L. D. 685), is amended to read:

You will reject all cash entries under the act of May 20, 1908 (35 Stat. 169), where evidence of redemption is required if the same is not filed in connection therewith.

The effect of the changes now made in Circulars Nos. 470 and 969 is to provide for the payment of delinquent drainage charges as a condition precedent to the allowance of an application in the case of cash purchases only; and in the case of ordinary homestead entries the register and receiver are required to formally advise the applicant of the drainage taxes due on his entry and the tax certificates outstanding thereon, a carbon copy of said notice to be filed with the application.

WILLIAM SPRY,
Commissioner.

Approved:
E C. FINNEY,
First Assistant Secretary.

SECOND HOMESTEAD ENTRIES—ACT OF FEBRUARY 25, 1925

INSTRUCTIONS

[Circular No. 990]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 2, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Your attention is directed to the act of Congress approved February 25, 1925 (43 Stat. 981), which provides—

That from and after the passage of this Act any person who has heretofore entered under the homestead laws and paid a price equivalent to or greater than $2.50 per acre, lands embraced in a ceded Indian reservation, shall, upon proof of such fact, if otherwise qualified, be entitled to the benefits of the homestead law as though such former entry had not been made: *Provided*, That the provisions of this Act shall not apply to any person who has failed to pay the full price for his former entry, or whose former entry was canceled for fraud.

2. A person claiming the right of second homestead entry pursuant to the provisions of this act must furnish a description of the land included in his perfected entry or data from which it can be identified, and he must state that he paid $2.50 or more per acre for the tract, but it is not necessary that he name the precise price paid. If the former entry embraced tracts appraised at less than $2.50 per acre and tracts appraised at more than $2.50 per acre, a second entry hereunder is not allowable unless the aggregate sum of the appraised prices of the former entry equals $2.50 per acre or more.

3. A second entry is not allowable unless the first entry was made prior to February 25, 1925, and unless satisfactory final proof has been submitted thereon and the entire price of the land included therein has been paid prior to the date of the application for second entry.

4. The act has no application if the first entry be canceled. Such cases will be governed by the general statutes allowing second entries.

5. If the original tract lies within your district, you will pass upon the application and will allow the entry if such action be proper; if said tract be not in your district, you will forward the application to this office for consideration.

6. A person who is entitled to the benefits of this act may at his option make second entry under either the general homestead law, the enlarged homestead act, or the stock-raising homestead act. Compliance with the law must be shown as though it were an original entry.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

PREFERENCE RIGHT TO PURCHASE UNAPPROPRIATED LANDS IN LOUISIANA ERRONEOUSLY MEANDERED AS WATER COVERED AREAS—ACT OF FEBRUARY 19, 1925

INSTRUCTIONS

[Circular No. 991]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 2, 1925.

REGISTER AND RECEIVER,
BATON ROUGE, LOUISIANA:

The act of February 19, 1925 (43 Stat. 951), entitled "An Act Granting to certain claimants the preference right to purchase unappropriated public lands," provides:

That the Secretary of the Interior, in his judgment and discretion, is hereby authorized to sell, in the manner hereinafter provided, any of those lands situated in the State of Louisiana which were originally erroneously meandered and shown upon the official plats as water-covered areas, and which are not lawfully appropriated by a qualified settler or entryman claiming under the public land laws.

That any citizen of the United States who, or whose ancestors in title in good faith under color of title or claiming as a riparian owner has, prior to this Act, placed valuable improvements upon or reduced to cultivation any of the lands subject to the operation of this Act, shall have a preferred right to file in the office of the register and receiver of the United States land office of the district in which the lands are situated, an application to purchase the lands thus improved by them at any time within ninety days from the date of the passage of this Act if the lands have been surveyed and plats filed in the United States land office; otherwise within ninety days from official notice to such claimant of the filing of such plats. Every such application must be accompanied with satisfactory proof that the applicant is entitled to such preference right and that the lands which he applies to purchase are not in the legal possession of an adverse claimant or in the actual possession of a person or persons who have improved the property and who have attempted to enter same in compliance with the laws and regulations of the United States land office.

That upon the filing of an application to purchase any lands subject to the operation of this Act, together with the required proof, the Secretary of the Interior shall cause the lands described in said application to be appraised, said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement thereof for agricultural purposes by the applicant or his predecessor in interest, but inclusive of the stumpage value of any timber cut or removed by the applicant or his predecessor in interest.

That an applicant who applies to purchase lands under the provisions of this Act, in order to be entitled to receive a patent, must within six months from receipt of notice of appraisal by the Secretary of the Interior pay to the receiver of the United States land office of the district in which the lands are situated, the appraised price of the lands, and thereupon a patent shall issue

to said applicant for such lands as the Secretary of the Interior shall determine that such applicant is entitled to purchase under this Act. The proceeds derived by the Government from the sale of the lands hereunder shall be covered into the United States Treasury and applied as provided by law for the disposal of the proceeds from the sale of public lands.

That the Secretary of the Interior is hereby authorized to prescribe all necessary rules and regulations for administering the provisions of this Act and determining conflicting claims arising hereunder.

Sec. 2. That all purchases 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, oil, gas, and other minerals in the lands so purchased and patented, together with the right to prospect for, mine, and remove the same.

Applications to purchase under the above act must be sworn to and may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the lands are located, and must be filed with the register and receiver of the local land office in that district within 90 days from the passage of this act, if the lands have been surveyed and plats filed in the local office, otherwise within 90 days from the filing of such plat. The applicant must show that he is either a native born or a naturalized citizen of the United States, and, if naturalized, file record evidence thereof; must describe the land which he desires to purchase, together with the land claimed as the basis of his preference right to the lands applied for if he applies as a riparian owner, or if claiming otherwise, under what color of title his claim is based; in other words, a complete history of the claim, and that the lands applied for are not lawfully appropriated by a qualified settler or entryman under the public land laws, nor in the legal possession of any adverse applicant; the kind, character, and value of the improvements on the land covered by the application; when they were placed thereon; the extent of the cultivation, if any, and how long continued. Such application must be supported by the affidavit of at least two persons having personal knowledge of the facts alleged in the application. Upon receipt of such application the local officers will assign a current serial number thereto.

If the land applied for is surveyed and is vacant, the local officers, after noting the application on their records, will suspend action thereon and will promptly forward it to the division inspector for investigation and appraisement of the land in accordance with the provisions of the act. If for unsurveyed land, the local officers will note the application and suspend same transmitting it to the Commissioner of the General Land Office for consideration as to whether or not the lands applied for are in fact public lands and of the class contemplated by the act under which title is sought. During such suspension the lands described in the application shall not be disposed of.

When an application is received by the division inspector he will assign same to a field examiner for investigation and appraisement of the land in accordance with the provisions of the act. The examiner will make a written report thereon as to the development or improvement for agricultural purposes and the evidence obtained as to whether or not the lands are of the class contemplated by the act, also recommending the allowance or rejection of the application. If such report is favorable, and the division inspector is of the opinion that the application should be allowed, he will return it to the register and receiver with the appraisement, report, and recommendation to that effect, whereupon the register and receiver will pass upon it in regular order in the light of the report which is to be attached to the record and made a part of the application, and transmit same to the General Land Office with their recommendations. If, however, the division inspector is of the opinion that the entry should not be allowed he will have a full report prepared and transmit the entire record to the General Land Office for consideration and action, advising the register and receiver therof. If the report justifies such action, this office will direct proceedings against the application under the circular of February 26, 1916 (44 L. D. 572), under which the claimant would have the right to apply for a hearing to determine whether or not he is entitled to purchase the lands applied for.

If, upon consideration of the application in the General Land Office, with report and appraisement, it shall be determined that the applicant is entitled to purchase the lands applied for, the local office will be authorized to notify the applicant at once, by registered mail, that he must within 6 months from receipt of notice deposit with the receiver the appraised price of the land or else forfeit all his rights under his application.

Upon payment of the appraised price of the land the local officers will issue notice of publication. Such notice shall be published at the expense of the applicant in a newspaper of general circulation designated by the register in the vicinity of the lands, once a week for 5 consecutive weeks, or 30 consecutive days, if in a daily paper, immediately prior to the date of sale, but a sufficient time shall elapse between the date of the last publication and the date of sale to enable the affidavit of the publisher to be filed in the local office. The notice will advise all persons claiming adversely to the applicant that they should file any objections or protests against the allowance of the application within the period of publication, otherwise the application may be allowed. Any objections or protests must be under oath, corroborated, and a copy thereof served upon the applicant. The register and receiver will also cause a copy of such notice of publication to be posted in their office during the entire period of

publication. The applicant must file in the local office prior to the date fixed for the sale evidence that publication has been had for the required period, which evidence must consist of the affidavit of the publisher accompanied by a copy of the notice so published.

Upon the submission of satisfactory proof, the register and receiver will, if no protest or contest is pending, allow a final entry and issue final certificate, such certificate to contain a stipulation that all the minerals in the lands described in the application are reserved to the United States with the right to prospect for, mine and remove same, transmitting same to the General Land Office with their regular monthly returns.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

GEORGE W. MARTIN (ON REHEARING)

Decided April 3, 1925

VALENTINE SCRIP—PUBLIC LANDS—OKLAHOMA.

Only such laws as were expressly extended to public lands in Oklahoma are applicable to their disposition.

VALENTINE SCRIP—ADVERSE CLAIM—OKLAHOMA.

Where the title to lands sought to be acquired under the public land laws is involved in litigation, valid claims thereto can not be initiated by location, filing or other assertion of claim, so long as the question of title is *sub judice.*

VALENTINE SCRIP—PUBLIC LANDS—OKLAHOMA.

The act of April 5, 1872, which authorizes the location of Valentine scrip upon unoccupied and unappropriated nonmineral public lands has no application to lands in the bed of Red River, Oklahoma.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Newhall* v. *Sanger* (92 U. S. 761), *Quinn* v. *Chapman* (111 U. S. 445), *State of Oklahoma* v. *State of Texas, United States intervener* (258 U. S. 574), and *Robert D. Hawley* (49 L. D. 578), cited and applied.

FINNEY, *First Assistant Secretary:*

George W. Martin has filed a motion for rehearing in the matter of his application to locate Valentine scrip on a tract of unsurveyed land, described by metes and bounds, wherein the Department, by decision of September 30, 1921, affirmed a decision of the Commissioner of the General Land Office dated May 31, 1921, rejecting the application.

Counsel has argued the matter orally, and has submitted a typewritten brief.

The scrip filed was issued under authority of the act of April 5, 1872 (17 Stat. 649), which provided that Valentine—

> or his legal representatives, may select, and shall be allowed, patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, * * * and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys.

The land on which this scrip is sought to be located is situated in the bed of Red River, south of surveyed fractional T. 5 S., R. 14 W., I. M., Oklahoma, and is within an area which has produced oil since 1919 and has been the subject of litigation between the States of Oklahoma and Texas and the United States. By a decision rendered May 1, 1922, in the case of *State of Oklahoma* v. *State of Texas, United States, intervener* (258 U. S. 574), the Supreme Court held that only such land laws as were expressly extended to public lands in Oklahoma governed their disposition, and found that the only laws passed with respect to this particular area were with respect to the Indian reservation commonly called the Big Pasture, and that those laws operated only to the medial line of Red River. After holding that the placer mining laws, though general in their nature, had never been expressly extended to Oklahoma, the court, in summing up the question of title to the south half of Red River in the area south of the Big Pasture, said:

> We conclude that this part of the river bed never was subject to location or acquisition under the mining laws—nor, indeed, to acquisition under any of the land laws.

This was a clear and conclusive finding that no land law had ever been extended to the area sought by this claimant, and is decisive of this case. Moreover, it is well settled that where title to lands sought to be acquired under the public land laws is involved in litigation, valid claims thereto can not be initiated by location, filing, or other assertion of claim so long as the question of title is *sub judice*. *Newhall* v. *Sanger* (92 U. S. 761); *Quinn* v. *Chapman* (111 U. S. 445); *Robert D. Hawley* (49 L. D. 578). Discussion of the contentions of counsel on other points is unnecessary.

The motion for rehearing is denied and the case is closed.

CLARK, Jr. v. BENALLY ET AL.[1]

Decided April 6, 1925

INDIAN LANDS—ALLOTMENT—SETTLEMENT.

Where Indians have voluntarily made settlement upon lands not reserved therefrom, the Land Department is without authority arbitrarily to deny them allotments on the ground that the lands are too poor in quality.

INDIAN LANDS—ALLOTMENT—RESIDENCE.

In determining the intention and good faith of an Indian applicant for allotment of public lands, the sufficiency of establishment and maintenance of residence is wholly between the Government and the Indian, where no adverse or conflicting rights are involved, and in this connection reasonable consideration is to be given to the habits, customs, and nomadic instinct of the race, as well as to the character of the land.

INDIAN LANDS—ALLOTMENT—PATENT—RESERVATION.

The provision in section 5 of the act of February 8, 1887, relating to the issuance to Indian allottees of patents after the expiration of the trust period, conveying the land in fee, discharged of the trust and free of all charge or incumbrance whatsoever, when construed in conjunction with subsequent legislation, does not prevent the issuance of restricted patents under acts of Congress which require reservations in grants under nonmineral land laws.

INDIAN LANDS—ALLOTMENT—RESERVATION—OIL AND GAS LANDS—PROSPECTING PERMIT.

An Indian allotment may be allowed under section 4 of the act of February 8, 1887, for oil and gas lands with reservation of the mineral contents to the United States.

FINNEY, *First Assistant Secretary:*

On April 1, 1921, Horace F. Clark, jr., filed application 029320 for a permit under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon certain unsurveyed lands in T. 42 S., R. 17 E., S. L. M., Salt Lake City, Utah, land district. On August 18, 1922, the Department issued a permit to Clark to prospect upon what will probably be, when surveyed, the W. ½, Sec. 9, all of Sec. 17, and N. ½, Sec. 18, said township. Extensions of time to comply with paragraph 2 of the permit until June 30, 1925, have been granted.

On May 10, 1924, there were filed in the local land office the applications, among others, of Randolph Benally, an Indian of the Navajo tribe, for allotment of public lands to himself and to each of his three minor children. His own application covers the SE ¼, Sec. 8, said township, and he alleges that he has made improvements thereon as follows: two hogans, fifteen feet in diameter, and a sheep corral and a small garden. This is corroborated by the joint affi-

[1] See decision on motion for rehearing, page 98.

davit of two witnesses, who allege that the applicant has used or occupied the land five years for grazing 325 head of sheep and raising a small garden. The applications on behalf of the children are for the NE. ¼, SE. ¼, and SW. ¼, Sec. 17, said township, and are based on the father's settlement and occupation as above set forth.

It appears that Benally's application was in conflict with a prospecting permit not here involved. The local officers forwarded all the applications to the Commissioner of the General Land Office for consideration and appropriate action. By decision dated May 31, 1924, the Commissioner directed that the permittee be allowed 30 days within which to show cause why the allotment applications should not be allowed, subject to the reservation to the United States of any oil and gas deposits in the land. It was also directed in that decision that the applicants for allotment be notified that it would be necessary for them to consent to the allowance of their applications, subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509), and in accordance with section 29 of the leasing act.

The permittee filed answer and argument in support thereof to the order to show cause. By decision dated November 28, 1924, the Commissioner overruled the objections of the permittee to the allowance of the allotments. The permittee has appealed from that decision. Oral argument in his behalf has also been submitted.

In the appeal there are 16 specifications of error, but it will not be necessary to consider these separately. The questions raised in the brief and oral argument will be fully considered, and these appear to cover all alleged errors.

It is contended that the lands involved are "not advantageous for agricultural and grazing purposes," and that they are solely potentially valuable for the oil believed to be therein contained. In support of this contention there is submitted the affidavit of one A. L. Raplee, a resident of Bluff, Utah, who alleges in this connection—

> That in his opinion the entire region embracing the tracts of land being applied for is wholly unfit for homesteads or for cultivation of any sort and is practically unfit for grazing purposes, and that it affords only such small amount of grazing as is necessary in the moving of the small herds of sheep from and to the ranges easterly and westerly of such lands. That none of the tracts of land being applied for would graze any livestock the year round, and no hay could be raised thereon for feeding purposes. That the tracts are barren, desert wastes; that the only water available for any purposes is that furnished by small seeps and the few water holes hereinafter mentioned, and the water supply is inadequate for anything more than the watering of a few sheep, cattle, and horses and for very limited culinary purposes.

Raplee's affidavit is corroborated by that of one witness, who avers that he is acquainted with that section of country, and that the statements and representations made by Raplee are true to his best knowledge and belief.

In the course of the oral argument before the Department counsel for the permittee filed in evidence a copy of Geological Survey Bulletin 751–D, entitled "Geologic Structure of San Juan Canyon and Adjacent Country, Utah," in which it stated:

> The roughness of the region, combined with the meager rainfall, the almost total absence of soil, and the scantiness of grass, sagebrush, pine, piñon, and cedar, make it a desert waste, practically all of which reveals bare rocks.

In response to a request from this Department to the Office of Indian Affairs for report, that office has submitted a report by the special allotting agent through whom the applications for allotment were made and filed substantially as follows:

There is a spring on Benally's allotment, and for several miles around springs occur at intervals of half a mile or more. The Navajos use these springs and are able to graze large areas in this region.

It is true that there are spaces of bare rock and sand dunes, but as a whole the land is recognized as the best grazing land in San Juan County. The Navajo has supported himself as a herdsman for several hundred years, and his ability to select good grazing land should not be questioned. Benally and the other Navajos who selected allotments here have not been put there arbitrarily by the superintendent or any allotting agent. They made their homes where they found a good place to live, and the special allotting agent merely made allotments as they asked therefor and showed themselves entitled thereto in accordance with law and departmental regulations. The Indians want the lands only for agricultural and grazing purposes and are willing to waive all rights to any mineral deposits.

It will be noted that Raplee admits that there are some water holes and small seeps, and that he does not allege that the land is wholly unfit for grazing purposes. Inasmuch as these Indians have voluntarily made settlement upon certain lands not in any manner reserved therefrom, the Department can not arbitrarily deny them allotments on the ground that the lands are too poor in quality. Raplee alleges "that lands far more desirable for allotment for grazing, agricultural, and homestead purposes may be found both easterly and westerly of the proposed allotments." But the allotting agent says that he believes the whole country is covered by prospect-

ing permits. Would not the same objections be raised if allotments were applied for to the east or west?

Furthermore, could the Department justly order these Indians from their homes and compel them to accept allotments elsewhere?

The objection is made that four allotment applications have been made upon one settlement, although the law contemplates that there shall be a settlement for each allotment.

These applications are for allotment under the provisions of section 4 of the act of February 8, 1887 (24 Stat. 388), as amended by the act of February 28, 1891 (26 Stat. 794), and the act of June 25, 1910 (36 Stat. 855). In its regulations under said act, approved April 15, 1918 (46 L. D. 344, 348), the Department says:

> An Indian settler on public lands under the fourth section is also entitled upon application to have allotments made thereunder to his minor children * * *. No actual settlement is required in case of allotment to minor children under the fourth section, but the actual settlement of the parent * * * will be regarded as the settlement of the minor children.

It is strenuously urged that the Department is without authority to allow any Indian allotment with oil and gas reservation because section 5 of the act of February 8, 1887, *supra*, provides:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs 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.

Counsel for the permittee says:

> Manifestly the issuance of a final patent is a mere form at the expiration of the trust period, and the final patent would merely follow the wording of the trust patent.
>
> It being certain that the jurisdiction of the Land Department over the land, save as to trusteeship, ceases and determines and that the Department could not thereafter dispose of the land to any one else while the trust patent is outstanding, it follows that the trust patent must express and convey to the Indian all the right and title he would acquire under a final patent upon termination of the trust.
>
> The law expressly provides that the patent so issued to the Indian allottee shall be free from "any incumbrance whatsoever."

In *Billilik Izhi* v. *Phelps* (46 L. D. 283), the Department held that an Indian allotment might be allowed subject to the provisions of the act of June 22, 1910 (36 Stat. 583), as to surface patent. In *Martha Head et al.* (48 L. D. 567), the Department held that where the lands embraced in an allotment application under section 4 of the act of

February 8, 1887, are chiefly valuable for their coal contents, the allottee must file an election as prescribed in the act of March 3, 1909 (35 Stat. 844), and take with a reservation of the coal to the United States, as required by the act of June 22, 1910, *supra*. In the latter case it is said:

> It has been held that the fourth section of the act of February 8, 1887, is in its essential elements a settlement law and that "to make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based on settlement." Indian lands—Allotments (8 L. D. 647, 650). That is, only agricultural and grazing lands are subject to allotment under that section. The Indian is required to state the character of the land applied for under said section and at the same time to file a nonmineral affidavit. In other words, lands to which the mineral laws of the United States apply are not subject to allotment under the fourth section of the act of February 8, 1887. Consequently if the lands in question are chiefly valuable for their coal deposits, as alleged on appeal, they are clearly not subject to allotment under that section except upon election being made in accordance with the act of March 3, 1909.
>
> * * * * * * *
>
> The instructions issued under the above act specifically state that "it applies alike to locations, selections, and entries made prior to its passage and those made subsequently thereto."

The act of July 17, 1914 (38 Stat. 509), provides—

> That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable * * *.
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> * * * * * * *
>
> 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 * * *.

Is the fourth section of the general allotment act of February 8, 1887, one of the nonmineral land laws of the United States? It has been noted that the Department has heretofore so construed it.

The appellant contends that this allotment act and the public land laws can not be construed *in pari materia*, and in support of that contention he cites the cases of *United States* v. *Sandoval* (231 U. S. 28); *La Roque* v. *United States* (239 U. S. 62); and *Cramer* v. *United States* (261 U. S. 219). None of these cases has any applica-

tion here because the question of Indian allotment on public land was not involved.

It is obvious that in providing for the issuance of patent "in fee, discharged of said trust and free of all charge or incumbrance whatsoever," in section 5 of the act of February 8, 1887, Congress intended to make it very clear that the trusteeship of the United States was to end entirely. But to hold that this benevolent provision of the act must be construed in such manner as to prevent the very people who are to be favored from entry within large areas of the now diminished public domain would indeed be an injustice and a hardship.

On November 18, 1908, this Department issued an order (unpublished) as follows:

> It is directed that in all patents hereafter issued for lands west of the 100th Meridian, taken up after August 30, 1890, including Indian allotments, under any of the land laws of the United States, or on entries or claims validated by the act of August 30, 1890 (26 Stat. 391), there be inserted the following:
>
> "And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States."

See also the case of *Clement Ironshields* (40 L. D. 28).

The Department is of the opinion that if section 5 of the act of February 8, 1887, must be construed as providing for wholly unrestricted patents, it has been amended by the later acts that have been considered, including the act of July 17, 1914, *supra*. Apparently Congress has viewed with approval the issuance of restricted patents to Indian allottees, because in section 6 of the act of June 4, 1920 (41 Stat. 751), providing for the allotment of lands of the Crow Tribe, etc., it is provided—

> That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe.

See also the acts of June 30, 1919 (41 Stat. 3, 17); February 14, 1920 (41 Stat. 408, 424); and March 3, 1921 (41 Stat. 1355).

Another point made is "that since the passage of the act of June 2, 1924, there has been no authority whatsoever for the issuance of an allotment patent for public lands of the United States to an Indian."

The act of June 2, 1924 (43 Stat. 253), is as follows:

> That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States; *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

It is true that the Department has held that Indians who are citizens of the United States are not entitled to allotments under the fourth section of the act of 1887. *Oliver C. Keller* (44 L. D. 520),

Martha Head et al., supra. That question is not here presented for determination, however. The applications for allotment were filed prior to June 2, 1924, and the rights of these Indians date from the filing of their applications. *Hamilton* v. *Harris* (18 L. D. 45); *Rippy* v. *Snowden* (47 L. D. 321); *Harris* v. *Miller* (47 L. D. 406); *Larson* v. *Parrish and Woodring* (49 L. D. 311); *Condas* v. *Heaston* (49 L. D. 374).

It is alleged by Raplee that the Indians "want and seem to expect the right to roam over the whole section of country with absolute freedom to make camp and run their herds wherever they choose, and in fact they are constantly roaming from place to place with their small herds, only stopping at any place where there is a hogan (whether or not it belongs to them) long enough to let their sheep rest and graze on what little grazing there is, and then moving on to another hogan for a short stay."

It is not alleged specifically that Benally did not make settlement and improvements and maintain such settlement as alleged by him. In its regulations of April 15, 1918, *supra*, the Departments says:

> In examining the acts of settlement and determining the intention and good faith of an Indian applicant, due and reasonable consideration should be given to the habits, customs, and nomadic instinct of the race, as well as the character of the land taken in allotment.

The matter of the sufficiency of establishment and maintenance of residence in this case is wholly between the Government and the Indians, inasmuch as no adverse or conflicting rights are involved. The Office of Indian Affairs has certified that these Indians are entitled to take allotments on the public domain under the act in question, and the Land Department has found the allegations of settlement sufficient.

It has been urged on appeal that the Indians have forfeited any rights they might have had under their applications because they failed to file mineral waivers in response to the Commissioner's decision.

The special allotting agent reports that he filed timely appeal from the Commissioner's decision, because the permittee was in default under paragraph 2 of his permit. The appeal is not found with the record, but that can not be held to have any importance. The agent has also reported that the Indians are willing to consent to reservations of minerals as required. In an *ex parte* case of this nature, delays in the matter of compliance with office requirements can not and need not be taken to defeat any rights intitated under applications duly filed.

The entire record has been very carefully and attentively considered, and the Department is unable to find that the permittee has

shown any valid objection to the allowance of the applications for allotment with proper reservations of mineral deposits under the act of July 17, 1914.

The decision appealed from is affirmed.

CLARK, Jr. v. BENALLY ET AL. (ON REHEARING)

Decided July 8, 1925

INDIAN LANDS—ALLOTMENT—SETTLEMENT—RESERVATION—STATUTES.

Section 4 of the act of February 8, 1887, provided for two classes of Indian settlers: (1) Those not residing upon a reservation, and (2) those for whose tribe no reservation had been made by treaty, act of Congress, or Executive order.

INDIAN LANDS—ALLOTMENT—SETTLEMENT—IMPROVEMENTS—RESERVATION—EVIDENCE.

The fact that an Indian had settled upon, occupied, and improved a tract of public land outside of a reservation is evidence that he was not residing upon a reservation and that he had abandoned his tribal relations.

INDIAN LANDS—ALLOTMENT—APPLICATION—VESTED RIGHT—RESERVATION.

The mere filing of an application for allotment on public lands under section 4 of the act of February 8, 1887, does not secure to the Indian a vested right, and until his right becomes vested Congress may impose such restrictions as it may see fit.

INDIAN LANDS—ALLOTMENT—MINERAL LANDS—OIL AND GAS LANDS—SURFACE RIGHTS—RESERVATION—STATUTES.

Indian allotments of public lands under section 4 of the act of February 8, 1887, are not excepted from the operation of the act of July 17, 1914.

INDIAN LANDS—ALLOTMENT—JURISDICTION—PRACTICE—INTERVENTION.

The determination of the qualifications of an Indian applicant under section 4 of the act of February 8, 1887, as well as the character of the lands, is a matter resting solely in the judgment of the Department, and third parties are not privileged to intervene.

DEPARTMENTAL DECISIONS AND INSTRUCTIONS CITED AND APPLIED.

Cases of *William Kalmbach* (26 L. D. 207), *Collins* v. *Hoyt* (31 L. D. 343), *Schumacher* v. *State of Washington* (33 L. D. 454), and instructions of February 21, 1903 (32 L. D. 17), cited and applied.

FINNEY, *First Assistant Secretary:*

A motion has been filed for rehearing of departmental decision of April 6, 1925 (51 L. D. 91), which affirmed the action of the Commissioner of the General Land Office in overruling the objections of Horace F. Clark, jr., mineral claimant under the act of February 25, 1920 (41 Stat. 437), to the allowance of applications made by Randolph Benally, a Navajo Indian, for allotments on the public domain to himself and minor children under section 4 of the act of February 8, 1887 (24 Stat. 388), as amended.

The motion for rehearing covers no material matters not fully discussed in the decision complained of.

The application for a prospecting permit was filed by the mineral claimant April 21, 1921, and was allowed by the Department August 18, 1922. The application for allotments under the fourth section of the act of 1887 was filed May 10, 1924, the Indian alleging that he had made settlement and improvements, and the evidence submitted at that time shows that he had used or occupied the lands for five years. It has long been the policy and practice of the Department to respect and protect the settlement or occupancy rights of the Indians on the public domain, such rights being upheld against various forms of attempted appropriation. Thus it was held in the case of *Schumacher* v. *State of Washington* (33 L. D. 454, 456)—

> This continued practice would seem to amount to an appropriation or dedication of such lands, and when considered in connection with the provisions of section 4 of the act of February 8, 1887, hereinbefore quoted, and under which the application for allotment in question is made, lands so occupied and applied for would seem to have been "otherwise disposed of by or under the authority of an act of Congress," within the meaning of those terms as employed in section 10 of the act of February 22, 1889, *supra*, making the grant to the State of Washington in support of common schools.
>
> * * * It is true that the Indian did not give notice of his intention to apply for an allotment of this land until after the State had made disposal thereof, but the purchaser at such sale was bound to take notice of the actual possession of the land by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for an allotment should be made.

Among the errors specified, or rather respecified, as the same contention was made on appeal, is that as these Indians are Navajos "and apparently not having abandoned their tribal relations," they are not entitled to allotments outside of the Navajo Reservation. Two classes of Indian settlers are provided for in the fourth section of the act of 1887—those not residing upon a reservation and those for whose tribe no reservation was provided by treaty, act of Congress, or Executive order. The fact that the Indian, Benally, settled upon the public domain and occupied and improved the lands in question for the length of time shown is evidence that he was not residing upon the reservation and that he had abandoned his tribal relations. Besides, the determination of the qualifications of an Indian applicant under the fourth section, as well as the character of the lands, is a matter resting solely in the judgment of the Department. Only agricultural and grazing lands are subject to allotments under that section. No one

is allowed to intervene and third parties are never invited to attack such allotments. *William Kalmbach* (26 L. D. 207), *Collins* v. *Hoyt* (31 L. D. 343), and Instructions (32 L. D. 17).

The main question involved here is as to the applicability to fourth-section allotments of the acts of Congress reserving minerals in the lands to the United States and authorizing the taking of such lands under conditional nonmineral or surface patents. The general act of July 17, 1914 (38 Stat. 509), provides in section 3 thereof as follows:

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

The act of June 22, 1910 (36 Stat. 583), is another general law which authorizes agricultural entries and surface patents for coal lands. It has been held that an Indian may take an allotment of public lands subject to the provisions of this act as to surface patent.

After the act of 1914 Congress passed several special acts containing provisions for the issuance of surface patents on allotments made in severalty to the Indians of certain tribes. From this fact the mineral claimant herein argues that Congress could not have intended that the act of 1914 should apply to Indian allotments, as otherwise it would have been unnecessary for Congress to pass the later special acts on the subject. This does not necessarily follow, as the later legislation does not necessarily imply that a different rule prevailed before. The rule of construction in such a situation is stated in Black on Interpretation of Laws (section 90) as follows:

> But the enactment of a specific provision on a given subject does not of itself prove that the law on that subject was different before, for such enactment may have been in affirmance of existing law and to remove doubts.

The provisions of the act of 1914 are sufficiently broad to cover fourth-section allotments. Congress did not except such allotments from the operation of said act, and, considering all the circumstances, there is apparently no valid reason why it should have been so, as said section involves the taking of public lands.

While there may be some question as to the power of Congress to impose mineral reservations in respect to lands taken under the

fourth section of the act of 1887, after the issuance of patent in accordance with the provisions of section 5 of said act, there can be none as to the exercise of such power prior to the time rights become vested under that section. An Indian has no vested right to an allotment on the public domain under the fourth section, as he may have to an allotment of reservation lands. Certainly no vested right is secured to him by the filing of an application under that section. In the meantime Congress may impose such conditions to the taking of lands under that section as it may see fit. Congress has clearly indicated a general policy to reserve the minerals in public lands under whatever form such lands are sought to be appropriated.

As stated in the decisions of the Commissioner of the General Land Office and the Department, the act of July 17, 1914, has already been construed as applying to lands covered by fourth-section allotments. Considering all the circumstances, the Department finds no valid reason for disturbing the action heretofore taken in this matter. The motion for rehearing herein is accordingly denied.

CRONBERG ET AL. v. HAZLETT

Decided April 6, 1925

MINING CLAIM—OIL AND GAS LANDS—EXPENDITURES.

An oil and gas mining location, unperfected at the date of the passage of the act of February 25, 1920, can not be perfected pursuant to the exception clause in section 37 of that act, unless the requirements of section 2324, Revised Statutes, relating to the performance of annual assessment work, are thereafter fulfilled.

MINING CLAIM—EXPENDITURES.

Credit toward compliance with the annual assessment work required by section 2324, Revised Statutes, can not be allowed for expenditures upon other claims of a group of which the one under consideration once formed a part, if the claimant had no interest in those other claims at the time that the expenditures thereupon were made.

MINING CLAIM—OIL AND GAS LANDS—EXPENDITURES.

The cost of excavations of so-called drilling cellars can not be applied as acceptable annual assessment work upon any other claim than that upon which the excavations were made.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Interstate Oil Corporation and Frank O. Chittenden* (50 L. D. 262), cited and applied.

FINNEY, *First Assistant Secretary:*

This case is before the Department on what is evidently intended to be an appeal by Albert Cronberg *et al.* from the decision of the

Commissioner of the General Land Office of September 26, 1924, dismissing their protest against the oil and gas prospecting permit 032888 of A. J. Hazlett, issued under section 13 of the leasing act, in so far as said permit involves the NW. ¼, Sec. 34, T. 23 N., R. 79 W., 6th P. M., Cheyenne land district, Wyoming.

Said permit was issued April 2, 1923, and the protest which was filed October 26, 1923, charged that the described tract—

> is embraced in the mining location known as the Allen Lake No. 8 and located March 2, 1918, by these protestants, and now is and has been ever since location a good valid and subsisting mining claim, upon which discovery has been made, and all the requirements of the mining laws of the United States, and of the State of Wyoming have been complied with; that there was a well drilled upon this land that produced gas in commercial quantities.

Hearing was had on said protest February 15, 1924, and from the evidence adduced the local officers found and held that the charges had been sustained and recommended the cancellation of the permit to the extent of the conflict area. On appeal from that action the Commissioner in the decision here appealed from found that the evidence failed to show that a valid discovery of oil or gas had been made on the said claim of protestants February 25, 1920, the date of the approval of the leasing act (41 Stat. 437), or that the mining claimants were in diligent prosecution of work leading to discovery or in actual possession of the land on said date; that while a well was drilled on the land in 1918 by a lessee of the mineral claimants, in which a quantity of gas was encountered, no development work had been performed on the land since 1919, and that the claim is not protected by the saving provisions of section 37 of the leasing act. He accordingly, as hereinbefore stated, dismissed the protest.

It is testified to that the claim made the basis of protest was located March 20, 1918, as Allen Lake No. 8 oil placer mining claim by the protestants, consisting of Albert Cronberg, T. R. Newbold, Stansbury Thompson, J. B. True, H. A. True, jr., A. R. Wilson, John F. Vail, and Thomas H. Devine. May 31, 1918, the claimants and a number of other persons executed a lease covering said land together with six other adjacent quarter-sections to one J. S. Cosden who commenced the drilling of a well on the involved quarter-section August 15, 1918, which on September 30, 1918, had attained a depth of 1,419 feet. It is testified by three of the mineral claimants and protestants—Albert Cronberg, H. A. True, jr., and J. B. True—that at depths between and including 950 and 1,367 feet three deposits of gas were encountered in said well in volumes estimated at respectively 3,000,000, 2,000,000, and 35,000,000 cubic feet; that owing to the lack of transportation facilities and a local market no attempt was made to utilize the gas deposits encountered in the well, but that drilling was continued with a view to reaching an oil sand which was known

to exist in the field in which the well is situated; that at a depth of 1,419 feet a flow of water was encountered in the well which the drillers, after spending about four months in the attempt, were unable to control, whereupon all but about 200 feet of the casing in the well was pulled and the well abandoned after being filled with mud to protect the gas sand, all work there ceasing in the latter part of January, 1919. In February, 1919, the drilling tools were removed and the lease to Cosden was later canceled by the locators because of his failure to commence the drilling of a second well upon an area covered by the lease within the time stipulated in that instrument. The lease, however, seems to have been reinstated on some date prior to the last of December, 1919, when it was assigned by Cosden to the Franz Corporation, and so far as anything to the contrary is shown, it expired at the end of its term, May 31, 1923.

H. A. True, jr., one of the locators, testifies that pending the reinstatement of the lease Franz, the head of the Franz Corporation, and one Clarke, representing the Midwest Refining Company, interviewed the witness, as a representative of the locators, with a view to reaching some agreement among the three interests that would be satisfactory to the Midwest Company, to induce it to drill an additional well in the field in which the land is situated, the Midwest Company having secured other lands in the field, which, however, is deemed to be insufficient in area to warrant the drilling of a well there. A three-cornered agreement was entered into whereby the Franz Corporation was to have the said Cosden lease reinstated and to assign a part of the acreage included therein to the Midwest Refining Company and that company was to drill a well to test the structure at a point farther down the flank of the anticline than that upon which the Cosden well was drilled in 1920. The Midwest Company drilled a well on the NW. ¼, Sec. 12, T. 22 N., R. 79 W., and at a point something over two miles to the southeast of the land involved but that operation resulted in a crooked hole. The rig was then moved over onto the adjoining Sec. 11 where a second well was started under the supervision of the Western States Oil and Land Company. Encountering trouble in the drilling of that hole the rig was again moved to another point on said Sec. 11 where a third hole was started, the drilling on Sec. 11 being performed in the latter part of 1920, and in 1921. The witness further testified he, as attorney in fact for the protestants, gave one Hinkle an option on the land here in question. The date of that option does not appear but it would seem from the testimony of one of the other witnesses that it was after June, 1922. Through Hinkle the claimants met and entered into an agreement with one Pattinson, said to have been connected with the Central Pipe Line Company of Chatham, Canada, for the further drilling of the land in question and other lands with

respect to which permits had been granted the protestants. Pattinson's company erected a rig on a tract adjoining that here in controversy and commenced the drilling of a well thereon July 1, 1923, and at the date of the hearing was still drilling in the field at that point. Acting on behalf of the protestants the witness made application for prospecting permits for land surrounding that here involved and the permits were granted and Pattinson entered into a contract with respect to the "adjoining permits." Asked what the nature of the contract with Pattinson was as to the tract in controversy the witness said, "that he will bear the expense in connection with patent proceedings, and, of course, that land is to be developed along with the other land in the field."

Respecting the performance of assessment work on the land Albert Cronberg, one of the protestants, testifies that he did assessment work after the drilling on the land and down to the date of the hearing. Asked what the assessment work consisted of witness said, "Of digging drilling cellars on the lease." Witness H. A. True, jr., asked if he knew what assessment work had been done "on these lands" since the disclosure of gas said: "On the NW. ¼, Sec. 34, the particular quarter-section in question, the assessment work has been done each year since 1918." James B. True, one of the protestants and their third witness, testified that he knew that the annual assessment work had been performed on the claim since the discovery of the gas well. Asked on cross-examination if there had been any development or drilling on the land in question since January, 1919, witness stated that there had been development work. "Cellars have been dug on locations for new drilling sites." Asked if that was done as assessment work to hold the claim witness said: "Why, you can probably tell better than I can whether it is necessary, but perhaps it is not necessary to do assessment work to hold the claim so long as we did not abandon it after discovery, and are entitled to a patent."

The prospecting permits referred to by the witnesses for the protestants were serially numbered 029699 and 029702, both issued March 11, 1922, under section 19 of the leasing act on applications filed August 25, 1920. Permit 029699 was issued to five of the locators of the claim here in question and six other persons, on the bases of the Soldier Springs Nos. 1 to 5 oil placer mining claims in which four of said protestants were named as locators and embraced the N. ½, Sec. 4, T. 22 N., R. 79 W., and the NW. ¼ and S. ½, Sec. 32, T. 23 N., R. 79 W. Permit 029702 was issued to all of the eight protestants, together with five other persons, on the bases of the Allen Lake Nos. 1 to 7, inclusive, and 9 to 14, inclusive, oil placer mining claims, each purported to have been located by eight persons comprising from three to all eight of the protestants,

and covering all of Sec. 2, T. 22 N., R. 79 W., and all of Sec. 28, NE. ¼, Sec. 32, and NW. ¼ and S. ½, Sec. 34, T. 23 N., R. 79 W. Both of said permits were on May 18, 1923, assigned by the permittees to L. C. Hinkle who, on the same date, assigned them to James R. Jones, the latter, it appears, taking title thereto as trustee for the use and benefit of a corporation to be thereafter organized. Said corporation, denominated the Kanawha Oil and Gas Company was organized May 6, 1924, whereupon and on May 8, 1924, Jones executed an assignment of said permits thereto. The president of said corporation appears to be R. J. Pattinson. In an application for an extension of time within which to comply with the requirements of said permits it was alleged that on July 1, 1923, a majority of the stockholders of the company commenced a well on an area included in permit 029702 which well, it otherwise appears, was drilled on the NE. ¼, Sec. 34, and which it would seem was the one referred to in the testimony of H. A. True, jr., as having been drilled by Pattinson on a tract adjoining that here involved.

The testimony of the protestants' witnesses as to the estimated flow of gas encountered in the well drilled on the claim in question is, in the opinion of the Department, insufficient, standing alone, to establish the existence of an adequate discovery to support a mining location, and the record fails to disclose other facts which suffice to warrant a finding that such a discovery has been made within the limits of the claim.

But even if it could be held that there had been an adequate discovery made upon said claim, the evidence fails to show, by the establishment of compliance with the requirements of section 2324, Revised Statutes, and the act of December 31, 1920 (41 Stat. 1084), in the matter of the performance of acceptable annual assessment work for the benefit of the claim during the calendar year ending December 31, 1920, and the years ending June 30, 1921, 1922, and 1923, that the claim was a valid and subsisting one at the date of the issuance of the permit of Hazlett covering the land. While it is true that the witnesses for the protestants testified in general terms that the annual assessment work had been performed upon the claim each year since 1918, and that the claim has never been abandoned by the locators, there is nothing in the record from which it can be determined what specific work had been performed on the claim, and it is evident from the testimony that the protestants are seeking credit toward compliance with assessment work requirements for the cost of excavating so-called drilling cellars upon other claims of the group of which that here in question once formed a part, and a portion of the cost of drilling operations performed on Secs. 11 and 12, T. 22 N., R. 79 W., and upon the NE. ¼ of said Sec. 34. The protestants, however, are not shown to have had any in-

terest in the ground upon which the wells in Secs. 11 and 12 were drilled, while the drilling upon the NE. ¼, Sec. 34, once covered by the Allen Lake No. 7 claim originally embraced in the group of which the claim here in question was a part, was performed long after the said Allen Lake No. 7 had been abandoned as a mining claim, and even after the protestants had assigned all of their right, title and interest in and to the permit issued therefor. The want of interest by the protestants in the tracts upon which said drilling operations were performed, and at the time of its performance, would, without regard to other objections that might be urged against the availability of the expenditures therefor, defeat the right of the protestants to have any part of such costs credited to the claim here involved as annual assessment work. As to the cost of the so-called drilling cellars excavated upon other claims of the group than that here in question, it is sufficient to say that that would not under any circumstances be available for any purpose toward any other claim or claims than those upon which the work was performed.

It was, however, suggested by one of the locator-protestants at the hearing, on the assumption that an adequate discovery of mineral had been made within the limits of the claim in 1918, that under the circumstances of the case the claimants are entitled to a patent to the claim whether annual assessment work was thereafter performed upon or for the benefit of the claim or not. The Department is not impressed with the soundness of that view. By section 2324 of the Revised Statutes it is provided that—

> * * * 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, * * * 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 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.

It was, however, by section 37 of the leasing act declared oil and gas deposits 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 view of the last quoted provisions it seems clear that Congress intended that an oil and gas mining location, unperfected at the date of the passage of the leasing act to the extent that the claimants would be entitled to a certificate of entry therefor, should be

forfeited to the United States in the event of the failure of such claimants after the date of the act to fulfill the requirements of said section 2324, relating to the performance of annual assessment work. It is unreasonable to assume that Congress intended that claims incapable of being passed to patent because of failure to comply with requirements of the law under which initiated should be permitted to be maintained merely on the basis of an asserted possessory right which could not be affected by a relocation of the land. This view is in harmony with the decision of the Department in *Interstate Oil Corporation and Frank O. Chittenden* (50 L. D. 262) and the cases there cited.

For the reasons stated the judgment of the Commissioner complained of, dismissing the protest, is affirmed.

CRONBERG ET AL. v. HAZLETT

Motion for rehearing of departmental decision of April 6, 1925 (51 L. D. 101), denied by First Assistant Secretary Finney, July 2, 1925.

PREFERENCE RIGHT TO PURCHASE UNAPPROPRIATED LANDS IN WISCONSIN ERRONEOUSLY MEANDERED AS WATER-COVERED AREAS—ACT OF FEBRUARY 27, 1925

INSTRUCTIONS

[Circular No. 994]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 7, 1925.

REGISTER AND RECEIVER,
WAUSAU, WISCONSIN:

The act of February 27, 1925 (43 Stat. 1013), entitled "An Act Granting to certain claimants the preference right to purchase unappropriated public lands," provides—

That the Secretary of the Interior, in his judgment and discretion, is hereby authorized to sell, in the manner hereinafter provided, any of those lands situated in the State of Wisconsin which were originally erroneously meandered and shown upon the official plats as water-covered areas, and which are not lawfully appropriated by a qualified settler or entryman claiming under the public land laws.

SEC. 2. That any owner in good faith of land shown by the official public land surveys to be bounded in whole or in part by such erroneously meandered area, and who acquired title to such land prior to this enactment, or any citizen of the United States who in good faith under color of title or claiming

as a riparian owner has, prior to this Act, placed valuable improvements upon or reduced to cultivation any of the lands subject to the operation of this Act, shall have a preferred right to file in the office of the register and receiver of the United States land office of the district in which the lands are situated an application to purchase the lands thus improved by them at any time within ninety days from the date of the passage of this Act if the lands have been surveyed and plats filed in the United States land office; otherwise within ninety days from the filing of such plats. Every such application must be accompanied with satisfactory proof that the applicant is entitled to such preference right and that the lands which he applies to purchase are not in the legal possession of an adverse claimant under the public land laws.

SEC. 3. In event such erroneously meandered land is bounded by two or more tracts of land held in private ownership with apparent riparian rights indicated by the official township plat of survey at date of disposal of title by the United States, the Commissioner of the General Land Office shall have discretionary power to cause such meandered area, when surveyed, to be divided into such tracts or lots as will permit a fair division of such meandered area among the owners of such surrounding or adjacent tracts under the provisions of this Act. In administering the provisions of this Act, where there shall exist a conflict of claims falling within its operation, if any claimant shall have placed valuable improvements upon the land involved or shall have reduced the same to cultivation, then to the extent of such improvements or cultivation such claimant shall be given preference in adjustment of such conflict: *Provided*, That no preference right of entry under this Act shall be recognized for a greater area than one hundred and sixty acres in one body to any one applicant, whether an individual, an association, or a corporation: *Provided further*, That this Act shall not be construed as in any manner abridging the existing rights of any settler or entryman under the public land laws.

SEC. 4. That upon the filing of an application to purchase any lands subject to the operation of this Act, together with the required proof, the Secretary of the Interior shall cause the lands described in said application to be appraised, said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement thereof for agricultural purposes by the applicant or his predecessor in interest, but inclusive of the stumpage value of any timber cut or removed by the applicant or his predecessor in interest.

SEC. 5. That an applicant who applies to purchase lands under the provisions of this Act, in order to be entitled to receive a patent, must within thirty days from receipt of notice of appraisal by the Secretary of the Interior pay to the receiver of the United States land office of the district in which the lands are situated the appraisal price of the lands, and thereupon a patent shall issue to said applicant for such lands as the Secretary of the Interior shall determine that such applicant is entitled to purchase under this Act. The proceeds derived by the Government from the sale of lands hereunder shall be covered into the United States Treasury and applied as provided by law for the disposal of the proceeds from the sale of public lands.

SEC. 6. That the Secretary of the Interior is hereby authorized to prescribe all necessary rules and regulations for administering the provisions of this Act and determining conflicting claims arising hereunder.

The following regulations are for the guidance of your office until the close of the business hour on April 30, 1925, after which applica-

tions to purchase under the act in conformity with these regulations must be filed with the Commissioner of the General Land Office.

Applications to purchase under this act must be sworn to and may be executed before any officer having a seal and authorized to administer oaths in the State of Wisconsin, and must be filed with the register and receiver of your office, or with the Commissioner of this office, within ninety days from the passage of this act, if the lands have been surveyed and plats filed in your office, otherwise within ninety days from the filing of such plat. The applicant must show that he is a native-born or naturalized citizen of the United States, and if naturalized, file record evidence thereof; must describe the lands which he desires to purchase, together with the land claimed as the basis of his preference right to the lands applied for, if he applies as a riparian owner, or, if claiming otherwise, under what color of title his claim is based, and that the applied for lands are not lawfully appropriated by a qualified settler or entryman under the public land laws, nor in the legal possession of any adverse applicant; the kind, character, and value of the improvements on the land covered by the application; when they were placed thereon; the extent of cultivation had, if any, and how long continued. This application must be supported by the affidavits of two persons having personal knowledge of the facts alleged in the application. Upon receipt of such application a proper serial number will be assigned thereto.

If the land applied for is surveyed and vacant, the local officers, after noting the application on their records, will suspend action thereon and will promptly forward same to the Commissioner of the General Land Office, whereupon same will be forwarded to the assistant chief inspector for investigation and appraisement of the land in accordance with the provisions of the act. If for unsurveyed land, the local officers will note the application and suspend same, transmitting it to this office for consideration as to whether or not the lands applied for are vacant public lands and of the class contemplated by the act under which title is sought. During such suspension the lands described in the application shall not be disposed of.

When an application is received by the assistant chief inspector, he will cause an investigation and appraisement of the land to be made in accordance with the provisions of the act. The inspector making the investigation and appraisement will make a report as to the development or improvement of the land for agricultural purposes, and as the evidence obtained as to whether or not the lands are of a class contemplated by the act, recommending the allowance

or rejection of the application, which report will be returned to this office through the assistant chief inspector.

If upon consideration of the application in this office, with report and appraisement, it shall be determined that the applicant is entitled to purchase the lands applied for, this office will notify the applicant at once, by registered mail, that he must within thirty days from service of notice deposit with the receiving clerk of this office the appraised price, or thereafter and without further notice forfeit all rights under his application.

Upon payment of the appraised price of the land this office will issue notice for publication. Such notice shall be published at the expense of the applicant in a newspaper of general circulation, designated by the Commissioner of this office, in the vicinity of the lands, once a week for five consecutive weeks (or thirty consecutive days if in a daily paper) immediately prior to the date of sale, but a sufficient time shall elapse between the date of last publication and date of sale to enable the affidavit of the publisher to be filed in this office. The notice will advise all persons claiming adversely to the applicant that they should file any objection or protests to the allowance of the application within the period of publication, otherwise the application may be allowed. Any objection or protest must be under oath, corroborated, and a copy thereof served upon the applicant. The Commissioner of this office will cause a notice similar to the notice of publication to be posted in this office, such notice to remain posted during the entire period of publication. The publisher of the newspaper must file in this office, prior to the date fixed for the sale, evidence that publication has been had for the required period, which evidence must consist of the affidavit of the publisher, accompanied by a copy of the notice published.

Upon submission of satisfactory proof, if no protest or contest is pending, final certificate will issue.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

UNITED STATES MINING LAWS—PARAGRAPH 60, CIRCULAR NO 430, AMENDED—ACT OF MARCH 3, 1925

INSTRUCTIONS

[Circular No. 995]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 7, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES IN ALASKA:

Your attention is directed to the act of Congress, approved March 3, 1925 (43 Stat. 1118), entitled "An Act To modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes," which amended section 4 of the act of August 1, 1912 (37 Stat. 242), as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4 of the Act of Congress of August 1, 1912, section 129d Compiled Laws of Alaska, entitled "An Act to modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes," be amended to read as follows:

"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 as determined by a transverse line drawn within the lines of the claim and at right angles to its longest side: *Provided,* That where any isolated parcel of placer ground lies between and adjoins patented or validly located claims on all of its sides and is not over one thousand three hundred and twenty feet in length this dimensional restriction shall not apply."

In accordance with this act, that portion of paragraph 60 (*c*) of the mining regulations relative to section 4 of said act of August 1, 1912, is amended to read:

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 act of March 3, 1925, provides that the greatest width of a placer claim in Alaska shall be determined by a transverse line drawn within the lines of the claim and at right angles to its longest side, and that this dimensional restriction shall not apply to any isolated parcel of placer ground which lies between and adjoins patented or validly located claims on all of its sides and is not over 1,320 feet in length. 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.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

OFFICE OF SURVEYOR GENERAL ABOLISHED—REORGANIZATION OF SURVEYING SERVICE—ACT OF MARCH 3, 1925

INSTRUCTIONS

[Circular No. 996]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 7, 1925.

THE SURVEYING SERVICE,
GENERAL LAND OFFICE:

The act of Congress approved March 3, 1925 (43 Stat. 1141, 1144), making appropriations for the Department of the Interior for the fiscal year ending June 30, 1926, and for other purposes, provides as follows:

> The office of surveyer general is hereby abolished, effective July 1, 1925, and the administration of all activities theretofore in charge of surveyors general, including the necessary personnel, all records, furniture, and other equipment, and all supplies of their respective offices are hereby transferred to and consolidated with the Field Surveying Service, under the jurisdiction of the United States Supervisor of Surveys, who shall hereafter administer same in association with the surveying operations in his charge and under such regulations as the Secretary of the Interior may provide.
>
> Surveying public lands: For surveys and resurveys of public lands, examination of surveys heretofore made and reported to be defective or fraudulent, inspecting mineral deposits, coal fields, and timber districts, making fragmentary surveys, and such other surveys or examinations as may be required for identification of lands for purposes of evidence in any suit or proceeding in behalf of the United States, under the supervision of the Commissioner of the General Land Office and direction of the Secretary of the Interior, $840,290: *Provided*, That the sum of not exceeding 10 per centum of the amount hereby appropriated may be expended by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, for the purchase of metal or other equally durable monuments to be used for public land survey corners wherever practicable: *Provided further*, That not to exceed $10,000 of this appropriation may be expended for salaries of employees of the field surveying service temporarily detailed to the General Land Office: *Provided further*, That not to exceed $15,000 of this appropriation may be used for the survey, classification, and sale of the lands and timber of the so-called Oregon and California Railroad lands and the Coos Bay Wagon Road lands: *Provided further*, That not to exceed $50,000 of this appropriation may be used for surveys and resurveys, under the rectangular system provided by law, of public lands deemed to be valuable for oil and oil shale.

By this legislation the entire surveying service of the General Land Office is brought under the immediate jurisdiction of the supervisor of surveys, who is charged with the administration of all matters pertaining to that service under the supervision of the Commissioner and direction of the Secretary.

In furtherance of the consolidation of the surveying service, the Secretary has directed that the division of surveys of the General Land Office be under the general supervision of the supervisor of surveys, who, under the Commissioner, shall prescribe the methods and procedure to be followed.

PUBLIC LAND SURVEYS

With this single surveying organization to perform all field and office duties—administrative, engineering, fiscal, or otherwise—ranging from the inception of a survey to its acceptance, the following regulations will govern:

Applications by settlers for original surveys will be the subject of appropriate investigation by the district cadastral engineer (formerly the assistant supervisor of surveys), and if the survey is found to be merited, special instructions will be prepared at once. Other surveys to cover lands of known agricultural value, or deemed advisable from an administrative standpoint, will also be made the subject of original consideration by the district cadastral engineer, and covered by appropriate special instructions to be prepared at once. All special instructions must be submitted to the General Land Office for examination. The approval of the special instructions by the General Land Office will carry with it the authorization for the survey.

Upon completion of the surveys in the field, township by township, formal report will be made to the General Land Office of that fact, in lieu of the monthly progress report system now in use.

Under the corps of competent engineers now constituting the field surveying service, and the close supervision exercised by the supervisor of surveys and the district cadastral engineers, the resulting surveys should be of a high standard, requiring but a single examination and review to test the sufficiency and accuracy of the work. This examination will be made under the supervision of the district cadastral engineer, and will cover both the field and office features of the accomplished work.

All surveying returns now prepared for the approval of the surveyor general, or ex-officio surveyor general, will, after June 30, 1925, be prepared for the approval of the supervisor of surveys, and when so approved will be forwarded to the General Land Office.

Upon receipt of the returns by the General Land Office, the survey will be formally accepted without further examination, unless, by reason of special or unusual conditions attending any particular case, the Commissioner deems it advisable to further scrutinize the returns or test the accuracy of the work.

The existing practice and procedure of handling resurveys and special surveys will be continued.

MINERAL SURVEYS

The appointment of United States mineral surveyors is under the jurisdiction of the supervisor of surveys, and all such appointments will be made by him under such rules and regulations as he may prescribe.

Orders for the survey of mining claims will be issued by the office cadastral engineers (formerly the technical and administrative head of the surveyor general's office force), who will be authorized by the supervisor of surveys to administer the work in connection therewith and approve plats and field notes of such surveys, and otherwise to perform the duties prescribed by the mining regulations to be performed by the surveyors general in connection with the survey of mining claims, including certification as to expenditures made upon the claims.

ACCOUNTS

The discontinuance of the office of surveyors general on July 1, 1925, necessitates a change in the method of handling accounts, allotments, and disbursements.

Subject to the provisions of the appropriation act that 10 per cent of the amount appropriated may be expended for the purchase of metal monuments, $10,000 for salaries of employees of the field surveying service temporarily detailed to the General Land Office, $15,000 for the survey, classification, and sale of the lands and timber of the so-called Oregon and California Railroad lands, and $50,000 for surveys and resurveys of oil and oil shale areas, and deducting $3,500 for stationery, as provided for elsewhere in the act, all matters pertaining to the accounts, allotments, and disbursements will be handled in the office of the supervisor of surveys, at Denver, with the single exception of Alaska.

The administration of all activities assigned by law to the surveyors general must continue until the close of business on June 30, 1925, but it is believed that the other duties now discharged by these officers, especially in the matter of the disbursements and accounts incident to the execution of the public land surveys in the field, should be taken over by the supervisor of surveys at the earliest opportunity in order that difficulties may be avoided at the end of the fiscal year.

Until June 30, whether vouchers are paid in Denver or by the respective surveyors general, they will be posted on the cost records

in the office of the surveyor general. Thereafter, vouchers to be paid by the special disbursing agent under the centralization plan will be sent to the district cadastral engineer, through the office cadastral engineer, in whose office the vouchers will be posted on his cost-keeping record, and the fact of such posting evidenced by the office cadastral engineer's initials over the space for the district cadastral engineer's signature as approving officer.

To the end that prompt payment may be made of the many vouchers coming to a central office, it will be expected that each district cadastral engineer will, before approving a voucher, give it such an examination, or require such an examination to be given by some one under his supervision, as shall insure that the voucher is in proper form, properly signed by the claimant and certified, extensions carefully carried out, and that it represents duly authorized and unpaid expenses, or, if not already authorized, that a full statement of the facts and a specific recommendation in the matter is attached.

Any special deposits that are not to go into the Treasury and be advanced therefrom as an appropriation, such as special deposits for resurveys, act of September 21, 1918 (40 Stat. 965), Circular No. 630, special deposits for potash surveys, act of October 2, 1917 (40 Stat. 297), Circular No. 961 (50 L. D. 644), and deposits for oil lease surveys, act of February 20, 1920 (41 Stat. 437), will be made with the special disbursing agent, who will deposit them with the Treasurer to his official credit (Form 6599), and disbursed or otherwise disposed of in accordance with instructions.

Each office cadastral engineer will be required to file a bond and will receive and receipt for moneys tendered for office work (transcripts, copies of records, plats, etc.), including office work in connection with mineral surveys, and for sales of Government property. Such moneys, together with the duplicate receipts, will be forwarded to the special disbursing agent at Denver. At the end of each month the special disbursing agent will be furnished with an abstract of all collections and of moneys to be returned or applied on account of office work not in connection with mineral surveys. No other accounting will be required of the office cadastral engineer.

The special disbursing agent at Denver will account for the moneys received for office work not in connection with mineral surveys in accordance with Circular No. 483, and for proceeds of Government property in accordance with paragraphs 156, 187, and 188 of Circular No. 616 (46 L. D. 513). Moneys received on account of office work in connection with mineral surveys will be deposited by the special disbursing agent to his personal credit, and refunds will

be made on direct settlement, as at present, in accordance with the act of February 24, 1909 (35 Stat. 645).

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
Acting Secretary.

L. E. JONES

Instructions, April 8, 1925

OIL AND GAS LANDS—DISCOVERY—LEASE.

The question as to whether valid discovery of mineral has been made is to be determined in each case from the facts disclosed in that case, and where there has been regular and continuous production of high gravity oil for two years upon which royalty has been paid, although averaging but one barrel per day, from a shallow well on land so near the edge of a structure that deeper drilling would not be justified, such constitutes discovery sufficient to authorize the issuance of a lease under section 14 of the act of February 25, 1920.

FINNEY, *First Assistant Secretary:*

I have your [Commissioner of the General Land Office] request for instructions in the matter of the application (019911) of L. E. Jones, filed March 15, 1924, for oil and gas lease covering the S. ½ NE. ¼ and N. ½ SE. ¼, Sec. 11, T. 1 N., R. 102 W., 6th P. M., Glenwood Springs, Colorado, land district.

The question submitted is whether oil deposits encountered in two wells drilled to depths of 600 and 650 feet, respectively, under a prospecting permit issued to Mr. Jones are sufficient in quantity to satisfy the requirements of section 14 of the leasing act as to discovery.

Your report of March 27, 1925, in the case states that well No. 1 produces one barrel of oil per day, and applicant states with reference to well No. 2, that it has not been pumped, but that bailing tests indicate it will be similar to well No. 1 in production.

The records of the Bureau of Mines show the gravity of the oil in this vicinity to be slightly over 40 degrees.

The first payment of royalty was for the month of June, 1922, $10.08. The last royalty posted was for December, 1924, $6.20. The lowest royalty received was $2.10 for the month of December, 1922. These royalties are figured at 20 per cent under the terms of the permit.

You refer to the case [unpublished] of Great Falls 052550, wherein, on December 26, 1924, lease was denied on the ground of insufficient discovery. In that case the well was shut in except for

tests, as no market was available, and the tests showed that about 12 barrels of fluid were bailed during the first 24 hours, of which 40 per cent was water and 60 per cent oil. No oil had been disposed of and no royalty paid. The Department stated in the case—

> no fixed amount has been or can be stated as a criterion in such instances, as that will depend upon quality of the oil, nearness to market, and many other factors.

Applications for lease under the provisions of sections 18 and 18a of the leasing act were denied in the [unpublished] case of the Pioneer Oil Company, for lands in the so-called Teapot Dome structure, where it was alleged that wells would produce as high as 6 or 8 barrels of oil per day. However, in that case the wells were shallow, in the opinion of the Department, having reached shale only; no oil had been produced and marketed, and doubt was entertained as to the possible volume and continuity of production.

In my judgment the question as to whether a sufficient discovery has been made should, in each case, be determined upon the facts disclosed in that case. Here it appears that there has been regular and continuous production from well No. 1 for more than two years; that well No. 2 will probably produce an equal amount; that both are shallow wells drilled into an oil sand; that the oil is high in gasoline, and a report by the Geological Survey made in 1924 indicates that in the opinion of that bureau the discovery is sufficient.

The record also shows that Mr. Jones has erected a skimming plant, produces gasoline for his own use, and disposes of small quantities to the public at his plant.

It further appears from informal advice of the Bureau of Mines that the royalty is paid on the crude oil before it passes through the refining process, thus insuring to the Government its royalty on the gasoline being used by Mr. Jones.

It is true that the returns to the Government from these wells will be very small, but in the opinion of the Geological Survey the land is so near the edge of the structure that deeper drilling would not be justified; consequently, the Department must decide whether or not a lease should be granted and comparatively small production secured from the shallow wells, or the operation be discouraged and abandoned, with the possible nonrecovery of the small amounts of oil present under this area.

This, as indicated, is not a case where the well is drilled to the sand, and lease applied for on the meager showing thus made. Mr. Jones has actually operated the well for more than two years and has converted the oil produced to beneficial use. In my opinion, the facts of this particular case warrant and justify the issuance of a lease to the permittee, and you are authorized to take the necessary steps to that end.

MOON v. WOODROW

Decided April 9, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—RECORDS—RESTORATIONS.

The allowance of an oil and gas prospecting permit for land embraced within a previously issued permit, still of record at the time that the second permit was allowed, was erroneous and confers no rights upon the permittee that can be recognized after the first permit has been canceled upon the records of the local United States land office.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Holt* v. *Murphy* (207 U. S. 407) and *Stewart* v. *Peterson* (28 L. D. 515) cited and applied; case of *Martin Judge* (49 L. D. 171) adhered to.

FINNEY, *First Assistant Secretary:*

Ella M. Moon has appealed from a decision of the Commissioner of the General Land Office, rendered December 22, 1924, holding for cancellation her oil and gas prospecting permit, approved May 29, 1924, and embracing the NW. ¼, NW. ¼ SW. ¼, Sec. 29, T. 47 N., R. 100 W., 6th P. M., Lander, Wyoming, land district, upon the ground that at the time her application was filed (August 24, 1923) the prior permit of one T. B. Brahany (Lander 012012), embracing the land involved, was of record in the local office, and so remained until January 3, 1924.

Following clearing of the record of Brahany's permit, one Gertrude Woodrow, on January 12, 1924, filed amended oil and gas application 014445, embracing the lands included in Mrs. Moon's application, and requested that said application be held for naught, under the rule, announced in the case of *Martin Judge* (49 L. D. 171), that an applicant for a permit to prospect for oil and gas on lands impressed with a subsisting permit acquires no rights, by the filing of an application therefor, while such permit is of record. The Woodrow application appears to be the first one filed embracing the land following cancellation of Brahany's permit.

In her appeal to the Department from the Commissioner's decision, Mrs. Moon asks the overruling of said decision upon two grounds. The first of these is that Mrs. Woodrow's application for this land (filed, as before mentioned, on January 12, 1924) was rejected on March 15, 1924, in so far as it conflicted with her (Mrs. Moon's) application; and that Mrs. Woodrow, being duly notified of such rejection, permitted the decision to become final by refraining from taking appropriate action in the premises. The second assigned ground of error is that the rule announced in the *Martin Judge decision* is not incompatible with the allowance of Mrs. Moon's application or allowing the permit granted her to stand, the prohibition of all benefit being under the express language of the *Judge*

decision only during the period "prior to the cancellation" of any outstanding permit; so that, applying the rule to this case, after cancellation of the Brahany permit, the inhibition was lifted and the disability cured.

The second assignment of error will be first considered. The construction of the language of the *Martin Judge decision* contended for by counsel for Mrs. Moon is not the construction recognized and followed by the Land Department. Its construction is that a necessary condition to the initiation of a right to an oil and gas permit is the cancellation upon the record of prior claims incompatible with allowance of a tendered application. In view of the state of the record the local officers should have declined to accept the application of Mrs. Moon when tendered August 24, 1923. Under the established practice of the Land Department the tendered application was without efficacy as the initiation of a right, and the later clearing of the record by the cancellation of Brahany's permit could not impart vitality to said application or the permit later issued thereon.

This practice is one of long standing and wide application in the Land Department. In the case of *Stewart* v. *Peterson* (28 L. D. 515) the Department held (page 519):

> In order that this important matter of regulation may be perfectly clear it is directed that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until said entry has been canceled upon the records of the local office.

In *Holt* v. *Murphy* (207 U. S. 407), the Supreme Court quoted the rule announced in *Stewart* v. *Peterson* and said:

> Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims.

It is unnecessary to consider the merits of the first matter assigned as error in the decision of the Commissioner, since, regardless of the strength or weakness of Mrs. Woodrow's claim, the allowance of Mrs. Moon's application and issue of permit to her were the result of a misapprehension of the state of the record.

The decision of the Commissioner in this case is found correct and is accordingly hereby affirmed.

ARTHUR K. LEE ET AL.

Decided April 21, 1925

COAL LANDS—MINING CLAIM—PATENT.

Land classified as coal and valuable therefor is not subject to location, entry, and patent under the general mining laws of the United States.

COURT AND DEPARTMENTAL DECISIONS DISTINGUISHED.

Cases of *United States ex rel. Durnford* v. *Fall* (285 Fed. 887), and *Lackey* v. *Durnford* (48 L. D. 226), cited and distinguished.

FINNEY, *First Assistant Secretary:*

The Commissioner of the General Land Office has submitted for instructions the question of what shall be done with placer oil locations on classified coal lands under conditions stated in his letter of April 1, 1925, as follows:

There is transmitted herewith mineral entry Lander 014556, made April 29, 1924, by Arthur K. Lee *et al.*, embracing the N. ½ SW. ¼, NW. ¼ SE. ¼ and SW. ¼ NE. ¼, Sec. 30, T. 58 N., R. 99 W., 6th P. M., which lands were located on August 16, 1915, as the Woods No. 3 oil placer mining claim.

The records of this office show that on March 9, 1910, the NE. ¼, NW. ¼ SE. ¼, and other lands in the above section, which had been theretofore withdrawn, were appraised as coal lands at the value of $20 per acre, and thereafter restored. On December 6, 1915, all of the section was included in Petroleum Reserve No. 41, and on December 16, 1924, it was included in the area designated as the Elk Basin Oil and Gas Field, a producing oil structure. The first discovery of oil on the claim was made on March 21, 1916. There are now 13 producing wells on the claim but the record does not disclose which of the said wells, if any, are located on lands classified as coal.

There are a number of similar cases now pending before the office.

The Department, April 19, 1918, held, in the case of American Potash Company, Evanston 05477 (unreported), that a coal classification such as appears in this case was sufficient to defeat the entryman's right to a patent under the potash location; but in this connection see *Lackey* v. *Durnford* (48 L. D. 226).

This office has construed the Lackey-Durnford case as modifying the American Potash case and as authorizing the passing to patent under the act of February 11, 1897 (29 Stat. 526), of placer-oil locations, notwithstanding that the oil claim was located subsequent to the classification of the land as coal land, and a few cases of that character have passed to patent in conformity with such construction.

But in view of the informal action taken February 21, 1925, by the First Assistant Secretary on the letter to Ralph T. Richards, 1170049, applying the ruling in the American Potash case to asphaltum locations, I am in doubt as to what disposition should be made of placer-oil locations on classified coal lands.

In its unpublished decision of June 12, 1918, on motion for rehearing in the case of American Potash Company (Evanston 05395—D32901), the Department declined to grant a rehearing of its decision of April 19, 1918, wherein the decision of the Commissioner of the General Land Office of May 16, 1916, rejecting the company's application for patent under the placer mining laws to 13 placer mining claims, for the reason that at the date of location the land covered thereby had been classified as coal land and valued at prices ranging from $170 to $325 per acre, was affirmed. In said decision

of June 12, 1918, the Department gave as a vital reason why the application for mineral patent must be denied the following:

> Prior to the attempted location of the mining claims applied for, the lands had been withdrawn and classified by this Department as coal lands, subject to disposition under the coal mining laws at prices ranging from $170 to $325 per acre.
>
> Sections 2347 to 2352, United States Revised Statutes, provide an exclusive method for the disposition of coal lands of the United States, and the lands in question having, as above stated, been classified and appraised as valuable coal lands, they were not subject to location, application, and patent for the deposits claimed by applicant company under the general mining laws.

The case of *Lackey* v. *Durnford* (48 L. D. 226) involved land which was in June, 1907, classified as coal land and appraised at the minimum price of $10 per acre. On May 12, 1916, Nelida A. Durnford filed coal-land application for said land, and this application was protested by Lackey, who alleged that he and others had located an earlier oil-placer claim thereon and had discovered oil. The protest resulted in a hearing. When the case came before the General Land Office the Commissioner found that Lackey was in possession of the land and had a perfected placer-mining location thereon when Durnford filed her application, and that, although some coal had been developed on the land, it was of poor grade and apparently of no commercial value. He held that on account of the placer location the land was not vacant coal land subject to purchase, and that the coal-land application should be rejected and the coal-land classification set aside.

The Department found that the evidence did not warrant the overturning of the classification of the land as valuable for coal and its appraisal at the minimum price as such; that Lackey was in possession and in diligent prosecution of work under claim and color of title asserted by virtue of the oil placer mining laws when Durnford filed her application. It was held that the land was not vacant and unappropriated coal land of the United States subject to entry under section 2347 of the Revised Statutes.

That case was taken into the courts of the District of Columbia on mandamus proceedings, and the action of the Department was sustained (*United States ex rel. Durnford* v. *Fall*, 285 Fed. 887). The Court of Appeals said:

> In the present case, however, we are of the opinion that the oil entries, whether valid or void, amounted to sufficient occupancy of the land within the statute to exclude it from entry as coal land. The land being occupied, we are not concerned in this proceeding with the validity of the oil entries or the legality of the assignments which were made.

Considered in the light of the facts in the *Lackey* v. *Durnford case*, there is nothing in the decision of either the Department or

the court that detracts from the force and effect of the ruling of the Department in the case of American Potash Company to the effect that land classified as coal and valuable therefor is not subject to location, entry, and patent under the general mining laws of the United States. That decision, therefore, will be followed and applied in such cases.

ROOSEVELT CONSERVATION DISTRICT

Instructions, April 24, 1925

RIGHT OF WAY—WITHDRAWAL—MILITARY RESERVATION—NATIONAL PARKS—NATIONAL MONUMENTS—RESTORATIONS.

The issuance of an Executive order of restoration is not a prerequisite to the approval of a right of way under the acts of March 3, 1891, and May 11, 1898, across lands withdrawn for military use, inasmuch as the law grants rights of way through the public lands and reservations except in national parks and national monuments.

FINNEY, *First Assistant Secretary:*

Reference is made to your [Commissioner of the General Land Office] letter of April 20, 1925, transmitting for approval a map submitted by the Roosevelt Conservation District for a right of way for a canal and lateral under the provisions of sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1095), and section 2 of the act of May 11, 1898 (30 Stat. 404), across Secs. 4 and 5, T. 1 N., R. 6 E., G. & S. R. M., Arizona, which sections were temporarily withdrawn by Executive order of August 20, 1910, for military use as a rifle range.

You also submitted draft of a proposed Executive order to modify the former order of withdrawal to the extent of authorizing this Department to approve the said application.

I am of opinion that it is not necessary to obtain an order from the President for this purpose. The law grants such right of way through the public lands and reservations (except in national parks and national monuments, prohibited by the act of March 3, 1921, 41 Stat. 1353), and it is expressly provided that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and that all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation.

It appears that the application was submitted to the Secretary of War and he has expressed his approval of same. While it would perhaps be preferable that such approval be made on the map, no objection to the form of approval in this case will now be raised.

I have accordingly approved the map.

HALES AND SYMONS

Decided April 25, 1925

MILL SITE—MINING CLAIM—RIGHT OF WAY.

The appropriation of land for the purpose of conveying water to and for a road used in transporting ore from actively operated mining claims can not be considered such a use for mining and milling purposes as is contemplated in section 2337, Revised Statutes.

MILL SITE—MINING CLAIM—STATUTES.

A mill site is not a mining claim or location within the meaning of the United States Mining laws.

MINING CLAIM—CONTIGUITY—PATENT—MILL SITE.

A single application for patent or entry under the United States mining laws may not include incontiguous mining claims or locations, and the location of a mill site on ground between mining claims will not establish the necessary contiguity.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Smelting Company* v. *Kemp* (104 U. S. 636), *Iron King Mine and Mill Site* (9 L. D. 201), *The Pasadena and Mt. Wilson Toll Road Co. et al.* v. *Schneider* (31 L. D. 405), cited and applied.

FINNEY, *First Assistant Secretary:*

On June 27, 1923, Hales and Symons, a corporation, filed mineral application, Survey No. 5693 A and B, for the Arthur D., J. T. Evans, Purdie, Jubilee, and Esterbrook lode mining claims and the Esterbrook mill site, situate in Secs. 35 and 36, T. 3 N., R. 15 E., M. D. M., Sacramento, California, land district. Final certificate was issued May 5, 1924.

In a decision of June 25, 1924, the Commissioner of the General Land Office directed that the claimant company be allowed 30 days from notice within which to furnish an affidavit as to the use and occupancy of the mill site. In response to said requirement there was filed an affidavit of the United States mineral surveyor who made the survey of the mining claims and the mill site. The surveyor alleges that there is on the mill site a small ditch which has been used to convey water from a ravine on the Esterbrook lode claim to the slope just above the mill on the J. T. Evans claim; that there is an old sled road which has been used in the past to convey ore from and supplies to the Esterbrook lode claim; that the main road to the buildings on the Arthur D. and J. T. Evans claims crosses the mill site; and that "by reason of the steep nature of the ground it would be difficult and expensive to construct a road for ingress and egress to these claims without crossing the Esterbrook mill site and the present road is the most practicable route to this group of lode claims,"

Upon consideration of the showing thus made the Commissioner found the same insufficient and by decision of August 19, 1924, made further requirements. He said:

> This evidence does not show that the claimant has complied with Sec. 2337 of the Revised Statutes in regard to the use and occupancy of a mill site.
>
> The plat discloses that the Arthur D., J. T. Evans, Jubilee, and Purdie lode claims are so grouped that they are contiguous. The Esterbrook claim is separated from the other claims by the Esterbrook mill site. While there is in the mining laws no express requirement that mineral lode claims sought to be embraced in a single application for patent and entry shall be contiguous, the provisions of the law respecting the proceedings to secure patent to such claims necessarily imply that the locations shall together comprise but one body of land. (See *Hidden Treasure Consolidated Quartz Mine*, 35 L. D. 485.)
>
> As there is no departmental decision cited and as none has been found which recognizes the principle that noncontiguous mining claims may be embraced in a single application, this entry is held for cancellation to the extent of the Esterbrook lode claim because of noncontiguity.
>
> You will, therefore, allow claimant 30 days from receipt of notice hereof in which to show cause why the entry should not be canceled to the extent of the Esterbrook lode and mill site, in default of which and in the absence of appeal, the entry will be so canceled.

Answering the rule to show cause the claimant company filed a supplemental affidavit by the mineral surveyor hereinbefore mentioned. The allegations are substantially the same as those made in the first affidavit. There was also filed a brief statement by the attorney for the claimant company, who contended that the land embraced in the mill site was directly being used in good faith in connection with "mining uses and purposes." In support of his contention of validity of the mill site he cited the cases of *Valcalda* v. *Silver Peak Mines* (86 Fed. 90); *Eclipse Mill Site* (22 L. D. 496); and *Alaska Mildred Gold Mining Co.* (42 L. D. 255).

By decision of November 8, 1924, the Commissioner declined to accept the supplemental showing as to the use of the mill site and held the entry for cancellation to the extent of the mill site and Esterbrook lode claim. The claimant company has appealed through its attorney, who has also filed an argument and brief in support of the appeal.

The appellant cites the cases which were previously cited but no others. It is contended that if the uses of mill sites could be held sufficient in said cases, the use of the mill site in the present case can not reasonably and logically be held insufficient. It is also urged that the entry should be left intact as to the Esterbrook lode claim regardless of any action taken on the mill site.

In the case of Alaska Mildred Gold Mining Co., cited by the appellant, the Department discusses at some length several cases in

which the question of use of mill sites for mining or milling purposes has been considered. But neither in that case nor in any one of the other cases cited has any such use as is shown in the present case been held sufficient. In *Iron King Mine and Mill Site* (9 L. D. 201), the Department held that the appropriation and use of water on land claimed as a mill site was not the use or occupation of the land contemplated by the mining laws. Attention was directed to section 2339, Revised Statutes.

The use of the land embraced in this mill site for a road needed in going to and from actively operated mining claims can not be considered such a use for mining and milling purposes as is contemplated in section 2337, for the reason that section 2477, Revised Statutes, affords ample protection of any rights. In this connection see the discussion in *The Pasadena and Mt. Wilson Toll Road Co. et al.* v. *Schneider* (31 L. D. 405).

If such use of land embraced in a mill site as is shown in the present case were sufficient for obtaining patent, there would be no reason why a mining claimant should not be permitted to acquire title to an unlimited number of mill sites in a similar manner. But the Department does not so construe the mining laws. There are ample provisions for the protection of all necessary rights in sections 2339, 2340, and 2477 of the Revised Statutes.

The Esterbrook lode claim is not contiguous to the Jubilee, Arthur D., J. T. Evans, and Purdie lode claims, and the fact that the Esterbrook mill site is so located between the Esterbrook and Jubilee lode claims as to make one body out of the whole does not serve to make the *lode* claims contiguous. In the case of *Hidden Treasure Consolidated Quartz Mines*, cited by the Commissioner, the Department held—

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

For the reasons stated in said decision incontiguous mining claims or locations can not be included in one application for patent or entry. And according to the definitions given in *Smelting Company* v. *Kemp* (104 U. S. 636), a mill site is not a mining claim or location.

Upon careful reconsideration of the full record the Department is convinced that the decision appealed from is correct, and the same is accordingly affirmed.

AUTHORITY OF AN ALASKA TOWN-SITE TRUSTEE TO DESIGNATE A UNITED STATES COMMISSIONER TO CONDUCT HEARINGS

Instructions, April 28, 1925

TOWN SITE—ALASKA—TRUSTEE—UNITED STATES COMMISSIONER—HEARING—ADVERSE CLAIM.

Under the authority imposed in him by section 11 of the act of March 3, 1891, to dispose of town lots in Alaska, a town-site trustee is empowered to designate a United States Commissioner to conduct hearings in controversies involving conflicting claims to lots under that act.

TOWN SITE—ALASKA—INSPECTORS—OATHS—HEARING—ADVERSE CLAIM.

The limited authority conferred upon inspectors of the Land Department by section 183, Revised Statutes, as amended by the act of February 13, 1911, to administer oaths, does not include the authority to administer oaths in connection with hearings to determine the rights of conflicting claimants under the Alaska town-site laws.

FINNEY, *First Assistant Secretary:*

Proposed regulations have been submitted for approval which are intended to authorize the Alaska town-site trustee to designate a United States commissioner or an inspector of this Department to act for him and in his stead in the conducting of hearings at which testimony of witnesses is to be taken in cases where two or more persons are adversely asserting rights to town lots, which are subject to disposal by the trustee.

The only statute relating to the sale and disposal of town lots in Alaska and the powers of town-site trustees is found in section 11 of the act of March 3, 1891 (26 Stat. 1095, 1099), which declares—

That until otherwise ordered by Congress, lands in Alaska may be entered for town-site purposes for the several use and benefit of the occupants of such town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred and eighty-seven of the Revised Statutes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such town site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory.

The regulations (33 L. D. 163, 170) authorized by that statute provide that—

* * * the trustee will then, and not before, in cases where he finds two or more applicants claiming the same lot, block, or parcel of land, proceed to hear and determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each fifteen days' notice thereof and a fair opportunity to present their interests in accordance

with the principles of law and equity applicable to the case, observing, as far as practicable, the rules prescribed for contests before registers and receivers of the local offices; he will administer oaths to the witnesses, observe the rules of evidence in making his investigations, and at the close of the case, or as soon thereafter as his duties will permit, render a decision in writing.

Paragraph 10 of the Alaska Circular of September 8, 1923, (50 L. D. 27, 47), provides that—

* * * in cases of conflicting applications for lots the trustee, if he considers it necessary, may order a hearing to be conducted in accordance with the rules of practice.

Rule 28 of the Rules of Practice, thus made pertinent, provides that—

Testimony may, by order of the register and receiver and after such notice as they may direct, be taken by deposition before a United States commissioner, or other officer authorized to administer oaths near the land in controversy, at a time and place to be designated in a notice of such taking of testimony.

From this it will be seen that the testimony of witnesses may, when so ordered by the trustee, be taken before a United States commissioner who is an officer authorized by law to administer oaths generally (29 Stat. 140, 184; 37 Stat. 512); but it is not believed that the same is true as to inspectors.

In *United States* v. *Hall* (131 U. S. 50, 52), it was said that "It can hardly be supposed that a defendant indicted for perjury can be held to be guilty, unless the oath, in regard to which the perjury is charged, was taken before an officer of some kind having due authority to administer the oath"; and it is well settled that the power to administer oaths can only be conferred by legislative action, and can not be given through an Executive order.

In the case just cited the court held that an oath administered by a notary public did not form an adequate basis for a charge of perjury because the Federal statutes did not authorize notaries to administer oaths either generally or in cases such as the one there involved.

While inspectors of this Department have been given power to administer oaths by section 183, Revised Statutes, as amended (36 Stat. 898), that power is limited to only such oaths as are to be administered in connection with the investigations of frauds or attempted frauds on the Government, or irregularities or misconduct on the part of officers or agents of the United States, and does not, therefore, authorize the administration of oaths such as are contemplated in the proposed regulation.

For this reason this Department can not give its approval to the regulations mentioned in the form in which they were presented,

but the holdings here made may be considered as ample justification on the part of the town-site trustee for the designation of United States commissioners or other officers having a seal and authorized to administer oaths generally to take the testimony in cases such as have been mentioned.

MITCHELL v. FERGUSON

Decided April 29, 1925

WATER RIGHT—IMPROVEMENTS—VESTED RIGHTS—POSSESSION—OCCUPANCY—HOMESTEAD ENTRY.

The protection accorded by section 2339, Revised Statutes, to one who had acquired a vested right to the use of water appropriated under local laws and customs, does not in itself permit him to assert such possession and occupancy of lands outside of the subdivision upon which the water and the improvements necessarily used in connection therewith are solely located, as to defeat the right of another to initiate title thereto under the homestead laws.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Wagoner* v. *Hanson* (50 L. D. 355), cited and applied.

FINNEY, *First Assistant Secretary:*

The dominant question raised by this appeal is as to whether the particular facts involved in this case except it from the general rule that no applicant will be permitted to enter lands which have been improved and are being held by another person under a claim of right; and in support of the theory that the contest should be dismissed it is contended that the contestant, John Bertram Mitchell, who is the head and proprietor of a cattle company, is seeking control of about 1,440 acres embraced in five tracts of grazing lands for the purpose of controlling stock water in the semiarid region where he grazes his cattle on the tracts mentioned and other lands.

It appears from the pertinent records that Mitchell made original homestead entry, Phoenix 053065, for 160 acres in sections 19 and 20, T. 8 S., R. 12 E., G. and S. R. M., Phoenix, Arizona, land district, on which he is now residing, under section 2289, Revised Statutes, which exhausted his homestead right; and that he is asserting his superior claims to the 1,280 acres embraced in the four other tracts referred to on the ground that he is in possession of the land through the purchase of alleged possessory rights and the ownership and maintenance of improvements made by him and his predecessors, which consist of buildings, fences, wells, windmills, pumps, tanks, and other things used in connection with the grazing and watering of livestock.

Mitchell has not sought to obtain title to any part of the 1,280 acres by presenting applications therefor under any of the public land laws but has sought to retain possession of the land by attacking the applications and entries of other persons as follows: He protested and secured the rejection of Presley A. Crawford's homestead application 055080, covering the SE. ¼ of section 7 in said township, on the ground that at the date of Crawford's application, he, Mitchell, was in possession of and using the lands and was the owner of improvements thereon similar to those mentioned above, which he valued at $5,000. He also contested and secured the cancellation of Marvin R. McCarty's stock-raising homestead entry 055276 embracing the S. ½ of section 14 and the N. ½ of section 23 in an adjoining township on the ground that he had purchased the alleged possessory rights and was in possession of a portion of the N. ½ of section 23 and had improvements thereon similar to those mentioned above, which he valued at $5,000.

In the case now under immediate consideration Mitchell protested the allowance of Julius A. Ferguson's homestead applications 055077 and 055102, covering the NW. ¼ and the E. ½ of section 35 in T. 8 S., R. 12 E., respectively, on the charge that the lands are mineral in character, and on the further ground that he, Mitchell, was in possession of the land and owned other improvements similar to those mentioned above on the SW. ¼ NW. ¼, mentioned in detail, which he valued at $10,000 and also other improvements on the NE. ¼ SE. ¼, valued at $5,000.

In addition to his possession and the ownership of the improvements on the tracts mentioned, Mitchell bases his claim to the exclusive right to hold and occupy all the lands embraced in Ferguson's applications on the ground that he had applied for and received certificates of appropriation of the underground waters which supply his wells under the laws of the State of Arizona in which the lands are located.

By its decision of October 11, 1924, the General Land Office, after considering the testimony taken at a hearing regularly conducted, held that Mitchell had failed to prove his charge that the lands were mineral in character, but rejected Ferguson's applications on the ground that Mitchell's possession and use of the land and his ownership of the watering systems thereon gave him superior right to the land under section 2339, Revised Statutes.

While that holding is in a measure supported by this Department's unreported decision of April 24, 1924, in Mitchell's contest against McCarty's entry, referred to above, it is not believed that the facts in this case justify the rejection of the applications here involved in their entirety, if at all. Here Mitchell seeks to control the

entire 480 acres applied for by Ferguson on the ground that he owns improvements and holds water rights on but two of the 40-acre tracts covered by the applications. The most that has been said by this Department on this subject was its declaration in *Wagoner* v. *Hanson* (50 L. D. 355), that one who had acquired a vested right to the use of water under section 2339 would be accorded the privilege of seeking title to the land on which the improvements are located from the Government, even in the presence of a junior adverse claim. But it certainly was not intended to say in that decision, or elsewhere, that such a person would be permitted to retain possession of, or allowed to enter an entire one-half section simply because he owned a watering place and permanent improvements on a single 40-acre tract to which he was not seeking title. To so hold would be to say that a single person could, by digging wells, and securing certificates of water rights on an indefinite number of one-half sections, secure the exclusive and free use and perpetual control in an unlimited area of public lands. This is particularly true in view of the fact that section 2339 does not do more than to say that a right to the use of water acquired under local laws and customs, and the right to construct ditches and canals "shall be maintained and protected."

Aside from Mitchell's rights under section 2339, and independent of them, there is no sufficient ground for the rejection of Ferguson's applications, found in the fact that Mitchell has improvements on these lands and is claiming possession. While he claims to be in possession of the land and the owner of the improvements thereon, he does not claim any of the land, except the tract covered by his homestead entry, under color of title, through the assertion of any equitable ownership or through any other than the mere fact that he has purchased or made improvements and is using the land in connection with his cattle business; and so far as the pertinent records of the General Land Office show, he has not made and is not making any effort to acquire title to any of the lands except those covered by his entry; and he has not said that it is his intention to do so in the future. He can not assert any right under the homestead laws through his occupation of the tracts covered by Ferguson's applications, because he has already completely exhausted his rights under those laws.

Under the circumstances present in this case Mitchell will, under the rule announced in *Wagoner* v. *Hanson*, *supra*, be permitted to timely take such steps as might possibly result in his acquisition of title to the legal subdivision on which his wells and the improvements necessarily used in connection therewith are located, and Ferguson will be allowed to make entry for the other subdivisions embraced in his applications. If, however, Mitchell fails to take the

action mentioned within a reasonable time, his protest will be dismissed and Ferguson's applications will be allowed in their entirety if there are no other controlling reasons to the contrary; but any entry that he may make or any patent that may be issued to him will be subject to such valid rights as Mitchell may have under said section 2339.

Inasmuch as Mitchell has not taken exception to and has not complained of the holding of the General Land Office that the land involved is not mineral in character, consideration will not be here given to that feature of the case.

For the reasons here given the decision below is hereby modified to conform to the views here expressed and the case is remanded for further and appropriate action hereunder.

LEWIS A. GOULD ET AL.

Decided April 30, 1925

RIGHT OF WAY—RAILROAD LAND—MINING CLAIM.

A right of way granted under the act of March 3, 1875, is neither a mere easement nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the grantee ceases to use or retain the land for the purposes for which it was granted, and carries with it the incidents and remedies usually attending the fee.

MINING CLAIM—RIGHT OF WAY—RAILROAD LAND—PATENT.

Where a mining claim and a railroad right of way overlap at one end of the claim, the mineral claimant may, in his application for patent, eliminate that part of his claim which is included in the right of way.

COURT AND DEPARTMENTAL DECISIONS CITED, APPLIED, AND DISTINGUISHED.

Cases of *Rio Grande Western Railway Company* v. *Stringham* (239 U. S. 44), *Carrie S. Gold Mining Company* (29 L. D. 287), *J. Arthur Connell* (29 L. D. 574), *E. A. Crandall* (43 L. D. 556), *Frank Eyrand et al.* (45 L. D. 212), cited and applied; case of *Schirm-Carey and other Placers* (37 L. D. 371), distinguished.

FINNEY, *First Assistant Secretary:*

April 18, 1923, Lewis A. Gould in behalf of himself and his wife, Moodie O. Gould, coowner, filed application for patent, Sacramento 014564, for two placer mining claims called the West Rim and Rattle Snake, located in Secs. 3 and 4, T. 15 N., R. 10 E., M. D. M., Placer County, California, embracing 60.949 acres, exclusive of conflict.

The claims in question are contiguous, both of them, as located, slightly overlapping at their southerly ends the Central Pacific Railroad Company's right of way granted by section 2 of the act of July 1, 1862 (12 Stat. 489), extending 200 feet on each side of its road, over which it now operates its transcontinental trains. The total area of the claims is given as 64.489 acres, and the area of con-

flict amounts to 3.540 acres. The survey exhibits the conflict with the right of way, the intersection of the lines being recorded in the field notes, the distances to these points being stated and properly represented upon the plat. The total area of the claims embraced by the exterior boundaries is shown, and also the area of conflict with the right of way, as above set out. Certificate of entry issued July 3, 1923. In the entry and in the published and posted notice of the application for patent the area of conflict with the right of way is expressly excluded.

By decision of May 12, 1924, the Commissioner of the General Land Office denied the right of claimants to exclude the right of way in the application for patent on the ground that said right of way is a mere easement and affords no justification for elimination or deduction. In support of this holding the Commissioner cited the case of *Schirm-Carey and Other Placers* (37 L. D. 371). Claimants were accordingly required to start new proceedings, including that portion of the railroad right of way embraced within the exterior boundaries of the claims in question.

In their appeal from that decision claimants assert, with citation of authorities, that an applicant for patent may eliminate any nonvital portion of his claim for any reason that may appeal to him as sufficient; that they excluded the area of conflict with the railroad right of way—a narrow strip at the extreme southerly end of the claims—because it could not be worked for its mineral and is valueless to them; that to be mined successfully excavations would have to be made upon and beneath the railroad right of way by drifting thereunder comparatively close to the surface, and the consequent injustice to the railroad company is so self-evident that claimants would not have the slightest opportunity of benefiting therefrom if the Department compelled them to purchase and pay for the ground in question.

Upon careful consideration of the matter the Department is convinced that claimants have the right to exclude the area of conflict. True, settlers on public lands to part of which right of way has attached take the same subject to such right of way and at the full area of the subdivision entered. This is in harmony with the terms of the right of way act of March 3, 1875 (18 Stat. 482), which by way of qualifying future disposals of lands to which such right has attached declares that "all such lands over which such right of way shall pass shall be disposed of, subject to such right of way." But the principle is now established that the right of way granted by this and similar acts is neither a mere easement nor a fee simple absolute, but a limited fee made on an implied condition of reverter in the event that the company ceases to use or retain the land for

the purposes for which it is granted and carries with it the incidents and remedies usually attending the fee. Entry and patent of a legal subdivision crossed by such right of way carries no interest or title to the right of way strip. *E. A. Crandall* (43 L. D. 556); *Rio Grande Western Railway Company* v. *Stringham* (239 U. S. 44). Inasmuch, therefore, as the applicant for mineral patent could acquire no interest in the land forming the right of way, no reason is apparent, either legal or administrative, in the circumstances shown, why he should be required to include the ground in question in his entry. Bearing in mind the fact that the entry does not conform to legal subdivisions, but is based upon a special survey, and the further fact that the right of way does not bisect the claims, but affects a strip along their southerly end lines, the reason for exclusion could hardly be more cogent, and the right should not be denied.

The case of *Schirm-Carey and Other Placers*, *supra*, cited in the Commissioner's decision is not authority for the action taken. The facts are wholly dissimilar. In that case the mineral survey embraced approximately 2,728 acres, and the Atlantic and Pacific Railroad Company's right of way crossed the land in a somewhat sinuous course for a distance of about four miles, cutting it into two parts. Other objections to the entry also existed.

Abundant support is found for appellant's contention that a mineral claimant is entitled to exclude any nonvital portion of his mining claim for any reason that may appeal to him, and in the circumstances here disclosed it must be held that claimants were fully within their rights in excluding the area of conflict with the railroad right of way. See 29 L. D. 287; ibid. 574; 45 L. D. 212.

The decision of the Commissioner is accordingly reversed and in the absence of other objections the entry will be allowed to stand.

ADDITION OF CERTAIN LANDS TO THE MOUNT HOOD NATIONAL FOREST—ACT OF FEBRUARY 28, 1925

INSTRUCTIONS

[Circular No. 1015]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 7, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES, OREGON:

The act of February 28, 1925 (43 Stat. 1079), entitled "An Act To authorize the addition of certain lands to the Mount Hood National Forest," reads as follows:

That any of the following-described lands which are found by the Secretary of Agriculture to be chiefly valuable for national forest purposes may

be offered in exchange under the provisions of the act of March 20, 1922 (Public 173), and upon acceptance of title shall become parts of the Mount Hood National Forest:

Township 2 north, range 9 east: Sections 22, 27, 28, 29, 30, 31, 32, 33, 34, southwest quarter northwest quarter, southwest quarter southeast quarter, and southwest quarter of section 35.

Township 1 north, range 9 east: Sections 8, 9, 10, 11; north half northeast quarter, southwest quarter northeast quarter, northwest quarter, north half southwest quarter, section 14; all of sections 15, 16, 17, 18, 19, 20; north half southwest quarter, and northwest quarter southeast quarter of section 21; north half northwest quarter, southeast quarter northeast quarter, south half southwest quarter, southeast quarter of section 22; south half north half and the south half of section 23; all of sections 26 and 27; northeast quarter northeast quarter, south half northeast quarter, southeast quarter northwest quarter, south half of section 28; southeast quarter and southeast quarter southwest quarter of section 29; northeast quarter and lots 1 to 11, inclusive, of section 30, southeast quarter northeast quarter, southeast quarter of section 31; all of sections 32, 33, 34, and 35.

SEC. 2. All public lands within the areas described in section 1 hereof are hereby added to the Mount Hood National Forest and shall hereafter become subject to all laws and regulations applicable to National Forests. But the addition of said lands shall not affect any entry or vested right under the public land laws initiated prior to the passage of this Act.

You will be governed in your action upon applications for exchanges under said act by the regulations contained in Circular No. 863 (51 L. D. 69), entitled "Consolidation of National Forests," modified, however, in accordance with the provisions of said act.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
Acting Secretary of the Interior.

R. W. DUNLAP,
Acting Secretary of Agriculture.

EVIDENCE OF CITIZENSHIP—CIRCULAR NO. 599, SUPERSEDED

INSTRUCTIONS

[Circular No. 1005.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 1, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

The following instructions relative to accepting evidence of citizenship in public-land cases and returning citizenship papers to the

parties will supersede the instructions of May 14, 1918 (Circular No. 599, 46 L. D. 382):

1. Evidence of a declaration of intention to become a citizen executed more than 7 years before the date of the filing, unless it be shown that there is pending a petition for naturalization pursuant thereto filed within 7 years after the date of the declaration, is not acceptable.

2. You may hereafter accept as evidence of a party's status a triplicate declaration of intention to become a citizen of the United States or an original certificate of naturalization. However, a certified copy of the paper made by the clerk of the court whence it issued is preferred; and if the copy is of a paper issued after September 26, 1906, it should be on the form prescribed by the Bureau of Naturalization. It is to the party's advantage to file a certified copy, since the triplicate declaration of intention to become a citizen is needed by him when petitioning for admission to citizenship, while the original certificate of naturalization may be lost or mutilated.

3. Triplicate declaration of intention to become a citizen, provided it has not become invalid by reason of its statutory life, or original certificate of naturalization will be returned by this office to the party upon request therefor or to any other person making request, provided it be clearly shown that the person applying is the proper person to receive the paper.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

CALIFORNIA CENTRAL OIL COMPANY, THE SPRINGS COMPANY, ASSIGNEE

Decided May 1, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT—LIMITATION AS TO ACREAGE.

There is no inhibition against the acquisition of direct and indirect interests by one person in several oil and gas prospecting permits, provided that the maximum acreage of 2,560 acres on a geologic structure, or of 7,680 acres in a State, is not exceeded.

OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT—RESTRICTIONS.

The limitations of section 27 of the act of February 25, 1920, while making no specific reference to prospecting permits, are nevertheless applicable to holdings under permits as well as to those under leases, except as to permits partially assigned, in which event the assignee is regarded as a member of an association and subject only to the acreage limitations upon indirect holdings.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Denver Exploration and Development Company, Assignee of Smith et al.* (50 L. D. 652), cited and applied.

FINNEY, *First Assistant Secretary:*

There is before me your [Commissioner of the General Land Office] letter of April 20, 1925, in which you recommend that an

assignment, in duplicate, be approved, such assignment being to The Springs Company by the California Central Oil Company of a portion of the land embraced in oil and gas permit 09645, which permit was issued on June 22, 1923, to the California Central Oil Company under section 13 of the act of February 25, 1920 (41 Stat. 437), for lots 1, 2, 3, 4, 5, 6, SE. ¼, Sec. 18, NE. ¼, NW. ¼ SE. ¼, SE. ¼ SE. ¼, NW. ¼ NW. ¼, SE. ¼ SW. ¼, Sec. 22, N. ½, SE. ¼, Sec. 26, NE. ¼, Sec. 28, W. ½ SE. ¼, SE. ¼ SE. ¼, Sec. 34, T. 21 S., R. 15 E., M. D. M., containing 1,488.38 acres, within the Visalia land district, California.

It appears that the California Central Oil Company made an assignment of part of the land included in its permit, namely, the NW. ¼ NW. ¼, S. ½ NW. ¼, said Sec. 26, to the Marland Oil Company of California, which assignment was on September 17, 1924, approved by the Department subject to certain conditions and among them the furnishing of a statement of what area would be included in a lease at a royalty of five per cent, should such a lease be applied for. Afterwards the conditions were complied with, and on October 4, 1924, departmental approval free from conditions was given the assignment, except that, since the land selected for the lease at five per cent royalty was not as compact as might be, the Department was not to be bound to issue a lease at five per cent royalty for the area as selected. The assignor and the assignee stated that, owing to the difficulty of making the selection before discovery, they reserved the right to select other land, should application for lease be filed. The land selected to be included in a lease at a royalty of five per cent, if such a lease were applied for, consisted of the NW. ¼ SW. ¼, SE. ¼ SW. ¼, NW. ¼ SE. ¼, SE¼ SE. ¼, Sec. 22, NW. ¼ and NW. ¼ SE. ¼, Sec. 26, above township and range, containing 360 acres.

On February 24, 1925, there was filed the assigment to The Springs Company, which assignment related to the SE. ¼ SE. ¼, Sec. 22, and S. ½ NE. ¼, Sec. 26, T. 21 S., R. 15 E., M. D. M., 120 acres. No reference was made by The Springs Company to the area selected for lease at a royalty of five per cent, but after you had explained the matter fully in a letter dated March 11, 1925, The Springs Company stated that it agreed to the five per cent royalty area as outlined in your said letter.

The qualifications of The Springs Company appearing to have been satisfactorily shown and the record appearing to be complete, you recommended that the assignment, in duplicate, from the California Central Oil Company to The Springs Company be approved, the reservation made by the Department in approving the former assignment by the California Central Oil Company to the Marland Oil Company relative to compactness of the five per cent area to remain intact.

Other matters mentioned in your letter need not here be discussed, except one that possibly deserves more detailed consideration than appears in your letter. From the showing submitted and from the records, it seems that The Springs Company already holds two oil and gas permits by assignment, each embracing lands located within the State of California. One of these permits, 033403, Los Angeles series, was issued under section 19 of the act of February 25, 1920 (41 Stat. 437), and embraces 1,154.89 acres of land located upon an entirely different geologic structure from that upon which the land embraced in permit 09645, Visalia series, is located. The other is permit 09656, Visalia series, which was issued under section 20 of the act of February 25, 1920, *supra*, for the NE. ¼ SE. ¼, SW. ¼ SE. ¼, NE. ¼ SW. ¼ and SW. ¼ SW ¼, Sec. 22, T. 21 S., R. 15 E., M. D. M., containing 160 acres. This land and that of permit 09645 lie upon the same geologic structure.

In a departmental ruling of October 9, 1924 (M–12866), it was stated:

> A corporation may hold indirect interests as a member of an association or associations in any number of permits or leases, provided such indirect interests together with its direct holdings, if any, do not exceed the maximum acreage allowable in one permit on a structure, or the maximum area which may be acquired in one State.

The maximum acreage on a geologic structure is 2,560 acres and in a State is 7,680 acres. In departmental instructions of October 9, 1924, in the case of *Denver Exploration and Development Company, assignee of Roy F. Smith et al.* (50 L. D. 652), it was stated:

> Thus it will be seen that, as to partial assignments of permits, the permit still exists as a unit after assignment; and the permittee and assignee are, in fact, associates, and as such may be interested in more than one permit upon a geologic structure, provided they do not exceed the acreage limitations of 2,560 acres. In cases where undivided interests in either permits or leases are assigned, the same result would obtain and the same limitation would apply.

In a departmental ruling of October 14, 1924 (M–13841), which is referred to in your letter, the following appears:

> There is no reference in section 27 of the leasing act to prospecting permits, but since a discovery under a permit gives the permittee a right to a lease, the limitations of section 27 of the said act have been regarded as applicable to holdings under permits. The foregoing statement of limitations on leases is, accordingly, equally applicable to prospecting-permit holdings, except in one instance. This exception is the case where a permittee assigns only a portion of the area covered by his permit. Under the regulations governing such assignments, the assignee and permittee are not regarded as having separate permits and obligations, but as associates for the performance of the drilling requirements of the permit. Such relationship is construed as making the assignee a member of an association within the meaning of section 27 of the leasing act, and subject only to the acreage limitations upon indirect holdings.

Permit 09656 is a direct holding by The Springs Company by subrogation to the position of the permittee through an approved assignment of the permit. The area is 160 acres. The 120 acres of land now assigned to The Springs Company as a portion of permit 09645 constitutes an indirect holding. The direct and the indirect holdings comprise 280 acres, which is far short of the 2,560-acre limitation.

The assignment under consideration comes within the rule, and I have approved the said assignment, in duplicate, and have given approval to your letter.

The record 09645 is herewith returned to you for appropriate action in the premises.

ACCOUNTS—FEES WITH APPLICATIONS FILED UNDER THE ACT OF FEBRUARY 25, 1920

INSTRUCTIONS

[Circular No. 1004]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 2, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Hereafter fees paid with applications for permits, leases, or other rights under the mineral leasing act of February 25, 1920 (41 Stat. 437), shall not be applied until receipt of notice from this office that the application has been allowed. Pending the allowance or rejection of an application the fee will be held as "Unearned Moneys." All instructions inconsistent herewith are hereby modified accordingly.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

STOCK-DRIVEWAY WITHDRAWAL

Instructions, May 2, 1925

STOCK-DRIVEWAY WITHDRAWAL—STOCK-RAISING HOMESTEAD—APPLICATION—LAND DEPARTMENT.

The Land Department has no authority to reject a pending and complete stock-raising homestead application on account of a withdrawal which attaches after the designation of the land under the stock-raising homestead act becomes effective.

DEPARTMENTAL DECISION CITED AND APPLIED—FORM OF STOCK-DRIVEWAY WITHDRAWAL MODIFIED.

Case of *Condas* v. *Heaston* (49 L. D. 374), cited and applied; language used in general form of stock-driveway withdrawals modified.

FINNEY, *First Assistant Secretary*:

The Department has considered your [Commissioner of the General Land Office] letter of April 17, 1925, transmitting the draft of an order to modify Stock Driveway Withdrawal No. 91, Idaho No. 5, and recommending that the same be signed.

It appears that said stock driveway withdrawal, which was established by departmental order of August 21, 1919, includes with other lands, the E. ½, Sec. 5, and E. ½, Sec. 8, T. 12 S., R. 34 E., B. M., Idaho. On May 2 and 9, 1921, Jasper E. John made original homestead entry and enlarged additional homestead entry for the NE. ¼, N. ½ SE. ¼, SE. ¼ SE. ¼, Sec. 18, NE. ¼ NE. ¼, Sec. 19, said township, showing that he had been a settler on the land since June, 1916. On August 6, 1923, this entryman filed application to amend his entries to embrace the SE. ¼, Sec. 5, N. ½ NE. ¼, SE. ¼ NE. ¼, and NE. ¼ SE. ¼, Sec. 8, said township, alleging that when he made his settlement the land was unsurveyed and that he was erroneously advised as to the proper descriptions when he filed his applications to enter.

Upon investigation in the field it was found that John was a settler in good faith on the land applied for in amendment. The land has not been designated under the enlarged homestead act, but the Geological Survey has reported that there is no objection to such designation other than the stock driveway withdrawal.

It is also shown that on June 13, 1923, Leo Archibald filed a stock-raising homestead application, together with petition for designation, for the S. ½ NE. ¼, Sec. 7, W. ½, Sec. 6, and N. ½ NE. ¼, Sec. 18, said township. The land has been designated as subject to entry under said act, such designation having become effective on February 14, 1924. It is not shown that the local officers have taken any action on Archibald's application, but that may be on account of the record conflict as to the N. ½ NE. ¼, Sec. 18.

The inspector who made investigation reported that John was willing to take the SE. ¼ SE. ¼, Sec. 8, in place of the NW. ¼ SE. ¼, Sec. 5. He also stated:

It is recommended that the application to amend be allowed so as to include the SW. ¼ SE. ¼, E. ½ SE. ¼, Sec. 5, NW. ¼ NE. ¼, E. ½ NE. ¼, E. ½ SE. ¼, Sec. 8, T. 12 S., R. 34 E.; that the SW. ¼ SE. ¼, E. ½ SE. ¼, Sec. 5, NW. ¼ NE. ¼, N. ½ NE. ¼, E. ½ SE. ¼, Sec. 8, T. 12 S., R. 34 E., be eliminated from the stock driveway withdrawal No. 91, Idaho No. 5; that the homestead application of Leo Archibald be rejected as to the W. ½, Sec. 8, T. 12 S.,

R. 34 E.; and that the following lands be withdrawn in connection with said stock driveway No. 91, Idaho No. 5:

W. ½, Sec. 8, E. ½ NW. ¼, SW. ¼, Sec. 5, T. 12 S., R. 34 E., SE. ¼ SW. ¼, Sec. 32, T. 11 S., R. 34 E.

The retention of this driveway is important to the stock industry in this locality, and the only way it can be kept intact at the point under consideration is by modifying it as hereinabove suggested. There is no vacant land lying to the east of the John tract.

Adopting the inspector's recommendation, you have proposed an order of modification as suggested by him. In regard to Archibald's application you state:

A portion of the area recommended for withdrawal, W. ½, Sec. 8, T. 12 S., R. 34 E., is embraced in a pending stock-raising homestead application, on which no improvements have been placed. Therefore its withdrawal would work no hardship on the applicant other than he would be required to file on other lands in the neighborhood, and it is recommended that said application be rejected as to said W. ½, Sec. 8. The lands involved in such stock-raising homestead application were designated effective February 14, 1924, but the records of this office fail to show that the local officers have taken any further action thereon.

These excerpts from your letter and from the report of the inspector tend to show that there is some misunderstanding as to the effect of an application under the stock-raising homestead act of December 29, 1916 (39 Stat. 862). In section 2 of said act it is provided that "if the said land shall be designated under this act, then such application shall be allowed."

In its instructions dated January 12, 1921 (47 L. D. 629), the Department said that it—

* * * has repeatedly held that the right conferred upon the applicant by section 2 of the stock-raising act and that created by section 8 thereof are mere preference rights, neither of which attaches to the land unless and until designated, and which, when in conflict, are to be determined by the dates of the original claims. Manifestly, therefore, there can be no appropriation, either under section 2 or section 8 of the stock-raising law, prior to designation of the land.

In the case of *Condas* v. *Heaston* (49 L. D. 374), the Department expressed itself as follows:

* * * Upon ascertainment that the land applied for was actually of the character contemplated by the stock-raising homestead act, the rights of the 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.

The Land Department has no authority to reject a pending and complete stock-raising homestead application on account of a withdrawal which occurs after effective designation of the land under the stock-raising act. In the present case Archibald's application can not arbitrarily be rejected in part, as proposed. The allowance

of his application will wholly cut off the driveway, as it is proposed to change the same. However, the order of modification of withdrawal is signed as submitted in order that there may be a withdrawal which shall be effective in case of change of status of the W. ½, Sec. 8. It is understood that the withdrawal is subject to Archibald's application, and you are instructed to refer the matter to the proper division inspector for further investigation and report. If necessary, the withdrawal as now modified may be subjected to further modification.

Your attention is also invited to the language used in the orders of stock driveway withdrawals. The form now in use reads in part as follows:

> Under and pursuant to the provisions of Sec. 10 of the act of Congress approved December 29, 1916 (39 Stat. 862), it is hereby ordered that the public lands in the following-described area be, and the same are hereby, withdrawn from all disposal under the public-land laws and reserved for use by the general public as stock driveways, subject to prior valid claims initiated under the public-land laws other than the said act of December 29, 1916, and maintained pursuant to law.

It is believed that the wording, in so far as it affects stock-raising homestead applications, is too broad and general, for it can not be said that all prior claims initiated under the act of December 29, 1916, can be defeated by such withdrawals. You are accordingly instructed that the form of order of withdrawal is modified to read:

> * * * subject to prior valid claims initiated and maintained pursuant to law, other than applications for undesignated land under the said act of December 29, 1916.

STATE OF CALIFORNIA, STANDARD OIL COMPANY OF CALIFORNIA ET AL., TRANSFEREES

Decided May 8, 1925

SECRETARY OF THE INTERIOR—PUBLIC LANDS—SCHOOL LAND—MINERAL LANDS—OIL AND GAS LANDS.

It is the statutory duty of the Secretary of the Interior to determine the character of public land as a prerequisite to its disposition and as a determination as to whether it passed under some grant, or, because of its mineral character, it was, under the law, reserved to the United States for other disposition under applicable statutes.

PRACTICE—LAND DEPARTMENT—HEARING.

The long-established and general practice of the Department in public-land matters is that determinations are not made either upon reports of special agents or upon the statements of parties in interest in controverted matters, but after hearings, similar to trials in courts at law, at which all parties in interest may be heard.

SECRETARY OF THE INTERIOR—COMMISSIONER OF THE GENERAL LAND OFFICE—JURISDICTION—PRACTICE.

The Secretary of the Interior or Commissioner of the General Land Office, upon discovery that a prior decision rendered by his predecessor was erroneous, unlawful, or unjust, may, on his own motion, review, reconsider, or vacate the same and cause whatever action to be taken with respect to the land as may appear appropriate, provided that jurisdiction thereover still remains in the Land Department.

WORK, *Secretary:*

By letter of the Commissioner of the General Land Office dated January 14, 1914, you [register and receiver, Visalia, California] were advised that from reports of a mineral inspector and special agent it appeared that the land involved, in Sec. 36, T. 30 S., R. 23 E., M. D. M., California—

is mineral in character and contains valuable deposits of petroleum, and that this fact was well known in 1901 and 1902, the years during which the land was surveyed and the plat of survey was approved by the United States surveyor general.

Acting under said reports, the Commissioner of the General Land Office in said letter directed proceedings under the circular of January 19, 1911 (39 L. D. 458), on the charges—

(1) That the land is mineral in character, containing valuable deposits of petroleum.

(2) That the land was known to be mineral in character at and prior to the date of survey, December 20, 1901.

It appears that the papers in the matter were mislaid or misfiled and no further action taken until the chief of field division at San Francisco, California, advised under date of February 2, 1921, that the records had been found and that he desired certain information before proceeding further. Thereupon, the matter was taken up by the Commissioner of the General Land Office, the latter holding in his decision of March 2, 1921, that while the plat of survey of the lands in question was approved by the surveyor general August 1, 1902, as stated in previous correspondence, the plat was not accepted nor approved by the General Land Office until January 26, 1903, and that under the holding of the Supreme Court of the United States in *United States* v. *Morrison* (240 U. S. 192), the right of the State would attach, if at all, at the date the survey was accepted and approved by the General Land Office, and not on the date of the preliminary approval by the United States surveyor general.

Your office was thereupon directed to proceed in accordance with circular of February 26, 1916 (44 L. D. 572), on the charges—

(1) That the land is mineral in character, containing valuable deposits of petroleum.

(2) That the land was known to be mineral in character at and prior to date of acceptance of the plat of survey by your office, January 26, 1903.

On June 8, 1921, the attorney for the Standard Oil Company of California, and representatives of others claiming said Sec. 36, as transferees of the State of California, appeared before the Secretary of the Interior, and the attorney for the Standard Oil Company argued their claim to the land and for the dismissal of the order for hearing hereinbefore described.

At the conclusion of the argument the Secretary of the Interior orally dismissed the proceedings, the order being subsequently communicated to the Commissioner of the General Land Office and the other parties in interest, in writing.

February 21, 1924, the Congress of the United States passed Public Resolution No. 6, 68th Congress (43 Stat. 15), providing—

> That the Secretary of the Interior be, and he hereby is, directed forthwith to institute proceedings to assert and establish the title of the United States to sections 16 and 36, township 30 south, range 23 east, Mount Diablo meridian, within the exterior limits of naval reserve numbered 1, in the State of California, and the President of the United States is hereby authorized and directed to employ special counsel to prosecute such proceedings and any suit or suits ancillary thereto or necessary or desirable to arrest the exhaustion of the oil within said sections 16 and 36 pending such proceedings.

Since that time the record has been carefully reviewed, and it appears that the land in question (Sec. 36) was returned as mineral by the surveyor who surveyed same in 1901, and whose survey was accepted and approved by the Commissioner of the General Land Office January 26, 1903. It also appears from the records that on March 7, 1903, the State of California offered the land in Sec. 36 as a basis for the selection of indemnity school lands, because of the mineral character of said Sec. 36. However, on December 18, 1909, the said selection was canceled because of conflict with indemnity school-land selection R. and R. 622.

The township in which this section is located was withdrawn from agricultural entry September 14, 1908, pending classification by the Geological Survey; was classified as oil land June 4, 1909, which classification was approved by the Secretary of the Interior June 7, 1909; was withdrawn from mineral entry by departmental order of September 27, 1909, pending proposed legislation; and the previous order of withdrawal ratified, confirmed, and continued by Executive order of July 2, 1910. Subsequently, by Executive order of September 2, 1912, it was placed in Naval Reserve No. 1.

It also appears that the State of California had attempted to dispose of the lands in said Sec. 36 by contract of sale in 1900, which contract was sold by the State for delinquent taxes and redeemed by third parties in August, 1908. In November, 1909, the contract was purchased by the attorney for the Standard Oil Company, which company secured a deed from the State covering the same in January, 1910.

Oil and gas have been produced from Sec. 36 since the year 1919, there being upon the section a large number of producing oil and gas wells. Lands in the same township, some of which adjoin Sec. 36, were determined to have been mineral in character and so known at and prior to the date of the patent to the Southern Pacific Railroad Company in the year 1904 (251 U. S. 1).

It will appear from the foregoing recitation that while this land was returned as mineral in character by the surveyor in 1902, was withdrawn by the United States as mineral land in 1909, included in a naval reserve in 1912, and has been since 1919 producing oil and gas in large quantities, and in spite of the fact that mineral inspectors and special agents of the Interior Department reported the lands to be mineral in character and to have been so known at and prior to date of acceptance of survey in January, 1903, and that hearing was twice ordered to determine the issues thus raised, no hearing has in fact been had or evidence taken in said matter, the proceedings having been dismissed by a former Secretary of the Interior on legal argument presented by attorney for the Standard Oil Company *et al.*, unaccompanied by any evidence as to the character of the land at date of approval of the survey or of any argument on behalf of the Government of the United States.

The long-established and general practice of the Department of the Interior in land matters is that determinations are not made either upon reports of special agents or upon the statements of parties in interest in controverted matters, but that hearings or trials are ordered and held, at which all parties in interest may present testimony and where witnesses may be examined and cross-examined, as is customary in such proceedings. The facts have not been evidentially presented before any tribunal and were not before the Department at the time of the dismissal of the proceedings, as above outlined. It is the statutory duty of the Secretary of the Interior to determine the character of land as a prerequisite to its disposition and as a determination as to whether or not it passed under grants like the one in question, or whether, because of its mineral character, it was, under the law, reserved to the United States for other disposition, as provided by applicable statutes.

There are numerous decisions of this Department to the effect that if the Commissioner of the General Land Office or the Secretary of the Interior shall, while the subject matter, i. e., the land, is within his jurisdiction, discover that a previous decision was erroneous, unlawful, or unjust, he has authority and it would be his duty to, upon his own motion, review and reconsider the case and take such action as is proper and appropriate therein. (19 L. D. 312; 24 L. D. 64, 280; 26 L. D. 640.)

Congress, by said joint resolution of February 21, 1924, having directed the Secretary of the Interior to institute proceedings to

assert and establish the title of the United States under said Sec. 36, T. 30 S., R. 23 E., it appearing, as hereinbefore recited, that the land was returned as mineral by the surveyor; that it is alleged by inspectors and special agents of this Department that the land is mineral in character, and was so known prior to January 26, 1903, date of acceptance of survey, there having been no determination of the facts with respect to the land or its contents, the action of the former Secretary of the Interior of June 8, 1921, is hereby reversed, vacated, and set aside, and a hearing is ordered on the charges—

(1) That the land is mineral in character, containing valuable deposits of petroleum and natural gas.

(2) That the land was known to be mineral in character at and prior to the date of the acceptance of the plat of survey by the General Land Office, January 26, 1903.

You will notify the State of California, the Standard Oil Company, Francis J. Carman, Pan American Petroleum Company, and others claiming title, directly or indirectly, in or to any portion of said Sec. 36, hereof, and by agreement of parties, or otherwise, determine upon a date for hearing, to be held at your office.

STATE OF CALIFORNIA, STANDARD OIL COMPANY OF CALIFORNIA ET AL., TRANSFEREES

Motion for rehearing of departmental decision of May 8, 1925 (51 L. D. 141), denied by Secretary Work, August 17, 1925.

ALLOTMENTS TO INDIANS AND ESKIMOS IN ALASKA—CIRCULAR NO. 491, MODIFIED

INSTRUCTIONS

[Circular No. 1006]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1925.

REGISTERS AND RECEIVERS AND
ASSISTANT SUPERVISOR OF SURVEYS AND PUBLIC LANDS,
TERRITORY OF ALASKA:

The fourth sentence of paragraph 1 under the caption of "Allotments to Indians and Eskimos" being a part of Circular No. 491, issued September 8, 1923 (50 L. D. 27, 48), is hereby modified to read as follows:

Allotments will not be made on tracts reserved by the United States as shore spaces under the act of March 3, 1903 (32 Stat. 1028), or within national forests, unless founded on actual occupancy prior to the establishment of the

forest, or unless the Secretary of Agriculture certifies that the application is allowable under section 31 of the act of June 25, 1910 (36 Stat. 855, 863), and provided the applicant shows occupancy, residence, or improvements required by said section. The application if filed under said section 31 should be made on Form 5–149, and should contain a reference to the act of May 17, 1906.

The effect of the amendment is to permit the allotting of lands in national forests in Alaska under the act of May 17, 1906 (34 Stat. 197), and section 31 of said act of June 25, 1910.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

EXTENSIONS OF TIME FOR PAYMENTS ON CHEYENNE RIVER AND STANDING ROCK INDIAN LANDS—ACT OF MARCH 3, 1925

INSTRUCTIONS

[Circular No. 1007]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1925.

REGISTER AND RECEIVER,
PIERRE, SOUTH DAKOTA:

The act of March 3, 1925 (43 Stat. 1184), provides—

That the act entitled "An Act authorizing extensions of time for the payment of purchase money due under certain homestead entries and Government-land purchases within the former Cheyenne River and Standing Rock Indian Reservations, North Dakota and South Dakota," approved April 25, 1922, be amended so as to read as follows:

"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 1925 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."

The extension granted by the act of April 25, 1922, was to the 1923 anniversary of the entry or purchase, with provision for addi-

tional extensions for not exceeding three years. The extension granted by the act of March 3, 1925, is to the 1925 anniversary of the entry or purchase with provision for additional extensions for not exceeding three years. In other words, two additional extensions of one year each are authorized. Subject to this modification extensions of time for payment on entries and purchases affected by the said acts will be granted in accordance with Circular No. 829, approved May 26, 1922 (49 L. D. 131).

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

RIGHTS OF WAY OVER PUBLIC LANDS AND RESERVATIONS—PARAGRAPH 38, CIRCULAR OF JUNE 6, 1908 (36 L. D. 567), AS AMENDED MAY 7, 1912 (41 L. D. 13), FURTHER AMENDED

INSTRUCTIONS

[Circular No. 1003]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 18, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

April 13, 1925, the Acting Secretary of the Interior directed that section 38, circular of June 6, 1908 (36 L. D. 567), as amended May 7, 1912 (41 L. D. 13), be modified to read as follows:

38. *Nature of Grant.*—It is to be specially noted that this act does not make a grant in the nature of an easement but authorizes a mere permit in the nature of a license, which permit may be revoked by the Secretary or his successor at any time in his discretion. Further, it gives no right whatever to take from public lands, reservations, or parks adjacent to the right of way any materials, earth, or stone, for construction or other purposes. The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be considered to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act.

The effect of this modification is a departmental recognition of the fact that a permit, under the act of February 15, 1901 (31 Stat. 790), once having been issued is a subsisting burden upon the land even after patent, until canceled by the Secretary of the Interior.

You should, therefore, as a matter of warning, note upon all applications to appropriate public lands affected by a previously filed application under the act of 1901 the words "subject to right of way act of February 15, 1901 (stating name of permittee)."

This notation need not be made upon the final certificate when issued and will not be carried into the patent.

It should be noted, however, that a permit under the act of 1901, *for hydroelectric power purposes*, is construed as being tantamount to a withdrawal of the land for power purposes, and the lands affected can be disposed of only subject to the terms and conditions of section 24 of the Federal water power act.

WILLIAM SPRY,
Commissioner.

ACCOUNTS—FORMS OF REMITTANCES—PARAGRAPH 72 OF CIRCULAR NO. 616, MODIFIED

INSTRUCTIONS

[Circular No. 1008]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 20, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

By direction of the Secretary of the Interior, paragraph 72 of the regulations approved August 9, 1918 (Circular No. 616, 46 L. D. 513, 531), which restricts the forms of remittances that may be accepted by receivers of public moneys to cash, currency, certified checks, and postal money orders, is hereby amended to permit the acceptance of uncertified checks and bank drafts that may be cashed without cost to the Government, and the last sentence of the paragraph, "Receivers must not accept or issue receipt for remittances tendered in any other form," is hereby revoked.

Upon receipt of notice that a check or draft, whether certified or uncertified, is uncollectible, the receiver should at once notify the General Land Office so that appropriate action may be taken on the matter in connection with which the dishonored check or draft was tendered.

WILLIAM SPRY,
Commissioner.

FINAL PROOF ON DESERT LAND ENTRIES—ACT OF FEBRUARY 25, 1925

INSTRUCTIONS

[Circular No. 1011]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 23, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Your attention is directed to the act of February 25, 1925 (43 Stat. 982), which provides—

That the Secretary of the Interior may, in his discretion, in addition to the extensions authorized by existing law, grant to any entryman under the desert land laws of the United States a further extension of time of not to exceed three years within which to make final proof: *Provided*, That such entryman shall, by his corroborated affidavit, filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of the irrigation works intended to convey water to the land embraced in his entry, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor: *And provided further*, That the entryman, his heirs, or his duly qualified assignee, has in good faith complied with the requirements of law as to yearly expenditures and proof thereof, and shall show, under rules and regulations to be prescribed by the Secretary of the Interior, that there is a reasonable prospect that if the extension is granted he will be able to make the final proof of reclamation, irrigation, and cultivation required by law.

Applications for further extension of time under the act of February 25, 1925, may be made in the same manner and the same procedure will be followed with respect to such applications as under the acts of March 28, 1908 (35 Stat. 52), April 30, 1912 (37 Stat. 106), and the act of March 4, 1915 (38 Stat. 1138, 1161), as amended by the act of March 21, 1918 (40 Stat. 458).

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

BENNETT H. BOWLEY, Sr.

Decided May 23, 1925

HOMESTEAD ENTRY—MILITARY SERVICE—PAYMASTER'S CLERK.

Time served as paymaster's clerk in the United States Army during the War with Spain or the suppression of the Philippine Insurrection is military service within the purview of sections 2304 and 2305, Revised Statutes, for which credit is allowable in lieu of homestead residence.

FINNEY, *First Assistant Secretary:*

Bennett H. Bowley, sr., has appealed from the action of the General Land Office dated January 22, 1925, rejecting final proof submitted on his homestead entry made October 26, 1920, for lots 1 and 2, Sec. 18, T. 34 N., R. 1 E., M. D. M., Sacramento, California, land district.

The proof was submitted June 18, 1924, showing sufficient residence and cultivation for two years and claiming credit for Army service for the remainder of the required period. The only question involved is in respect to the claim for credit on account of military service.

It appears that the entryman was appointed paymaster's clerk June 20, 1898, to serve with Major Charles McClure, Chief Paymaster, United States Army, and served until December 10, 1907, when he resigned. For nearly two years of this period he served in the Philippine Islands.

Sections 2304 and 2305, United States Revised Statutes, provide that every private soldier and officer who served in the Army of the United States during the Spanish War or the suppression of the insurrection in the Philippines for 90 days and who was honorably discharged shall be entitled to make homestead entry and that the time of such service in the Army shall be deducted from the time required to perfect title, 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 after he shall have commenced his improvements.

It has been decided that a person serving in the Army of the United States is entitled to such credit for service between the dates of April 21, 1898, when the Spanish War began, and July 15, 1903, when the Philippine Insurrection ceased.

The decision appealed from contained the following:

> Credit can be extended under the homestead laws for only that "army service" which was identified with and a part of the military establishment of the United States. It is evident that Bowley's service was in a civilian capacity and not such as to entitle him under Secs. 2304–2305 R. S. to a reduction of the regular requirements of the homestead law.

The law in question does not employ the term "military establishment." That is probably of wider significance than the term "Army," but we are only concerned with the latter. Did this claimant, as paymaster's clerk, serve in the "Army" either as private or officer?

In regard to his service the claimant states—

> I was examined, sworn in, vaccinated, ordered to and served in the Philippines for about two years in time of war, in the face of the enemy, under strict martial law, amenable to all discipline, court martial and punishment.

As an instance of military service; one day after the occupation of Manila, by order of the Adjutant General, I was given command of the sea going tug "Oeste" (captured) and proceeded to Cavite from Manila on a perilous mission. Although a regular Army captain and enlisted men were on board I did not relinquish command. I was less able to leave the service than a regular soldier who had a definite enlistment term. Disability, death or discreditable conduct were my only means of exit from the service. Had I offered my resignation it would have been refused. Is this not military service?

The status of paymasters' clerks, both as to the Army and Navy, has been determined by the Comptroller's Office to be that of officers. See 5 Comp. Dec. 684; 7 id. 715; 9 id. 90; 13 id. 654; 25 id. 141.

In respect to paymaster's clerk in the Navy, the Supreme Court in the case of *ex parte Reed* (100 U. S. 13), used the following language:

The place of paymaster's clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department. They must take an oath and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the pay-roll, and are paid accordingly. They may also become entitled to a pension and to bounty land. Navy Regulations of Aug. 7, 1876, p. 95; *In re Bogart*, 2 Sawyer, 396; *United States* v. *Bogart*, 3 Benedict, 257; Rev. Stat., Sects. 4695 and 2426.

The good order and efficiency of the service depends largely upon the faithful performance of their duties.

If these officers are not in the naval service, it may well be asked who are.

See also *United States* v. *Hendee* (124 U. S. 309).

In 7 Comp. Dec. 715, 720, it was held that a paymaster's clerk of the Army is an officer in the Army. Numerous decisions were cited including rulings regarding the status of paymasters' clerks in the Navy with reference to which it was said:

Within the meaning of the authorities cited, so far as the question here involved is concerned, I can see no difference in the status of a paymaster's clerk in the Army and a paymaster's clerk in the Navy. According to the above authorities, one is an officer, in a general sense, in the military service, and is liable to be arrested and tried before a court-martial, and the other is an officer, in the general sense, in the Navy, and subject to the jurisdiction of naval courts-martial. The nature of their duties is essentially the same. The duties of an army paymaster's clerk bear the same relation to the Army as those of a navy paymaster's clerk do to the Navy. Whether one is subjected to a more rigid discipline than the other, which is a matter of regulation, and which may be changed from time to time, can make no difference so far as the question here involved is concerned. The salary of each is fixed by law. The position of paymaster's clerk in the Army is provided by law, and, although there is no statute specifically authorizing it, he is appointed by the Secretary of War for an indefinite period, is required to take an oath, and is discharged on recommendation of the Paymaster General by the Secretary of War.

This question was most elaborately considered by the Department in the case of *Anna F. Stout* (19 P. D. 149), wherein the conclusion was reached that a paymaster's clerk of the Army is a person in the military service for pensionable purposes.

The Department is clearly of the opinion that the service in question during the Spanish War and the Philippine Insurrection should be credited.

The decision appealed from is accordingly reversed.

EXCHANGE OF LANDS IN THE ADDITIONS TO THE NAVAJO INDIAN RESERVATION, ARIZONA—ACT OF MARCH 3, 1925

INSTRUCTIONS

[Circular No. 1012]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 27, 1925.

REGISTER AND RECEIVER,
PHOENIX, ARIZONA.
SUPERINTENDENT, LEUPP AGENCY,
LEUPP, ARIZONA.
SUPERINTENDENT, WESTERN NAVAJO AGENCY,
TUBA CITY, ARIZONA:

The following regulations are issued for your guidance under the act of March 3, 1925 (43 Stat. 1115), authorizing reconveyances and relinquishments of lands, and lieu selections therefor, within the additions to the Navajo Indian Reservation in Arizona, by Executive orders of January 8, 1900, and November 14, 1901. The act reads as follows:

> That 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 any valid filings under the homestead laws, or of other valid claims within the additions to the Navajo Indian Reservation, Arizona, by Executive orders of January 8, 1900, and November 14, 1901, and to permit lieu selections within the boundaries of the said reservation additions by those surrendering their rights, so that the lands retained for Indian purposes may be consolidated and held in a solid area so far as may be possible: *Provided*, That the title or claim of any person or company 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 persons interested, and be brought to the point where approvals may be had of the Secretary of the Interior, there should be full pre-

liminary 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 to determine the exact status of the land desired in exchange.

A person or corporation, or the State of Arizona, desiring to reconvey and select lieu lands should file in duplicate an application with the local land officers at Phoenix 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, which serial number, together with the name of 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. 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 Phoenix.

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 exchange under the said act of March 3, 1925, *supra*, after noting the same on their records in the usual manner.

The inspection service of the Department 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, 1925, and these instructions.

An affidavit showing that the land asked for in exchange is not adversely claimed should accompany each application, and in cases where the land is covered by an allotment, homestead, or desert entry, proper relinquishments should be filed. 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.

There should also accompany the application a warranty deed duly executed according to the laws of Arizona 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 encumbrances, 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. 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 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 and 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 had not sold, assigned, mortgaged, or contracted to sell, assign, or mortgage the land covered by the unperfected claim or relinquished allotment.

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.

WILLIAM SPRY,
Commissioner of the General Land Office.
CHAS. H. BURKE,
Commissioner of Indian Affairs.

Approved:
E. C. FINNEY,
First Assistant Secretary.

POWER OF THE TERRITORIAL LEGISLATURE TO IMPOSE A TAX UPON REINDEER HELD OR CONTROLLED BY THE NATIVES OF ALASKA

Opinion, May 27, 1925

ALASKAN NATIVES—REINDEER—TAXATION.

The United States has such an ownership, reversionary or otherwise, in the reindeer held or controlled by the natives of Alaska, as to bring them within the inhibition of the act of August 24, 1912, which denies to the legislature of that Territory the power to impose a tax upon the property of the United States.

ALASKAN NATIVES—REINDEER—TAXATION.

An act of the territoral legislature of Alaska imposing a tax upon each reindeer killed for market does not extend to reindeer held or controlled by the natives of that Territory.

WRIGHT, *Acting Solicitor:*

At the suggestion of the Commissioner of Education I have been asked to give my opinion in answer to his question as to whether or not an act of the legislature of Alaska requiring the payment of a fee of 25 cents to the treasurer of that Territory for the killing of each reindeer killed therein for market "applies to reindeer killed for the market by natives of Alaska."

The statute referred to is embraced in chapter 31 of the Session Laws of Alaska, 1921, and is entitled "An Act to establish a system of license taxation, to provide for the collection thereof, and to provide punishment for doing business without a license," etc.

The act provides, among other things, that there shall be paid "for each reindeer killed for the market 25 cents (25c)"; requires that a license for such killing be obtained in advance and in effect declares that each person so killing a reindeer without first obtaining such a license shall be guilty of a misdemeanor and punished by a fine of not exceeding $1,000 or by imprisonment for not to exceed three months, or by both such fine and imprisonment.

From this it will be seen that this statute was enacted for the primary purpose of raising revenue and not to authorize the regulation, control, or prohibition of businesses or vocations. The fee to be collected is, therefore, a tax in the broadest sense (*St. Louis* v. *Spiegel*, 75 Mo. 145; *State* v. *Moore*, 113 N. C. 597; 18 S. E. 342); and the question to be determined here is, then, as to whether the territorial legislature had the power to subject reindeer held or controlled by natives of Alaska to taxation of any kind.

Two queries arise here, each of which is worthy of consideration: *First*, Is there anything in the Government's relationship with these natives which prevents the application of that act to reindeer killed by them; and, *second*, Does the United States have such an interest or ownership in reindeer held and controlled by natives of Alaska as prevents such taxation?

The treaty under which our Government acquired the ownership and sovereignty over the area embraced in Alaska contained the declaration that "The uncivilized tribes (located there) will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes in that country" (15 Stat. 539); and, as was said by Solicitor Edwards in his opinion of May 18, 1923 (49 L. D. 592), with departmental approval:

> 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.

See also 50 L. D. 315, and *Alaska Pacific Fisheries* v. *United States* (248 U. S. 78).

It has long been the well-established and absolute rule that State and Territorial legislatures do not have the power to enact any law the enforcement of which would, in any way, interfere with or hamper the United States in its use of any instrumentalities adopted by it for the purpose of exercising any of its governmental functions, or the performance of any of its duties as a sovereign (*Mc-*

Cullough v. *Maryland*, 4 Wheat. 315, 429, 432, 436), and that doctrine has universally controlled in all cases where the Government has adopted measures for the purpose of protecting its aborigines and advancing them towards civilized customs and habits. (See *Gillespie* v. *State of Oklahoma*, 257 U. S. 501; *Territory of Alaska* v. *Annette Island Packing Company et al.*, 289 Fed. 671; and *United States* v. *Thurston County*, 143 Fed. 287.)

As was said in *United States* v. *Pearson* (231 Fed. 270, 277):

> The purpose and object of the government in its dealings with these Indians, and in the relation that it maintains toward them and their property, is to encourage habits of industry and reward labor, and to encourage them to undertake the cultivation of the soil, the raising of stock, or engage in pastoral pursuits, enabling them to support themselves, and as a means of obtaining a livelihood.

Coming now to the pertinent facts, it will be well to remember that a considerable number of years ago the Government imported reindeer into Alaska for the purpose of encouraging the natives to abandon their former habits and sources of food and engage in raising these animals for their own subsistence and eventually for sale on the market. The United States has given these natives instructions to that end and has, for that purpose, distributed reindeer among many of them on terms which enable them eventually to acquire a qualified ownership, under regulations prescribed and enforced by its representatives.

It has been frequently held that the power to tax is the power to destroy, and while the tax provided in the act under consideration is a very small one, and might not result in injury to the reindeer industry by the natives, nevertheless, if the Territory has the power to levy and collect that tax, it might, in the exercise of that power, go further and very materially interfere with this instrumentality which the Government has adopted for the advancement of these natives. That act, in so far as it relates to reindeer killed by natives, is, consequently, repugnant to the Constitution and hence without effect.

A strong reason for holding that that act can not be applied to reindeer killed by the natives is found in the fact that the United States has such an ownership in those animals, reversionary or otherwise, as would bring them within the inhibition of the act of August 24, 1912 (37 Stat. 512), which says, in limiting the powers of the legislature of Alaska, that "no tax shall be imposed on the property of the United States."

As has already been intimated, the absolute ownership of all reindeer in Alaska was in the Government originally, and such interests in them as are held by the natives grow out of contractual relations between the individual natives and the United States based on regu-

lations issued for that purpose. By these regulations the natives who hold reindeer are divided into two classes, one known as "apprentices," to whom a stated number of reindeer are issued by the Government from its herds, and the other as "herders." The regulations provided that the reindeer issued to these natives shall revert to the Government in the case of the death of either an apprentice or a herder without heirs, or with heirs who are not competent or do not manifest a desire to take charge of the herd, or in case of an apprentice who abandons his herd, or where a herder becomes intemperate and fails to reform within one year, or continuously neglects his herd, and the members of his family are not competent to control the herd and fail to provide a competent herder.

Each apprentice and herder is required to enter into a contract with the Government, of which the regulations mentioned are made a part, and in which there are other stipulations calling for the reversion of the herd to the Government, under certain contingencies.

From this it will be seen that the reindeer in the possession of the natives so far remain the property of the Government as to bring them within such an ownership as prevents taxation under the act of 1912, *supra*.

The facts in this case are similar to those in the case of *United States* v. *Pearson*, *supra*, where it was held that horses and cattle issued by the Government to Sioux Indians, and their increase, and other property acquired by their exchange, were not subject to taxation by a State.

For the reasons I have given at some length, I am of opinion that the act mentioned can not be applied to reindeer held and killed for the market by natives of Alaska.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

WILLIAM H. WARD, SAMUEL H. ANSCHELL, ATTORNEY

Decided June 10, 1925

WITHDRAWAL—NATIONAL FORESTS—RESTORATIONS—SELECTION.

A permanent withdrawal which includes certain lands and omits others embraced within a prior temporary withdrawal does not, unless so expressly provided, effect the restoration of the omitted lands, but they still remain subject to the temporary withdrawal, reserved from selection or entry, until regularly restored.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Ira J. Newton* (36 L. D. 271), *John M. Kane* (37 L. D. 277), and *George B. Pratt* (38 L. D. 146) cited and applied.

FINNEY, *First Assistant Secretary:*

William H. Ward, by attorney in fact, Samuel H. Anschell, on August 6, 1909, filed individual lieu selection Spokane 04952, under the act of July 1, 1898 (30 Stat. 597, 620), for unsurveyed land described by metes and bounds, and as further description it was stated that said land when surveyed would be the NW. ¼ NW. ¼, Sec. 28, west part SE. ¼ NE. ¼, north part NE. ¼ SE. ¼, and the NE. ¼ NE. ¼, Sec. 29, T. 39 N., R. 43 E., W. M., Washington, containing 120 acres.

A portion of the land was afterwards relinquished because of conflict with a mining claim. The township plat was officially filed in the local office October 9, 1913, and on October 16, 1913, the selector filed his application for adjustment of the selection to the survey to read as follows: W. ½ SE. ¼ NE. ¼, NE. ¼ NE. ¼, Sec. 29, and lot 2, Sec. 28, said township, and waived claim to all other lands described in his original application.

This case was submitted to the Department for instructions by the Commissioner's letter of August 23, 1917, in view of the fact that lot 2, Sec. 28, was embraced in power-site reserve, and by letter of October 20, 1917, the Department directed the Commissioner to advise the selector that he could have patent for the tracts which were not withdrawn, the selection to be canceled as to lot 2, Sec. 28, if he should so elect, but otherwise the case would be suspended pending consideration by Congress of legislation for the disposal of power sites. In response to that notice the selector elected to have his selection suspended pending action by Congress on the power site legislation then under consideration.

The water power law was finally enacted June 10, 1920 (41 Stat. 1063), and section 24 thereof expressly provided that locations, entries, selections, or filings theretofore made for lands reserved as water-power sites might proceed to approval or patent under and subject to the limitations and conditions contained in that section, namely, subject to a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of the land necessary for the purpose of the act without payment of compensation for such occupation or use.

By decision of May 31, 1924, the General Land Office held the selection for cancellation as to the SW. ¼ NW. ¼ SE. ¼ NE. ¼ and NW. ¼ SW. ¼ SE. ¼ NE. ¼, Sec. 29, containing 5 acres, for the reason that the land was needed for cemetery purposes and had been so used prior to the date of the selection. That decision became final and the selection was accordingly canceled to that extent by the Commissioner's letter of September 22, 1924, and amended to describe the remaining portion to read as follows: Lot 2, Sec. 28,

NE. ¼ NE. ¼, E. ½ W. ½ SE. ¼ NE. ¼, NW. ¼ NW. ¼ SE. ¼ NE. ¼, SW. ¼ SW. ¼ SE. ¼ NE. ¼, Sec. 29, said township.

By Commissioner's decision of October 24, 1924, the selection was further held for cancellation as to lot 2, Sec. 28, with the privilege, however, of the selector to retain that lot subject to the provisions of section 24 of the Federal Water Power Act, above referred to. Appeal from that action has brought the case before the Department for consideration.

It appears that said lot was embraced in a temporary withdrawal by departmental order of July 27, 1906, with a view to its possible inclusion in a permanent forest reserve. While occupying that status it was further withdrawn by departmental order of November 27, 1909, promulgated December 4, 1909, for a power site and which was confirmed by Executive order of July 2, 1910, placing said tract in Power Site Reserve No. 72.

By proclamation of March 2, 1907, other near-by areas were placed in a permanent forest reservation, but this tract was not so included, and by departmental order of August 19, 1913, said lot was restored from the temporary forest withdrawal. In view of that status the decision appealed from held as follows:

> The selection was filed subsequent to the forest withdrawal and was not allowable until the restoration from said forest withdrawal, and the lands having been placed in a power-site withdrawal prior to the restoration of the lands from the forest withdrawal, the power-site withdrawal attached prior to the date upon which the application could have been considered, and it will be necessary for the selector to file an election to take said lot 2 reserving to the United States, its permittees, or licensees, the right to enter upon, take, and use any or all of said lands for power purposes, in accordance with the terms and conditions of Sec. 24 of the Federal water power act, and in default thereof, or appeal herefrom, said selection, hereby held for cancellation, will be finally canceled as to said lot 2, and allowed to remain intact as to the balance of the lands applied for.

The argument in support of the appeal is to the effect that the later permanent reservation made by the President on March 2, 1907, which did not include this tract, superseded all prior withdrawals, and that all lands not within its boundaries were thrown back into the public domain and made subject to sale and entry; that having been thus subject to selection on August 6, 1909, when the selection was filed, the selection properly attached prior to the withdrawal of December 4, 1909, and is thus superior to and stands unaffected by the power-site withdrawal. In this connection it is contended as follows:

> If the lands were *open* when the scrip was laid, it is of no importance or consequence that subsequently and before the selector's application had been passed on by the land office or the department, the lands were included in a power reservation. Because if the lands were open when the scrip was laid,

they were *ipso facto* appropriated lands and could not be included in any other withdrawal or reservation. See: *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228; *Payne* v. *New Mexico*, 255 U. S. 367; *Payne* v. *United States ex rel Newton*, 255 U. S. 438; *Wyoming* v. *United States*, 255 U. S. 489.

The selector in this case did not acquire a vested right prior to the power-site withdrawal so as to bring the case within the rulings of the Supreme Court in the decisions cited.

The tract was not subject to selection at the time of the filing because it was then embraced in the prior withdrawal of July 27, 1906. The Secretary had authority to make the withdrawal for the purpose of examination to determine the propriety of placing the land in a national forest. See case of *John M. Kane* (37 L. D. 277).

A withdrawal, even though erroneously made to embrace land not intended to be included therein, is nevertheless effective to reserve the land from entry until regularly revoked. *Ira J. Newton* (36 L. D. 271).

No rights inconsistent with the withdrawal may be initiated until the order of restoration is received in the local land office. *George B. Pratt* (38 L. D. 146).

The temporary withdrawal was, of course, superseded by the permanent withdrawal as to the lands covered by the latter, but remained unaffected as to tracts not included in the permanent withdrawal. It is not at all unusual to extend the forest boundaries from time to time as a result of further study of conditions, and such was precisely the case in the present instance. The proclamation in question was the third issued to establish enlarged boundaries of the reservation. The more extensive temporary withdrawal was not revoked until it had been concluded that the lands would not be needed for further forest extension. The proclamation itself did not purport to restore lands not included therein, and it would be contrary to all accepted practice to so construe it.

The decision appealed from is accordingly affirmed.

ALMEDA VAN NOSTERN

Decided June 12, 1925

WITHDRAWAL—APPLICATION.

Unless otherwise specified, the date of issuance, not the date of its promulgation, marks the commencement of the effective operation of an Executive order.

FINNEY, *First Assistant Secretary:*

By decision of the 8th instant, the Department rejected the application (Gainesville 019081) of Almeda Van Nostern under the act of January 27, 1922 (42 Stat. 359), because the tract applied for is

a part of Sanibel Island, and affected by the Executive order of December 8, 1924.

Under date of June 2, 1925, you [Edwin W. Spalding, National Metropolitan Bank Building, Washington, D. C.] advised the Department that if it is held that the said Executive order was effective from its date, you wished to withdraw the application. The departmental decision was accordingly declared final on June 10, 1925.

I am now in receipt of your letter of the 10th instant, calling attention to the date the Van Nostern application was filed—December 19, 1924—and stating that the Executive order of December 8, 1924, was not promulgated until December 30, 1924.

It is well settled that a Proclamation or Executive order is effective from its date. *Lapeyre* v. *United States* (17 Wall. 191).

In the case of *Hiram C. Smith* (33 L. D. 677) the Department held that a withdrawal of land from entry, when made by authority of law and a competent officer, has the force of law, and if unlimited as to the time of its taking effect must, like any other law, operate from the time it is made. See, also, the case of *Frank X. Mann* (40 L. D. 440).

BERTRAM N. BEAL

Decided June 22, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—RESERVATION.

A prospecting permit may not be issued to include land, either withdrawn or unwithdrawn, that is covered by an unpatented nonmineral entry allowed without any reservation of the oil and gas contents to the United States, so long as the entry subsists without such reservation.

HOMESTEAD ENTRY—RESERVATION—OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION.

A report by the United States Geological Survey which concludes that land within an unpatented nonmineral entry allowed without any reservation of the oil and gas contents to the United States, has no prospective oil value, is sufficient cause for the rejection of a prospecting permit application filed by one other than the entryman.

PUBLIC LANDS—RESERVATION—PROSPECTING PERMIT.

As to vacant, unappropriated lands, or lands of which the possible oil and gas content is reserved to the United States, the Department does not decline to issue permits to prospect for oil and gas on the ground that the lands are not shown to have any prospective value for those minerals.

FINNEY, *First Assistant Secretary:*

This is an appeal by Bertram N. Beal from the decision of the Commissioner of the General Land Office dated February 9, 1925, rejecting his application 032171, filed March 2, 1923, under section 13 of the act of February 25, 1920 (41 Stat. 437), for a permit to

prospect for oil and gas upon certain lands in the Douglas, Wyoming, land district, as to the E. ½, Sec. 27, N. ½, Sec. 34, T. 37 N., R. 82 W., 6th P. M., on the ground that said tracts were embraced in two prior homestead entries without oil and gas reservation, and that the Geological Survey had reported that the land was without prospective oil or gas value.

All the pertinent facts are set forth in the decision appealed from and no restatement thereof will here be made.

It appears that the appellant does not clearly understand the provisions of the leasing act as applicable in this case. He speaks of equities in his own favor and the lack of equity in favor of either homestead entryman. He calls attention to the facts that one of the entrymen appears to have wholly abandoned his entry; that the other made unsatisfactory final proof and thereafter filed application for reduction of the required area of cultivation, which was denied; that the Commissioner suggested that on application his entry might be amended in character to one under the stock-raising homestead act, and that if this were done the conflict with oil and gas application 032171 would be removed. The appellant then states that he—

> is unable to understand why there should be such reference to his present application which asks nothing save the permit at his own cost to try to find oil or gas. At date of that letter, December 23, 1924, the General Land Office had been for five days in possession of the above-quoted report of the Director of the Geological Survey dated December 18, 1924, upon which is based its decision which is herein appealed from. If that report was and is sufficient basis to defeat appellant's application why suggest the substitution of a stock-raising homestead application by James D. Talbot to "remove the conflict with oil and gas application 032171"—being that here in question?

The appellant also says that—

> The surface rights of the homestead entrymen will not be affected thereby (the granting of a prospecting permit) and they have asked for no other rights and they have abandoned those they did ask for.

The entries of Edward J. Talbot and James D. Talbot were made on July 8, 1922, for the tracts involved, under the enlarged homestead act. It has been alleged in a contest affidavit that Edward J. Talbot has wholly abandoned his homestead, but the application to contest has been rejected without appeal. James D. Talbot submitted final proof in June, 1923, claiming credit for military service. The proof was considered unsatisfactory by reason of insufficient residence and cultivation. The objection as to residence was cured by a showing as to continued residence on the land after final proof, but it was alleged that the land was wholly unfit for cultivation, and application for reduction was made. This was denied because the land had been designated as stock-raising in character when the homestead application was filed. Under these circumstances the

Commissioner suggested that application be made to change the character of the entry to one under the stock-raising homestead act. Inasmuch as said act provides for the reservation of mineral deposits to the United States, and as there had been references to the conflicting application for permit, it followed naturally and logically that the Commissioner should say that a change in the kind of homestead entry would remove the conflict with the application for permit. It is true that in January, 1925, the attorneys for this entryman advised that their client would apply to change the character of his entry to an original stock-raising homestead, but he has not done this and the Land Department can not compel him to do so.

Section 13 of the leasing act provides—

> That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit * * *.

In section 32 of said act it is provided—

> That the Secretary of the Interior is authorized 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, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act.

In its oil and gas regulations approved March 11, 1920, and amended to October 29, 1920 (Circular No. 672, 47 L. D. 437), the Department says (in section 2):

> It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts in the case may be deemed to warrant.

In section 12(c) of said regulations it is stated:

> If the land, either withdrawn or unwithdrawn, is covered by an unpatented nonmineral entry *without a reservation* of the oil and gas content to the Government, a prospecting permit may not be granted so long as the entry subsists without such reservation. In cases where applications for prospecting permits are filed by persons other than the entrymen for land in this status such applications will be referred to the United States Geological Survey for classification as to the prospective oil value of the land affected. If the Geological Survey shall conclude and report that the land embraced in such a nonmineral entry is without prospective oil or gas value, the application for permit will be rejected as to such land.

The homestead entries in question need not be perfected prior to July 8, 1927. There is no reservation as to oil and gas, and without such reservation a prospecting permit covering the land can not be granted. The homesteaders are not limited to mere surface rights. If Edward J. Talbot has abandoned his homestead, the entry may be canceled under contest proceedings prosecuted to a conclusion. The fact that the other entryman submitted an unsatisfactory final proof does not affect the validity of his entry.

The preliminary report of the Geological Survey was that so far as relations to structure were concerned there appeared to be no objection to granting a permit to Beal. As to vacant, unappropriated lands, or lands of which the possible oil and gas content is reserved to the United States, the Department does not decline to issue permits to prospect for oil and gas on the ground that the lands are not shown to have any prospective value for oil or gas. Consequently, what the appellant says as to permits granted upon all surrounding lands is without merit as to the tracts involved.

Although it was apparent that the Geological Survey had considered and reported on the full showing made by Beal, nevertheless his appeal, together with the whole record, was referred to the Survey for review. On June 16, 1925, the Acting Director of said bureau reported to the Department as follows:

> Available geological evidence including the results of drilling to date in the vicinity of this land provide no warrant for modification of the conclusions heretofore expressed by the Geological Survey as to the nonoil and nongas character of the land in controversy.
>
> Contrary to Beal's allegations, Survey Press Bulletin No. 16846, shows the land in question to occupy the trough of the northward plunging syncline which bounds the North Casper Creek anticline on the west rather than a position high up on the west flank of the latter fold. The contour map filed by Beal shows the land to lie areally two miles northwest of the apex of the North Casper Creek anticline and structurally at a minimum of 800 feet below the highest 100-foot closing contour on that structure. Within that uppermost contour, as drawn on the map submitted, two adequate tests have been drilled to the Tensleep formation, one by the Arkansas Natural Gas Co., in Sec. 7, T. 36 N., R. 81 W. (No. 4 on Beal's map), and one by the Midwest Refining Co., in Sec. 36, T. 37 N., R. 82 W. (No. 1 on Beal's map). The Arkansas Natural well was abandoned in November, 1924, without having encountered consequential showings of oil or gas. On or about January 6, 1925, the Midwest well, which, despite the contours indicated, is in fact about 200 feet higher structurally than the Arkansas Natural well, encountered in the Tensleep sand a flow of black oil and water rated initially at 250 barrels of oil and 50 barrels of water a day. Within a week the ratio had reversed to something like 50 barrels of oil and 475 barrels of water, and the small pool of oil apparently accumulated at the very apex of the structure was regarded to have been essentially exhausted. The well was accordingly deepened some 82 feet, and about January 26, encountered fresh artesian water in enormous volume, and under a reported pressure of 180 lbs., in or near the top of the Amsden formation. The well has since been abandoned and press reports state that the field has likewise been abandoned by the Midwest interests.
>
> In the opinion of the Survey these results provide no geological basis for a conclusion that an oil field has been "absolutely proven" on the North Casper Creek structure, that the "actual presence of a large reservoir of oil in the structure" has been established or that *bona fide* drilling for oil and gas low on the flank of the anticline and in the bordering syncline might result other than in failure. The theory that either the Midwest well or the Arkansas Natural well is drilled on a fault is not proved and its postulation does not appear to be at all necessary to explain the results obtained. The existence

of faults competent to effect valuable accumulations of oil and gas in the land in controversy is wholly conjectural.

For the reasons herein stated the decision appealed from is affirmed.

RECITALS IN SURFACE PATENTS ISSUED SUBJECT TO THE CONDITIONS OF SECTION 29 OF THE ACT OF FEBRUARY 25, 1920

Instructions, July 2, 1925

OIL AND GAS LANDS—LEASE—PROSPECTING PERMIT—STATUTES—WORDS AND PHRASES.

The term "lease" used in section 29 of the leasing act of February 25, 1920, includes prospecting permits issued under that act.

HOMESTEAD ENTRY—PATENT—RESERVATION—OIL AND GAS LANDS—LEASE—PROSPECTING PERMIT—IMPROVEMENTS—DAMAGES.

Patents issued upon nonmineral entries made under the acts of July 17, 1914, and December 29, 1916, for lands covered by prospecting permits or leases, should contain recitals to the effect that the entries were allowed subject to the conditions of section 29 of the act of February 25, 1920, and to the rights of the prior permittees or lessees to use so much of the surface as is required for mining operations, without compensation for damages to crops and improvements resulting from the use of the lands for proper mining purposes.

FINNEY, *First Assistant Secretary:*

I have before me your [Commissioner of the General Land Office] letter of June 23, 1925, requesting instructions as to whether patents issued with mineral reservations pursuant to the act of July 17, 1914 (38 Stat. 509), should, in appropriate cases, contain a statement that the entry was patented subject to the prior rights of oil and gas permittees or lessees, pursuant to section 29 of the general leasing act of February 25, 1920 (41 Stat. 437).

Section 29 of the leasing act authorizes, in the discretion of the Secretary, the disposal under nonmineral-land laws of such of the surface of lands leased under the provisions of the act of February 25, 1920, as is not necessary to the operations of the lessees.

The term "lease" used in section 29 of the act has been construed as including prospecting permits issued under the act (Instructions of October 6, 1920, 47 L. D. 474), and the surface entries allowable under this section are nonmineral entries pursuant to the acts of July 17, 1914 (38 Stat. 509), and December 29, 1916 (39 Stat. 862). Instructions of September 23, 1924 (50 L. D. 640). As these nonmineral entries are wholly subordinate to the prior rights of permittees or lessees, the entrymen are without those rights to compensation for damages to crops or improvements which occur through proper mining operations by permittees or lessees which

they would have had under the nonmineral-land laws. Under the practice in force an expressed waiver of compensation for such damages is required. This waiver, however, is a mere administrative means of informing the entrymen of their rights (*Pace* v. *Carstarphen et al.*, 50 L. D. 369). As to entries made under the act of July 17, 1914, no right to compensation was required (*Pace* v. *Carstarphen et al.*, *supra*), and in the case of entries under the act of December 29, 1916, *supra*, the compensation provision of section 9 of that act was modified by section 29 of the general leasing act. *Carlin* v. *Cassriel* (50 L. D. 383).

There can be no allowance of nonmineral entries of lands already included in prospecting permits or leases under the act of February 25, 1920 (41 Stat. 437), except in the exercise of the discretion vested in the Secretary by section 29 of that act, and it is therefore apparent that a statement that such allowance has been made must appear in the record and in the final certificate.

As section 29 of the act is one of the essential provisions under which nonmineral entries in these special cases are made, reference to that section as part of the source of the entry should appear in the patent. This is true even though the prospecting permit or lease which antedated the nonmineral filing has been canceled before patent issues. This requirement is made to show the true source of authority for the entry, but the reference to section 29 of the act should also state that the entry is subject to the rights of the *prior* permittees or lessees to use so much of the surface of the area patented as is required for mining operations, without compensation to the entryman or patentee for damages to crops and improvements resulting from proper mining operations. If this is done, the entrymen and their assigns will be at all times chargeable with notice of their rights, through expressed limitations founded upon the law and set forth in their grants.

PROCEDURE UPON NONMINERAL APPLICATIONS FILED SUBSEQUENT TO APPLICATIONS FOR PROSPECTING PERMITS AND LEASES—INSTRUCTIONS OF OCTOBER 6, 1920 (47 L. D. 474), SUPERSEDED SO FAR AS IN CONFLICT

INSTRUCTIONS

[Circular No. 1021]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 21, 1925.

REGISTERS,
UNITED STATES LAND OFFICES:

In all cases of applications to make nonmineral entries or selections of lands *outside* of areas which have been designated by the

Department as within the geologic structures of producing oil or gas fields and which lands are also embraced in applications for oil and gas prospecting permits or in permits granted, or in applications for coal, phosphate, sodium, oil shale, or potash permits or leases, or in permits or leases granted, such nonmineral applications should be received, noted upon your records, and the applicant for prospecting permit, or the permittee or lessee, as the case may be, advised that he will be allowed thirty days in which to show why the nonmineral application should not be allowed subject to the reservation to the United States of the minerals sought to be acquired by the mineral claimant, and with a waiver of claim to compensation in accordance with Section 29 of the act of February 25, 1920 (41 Stat. 437), except in the case of applications for potash permits or leases or permits or leases granted, in which case the waiver should be in accordance with Section 6 of the act of October 2, 1917 (40 Stat. 297), which showing must bear evidence of service of notice on the nonmineral applicant.

At the same time you will allow the nonmineral applicant thirty days to file the reservation and waiver mentioned, if he has not already done so, witnessed by two persons or acknowledged before an officer authorized to take acknowledgments, or to appeal, and advise him that if he fails to do either, his application will be finally rejected and the case closed.

The waiver of claim for compensation should be in the following form:

> Subject to the right of any permittee or lessee under any permit or lease which has been or may hereafter be granted to prospect for the minerals sought ON THE LAND IN CONFLICT where the right of such permittee or lessee was initiated prior to the nonmineral filing, and to use so much of the surface thereof as may be necessary in prospecting for, mining, and removing the mineral deposits without compensation to the nonmineral claimant therefor, in accordance with Section 29 of the act of February 25, 1920, or Section 6 of the act of October 2, 1917 (40 Stat. 297), if applicable.

If the nonmineral application was not made under the stock-raising homestead law, the reservation for coal should be under the act of June 22, 1910 (36 Stat. 583), and for the other minerals under the act of July 17, 1914 (38 Stat. 509).

Immediately upon the expiration of the time allowed you will forward all papers to this office, with evidence of service on each of the persons involved, with your report. You will not allow any such nonmineral application until instructed by this office.

You will submit to this office for instructions without taking action as above directed—

(a) Homestead applications in which priority is claimed by reason of prior settlement over mineral claimants having prior applications for the same land, and

(b) Homestead applications, except stock-raising applications, which conflict in part only with prior applications for oil and gas prospecting permits or permits granted.

In cases coming under paragraph (b), an appropriate mineral waiver and consent covering all the lands applied for will be required by this office if it be ascertained by report from the Geological Survey or otherwise that at the date of the application all the lands applied for were known to be prospectively valuable for oil and gas.

An applicant under the reclamation act of June 17, 1902 (32 Stat. 388), for lands applied for under the leasing act after withdrawal for reclamation purposes will be required to consent to a reservation to the United States of the proper mineral deposits as above indicated, but will not be required to consent under Section 29 of the leasing act, as he will be regarded as having succeeded to the prior rights of the United States in connection with the project. For this reason also it will not be necessary for you to send notice of the conflict to the mineral claimant. An application under the reclamation act in conflict as above indicated may be allowed without reference to this office, provided the applicant has consented to a reservation of the mineral deposits as required, and provided also reference to this office is not necessary under paragraph (b) above.

Where an area under lease is wholly or in part best adapted to mining by stripping methods, resulting in the surface being of purely temporary value, and it is satisfactorily shown that the granting of any additional surface rights over and above those of the lessee would be a serious embarrassment to the lessee, an application to make surface entry will be rejected by this office, subject to appeal.

You will reject, subject to appeal, all nonmineral applications for lands covered by oil and gas leases pursuant to the departmental decision of October 6, 1922 (49 L. D. 312), in the case of *Oscar R. Lingo*.

These instructions supersede instructions of October 6, 1920 (47 L. D. 474), in so far as they are in conflict herewith.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

RESERVATION IN PATENTS ISSUED FOR MISSION CLAIMS ON INDIAN RESERVATIONS

Opinion, July 22, 1925

PATENT—RESERVATION—MISSION CLAIM—INDIAN LANDS.

The act of September 21, 1922, supersedes the act of March 3, 1909, as to the form of patent to be issued for lands on Indian reservations set apart for missionary or church purposes, and all patents issued thereafter should contain the reversionary clause which the later act requires.

PATENT—JURISDICTION—MISSION CLAIM—INDIAN LANDS.

A patent issued after the passage of the act of September 21, 1922, erroneously conveying the fee simple title to lands in which the act requires that a reversionary interest be retained, places the fee beyond administrative recall, but the extent of the actual grant to the patentee is, in contemplation of law, no larger than that which Congress intended.

PRIOR OPINION OF THE SOLICITOR CITED AND APPLIED.

Opinion of the Solicitor (50 L. D. 676) cited and applied.

WRIGHT, *Acting Solicitor:*

You [Secretary of the Interior] have requested my opinion in connection with the issuance of patents for lands on Indian reservations set apart for missionary or church purposes, the particular point at issue being whether such patents should carry the reversionary clause called for by the act of September 21, 1922 (42 Stat. 994, 995).

From an early date sundry religious organizations have labored zealously among the Indians, looking to their moral and civil betterment. Wherever practicable, such organizations had been encouraged and aided in this work. In the general allotment act of February 8, 1887 (24 Stat. 388), we find an item in section 5 which reads:

* * * And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law.

As the foregoing legislation carried no express authority for the issuance of patents, it was administratively ruled at an early date that the lands so occupied or used by religious organizations could only be set apart or "reserved" for such purposes until Congress otherwise directed. From time to time, by special enactment relating to particular reservations, Congress expressly authorized the issuance of patents for given areas so used for church purposes. It was not until 1909, however, that additional legislation of general scope

or application was had, and in the Indian appropriation act of March 3, 1909 (35 Stat. 781, 814), we find an item which reads:

> That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority of any religious organization engaged in mission or school work on *any* Indian reservation, for such lands thereon as have been *heretofore* set apart to and are now being used and occupied by such organization for mission or school purposes. [Italics supplied.]

Matters stood thus legislatively until September 21, 1922, when Congress by act of that date (42 Stat. 994, 995), provided—

> SEC. 3. That the Secretary of the Interior is hereby authorized and directed to issue a patent to the duly authorized missionary board, or other proper authority, of any religious organization engaged in mission or school work on any Indian reservation for such lands thereon as have been heretofore set apart to and are now being actually and beneficially used and occupied by such organization solely for mission or school purposes, the area so patented to not exceed one hundred and sixty acres to any one organization at any station: *Provided*, That such patent shall provide that when no longer used for mission or school purposes said lands shall revert to the Indian owner.

It will be noted that the act of 1922 contains limitations not found in the earlier statute of 1909, to wit, that the area patented shall not exceed 160 acres at any one station and that after abandonment of the lands for missionary purposes, they shall revert to the Indians. These limitations do not appear in the earlier act of 1909. The question naturally arises, therefore, does the later statute supersede or repeal the former?

As observed by the Supreme Court in *United States* v. *Yuginovich* (256 U. S. 450, 463), "It is, of course, well settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments." In this connection the court cited *United States* v. *Tynen* (11 Wall, 88), and from the syllabus of the latter case we quote:

> When there are two acts of Congress on the same subject, and the latter act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first.

Neither act is in itself a grant of anything to anyone. Both are authorizations and directions to an administrative officer, defining power and fixing duty. No rights are taken away from anyone by the later expression of the will of Congress. Merely the authority of the Secretary is curtailed. Whereas before he was authorized and directed to issue one kind of patent, he is now authorized and

directed to issue another sort of patent. The last expression governs. We would not now be warranted in issuing under the earlier act of 1909 unqualified fee patents for these church or missionary lands in utter disregard of the limitations set up in the later act of 1922. In this connection, see the Solicitor's opinion of November 21, 1924 (50 L. D. 676).

In bringing this matter to your attention, the Commissioner of Indian Affairs reports that since September 21, 1922, several fee patents have been issued under the terms of the 1909 statute, and asks if such patents should now be recalled, canceled, and new ones issued, carrying the reversionary clause called for by the act of 1922.

The fee having passed on the issuance and delivery of such patents, without a reconveyance from the grantees or present owners, such fee is now beyond administrative recall. The courts, however, should encounter no difficulty in reading into those patents the requirements called for by the later statute, and this on the theory broadly stated in *Choate* v. *Trapp* (224 U. S. 665, 673), to the effect that those who signed the patent could not convey more rights than were granted, nor could they by omission deprive the patentee of any rights to which he was entitled as a matter of law. See also *United States* v. *Joyce* (240 Fed. 610). But inasmuch as the issued patents do not show on their face the reservation which the law requires, innocent third parties might conceivably be misled to their great disadvantage. Of course, these patents have been locally recorded. To the end that the public may be advised of the reversion to the United States in the event of discontinuance of use for school or mission purposes, it would be advisable to notify each such patentee to call for a proper reconveyance and then to reissue patent with the reversionary clause that the law requires. It is not thought that any mission will object to this course; but it is not meant that in the event of refusal any proceeding should be instituted for the cancellation of the patent. The grantee's rights are not enlarged by the inadvertent omission of the clause, and each patentee should be advised to that effect. As to patents hereafter issued, I am of the opinion that these should be made to conform to the latest requirements of Congress in the matter as found in the act of September 21, 1922, *supra*.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

CENTRAL PACIFIC RAILWAY COMPANY

Decided July 31, 1925

RAILROAD GRANT—SETTLEMENT—ENTRY—DECLARATORY STATEMENT—SELECTION.

Where a declaratory statement or entry for lands within the primary limits of a grant to a railroad company was not filed or made until after the date of definite location of the road, the grant to the company attached and, under the terms of the act of June 22, 1874, the lands may be assigned as base and an equal quantity of unappropriated, nonmineral lands elsewhere within the limits of the grant may be selected in lieu thereof.

FINNEY, *First Assistant Secretary:*

The Central Pacific Railway Company has appealed from a decision of the Commissioner of the General Land Office, dated January 12, 1925, holding for cancellation its selection under the act of June 22, 1874 (18 Stat. 194), of SE. ¼ NE. ¼, Sec. 14, T. 16 N., R. 11 E., M. D. M., in lieu of SE. ¼ SW. ¼, Sec. 17, T. 15 N., R. 7 E., M. D. M.

The tract assigned as base for the selection is within the primary limits of the grant to the Central Pacific Railway Company by the acts of July 1, 1862 (12 Stat. 489), and July 2, 1864 (13 Stat. 356), as fixed by the map of definite location of the line of road opposite thereto, filed October 27, 1866.

The records of the Land Department show that the plat of survey of T. 15 N., R. 7 E., M. D. M., was filed in the local land office on May 6, 1868; that on July 17, 1868, Mary Downey filed her preemption declaratory statement covering the SE. ¼ SW. ¼, said Sec. 17, alleging settlement on July 1, 1856; that said Downey made final proof and payment, and that patent issued to her February 15, 1870.

The selection in question was filed February 15, 1912.

The act of June 22, 1874, *supra*, entitled "An act for the relief of settlers on railroad lands," provides in part—

> 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 land 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.

The question presented by the appeal has been heretofore decided by the Department. By decision of April 22, 1918 (unreported), discussing a selection (Carson City 06752) by the Central Pacific Railway Company under the act of June 22, 1874, *supra*, after quoting from the decisions of the Supreme Court of the United

States in *Kansas Pacific Ry. Co.* v. *Dunmeyer* (113 U. S. 629) and *Tarpey* v. *Madsen* (178 U. S. 215), the Department held:

The only question before the Department for adjudication is whether the lands assigned as base for the selections are or are not within the terms and purpose of the act of June 22, 1874, *supra*, and that question must be determined by the state of the record of the land office at the date of the definite location of the road. Congress apparently recognized that the provisions of the grant imposed hardships on settlers who had taken up claims within the grant, but had not filed their declaratory statements or made entries prior to the definite location of the road, and by the act of June 22, 1874, *supra*, provided a method by which the settlers' claims could be allowed without litigation and the railroad company given the right to take other land. The Central Pacific Railway Company accepted the proposal and is entitled to select an acre of vacant land within the limits of its grant for each acre awarded to a settler whose claim was not of record when the definite location of the road was fixed.

The preemption declaratory statement of Mary Downey for the tract assigned as base for the selection in question was not filed in the local land office until after the railway company's map of definite location of the line of road opposite the tract was filed. It follows that the grant to the railway company attached to the base land and that the selection must be approved.

The discussion in the case of *Santa Fe Pacific Railroad Company* (49 L. D. 180, 183), quoted by the Commissioner in his decision of January 12, 1925, is not in point.

For the reasons aforesaid the decision appealed from is reversed.

HYDE v. KILE

Decided July 31, 1925

HOMESTEAD ENTRY—CONTEST—ABANDONMENT—JUDICIAL RESTRAINT.

A homestead entry is not subject to contest on the ground of abandonment where the entryman is placed under judicial restraint.

HOMESTEAD ENTRY—CONTEST—APPLICATION.

An application to contest which does not allege an existing default or disqualification in the entryman does not contain a sufficient charge upon which to predicate a contest.

HOMESTEAD ENTRY—JUDICIAL RESTRAINT—EVIDENCE—NOTICE—FORFEITURE—FINAL PROOF—RELINQUISHMENT.

Upon the filing of evidence of the judicial restraint of a homestead entryman the entry will be held suspended for a period discretionary with the Commissioner of the General Land Office, having regard to the facts and circumstances adduced, and the entryman will be put on notice that at the expiration of the time limit the entry will be declared forfeited if, in the meantime, satisfactory final proof is not submitted or a relinquishment filed.

DEPARTMENTAL INSTRUCTIONS AMENDED.

Instructions of October 20, 1917 (46 L. D. 224), amended.

FINNEY, *First Assistant Secretary:*

In January, 1919, George L. Kile purchased for an alleged consideration of $2,400 a relinquishment of the homestead entry of one Thomas Davy covering the SE. ¼, Sec. 4, T. 11 N., R. 10 W., N. M. P. M., Santa Fe, New Mexico, land district. On January 24, 1919, Kile filed second homestead application 036778 for said quarter section and, it appears, he and his wife moved to the land and established residence thereon March 5, 1919. His homestead application was accepted and entry allowed August 9, 1919. September 5, 1924, expiration notice issued to the entryman, and shortly thereafter Kile's attorney filed a certified copy of the record of his conviction, in the courts of Valencia County, of the crime of murder. From the evidence submitted it appears that Kile was arrested about March 13, 1919, tried and convicted and sentenced to be hung; that on appeal to the Supreme Court of the State a new trial was granted whereat defendant plead guilty to murder in the second degree, and in January, 1924, was sentenced to imprisonment for a term not exceeding 99 years in the State penitentiary at Santa Fe, where he is now confined. Mrs. Kile in consequence of the conviction of her husband was compelled in December, 1919, to remove from the land to the city of Albuquerque for the purpose of supporting herself and her mother, who is now past 83 years of age and in feeble health.

October 7, 1924, Arthur W. Hyde filed application to contest Kile's entry alleging abandonment. The register and receiver suspended the application because expiration notice had issued on the entry. Thereafter, upon consideration of the record, the Commissioner of the General Land Office found that the entryman had been judicially restrained, as stated above, and by decision of January 8, 1925, directed that the entry be suspended during the period of such restraint, and further that the contest be dismissed.

January 27, 1925, Hyde filed an appeal from that decision and on February 3, 1925, filed an amended affidavit of contest alleging that Kile was not a qualified entryman under the homestead laws because at the date of the initiation of his entry he was the owner of 320 acres of land.

The Commissioner's action in the matter being in harmony with instructions of October 20, 1917 (46 L. D. 224), was proper and is affirmed. The order referred to provides that a homestead entry shall not be subject to contest on a charge of abandonment where the claimant has been placed under judicial restraint, but in such case the entry shall be placed in a state of suspension and so held until the termination of the judicial restraint, whereupon compliance with the requirements of the homestead law shall be exacted of the entryman as a prerequisite to final proof and patent.

The charge that Kile at date of entry was the owner of more than 160 acres of land is not a good and sufficient charge because there is no allegation that he is not now qualified to hold the entry. An application to contest which does not allege an existing default or disqualification in the entryman does not contain a sufficient charge. See *Dillard* v. *Hurd* (46 L. D. 51). The amended application to contest is, therefore, rejected.

While this disposes of Hyde's contest, it is clear upon consideration of the situation here disclosed that the administrative order of October 20, 1917, is defective and should be changed. There would seem to be insuperable difficulties in the practical application of the terms of that order to the case in hand. The proposition that the homestead entry of a man sentenced to imprisonment for a term of 99 years should be held intact until his judicial restraint is ended, and that he should then be required to comply with the homestead laws as to residence and cultivation as a prerequisite to final proof and patent is highly incongruous and leads to an absurdity. Of course, the convict may be pardoned or paroled or his sentence commuted, but assuming that he will serve out his sentence, or at least that part of his sentence covered by the span of his life, it is manifest that he is wholly disabled from performing his obligations and that he will never be able to resume residence upon his homestead and perfect it in accordance with law. In these circumstances it is questionable, to say the least, whether the statute contemplates that the entry of a homesteader should be held intact for his benefit, and in any event it is not believed that such practice is sanctioned by sound administrative policy. It would seem to be expedient and advisable to hold the entry of an imprisoned man intact during the time of his judicial restraint for a *term of years*, but in the opinion of the Department there is no justification or reason for holding it intact for an *indefinite* time where he is sentenced to life imprisonment, whereby under the laws of a number of the public-land States a person is deemed to be civilly dead.

The difficulty of establishing a hard and fast rule for all cases of this kind which may hereafter arise is obvious. The Department is convinced, however, that the entry of no imprisoned person, serving a life term, should be held intact for an *indefinite period* on the theory that the entryman will ultimately return to the land and comply with the requirements of the homestead laws. On the other hand it is believed, in such case, that the claimant should be afforded full opportunity to perfect, or dispose of his entry, and thus, perhaps effectuate a desire to derive some substantial and immediate benefit from his property. For this purpose, upon the filing of evidence of judicial restraint there should be a period of suspension,

discretionary with the Commissioner of the General Land Office, having regard to the facts and circumstances adduced, and the entryman should be put upon notice that at the expiration of the time limited the entry will be declared forfeited, unless, in the meantime satisfactory final proof is submitted or a relinquishment has been filed.

Instructions of October 20, 1917, *supra*, are modified to conform herewith and the case is remanded for action in harmony with the views expressed.

STANDARD OIL COMPANY

Decided August 14, 1925

OIL AND GAS LANDS—PROSPECTING PERMITS—ALASKA—EXTENSIONS OF TIME FOR PERFORMANCE OF DRILLING OPERATIONS—STATUTES.

The act of January 11, 1922, enlarged, but did not supersede, the provision in section 13 of the act of February 25, 1920, relating to the granting of extensions of time for the performance of drilling operations upon lands embraced within oil and gas prospecting permits.

OIL AND GAS LANDS—PROSPECTING PERMITS—ALASKA—EXTENSIONS OF TIME FOR PERFORMANCE OF DRILLING OPERATIONS—STATUTES.

A permittee of lands in Alaska who has drilled beyond the depth (2,000 feet) required by section 13 of the act of February 25, 1920, and who desires to perform further drilling, is as much entitled to an extension of time under that section, for not exceeding two years, under the same circumstances, as would a permittee of lands in the United States.

OIL AND GAS LANDS—PROSPECTING PERMITS—ALASKA—WORDS AND PHRASES—STATUTES.

The word "provided," as used in section 13 of the act of February 25, 1920, is to be construed as a conjunction, and when thus construed all preceding provisions in that section not inconsistent with the later provisions thereof are applicable in so far as they relate to permits issued both for lands in the United States and in Alaska.

DEPARTMENTAL REGULATIONS VACATED SO FAR AS IN CONFLICT.

Section 1 of the regulations of August 12, 1922 (49 L. D. 207), vacated so far as in conflict.

FINNEY, *First Assistant Secretary:*

There is returned herewith, without approval, your [Commissioner of the General Land Office] letter of July 31, 1925, in which it was proposed to deny an extension of time to the Standard Oil Company for the continuation of drilling by it upon lands in Alaska covered by a prospecting permit issued on July 16, 1921, to W. E. Lee, pursuant to section 13 of the act of February 25, 1920 (41 Stat. 437).

The assignment of this permit to the Standard Oil Company was approved on August 2, 1922.

It appears that this company has carried on drilling operations upon the area covered by this permit to a depth of over 3,647 feet without discovering oil or gas in substantial quantities and now desires additional time to continue drilling.

The Department has heretofore held, as is stated in your letter, that extensions of time may not be granted, pursuant to the act of January 11, 1922 (42 Stat. 356), in cases where permittees have drilled to or beyond the depths required by section 13 of the act of February 25, 1920, *supra*, for the periods of time prescribed therein. This is because the act of January 11, 1922, is specifically confined to cases where drilling to the depths prescribed by section 13 of the general leasing act has not been carried out, although the permittees have exercised diligence.

Sections 7 and 10 (c) of the departmental regulations of March 11, 1920 (47 L. D. 437), stated that the provision of section 13 of the act of February 25, 1920, *supra*, that—

> The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe

is inapplicable to prospecting permits for lands in Alaska.

In section 1 of departmental regulations of August 12, 1922 (49 L. D. 207), it was stated that the act of January 11, 1922, *supra*, superseded the extension-of-time provision of section 13 of the act of February 25, 1920, *supra*, and authorized extensions of time in Alaska. There can be no doubt that extensions under the act of January 11, 1922, may be granted permittees of lands in Alaska, but, as herein pointed out, the act of January 11, 1922, *enlarged* but did not supersede the provision in section 13 of the leasing act of February 25, 1920. The later act related to a situation not covered by the earlier; and being in nowise inconsistent therewith, did not supersede it. In so far as the regulations of August 12, 1922, are contrary hereto, those regulations are vacated.

This case presents for the first time a situation where a permittee of lands in Alaska has drilled beyond the depth required by section 13 of the act of February 25, 1920, *supra*, and desires to perform further drilling.

The interpretation of section 13 of the act, as making no provision for further time for such work *in Alaska*, although so providing as to lands in the United States, appears to have been made without full consideration of the provisions of the statute.

Under section 13 of the act of February 25, 1920, a permittee of lands in the United States is required to begin drilling operations within six months from the date of issuance of the permit. A permittee of lands in Alaska is required to begin drilling within two

years from the date of his permit. This difference evidently was in recognition of the immense task of transporting materials and arranging for drilling in Alaskan territory. Drilling, once started, must reach a depth of 500 feet, on lands in the United States, within six months after drilling is started. In Alaska, twelve months are allowed for reaching this depth. In both the United States and Alaska, twelve more months are allowed for drilling the remaining 1,500 feet necessary to make the depth of 2,000 feet, prescribed by the act as an average test depth.

Consideration of the drilling requirements, both in the United States and in Alaska, compels the conclusion that the difference in time allowed for the initial stages of drilling, in favor of Alaskan permittees, was in recognition of the greater difficulties to be met in the latter territory. Nothing appears in the act which suggests that, having been given greater time for reaching 500 feet, an Alaskan permittee is not entitled, if he makes no discovery before reaching 2,000 feet, or within the last year's drilling, no matter what the depth, to the same period for further work accorded permittees of lands in the United States.

It is true that the provision for a two-year extension for deep drilling appears in section 13 of the act of February 25, 1920, immediately following a statement as to the drilling requirements herein stated as relating to lands in the United States, and that the provisions as to drilling in Alaska appear later in the section as a proviso. This seems to be one of the cases where the word "Provided" is used as a conjunction, to add to preceding provisions so as to indicate that, as against the earlier provisions of the statute, the later is to prevail. See *Georgia Railroad and Banking Company* v. *Smith* (128 U. S. 174) and Vol. 3, Words and Phrases (Second Series), page 1317. It follows, therefore, that all preceding matters in the section, not inconsistent with the provision, shall apply to permits issued both for lands in the United States and in Alaska.

In addition, the provision for the extension of time for deeper drilling, when considered in connection with the entire section, is so clearly necessary to the granting of rights to Alaskan permittees, at least equal to those of permittees of lands in the United States, as to require the conclusion that the extensions may be granted in both cases. To hold otherwise would be to find that the Congress had made it mandatory upon permittees in Alaska to do more drilling than permittees in the United States within the last twelve months covered by their permits, on the penalty of losing all their previous efforts. This is clearly at variance with the liberal provisions for preliminary drilling in Alaska.

It is concluded, therefore, that extensions of time may be granted under section 13 of the act of February 25, 1920, to permittees in Alaska, and, upon the facts presented in this case, that an extension of twelve months from July 16, 1925, may now be granted this claimant, conditioned upon reasonable diligence in further drilling.

ISSUANCE OF PERMITS TO PROSPECT FOR POTASSIUM UPON LANDS EMBRACED WITHIN OIL AND GAS PROSPECTING PERMITS

Decided August 17, 1925

POTASH LANDS — OIL AND GAS LANDS — PROSPECTING PERMITS — PATENT — WAIVER — LEASE — PREFERENCE RIGHT — STATUTES.

The act of October 2, 1917, does not make the issuance of a patent thereunder mandatory, and the Secretary of the Interior may issue a permit to prospect for potassium carrying with it a preference right to a lease upon discovery for not to exceed one-fourth of the area covered by the permit, upon lands embraced within a subsisting oil and gas prospecting permit, provided that the permittee waives all rights to a patent.

DEPARTMENTAL DECISION OVERRULED SO FAR AS IN CONFLICT.

Decision of September 23, 1924 (50 L. D. 640), overruled so far as in conflict.

FINNEY, *First Assistant Secretary:*

The Department has considered your [Commissioner of the General Land Office] letter of June 24, 1925, transmitting 43 applications for potassium prospecting permits, under the act of October 2, 1917 (40 Stat. 297), for lands in Ts. 21 to 24 S., Rs. 18 to 21 E., S. L. M., Salt Lake City, Utah, land district, which conflict for the most part with prior oil and gas prospecting permits, or applications for such permits, under the act of February 25, 1920 (41 Stat. 437), and recommending favorable consideration upon the same.

It is provided in the act of October 2, 1917, *supra*—

> That the Secretary of the Interior is hereby authorized and directed, under such rules and regulations as he may prescribe, to issue to any applicant * * * a prospecting permit which shall give the exclusive right, for a period not exceeding two years, to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium on public lands of the United States * * *.
>
> SEC. 2. That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one or more of the substances enumerated in section one hereof have been discovered by the permittee within the area covered by his permit, the permittee shall be entitled to a patent for not to exceed one-fourth of the land embraced in the prospecting permit * * *. All other lands described and embraced in such a prospecting permit from and after the exercise of the right to patent accorded to the discoverer, and not covered by leases, may be leased by the Secretary of the Interior, through advertise-

ment, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres * * *.

In its opinion dated September 23, 1924 (50 L. D. 640), the Department held that—

> * * * while joint operation of lands for the development of potassium and sodium might be feasible and perhaps economically desirable, it is without authority of law to permit joint development under the act of October 2, 1917, and the act of February 25, 1920, *supra*.

This opinion is based on the ground that there is no authority in the act of February 25, 1920, for the issuance of limited patents to permittees under the act of October 2, 1917, and that as the permittee under the latter act is entitled to select the area to be patented in a compact form from the general area covered by the permit, all the lands in said permit are potentially subject to patent until a selection is made.

These applicants through their attorney have offered to waive the right to patent, and you express the opinion that the Department has the authority to accept such waivers and grant potassium prospecting permits which shall run concurrently with the oil and gas prospecting permits, and to grant leases to the potassium permittees upon commercial discovery.

In section 1 of the act of February 25, 1920, it is provided—

> That 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.

In section 13 of said act the Secretary of the Interior is authorized to grant to a qualified applicant a permit giving the exclusive right for two years to prospect for oil and gas upon not to exceed 2,560 acres of land wherein such deposits belong to the United States. Similarly, in section 23 there is authority for granting permits giving exclusive right to prospect for two years for sodium upon 2,560 acres of land belonging to the United States. In section 2 there is authority for granting permits to prospect for coal for a like period and upon an area of the same extent.

It is not specifically provided in said act that permits to prospect for different minerals enumerated therein may be granted to run concurrently, but inasmuch as the purpose of the act is to promote the mining of such minerals on public lands, the Department has determined that it has authority to grant concurrently permits to prospect for coal and for oil and gas upon the same area; likewise, sodium and oil and gas prospecting permits.

Section 32 reads in part as follows:

> That the Secretary of the Interior is authorized to prescribe necessary rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, * * *.

In sections 11 and 12 of the act of October 2, 1917, it is provided:

> SEC. 11. That the Secretary of the Interior is authorized 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.
>
> SEC. 12. That the deposits herein referred to, in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in this Act * * *.

It does not appear that either at the time of the passage of the act of October 2, 1917, or when the provisions of the bill which subsequently became the act of February 25, 1920, were considered for enactment, Congress had in mind that conditions might be presented where the interests of the Government would call for concurrent development for potash and for other minerals, and it must be assumed that this has been the reason for failure to provide in specific terms for concurrent development under the two acts.

Upon mature consideration the Department is of the opinion that if an applicant for a potassium prospecting permit shall waive any and all rights to a patent conferred by the act of October 2, 1917, with respect to the area applied for, he may be granted a permit covering land which is already embraced in an oil and gas prospecting permit. The provision as to the issuance of patent is not mandatory. In the event of discovery it is optional with the permittee whether he shall apply for a patent. If he has waived his right to a patent, there seems to be no reason why the Government may not have prospecting permittees or lessees under the two acts upon the same land at the same time.

But the Department believes that if under such circumstances a potassium permit shall be granted, the permittee may in the event of discovery be given a preference right to a lease for not to exceed one-fourth of the land embraced in the prospecting permit, to be taken in compact form; that is, the same area as could be patented under different conditions. The act accords to a permittee, after making a discovery, an exclusive right with respect to only one-fourth of the area included in the permit, and if the Department were to attempt to give a permittee a preference right of lease for the whole area it would be a wide departure from the limitations in the act. In a case like this the question is whether an applicant for a potassium prospecting permit may, through a fair and reasonable interpretation of the acts in question, be granted a permit so limited, or whether his application shall be rejected outright.

The applications presented need be considered as involving only the question of what shall be done in case an application is filed to prospect for potassium on land which is embraced in a subsisting oil and gas prospecting permit. Obviously, if a potassium prospecting permit has been granted no application for a prospecting permit under the general leasing act can thereafter be considered on account of the potential right of the permittee to a patent for a part. Prior to the allowance of a permit under either act the Department may inquire as to the probable character of the land. Under the act of February 25, 1920, it is discretionary with the Secretary of the Interior whether to grant a prospecting permit for oil and gas.

Each applicant must file a waiver of any and all rights to patent and consent to take a lease for one-fourth of the area in lieu of patent, in the event of discovery.

The papers are herewith returned for appropriate action in accordance with the views herein expressed.

The opinion of September 23, 1924, *supra*, is modified to the extent that it is not in harmony with the opinion herein.

ROARK v. TARKINGTON, McCRACKEN, INTERVENER

Decided August 20, 1925

CONTEST—CONTESTANT—HOMESTEAD ENTRY—RELINQUISHMENT—PREFERENCE RIGHT.

Where a homestead entry is relinquished in favor of a third party during the pendency of an application to contest, the rights of the contestant with respect to entering the lands must be determined in accordance with the state of the record at the date of the acceptance of the relinquishment.

CONTEST—AFFIDAVIT—HOMESTEAD ENTRY—ABANDONMENT—RELINQUISHMENT—AMENDMENT—PRACTICE.

A contest affidavit which does not contain the date and number of the entry or a correct description of the land and merely alleges that the homestead has been wholly abandoned for more than two years, does not meet the requirements prescribed by the Rules of Practice, and may not be amended after the entry is relinquished and a third party has applied to enter the land.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Fosdick* v. *Shackleford* (47 L. D. 558), cited and applied.

FINNEY, *First Assistant Secretary:*

Glen F. McCracken has appealed from a decision of the Commissioner of the General Land Office dated April 8, 1925, holding, in effect, that Amos Lee Roark should be allowed to make entry under section 1 of the stock-raising homestead act for SE. ¼, lots 7, 8, 9, 10, 11, 12, Sec. 7, T. 26 N., R. 10 E., N. M. M., and NE. ¼, N. ½

SE. ¼, SE. ¼ SE. ¼, Sec. 12, T. 26 N., R. 9 E., N. M. M., Santa Fe, New Mexico, land district.

On March 24, 1922, Thomas B. Tarkington made entry under section 2289, Revised Statutes, for SE. ¼, Sec. 7, T. 26 N., R. 10 E., N. M. M., and on October 14, 1922, his application to make entry under section 4 of the stock-raising homestead act for lots 7, 8, 9, 10, 11, and 12, Sec. 7, T. 26 N., R. 10 E., N. M. M., NE. ¼, N. ½ SE. ¼, and SE. ¼ SE. ¼, Sec. 12, T. 26 N., R. 9 E., N. M. M., was allowed.

On November 19, 1924, said Roark filed an application to contest Tarkington's entries, describing the land as S. ½, Sec. 7, T. 26 N., R. 10 E., N. M. M., and W. ½, Sec. 12, T. 26 N., R. 9 E., N. M. M., and charging that—

> said homestead is wholly abandoned by the claimant for more than two years; abandonment was not due to his service in the Army or Navy of the United States on enlistment prior to March 1, 1921.

The affidavit was corroborated by Norris W. Roark and Marshal Manning, as follows:

> We know from personal observation that the statement made by the affiant is true.

The affidavit did not set forth the serial numbers of the entries.

Under date of December 2, 1924, the local officers advised Roark that his application to contest had been suspended because the land had been erroneously described, and he was allowed 30 days within which to cure the defect by filing an amended contest affidavit.

On November 28, 1924, McCracken appeared at the local office and filed a relinquishment of the two entries of Tarkington, which relinquishment had been executed before a notary public in Wise County, Texas, on October 11, 1924. The printed form used had been changed from "I hereby relinquish to the United States" to "I hereby relinquish to Glen F. McCracken," At the same time, McCracken applied to amend his additional entry under the stock-raising homestead act, made December 4, 1923, for NW. ¼, Sec. 8, T. 26 N., R. 10 E., N. M. M., and S. ½, Sec. 17, T. 26 N., R. 11 E., N. M. M., so as to describe NW. ¼, Sec. 8, and lots 7, 8, 9, 10, 11, 12, SE. ¼, Sec. 7, T. 26 N., R. 10 E., N. M. M. The register held that Tarkington's relinquishment could not be accepted, "because of invalidity," and McCracken was required to eliminate two of the lots sought by amendment, to reduce the area to approximately 480 acres. On December 10, 1924, a relinquishment of Tarkington's entries was filed and accepted by the register.

On January 8, 1925, an amended application to contest was filed by Roark, in which, due to erroneous information by the register, the land was incorrectly described. A second amended contest affi-

davit was filed by Roark on January 23, 1925, in which the land was correctly described, and in which he charged that—

> said homestead is wholly abandoned by the claimant for more than three years, and is still abandoned.

Roark received notice on December 17, 1924, of the cancellation of Tarkington's entries, and on January 8, 1925, applied to make entry under the stock-raising homestead act for SE. ¼, Sec. 7, lots 7 to 12, inclusive, Sec. 6, T. 26 N., R. 10 E., N. M. M., NE. ¼, N. ½ SE. ¼, SE. ¼ SE. ¼, Sec. 12, T. 26 N., R. 9 E., N. M. M. An amended application was filed on January 23, 1925, describing all the land formerly embraced in Tarkington's entries.

The papers having been forwarded to the General Land Office, the Commissioner, in the decision appealed from, held that Roark's right was superior to that of McCracken, who, it was held, was at liberty to proceed further in accordance with the regulations of April 1, 1913 (42 L. D. 71).

Paragraph 3 of the regulations last referred to was adopted as a rule for the disposition of controversies such as is presented by the appeal of McCracken. The paragraph provides in part as follows:

> Where a good and sufficient affidavit of contest has been filed against an entry and no notice of contest has issued on such affidavit, * * * if the entry should be relinquished you will, as heretofore, immediately note the cancellation of the entry upon the records of your office. In such cases for purposes of administration a presumption will obtain that the contest induced the relinquishment, and you will at once so notify the contestant and that he will be allowed to make entry accordingly. * * *

Thus the first question to be determined is whether Roark's affidavit was "a good and sufficient affidavit of contest."

Rule of Practice 2 provides that the affidavit of contest must contain, among other things, a description of the land involved, together with a statement, in ordinary and concise language, of the facts constituting the grounds of contest.

And Rule 3 provides that the affidavit must be corroborated by the affidavit of at least one witness having personal knowledge of the facts, "and these facts must be set forth in his affidavit."

The affidavit of contest which was pending when Tarkington's entries were canceled on relinquishment did not contain the dates or numbers of the entries or a correct description of the land, and merely alleged that the "homestead is wholly abandoned * * * for more than two years."

While the Department long ago adopted a liberal rule in regard to the amendment of applications and affidavits, and ordinarily Roark would have been permitted to amend his charge had he ap-

plied within 30 days from notice, his rights, if any, must be determined in accordance with the state of the record at the date of the acceptance of Tarkington's relinquishment; and the affidavit of contest then pending being fatally defective, it must be held that there was not pending "a good and sufficient affidavit of contest." *Fosdick* v. *Shackleford* (47 L. D. 558). It follows that Roark is without any rights under his contest, and that his application must be rejected to the extent it conflicts with McCracken's application to amend.

The decision appealed from is modified to agree with the foregoing.

USE OF LANDS WITHDRAWN AS PUBLIC WATER RESERVES

REGULATIONS

[Circular No. 1028]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 27, 1925.

1. Permission may be obtained to use or improve lands withdrawn as or in connection with public water reserves under the act of June 25, 1910 (36 Stat. 847), or any other act, by filing application for such permission under the act of February 15, 1901 (31 Stat. 790), in accordance with the regulations governing said act, as found in 36 L. D. 567, as supplemented by these regulations.

2. As a condition precedent to the granting of any such permission, the applicant will be required to execute such stipulations and agreements as may be deemed proper and necessary by the Secretary of the Interior to safeguard the public interests, after investigation of the facts, circumstances, and conditions in connection with each individual case.

3. Any citizen or association of citizens of the United States, or any corporation duly created and existing under and by virtue of the laws of any State of the United States, who may desire to improve the productivity of any water hole or source of water supply within the boundaries of any public water reserve, or to conduct such waters from their source within such a reserve to a point or place more convenient for public use, may file in the office of the register of the United States land district within which the reservation is situated an application for permission so to use the reserved land or conduct the waters over or through the same.

Such application should be in the form of an affidavit, duly corroborated by at least two persons, setting forth in detail the plan of

the applicant for the improvement and care of the public water reserve, the public necessity for such improvement, the reasons why such plan will be more conducive to the public good and better conserve the waters for public use, and any other facts and circumstances pertinent thereto.

4. If the waters are to be conducted from their source within the reserve to a point outside of the reserve, the application should be accompanied by a map and separate field notes in duplicate, the map being delineated upon tracing linen and prepared in accordance with the regulations of June 6, 1908, governing the submission of applications under the act of February 15, 1901, *supra*, also evidence that applicant has applied to the proper State official for permission to appropriate the waters to the uses contemplated and has prosecuted such application in good faith to date of the filing of the application.

5. Upon receipt of such an application in the General Land Office the Commissioner will direct the division inspector to make careful field investigation as to the facts and circumstances set forth in the affidavit of applicant, as to the public necessity or desirability of the system proposed, and as to all other facts and circumstances germane to the granting of such a permit, together with recommendation as to any stipulations or agreements which to him may seem necessary or proper for the protection of the public interest and the most economical conservation and use of such waters.

6. Upon receipt of said report the Commissioner of the General Land Office will transmit a copy of the same, together with the application, to the Director of the Geological Survey, for report and suggestion relative to the feasibility of the plan and the terms and conditions upon which the permit should be issued, if at all.

7. If the place of use of the water is upon unreserved public land the applicant may be called upon to file a reservoir declaratory statement under the act of January 13, 1897 (29 Stat. 484), as well as the application under the act of February 15, 1901, *supra*, if deemed advisable.

8. Each permit shall contain, besides those found necessary in individual cases, the following conditions:

A. That the right to appropriate the waters of the State to the uses contemplated shall be obtained within one year from and after the issuance of the permit and the permittee shall file a certificate to that effect issued by the proper State authority.

B. That the proposed system shall be fully completed in substantial conformity with the plan upon which the permit is predicated within two years from and after the issuance of such permit, unless a different period is specifically provided for in such permit.

C. That the permittee shall, during the month of January in each year after the completion of such system, file with the register of the land district

within which the system is located. for transmission to the General Land Office, an affidavit of maintenance, in substantially the following form:

State of_____}
County of_____} ss:

_____ being duly sworn, says that he is the president of the _____ company (or person) to whom permit (give land district and serial number) was issued by the Secretary of the Interior (give date), in connection with Public Water Reserve No. ____; that the system as set forth and described in said permit has been kept in repair and water sufficient for the public needs has been kept therein during the whole of the calendar year of 19__; that the same has been kept open to the public at all times during the year and that the said permittee has in all things complied with the provisions of said permit and the stipulations therein contained and the acts under which said permit was issued.

_____
(Signature.)

Subscribed and sworn to before me this _____ day of _____ _____ 19__.

_____
Notary Public.

9. In the event that the State certificate as to the right to appropriate the water is not filed within one year, or proof of the construction of the system, consisting of the affidavit of the permittee duly corroborated by two witnesses, within two years or such other period as may be mentioned in the permit, or affidavit of maintenance is not filed as hereinbefore provided, or in case any of the terms, conditions, provisions, or stipulations of the permit shall not be well and in good faith performed, observed, and carried out, then such permit shall become and be subject to cancellation. Nothing hereinbefore contained, however, is to be construed as limiting the power or authority of the Secretary of the Interior to cancel and determine the permit at any time when in his judgment such action is desirable.

10. Permits issued hereunder are transferable only upon the written authority and consent of the Secretary of the Interior.

11. If at any time it becomes necessary for the permittee to change his system or to erect structures other than those authorized by his permit, application for permission so to do, in the form of an affidavit setting forth in detail the reason and necessity for the change, must be filed, and no such change shall be made until authorized in writing by the Secretary of the Interior.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

ELIZABETH J. VAUGHN

Decided September 1, 1925

HOMESTEAD ENTRY — DESERTED WIFE — RESIDENCE — FINAL PROOF — MILITARY SERVICE.

A deserted wife who submits proof upon a homestead entry in accordance with the provisions of the act of October 22, 1914, is entitled to claim credit, in lieu of residence, for the military or naval service of her husband.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Jennie P. Musser* (44 L. D. 494), cited and applied.

EDWARDS, *Assistant Secretary:*

Elizabeth J. Vaughn has appealed from a decision of the Commissioner of the General Land Office, dated January 24, 1925, rejecting the final proof submitted by her on December 4, 1924, under the provisions of the act of October 22, 1914 (38 Stat. 766), as the deserted wife of Rexford E. Vaughn, on the latter's entry under the enlarged homestead act, made October 15, 1919, for N. ½ (or lots 1 and 2 of NE. ¼ and lots 1 and 2 of NW. ¼), Sec. 2, T. 9 N., R. 13 W., S. B. M., California (319.90 acres).

With the final proof was filed an application for reduction of the required area of cultivation. The Commissioner, in his decision rejecting the final proof, denied the application for reduction of cultivation, and held that Mrs. Vaughn was not entitled to credit, in lieu of residence, for her husband's services in the United States Navy from May 23, 1918, to December 9, 1918.

It appears that residence was established April 15, 1920. The couple resided on the land for at least seven months during the first and second residence-years, and for one month during the third year (April 15 to May 15, 1923). They were on a visit to San Francisco thereafter, where entryman deserted the claimant, and she was obliged to earn money to pay debts they had incurred and defray her railroad fare to Los Angeles. As a result, she had not returned to the land. About 22 acres were cultivated during 1920 and 1921, but nothing matured, there having been insufficient precipitation during the growing seasons.

Under the circumstances disclosed by the record, it is considered proper to reduce the requirements as to cultivation to the area actually cultivated.

The Department knows of no reason why the claimant should be denied credit for her husband's naval service.

In the case of *Jennie P. Musser* (44 L. D. 494), in discussing the act of October 22, 1914, *supra*, the Department said:

> This was a remedial act. It showed no purpose of Congress to require more of the wife than would have been required of the husband had he completed the entry. Relief acts are to be liberally construed. The words of the act

* * * are general in terms and, in substance, require of the wife no stricter proof of compliance with the law than is required by the husband should he offer final proof. There is no apparent reason why the wife of a man holding a homestead upon which his residence is excused should herself be required to make such residence or to do more than her husband would be required to do.

The actual residence on the land when added to the period of naval service equals three years.

The final proof is therefore accepted, the decision appealed from being reversed.

THE COLLINS LAND COMPANY

Decided September 8, 1925

FOREST LIEU SELECTION—NATIONAL FORESTS—ASSIGNMENT—DEEDS.

Where the right to make a selection is denied on the ground that the title of the selector to the base land was invalid, a subsequent assignee of the selector is entitled under the act of September 22, 1922, to a quitclaim deed from the United States, notwithstanding that the assignment would not have affected the title to the base land had the selection been allowable.

EDWARDS, *Assistant Secretary:*

On October 23, 1901, patent issued to Giovanni Lupicini for SW. ¼ SW. ¼, Sec. 15, NE. ¼ NE. ¼, Sec. 21, and NE. ¼ NW. ¼, Sec. 22, T. 5 N., R. 28 W., S. B. M., together with another 40-acre tract not here involved, all within a national forest, under his homestead entry. About November 11, 1900, after the submission of final proof, Lupicini died, without any known heirs or widow. Proceedings for probate of his estate were instituted November 15, 1900, by the public administrator of the county, pursuant to which a decree was rendered for sale of the homestead land to pay the debts of the deceased and costs of probate. A sale was made and confirmed, and a deed was issued by the administrator. Under this deed C. U. Armstrong, through sundry mesne conveyances, deraigned title. By deed dated October 16, 1902, and recorded four days later, said Armstrong and his wife relinquished the 120 acres above described to the United States under the act of June 4, 1897 (30 Stat. 11, 36), and on February 19, 1903, said Armstrong, by Judith Bernheim, attorney in fact, applied to select, in lieu thereof, N. ½ NW. ¼ and SW. ¼ NW. ¼, Sec. 20, T. 16 N., R. 20 W., M. M., Montana.

By decision dated April 2, 1904, the Commissioner of the General Land Office held that the sale of the land embraced in Lupicini's homestead entry, for debts contracted prior to patent, was void, and that no title passed to the grantee. The selection made by Armstrong's attorney in fact was therefore rejected. On appeal, the rejection of the selection was affirmed by departmental decision of July 12, 1904.

On May 27, 1925, the Collins Land Company, a Montana corporation, filed in the General Land Office an application for a quitclaim deed for SW. ¼ SW. ¼, Sec. 15, NE. ¼ NE. ¼, Sec. 21, and NE. ¼ NW. ¼, Sec. 22, T. 5 N., R. 28 W., S. B. M., and filed therewith an abstract of title showing that said Armstrong and wife, by deed dated June 11, 1908, and recorded April 25, 1925, quitclaimed the 120 acres to said company. By decision dated June 22, 1925, the Commissioner of the General Land Office denied the company's request, and an appeal to the Department has been filed.

In refusing to execute the deed applied for, the Commissioner held that inasmuch as the Department had decided that no title passed to Armstrong, he could not undertake to relinquish that to which the United States had at no time asserted ownership since the date of patent to Lupicini, and, moreover, even if Armstrong's title were valid, the Collins Land Company could not secure a quitclaim deed, the land having been sold by the selector subsequent to the recording of the deed to the United States.

The act of 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," provides in part—

> That where any person or persons 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(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.

It is true that the United States at no time since the date of the patent to Lupicini asserted ownership of the land relinquished by Armstrong, but the recorded deed of relinquishment clouded the title, and one of the purposes of the act quoted was to authorize the Commissioner of the General Land Office to formally disclaim on behalf of the United States any interest in the land.

The act explicitly provides that the quitclaim may be to the person who relinquished the land to the United States, his heirs or assigns.

Had the Department accepted title from Armstrong, his subsequent deed to the Collins Land Company would not have affected the title; but said company has been shown to be the assignee of Armstrong, and is therefore entitled to have the land quitclaimed to it by name.

The decision appealed from is reversed.

EXCHANGE OF LANDS IN THE WALAPAI INDIAN RESERVATION, ARIZONA—ACT OF FEBRUARY 20, 1925

INSTRUCTIONS

[Circular No. 1029]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 8, 1925.

REGISTER,
Phoenix, Arizona.
SUPERINTENDENT, TRUXTON CANYON AGENCY,
Valentine, Arizona.

The following regulations are issued for your guidance under the act of February 20, 1925 (43 Stat. 954), authorizing reconveyances and relinquishments of lands, and lieu selections therefor, within the Walapai Indian Reservation in Arizona. The act reads as follows:

> That 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 any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation in Mohave and Coconino Counties, Arizona, and to permit lieu selections within the boundaries of the said reservation by those surrendering their rights so that the lands retained for Indian purposes may be consolidated and held in a solid area so far as may be possible: *Provided*, That the title or claim of any person or company 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 persons 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 of arriving at some tentative agreement as to what lands they wish to relinquish and to determine the exact status of the land desired in exchange.

A person or corporation, or the State of Arizona, desiring to reconvey and select lieu lands should file in duplicate an application with the local land officer at Phoenix 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 that the application has been placed of record.

In all cases where the application involves land occupied, claimed, or owned by an Indian, or where the land is occupied, claimed, or held by the Indians as a tribe, the register will forward a copy of the application to the 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. It will be the duty of this official to examine the land proposed to be relinquished or reconveyed by the Indian applicant or on behalf of the tribe and the land proposed to be acquired by or for the Indians, and to submit reports of such examinations 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 at Phoenix.

The register will forward to the Commissioner of the General Land Office, with his monthly returns, all applications filed in his office for exchange under the said act of February 20, 1925, *supra*, after noting the same on his records in the usual manner.

The inspection service of the Department 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 February 20, 1925, and these instructions. An affidavit showing that the land asked for in exchange is not adversely claimed should accompany each application, and in cases where the land is covered by homestead or desert entry or application, proper relinquishments should be filed.

There should also accompany the application a warranty deed duly executed according to the laws of Arizona 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 encumbrances, 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. 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.

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.

THOS. C. HAVELL,
Acting Commissioner.
CHAS. H. BURKE,
Commissioner of Indian Affairs.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

WILBUR J. ERSKINE

Decided September 11, 1925

TRADE AND MANUFACTURING SITE—ALASKA—OCCUPANCY—PURCHASE.

Section 10 of the act of May 14, 1898, limits the right to purchase a tract of land in the Territory of Alaska for a trade and manufacturing site to land actually occupied and used for such purpose, and an application for a prospective business site is not within the contemplation of the act.

EDWARDS, *Assistant Secretary:*

Wilbur J. Erskine has appealed from the decision of the Commissioner of the General Land Office dated September 4, 1924, rejecting his application, Anchorage 05934, filed May 10, 1923, under section 10, act of May 14, 1898 (30 Stat. 409), for the purchase of an unsurveyed tract containing approximately 20 acres, situated on the north shore of Sitkalidak Strait, Kodiak Island, in the Territory of Alaska.

The application was referred to the chief of field division for report. Investigation was made by an examiner in July, 1923, and report submitted October 22, 1923, in part as follows:

> There were no improvements whatever on the tract, except that posts had been set at each corner to indicate the lands applied for, and a notice of intention to purchase was posted on the initial post.
>
> * * * I was advised that the applicant, Mr. Erskine, had applied to the Bureau of Fisheries for permission to pack 100,000 cases of salmon at this point. I understood that the applicant would be given favorable consideration for a much smaller number of cases, probably 40,000.
>
> The applicant is a prominent merchant and business man of Kodiak, and intends to form a company for the construction of a cannery on this site. In view of the fact that the act of May 14, 1898, only provides for the sale of lands which have been occupied and improved, and that there are no improvements on these lands, it is recommended that the application be rejected.

The Commissioner rejected the application because the land had not been occupied or improved as contemplated by the said act of 1898.

The appellant contends that the act invoked does not require actual occupation or improvement as a condition precedent to the making of an application for a trade and manufacturing site, but only, if at all, as a condition precedent to the issuance of patent.

There is no merit in this contention. The Department has uniformly held that the right of purchase accorded by the law is limited to cases where the land is *actually occupied and used* for purposes of trade and manufacture. An application for a prospective business site is not within the law. 23 L. D. 7; id. 245; id. 280; 29 L. D. 416. While the cases cited arose under sections 12, 13, and 14 of the act of March 3, 1891 (26 Stat. 1095), the terms and requirements of section 10 of the act of May 14, 1898, *supra*, which in some respects enlarged the provisions above referred to, are in this regard identical. See regulations of September 8, 1923 (50 L. D. 27, 41)

The decision appealed from is affirmed.

ISSUANCE OF OIL AND GAS PROSPECTING PERMITS FOR LANDS IN THE PLACE LIMITS OF RAILROAD GRANTS

Instructions, September 17, 1925

RAILROAD GRANT—OIL AND GAS LANDS—PROSPECTING PERMITS.

The Land Department has the authority to issue permits to prospect for oil and gas pursuant to the act of February 25, 1920, on lands within the primary limits of railroad grants, which, if nonmineral in character, would inure to the grantees under those grants.

RAILROAD GRANT—OIL AND GAS LANDS—SURFACE RIGHTS—RESERVATION—PREFERENCE RIGHT—PROSPECTING PERMITS.

The act of July 17, 1914, confers upon railroad grantees the right to select the surface of lands, which, except for that act, would be excluded from the grants on account of their mineral character, but neither a railroad company nor any person claiming under a railroad grant is entitled to a preference right to a permit or lease under the act of February 25, 1920, by reason of such selection.

DEPARTMENTAL DECISION OVERRULED SO FAR AS IN CONFLICT.

Case of *Northern Pacific Railway Company* (48 L. D. 573), overruled so far as in conflict.

FINNEY, *First Assistant Secretary:*

Reference is had to an appeal by the Southern Pacific Railroad Company, pending in your [Commissioner of the General Land Office] office from action by the register and receiver at Los Angeles, California, in rejecting the company's listing September 28, 1922, of Sec. 3, T. 11 N., R. 3 E., S. B. M., California, for the reason that this Department had previously granted a permit covering the land, under the provisions of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas therein.

Calling attention to that proceeding you request instructions on the general question as to whether permits may be lawfully issued under said act to prospect upon unpatented odd-numbered sections within the place limits of certain railroad grants.

In view of the importance of the question involved, I referred the matter to the Attorney General for an opinion, which was given August 29, 1925. His opinion concludes:

> I am therefore of the opinion, and so advise you, that your Department has the right and authority to issue oil prospecting permits under the act of February 25, 1920, 41 Stat. 437, for lands within the primary limits of grants to railroads, which lands, if nonmineral and not otherwise appropriated or reserved at the date of the grant, were granted to the railroads.

This Department will be governed by the conclusions reached by the Attorney General, and you are authorized and instructed to proceed in accordance with his opinion in disposing of cases of the class described therein.

Any application to prospect such lands will be handled administratively as near as may be as provided in paragraph 12(c) of subsisting oil and gas regulations as of land covered by nonmineral entry within mineral reservation. It will be referred to the Geological Survey for classification as to prospective oil and gas values. If the Geological Survey reports that the land is without such value, the application will be rejected. If the Survey reports that it has such value and affords a favorable opportunity for prospecting, the railroad company will be so notified and required to file consent to a mineral reservation or to show cause why such reservation should not be made. The decision of this Department of January 31, 1922, in *Northern Pacific Railway Co.* (48 L. D. 573), is hereby overruled, in so far as it holds that a railroad company is not entitled to the benefits of the act of July 17, 1914 (38 Stat. 509). But no railroad company or person claiming land under a railroad land grant shall be entitled to *a preference right* to a permit and lease under the act of February 25, 1920. See section 20 of said act.

PARK FALLS LUMBER COMPANY ET AL. v. DWYER ET AL.

Decided September 17, 1925

PUBLIC LANDS—SURVEY—PATENT—LAKE—PREFERENCE RIGHT.

Lands omitted from the original surveys through error in running the meander lines of lakes or other bodies of water, to which claims of ownership are predicated upon titles derived under patents issued in conformity with the original surveys, are not such vacant, unappropriated lands as to be subject to general disposition under the public land laws prior to the determination of the claims arising under the old titles.

FINNEY, *First Assistant Secretary*:

The Park Falls Lumber Company, now the Edward Hines Hardwood and Hemlock Company, has appealed from the decision of the Commissioner of the General Land Office, dated February 20, 1925, denying its petition for preference right to acquire under the public land laws the lands described as lots 9 to 18 inclusive, containing 130.80 acres, as shown upon the supplemental plat of survey of Sec. 20, T. 44 N., R. 5 W., 4th P. M., Wisconsin, approved April 12, 1923, and filed in the Wausau land office May 12, 1924.

The records show that the following applications affecting this land have been filed:

04583, filed November 4, 1919, by Frank Adams, attorney-in-fact for Willis E. Dwyer under the act of July 1, 1898 (30 Stat. 597, 620), as amended by the act of February 27, 1917 (39 Stat. 946), for unsurveyed land, approximately described as the NE. ¼ SW. ¼, said section 20, which description was adjusted by the Commis-

sioner's decision of February 20, 1925, to conform to the supplemental plat and describe lot 15, said section.

04637, filed June 10, 1920, by Frank Adams, attorney-in-fact for William S. Kinyon, under the above acts, for unsurveyed lands described by metes and bounds and adjusted by said decision to conform to the supplemental plat and describe lots 14 and 16, said section.

05021, filed May 6, 1924, by Frank Adams, attorney-in-fact for William S. Kinyon, to select lots 17 and 18, said section, and to apply the residue of the right presented with 04637 in satisfaction thereof.

05037, filed October 20, 1924, by Walter David Gunckel, to purchase under the timber and stone law lots 9, 10, 11, 12, and 13, said section.

05055, filed April 15, 1925, by the Edward Hines Hardwood and Hemlock Company, to purchase under the act of February 27, 1925 (43 Stat. 1013), lots 9 to 18, inclusive, in said section, as the owner of lands bounded by the erroneously meandered area shown by the plats.

In addition to the foregoing applications, Robert E. Wegg made homestead entry 04854 on March 26, 1923, for land described as fractional N. ½ SW.¼, said section, furnishing evidence of service in the United States Army from March 28, 1916, to November 18, 1920, in support thereof. Wegg's entry was held for cancellation by the Commissioner on April 25, 1924, on the ground that the land was unsurveyed and not subject to homestead entry. In said decision the Commissioner also called attention to the pending applications of Adams as attorney-in-fact for Dwyer and Kinyon and stated that such applications for unsurveyed lands were permissible under the law.

The records further show that the Park Falls Lumber Company asserted its claim of ownership as against the world to the lands in question prior to the approval of the survey and filed its protest against the making of any survey of the lands omitted from the original survey, relying upon the plat approved January 11, 1859. The Department, however, by its decision of September 4, 1923, affirmed the Commissioner in dismissing the protest, having found that, as disclosed by the investigation, the meander line shown by the original survey did not approach within reasonable proximity to the water's edge of Atkins Lake and that the survey of the omitted lands must be upheld. On rehearing, the Department in its decision of December 13, 1923, held that the record disclosed gross error in the original survey and that therefore the omitted area should be regarded as public land of the United States. The company thereupon filed a petition for recognition of a preference

right of entry for the omitted area, based upon alleged purchase and ownership, or interest in and expenditures in connection with, certain lands shown by the original survey to have a frontage on the lake but which are cut off from the lake by the supplemental survey in said section. This petition was transmitted to the Department, and, after consideration, was remanded with instructions as follows:

> No ruling can be made on the company's request for preference right at the present stage of the case. The adverse claimants are entitled to due notice so that issue may be joined and opportunity for a hearing afforded. The petition is accordingly remanded with directions that the plat be filed and that the company be advised that if it seeks to defeat any adverse applications for any portion of the area, it should file specific protests against all adverse filings, serving copies thereof on the parties involved advising them of the basis of its claim. Should material issue be joined, hearing will be ordered and the controversy adjudicated in regular order of procedure.

On June 11, 1924, the company filed a paper setting up its claim of ownership of the land in question based upon a chain of title in certain of the lands adjoining the meander line shown on the original plat of 1859, and stated that copies of said paper had been served upon adverse parties.

The Commissioner in the decision from which appeal herein was taken, held that the 130.80 acres of land shown by the supplemental plat was surveyed as public land and as such it was, at the time the filings of Adams and Gunckel were made, subject to appropriation by settlement or by the filing of proper applications under any applicable public land laws, and that the showing of the company filed on June 11, 1924, does not set up any facts other than, or in addition to, those already decided upon adversely by the Commissioner or the Department.

Appellant, in addition to taking appeal from the said Commissioner's decision, has filed its application to purchase under the preference right accorded certain claimants under the act of February 27, 1925, *supra*, which was enacted a few days after the decision complained of was rendered.

A review of the records discloses that in the course of the proceedings the appellant has asserted three distinct grounds upon which its claims are based.

1. A claim of ownership in fee asserted in its protest against the approval of the supplemental survey of the tracts as public lands.

2. A claim of preference right on equitable grounds to acquire same under appropriate public land laws as appears from its petition filed after the Secretary's decision of December 12, 1923, dismissing its protect against the survey.

3. A claim of preference right to purchase under the act of February 27, 1925, *supra*, filed April 15, 1925.

The claim of ownership in fee was decided adversely by the Department in its decisions of September 4, 1923, and December 13, 1923, dismissing the protest against the survey and holding the tracts to be public lands. The petition for preference right was remanded by departmental decision of March 20, 1924, and the subsequent showing made by the company was the subject of consideration in the decision appealed from. The claim of preference right to purchase is asserted under an act of Congress subsequent to the decision. The remaining questions for determination concern the claims of the company to a preference right to enter the lands on equitable or legal grounds.

The Commissioner was in error in holding in effect that the question concerning the claim of preference right had been previously decided adversely to the company by the Department. The previous decisions concerned only the question of the authority of the Department to survey the land as public land and dispose of it as such, and the finding was in the affirmative.

As a natural consequence of such finding there now remain the questions concerning the disposition of such lands under the public-land laws, including the adjudication of any existing claims based on settlement rights, occupancy, improvements or under *bona fide* claim of right or color of title. There are claims arising in a situation such as this which do not ordinarily occur when a plat of survey of public land is filed and lands become subject to disposition under the public-land laws. In surveying and platting small areas, which on investigation are found to have been omitted from surveys through error in running the meander lines of lakes or other bodies of water, many claims of ownership will arise predicated upon titles derived under patents issued in conformity with the original surveys and plats, which must be considered before the land may be disposed of to other applicants. Otherwise, vexatious litigation may ensue.

Until these claims are disposed of the Department is not warranted in considering the claims of others, nor are the lands subject to disposal generally until such matters are settled. Lands of the status of the tracts herein concerned are not such as may be considered vacant unappropriated lands subject to general disposition under the public-land laws, and no rights accrue to anyone through the mere filing of an application therefor prior to the disposition of claims arising under the old titles.

In the present case a claim has been continuously asserted by appellant since prior to the approval of the supplemental plat of survey, and has not been finally adjudicated. The pending applications under the act of July 1, 1898, *supra*, notices of which were not published until during March and April, 1925, and the pend-

ing application under the timber and stone law, will not preclude the Department from examining into and determining the status of claims asserted by adjoining owners and the legal or equitable rights which such owners may have in the premises. *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).

Appellant has consistently asserted ownership of the lands in question under a record title to certain lands based on patents issued in accordance with the original survey and alleges that the lands are not in the possession of any other party, that no settlement has been made thereon, that the only improvements upon the lands have been constructed by a subsidiary of appellant's predecessor in interest, that it claims ownership under the laws and decisions holding that the watermark and not the meander line is the boundary of the land patented under the former survey, and that the appellant and its predecessors in interest have done whatever has been done of a beneficial nature in connection with the east shore of the lake and have done so under the belief that they were the owners to the shore of the lake, which belief was founded upon the plat of survey of 1859.

Notwithstanding the previous holding of the Department that the lands are public lands and the company has no legal title in the premises, its continued claim of ownership can not be denied, nor its good faith questioned in asserting same under the doctrine announced in numerous decisions of the courts to the effect that a meander line of a body of water is not generally to be regarded as the boundary line of the adjacent surveyed tract, but that the patent carries title to all of the land at least to the water's edge and possibly beyond to the middle of the stream, depending on the law of the State wherein the land is situated. *Mitchell* v. *Smale* (140 U. S. 406); *St. Paul, etc., R. Co.* v. *Schurmeier* (7 Wall. 272); *Shively* v. *Bowlby* (152 U. S. 1, 39); *French-Glenn Livestock Company* v. *Marshall* (28 L. D. 444).

The lands in the township, as shown by the original plat of survey, had all been disposed of under the public land laws, and it was not until after a question had been raised and carefully investigated that it was decided by the Department that the magnitude of error in the original survey was sufficient to bring this case within the exception to the general rule. *Security Land, etc., Co.* v. *Burns* (193 U. S. 167); *Etoile P. Hatcher and William Palmer et al.* (49 L. D. 452); *Rust Owen Lumber Company* (50 L. D. 678).

Under the circumstances of the case the Department is of the opinion that appellant has made a *prima facie* showing sufficient to warrant consideration of its claim of preference right to acquire

under the public land laws such of the erroneously omitted land lying between subdivisions covered by its record title and the meander line of the lake, as shown by the supplemental plat of survey. And it is not believed that the pending applications of Adams and Gunckel serve as a bar to the consideration of appellant's application to purchase under the act of February 27, 1925, *supra*, nor were such applicants at the time of the passage of the act settlers or entrymen under the public land laws with superior existing rights.

The appellant will be required to furnish evidence of title in the surrounding lands, consisting preferably of a properly certified abstract of title and sworn statements regarding any improvements made upon the premises, and such other facts as will support its allegations as to claim of ownership or establish its preference right to acquire any of the land under the provisions of the act of February 27, 1925, *supra*. Upon the receipt of such showing, the matter will receive further consideration.

The case is remanded for action in accordance with the views herein expressed.

PROCEDURE UPON NONMINERAL APPLICATIONS FILED SUBSEQUENT TO APPLICATIONS FOR PROSPECTING PERMITS AND LEASES—CIRCULAR NO. 1021, MODIFIED

INSTRUCTIONS

[Circular No. 1031]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 17, 1925.

REGISTERS,
UNITED STATES LAND OFFICES:

Circular No. 1021, approved July 21, 1925 (51 L. D. 167), containing instructions as to action on nonmineral applications filed subsequent to applications for prospecting permits or leases, is hereby modified by the insertion therein—immediately preceding the penultimate paragraph thereof—of the following additional provision:

> Where a mineral lessee or permittee shows cause or protests against the allowance of a nonmineral entry or selection with proper mineral reservation, and upon which waiver of compensation has been filed, the showing or protest shall be forwarded by the General Land Office, with the application to make nonmineral entry or selection, to the Geological Survey for report and recommendation as to whether or not the granting of any additional surface rights over and above those of the lessee or permittee, as the case may be, would seriously or substantially embarrass or hinder such lessee or permittee in his operations.

If the Geological Survey shall conclude and report that the granting of additional surface rights to a nonmineral entryman or selector will so embarrass and hinder the mineral lessee or permittee in conducting operations under his lease or permit, as the case may be, then the General Land Office will reject the nonmineral filing, but if the report and conclusion of the Geological Survey shall be to the contrary, then the entry or selection may be allowed.

E. C. FINNEY,
First Assistant Secretary.

REGULATIONS GOVERNING RECLAMATION ENTRIES ON FEDERAL IRRIGATION PROJECTS

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 19, 1925.

REGISTERS,
UNITED STATES LAND OFFICES:

There is inclosed a copy of the regulations approved September 12, 1925, by the Secretary of the Interior governing the administration of subsection C of the act of December 5, 1924 (43 Stat. 672, 702). Your attention is particularly called to paragraph 2 of the regulations which provides that hereafter (that is, September 12, 1925, the date of the approval of the regulations) no entry for public lands within a Federal irrigation project shall be accepted until the applicant therefor has satisfied an examining board that he is possessed of such qualifications as are necessary to give reasonable assurance of success by the prospective settler.

Accordingly, you will allow no further reclamation entries until the examining boards have been organized on the several projects by the Bureau of Reclamation and are prepared to pass on the qualifications of the applicants. The application for lands must have the approval of the board; and paragraph 10 of the regulations states that such homestead application shall be made within 15 days from the date of approval of the application except in those cases where a preference right is being exercised in which event the period provided by law for the exercise of the preference right shall control.

Paragraph 11 states that the regulations relate in the main to entry of vacant farm units, and that each public order opening new projects or divisions will contain specific instructions on the subject.

You will at once incorporate this order on the records of your office, be governed accordingly, and acknowledge receipt hereof.

THOS. C. HAVELL,
Acting Commissioner.

REGULATIONS GOVERNING THE ADMINISTRATION OF SUBSECTION C OF THE ACT OF DECEMBER 5, 1924—RECLAMATION ENTRIES

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, D. C., September 12, 1925.

TO ALL FIELD OFFICES:

1. Subsection C of the act of December 5, 1924 (43 Stat. 672, 702), reads as follows:

> That the Secretary is hereby authorized, under regulations to be promulgated by him, to require of each applicant including preference right ex-service men for entry to public lands on a project, such qualifications as to industry, experience, character, and capital as in his opinion are necessary to give reasonable assurance of success by the prospective settler. The Secretary is authorized to appoint boards in part composed of private citizens, to assist in determining such qualifications.

2. Hereafter no entry for public lands within a Federal irrigation project shall be accepted by the local land office until the applicant therefor has satisfied an examining board, to be appointed on each project to consider such matters, that he is possessed of such qualifications (in addition to the qualifications required under the homestead laws) as to industry, experience, character, and capital, as in the opinion of the board are necessary to give reasonable assurance of success by the prospective settler.

3. Each applicant for entry of such public lands, including preference right ex-service men, and successful contestants under the act of May 14, 1880 (21 Stat. 140), shall file an application with the Bureau of Reclamation which, among other things, must state with respect to the applicant, his or her age, status as to citizenship, whether married or single, number of children, and their sex and ages, other dependents, ownership of farm lands elsewhere and the value thereof, farming experience, assets and liabilities, and give references as to character and industry. The application may state the particular farm unit desired and may also include a second and third choice and, when practicable, the choice of a fully qualified applicant will be approved. However, the intent of the law is to select the best qualified applicants for all farms available and the Government must therefore reserve the right to distribute the farms to those best qualified, regardless of individual preferences.

4. Applicant must possess good health and vigor and have had at least two years' actual experience in farm work and farm practice. The applicant must have at least $2,000 in money, free of liability, or the equivalent thereof in livestock, farming equipment, or other

assets deemed by the examining board to be as useful to the said applicant as money.

5. The above minimum requirement as to capital and experience shall not apply when the farm (fractional farm unit) applied for is 10 acres or less in area and the applicant can show to the satisfaction of the examining board that the development of the farm is feasible from the capital the applicant may reasonably be expected to obtain as a wage-earner.

6. An examining board of three members, or more, shall be appointed on each project by the Secretary of the Interior, or such officer as he shall authorize to make such appointments, to consider the fitness of applicants to undertake the development and operation of a farm. The members of such board shall serve for a period of one year, or until their successors are appointed, unless otherwise ordered by the Secretary or such officer as he shall authorize to make such appointment. Each superintendent is requested to submit recommendations for membership on the board of examiners for his project at the earliest practical date.

7. A member representing the Bureau of Reclamation shall keep the records of the board and notify applicants when and where the board shall meet to deal with applications, in order that applicants may personally submit additional information as to their fitness for the undertaking.

8. The examining board shall note the date of receipt by it of each application filed, and interview the applicants who appear before it, to determine the qualifications of prospective settlers. Careful investigation shall be made to verify statements and presentations made by applicants to the end that no misunderstanding may prevail either as to the applicant's fitness or his appreciation of the problems before him.

9. After decision by the board its conclusion, if adverse to the applicant, shall be reduced to writing and a copy thereof forwarded to the applicant by registered mail. Evidence of service of such notice shall consist of registry return receipt signed by the applicant, or his agent, or registered letter addressed to applicant at his record address and returned unclaimed. The board's decision as to the relative qualification of each applicant, based upon a percentage rating of the elements of industry, experience, character, and capital, shall be final unless appeal from such decision be made to the Secretary of the Interior within 30 days from receipt of notice, and such appeal should be filed in the project office where the lands are situated.

The relative standing of applicants will be based upon a percentage rating, determined as follows:

Each of the elements of industry, experience, character, and capital will be considered as having a possible weight of 25 per cent, and applicants will be rated according to the following scale:

Industry	%	*Farm Experience*	%	*Character*	%	*Capital*	%
Fair	5	2 yrs. or more in East	15	Fair	5	$2,000	15
Good	15	2 yrs. or more in irrigation	25	Good	15	3,000	20
Excellent	25		--	Excellent	25	5,000	25

10. Approval by the board of an application followed by the filing of water right or water rental application when either is provided for on the particular project involved, which feature the board shall cover by appropriate notation on the application, will entitle the applicant to file homestead application at the designated local land office for the farm unit assigned to him. Such homestead application shall be made within 15 days from the date of approval of the application, except in those cases where a preference right is being exercised, in which event the period provided by law for the exercise of the preference right shall control. Failure to so make such homestead application will entitle the board to approve another application for the same unit, allowing the applicant to make homestead entry; this procedure continuing, if necessary, until an approved applicant makes a homestead entry.

11. The above regulations relate in the main to the entry of vacant farm units upon existing projects and existing divisions thereof, and while suggestive of the procedure to be followed in the opening of new projects or new divisions, each public notice or order opening new projects or new divisions will contain detailed instructions on the subject of the qualifications necessary for prospective entrymen and the procedure under which such qualifications will be determined.

ELWOOD MEAD,
Commissioner.

I concur:

WILLIAM SPRY,
Commissioner of the General Land Office.

Approved:

HUBERT WORK,
Secretary.

INTERPRETATION OF SUBSECTIONS F, G, I, J, AND L OF SECTION 4 OF THE ACT OF DECEMBER 5, 1924, RELATING TO PAYMENT OF CONSTRUCTION AND WATER CHARGES ON FEDERAL IRRIGATION PROJECTS

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, D. C., January 28, 1925.

The application of the terms of section 4 of the act of December 5, 1924 (43 Stat. 672,701), commonly known as the Fact Finders Act, to the various reclamation projects and the preparation of suitable forms of contracts thereunder, require interpretation of certain provisions of that act.

Subsection F of the act provides—

> That hereafter all project construction charges shall be made payable in annual installments based on the productive power of the land as provided in this subsection. The installment of the construction charge per irrigable acre payable each year shall be 5 per centum of the average gross annual acre income for the ten calendar years first preceding, or for all years of record if fewer than ten years are available, of the area in cultivation in the division or subdivision thereof of the project in which the land is located, as found by the Secretary annually. The decision of the Secretary as to the amount of any such installment shall be conclusive. These annual payments shall continue until the total construction charge against each unit is paid. The Secretary is authorized upon request to amend any existing contract for a project water right so that it will provide for payment of the construction charges thereunder in accordance with the provisions of this subsection or for the deferment of such construction charges for a period of three years from the approval of this section, or both.

The first sentence of this subsection reading: "That hereafter all project construction charges shall be made payable in annual installments based upon the productive power of the land," applies to all new projects and divisions of projects where the terms of payment have not already been established by contract or accepted water-right applications. Existing contracts can not be modified without the consent of both parties thereto and cases where a modification of existing contracts is necessary in order to apply the new plan of payment are covered by the last sentence of subsection F which provides—

> The Secretary is authorized upon request to amend any existing contract for a project water right so that it will provide for payment of the construction charge thereunder in accordance with the provisions of this subsection or for deferment of such construction charge for a period of three years from the approval of this section, or both.

This provision vests discretion in the Secretary to amend existing contracts upon request. It is permissive, not mandatory. The words, "upon request" are understood to mean upon request of the other

party to the water right contract in question. The word "contract" itself implies a voluntary agreement and an amendment of an existing contract is a new contract which likewise requires the voluntary assent of both parties thereto. The claim that this provision is mandatory and leaves no discretion in the Secretary of the Interior in applying the new plan of payment when the new plan is requested, is not sustained by the language of the act, which is, "The Secretary *is authorized* upon request to amend any existing contract," etc. [Italics supplied.] If it had been intended that there should be no discretion on the part of the Secretary, the act would provide, "The Secretary shall upon request amend any existing contract, etc."

Subsection F also provides: "These annual payments shall continue until the total construction charge against each unit is paid." Some of the water users on certain projects claim that this provision indicates an intent on the part of Congress to release the guarantees given to the Government by the various irrigation districts and water users' associations and that the Government take a loss whenever any individual farm unit for any reason proves incapable of paying its pro rata share of the project construction cost.

This argument is largely answered by the fact that the authority to amend existing contracts is permissive and not mandatory and if the Secretary is not required to amend existing contracts at all he is certainly not required to do so for the purpose of releasing guarantees given by water users' organizations and throwing a loss on the Reclamation Fund which the Supreme Court has held it was not intended should occur. The intent underlying the Reclamation Act is stated by the Supreme Court as follows in the case of *Swigart* v. *Baker* (229 U. S., 187, 197):

> * * * That fund was the proceeds of public land and was not intended to be diminished for the benefit of any one project, but, without increase by interest and undiminished by local expenses, was again to be used for constructing other works. The cost of surveying these projects which were not developed and the administrative expenses not chargeable to any particular Project might not be repaid, but these sums were so small as to be negligible as against the fundamental idea of the Bill, that the proceeds of public land as a Trust Fund should be kept intact and again invested and reinvested for constructing new irrigation works.

From time to time as repayment contracts were made with the various irrigation districts and water users' associations, the Secretary of the Interior attempted to carry out the intent of the act and protect the trust fund in question by requiring the water users' organization, whether a district or association, to guarantee the water right payments of its members or to make lump sum payments sufficient to cover the annual payments for the entire project or division

covered by the district or association. Under this practice the water user has a primary obligation to pay the portion of the cost of the project apportioned to his particular farm unit or specified in his water right application and a secondary obligation as a member of an irrigation district or water users' association, to pay assessments if necessary to carry out the guarantee given by the association or district. This secondary liability assumed by reason of the guarantee given by the district or association of which the individual is a member, is referred to by the water users of some of the projects as a joint liability and it is contended by some of the water users that the sentence of subsection F reading, "These annual payments shall continue until the total construction charge against each unit is paid," requires the Secretary to release districts and associations from their guarantees or agreements to make lump sum payments and thereby relieve the individual members of the association or individual landowners of the district as the case may be, from any responsibility except for a portion of the project construction cost as specified in the individual water right application or apportioned to the land of the individual landowner of the district.

In every large body of land there will be some tracts which, for one reason or another, will be found incapable of paying construction charges, and if the guarantee of the district or association which has been given for the purpose of avoiding loss to the fund in such cases should be released, a loss to the fund would occur, and it was to prevent such losses that the settlers' organizations were required to guarantee the payments.

A modification of existing contracts for such purpose would be contrary to the intent of the reclamation law as construed by the Supreme Court in the *Swigart* v. *Baker* case. The general intent of the new act appears to have been to grant more favorable terms of payment for the purpose of enabling the projects to pay out in a longer period of time. Nothing in the new law requires release of district or association guarantees under existing contracts and so far as the releases of guarantees would tend to deplete the fund would be contrary to the general purpose of the reclamation law as construed by the Supreme Court. If it had been the intent of Congress to change the policy of the reclamation law with respect to the return of the fund in full, it is reasonable to expect that Congress would have expressed some such intent in a plain and definite way, particularly in view of the well-known decision of the Supreme Court. But what was done by Congress was merely to vest discretionary power in the Secretary to amend existing contracts.

Another question which has been raised with reference to the construction of subsection F is the question whether the terms of pay-

ment provided under this subsection may be allowed to water users or water users' organizations which have contracted for a supplemental water supply under the Warren Act. In most cases the holders of such Warren Act contracts have contracted for a comparatively small additional water supply and would not desire to adopt the new plan of payment for the reason that their annual payments under their present contracts for the limited amount of water which they are receiving from the Government works, is lower than would be the payments under the new plan of payment based on the average gross acre income; but in cases where the amounts to be paid by such Warren Act water users is comparable to the amounts paid for a full Government water right, the same reason exists for applying the new plan of payment as in the case of the water users who receive their entire water supply from the Government works and there appears to be nothing in subsection F which would prevent the application of the new plan of payment to Warren Act water users in cases where the new plan is desired by the water users and found by the Secretary to be desirable. The language of the last sentence of subsection F is, "The Secretary is authorized upon request, to amend any existing contract for a project water right so that it will provide for payment of the construction charge thereunder in accordance with the provisions of this subsection." The term, "to amend the contract for a project water right" is understood to be broad enough to apply to any contract for water from the project works, and that any contract for water from the project works whether a complete water supply or only a partial water supply, may be considered as within the authority granted the Secretary under this subsection.

Another question which has been raised in connection with the interpretation of subsection F is the question whether, in cases where the three-year deferment of construction charge is granted under the last sentence of subsection F but the new plan of payment on the basis of average gross acre income is not granted or desired, the three-year deferment of construction charges would result in the four years' construction charges all becoming due at once at the end of the three-year period. Such a construction would lead to impractical results. If settlers have difficulty in meeting annual construction payments as the same come due, obviously, it would not be practical for them to pay four annual construction payments in one year, and it would not be presumed that Congress intended such an obviously impractical result. The language of the act applicable to this question is as follows: "Or for the deferment of such construction charges for a period of three years from the approval of this section." The word, "such" in the expression, "such construction charges" relates back to the construction charge last above mentioned in the act, which

is as follows: "The Secretary is authorized upon request, to amend any existing contract for a project water right so that it will provide for payment of *the construction charge thereunder* in accordance with the provisions of this subsection." [Italics supplied.] Consequently the expression, "such construction charges" referring back to the term, "the construction charge," relates to the entire construction charge in whatever number of installments it may be divided, and not merely to three annual installments of the construction charge. Consequently the effect of this provision is to defer, "the construction charge," including all unpaid installments, for a period of three years and not merely to suspend three installments and thereby require four annual installments to be paid in one year. This interpretation avoids the obviously impractical result of requiring four annual payments in one year and also appears to be the natural meaning of the language used in this subsection.

The closing portion of subsection G reads, "and when the water users assume control of the project the operation and maintenance charges for the year then current shall be covered into the construction account to be repaid as part of the construction repayments." The words "charges for the year then current" mean those made for the year in which the operation and maintenance is assumed by the water users. Thus, if operation and maintenance is turned over during the year 1925, all expense incurred by the United States for operation and maintenance and which thereupon would constitute "charges" for that year will be covered into the construction account. That is, they will be *transferred* from the operation and maintenance account to the construction account. If at the time operation and maintenance is assumed by the water users no operation and maintenance expense has been incurred during the current year, there will be no operation and maintenance "charges" to be transferred.

The suggestion has been made that the clause discussed requires that the operation and maintenance cost for the year control is assumed, be paid by the United States and charged into construction whether operated by the United States for the full year or by the water users during a portion of that year. In the latter case the cost of operation and maintenance must be advanced or the bills and other expenses incurred by the water users must be paid by the United States monthly or otherwise.

It is not believed that the phrase "operation and maintenance charges" is synonymous with operation and maintenance *expense*. The term "operation and maintenance charges" is one that heretofore has had a well-defined significance, meaning charges due the United States for service performed in operation and maintenance of the project, which is the interpretation given it in this connection.

It could hardly mean in this sentence cost incurred by the water users for their own benefit after control has been assumed. Therefore the United States is not called upon to advance or pay to the water users a sum sufficient to enable them to operate and maintain the project for themselves, merely in order that there may be "charges" in the operation and maintenance account to be transferred to the construction account. Had this been intended the word "*expense*," or some term other than "charges" should have been employed. It is believed the provision is designed merely to obviate the necessity of the water users being required to pay in one year operation and maintenance charges for two seasons which would be necessary when changing from the present plan, under which payment is made at the end of the season, to that which requires payment in advance.

Subsection G of the act provides—

> That whenever two-thirds of the irrigable area of any project, or division of a project, shall be covered by water-right contracts between the water users and the United States, said project shall be required, as a condition precedent to receiving the benefits of this section, to take over, through a legally organized water users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe, and thereafter the United States, in its relation to said project, shall deal with a water users' association or irrigation district, and when the water users assume control of a project the operation and maintenance charges for the year then current shall be covered into the construction account to be repaid as part of the construction repayments.

The application of this subsection to any project or division depends on the question whether two-thirds of the irrigable area of the project or division in question is covered by water-right contracts. Such contracts may be either in the form of accepted water-right applications from water users or a contract with the district or other water users' organizations covering the entire irrigable area or two-thirds thereof. The intent of this subsection is to encourage the water users in the taking over of the operation of the irrigation works or a part thereof on each project. Such operation and maintenance by the water users' organization is a prerequisite to the granting of the benefits of the new plan of payments and also to the funding of delinquent charges under subsection L and the deferment of charges under subsection F.

Subsection I provides—

> That whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by

the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid.

The difference in the language used with reference to the total accumulated net profits from past operations which it is provided, "shall be credited to the construction charge of the project" and the language used with reference to net profits thereafter secured from such sources, which it is provided, "may be used by the water users to be credited *annually*, first on account of project construction charge, second on account of project operation and maintenance charge, and third as the water users may direct" (italics supplied) indicates a different intent with reference to these two classes of profits. The last sentence of this subsection reading, "No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid," appears to apply to all profits of both classes. The credit of the "total accumulated net profits" from past operations as determined by the Secretary, "to the construction charge of the project" results in lessening by that much the total construction obligation, consequently construction payments on the basis of average gross acre income would be completed at an earlier date than would otherwise be the case; but each annual installment based on the average gross acre income would remain the same until the end of the payment period. But the provision with reference to net profits hereafter realized from such sources to be credited annually first on account of project construction charge and second on account of project operation and maintenance charges, is understood to provide for the application of future profits annually upon the annual construction charges as the same come due. That is, such credit for future profits will be applied annually, first to construction charges, beginning with the construction installment first coming due and continuing with subsequent construction installments as far as such credit will go, and then in the same manner upon operation and maintenance charges when the time arrives that the project construction charges have been completed.

Subsection J provides that profits of the class described in that subsection shall be credited to the project or division of project to which the construction cost has been charged, but does not specify whether the same should be credited on construction or operation and maintenance. It is therefore believed to be within the discretion of the Secretary of the Interior to determine the manner of applying such credit. In this connection, however, it is noted that this fund is to be applied as a credit and not turned over as a cash

payment from the Government. Consequently if the water users' organization takes over the operation and maintenance of the irrigation system or a part thereof and collects and pays its own operation and maintenance expenses there will be no indebtedness from the water users to the United States for operation and maintenance except the operation and maintenance of reserved works in cases where only a part of the irrigation works are turned over and in cases where all of the irrigation works are turned over there would be no indebtedness to the Government on which a credit could apply except indebtedness for the construction payments.

Subsection L of the act provides—

> That in any adjustment of water charges as provided in this section all due and unpaid charges to the United States, both on account of construction and on account of operation and maintenance, including interest and penalties, shall be added in each case to the total obligation of the water user, and the new total thus established shall then be the construction charge against the land in question.

In this subsection the words, "in any adjustment of water charges," are understood to indicate the time which will determine what charges are due and unpaid, and what charges will thereafter be added in each case to the total obligation of the water user. It is believed that the adjustment of water charges occurs on the date when the adjustment contract is made, and that the charges due and unpaid on that date are the charges added in each case to the total obligation. Attention is called to the fact that, so far as the construction charges are concerned, the provisions of subsection L and the provision of the last sentence of subsection F may overlap if the adjustment contract is made at a date later than December 1, 1925. As the provision with reference to the deferment of construction charges is "for a period of three years from the approval of this section," so that the three years deferment if granted applies to the construction charges of 1925, 1926, and 1927; and in the event of an adjustment contract of later date than December 1, 1925, providing for deferment of construction charges, the 1925 construction charges would be a delinquent charge covered by subsection L as well as by the deferment provision of subsection F. It may be argued that the language of subsection L tends to encourage dilatory practices in the making of adjustment contracts under the new act. But this would not be true as to construction charges under any contract providing for deferment of construction charges as such construction charges for 1925, 1926, and 1927 would in any event be funded; and, as applied to operation and maintenance charges, the provision of subsection L would have to be considered in connection with section 6 of the extension act, which states, "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 for the payment of any charge for operation and maintenance or any annual construction charge and penalties." This provision is still in force, and will prevent any extensive delay with reference to the operation and maintenance charges in question.

ELWOOD MEAD,
Commissioner.

Approved:
HUBERT WORK,
Secretary.

INTERPRETATION OF CERTAIN PROVISIONS OF SECTION 4 OF THE ACT OF DECEMBER 5, 1924, RELATING TO FEDERAL IRRIGATION PROJECTS

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, D. C., March 19, 1925.

Under date of January 28, 1925 (51 L. D. 207), interpretation of certain provisions of section 4 of the act of December 5, 1924 (43 Stat. 672, 701), was approved by the Secretary of the Interior. For the information and guidance of all concerned the additional provisions of that act, hereafter mentioned, require interpretation.

Subsection G provides as follows:

> That whenever two-thirds of the irrigable area of any project, or division of a project, shall be covered by water-right contracts between the water users and the United States, said project shall be required, as a condition precedent to receiving the benefits of this section to take over, through a legally organized water users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe, and thereafter the United States, in its relation to said project, shall deal with a water users' association or irrigation district, and when the water users assume control of a project the operation and maintenance charges for the year then current shall be covered into the construction account to be repaid as part of the construction repayments.

It is necessary to construe the word "benefits" to determine the other subsections of the act to which subsection G is applicable. A strict, literal interpretation of this subsection, taken alone, would lead to the conclusion that all subsections of the act from F to R are qualified by subsection G.

However, it is to be remembered that this is a remedial statute and under the rules of statutory construction a liberal interpretation must be given of the act as a whole with view to giving effect, if possible, to each provision. It is believed that a possible and reasonable construction is that the "benefits" mentioned in subsection G

are those only which flow from the execution of the amendatory contracts; that is, those provided for in subsection F immediately following, which require some affirmative action on the part of the water user, and that it has no application to the other provisions of the act, which appear to be more general in character, and do not require the execution of amended contracts to make them effective. The other provisions are self-executing. It is believed that subsection G means merely that if application is made for any of the benefits depending upon execution of contracts and two-thirds of the irrigable area is under water-right application, the Secretary shall require as a condition precedent that the operation and maintenance of the project or the division affected shall be taken over by the water users.

Had it been intended that subsection G should qualify the other provisions of the act, this subsection should have been placed at the end or following the clauses intended to be qualified. The position alone, of course, is not controlling, but has a proper place in the construction of the act. Moreover, subsection I provides expressly that the benefits of that subsection shall be applicable only after the operation and maintenance of constructed works is taken over. This is unnecessary and superfluous if subsection G already limits the application of all the other subsections. Specific mention in this subsection seems to negative the idea of applicability to all subsections.

Literal interpretation of subsection G would apparently prevent anything being done under subsection K except where operation and maintenance has been taken over under the two-thirds rule. This is certainly true if what has been therein authorized is to be called a "benefit." While further action by Congress is necessary before any charges may be remitted or adjustment made under subsection K, it would seem that the survey and report authorized to be made, manifestly with the expectation that Congress will authorize reductions, reallocations of charges and other adjustments, constitute a benefit—in fact, no doubt this is regarded by many projects and water users as the outstanding benefit of the act. It would seem that any interpretation which would prevent survey and report under subsection K, regardless of operation and maintenance being turned over, would defeat in large measure the relief manifestly sought to be extended. Such construction being absurd should not be adopted.

A strict, literal interpretation of subsection G, standing alone, would likewise make it necessary to withhold the benefits of subsections M and Q, having only purely personal application. The Bureau has had already applications for exchange of entries under subsection M from projects the operation and maintenance of which

has not been taken over. These must be denied if subsection G is applicable to such cases. Such literal interpretation would necessarily split the Washington office expense under subsection O, certain projects bearing their proportionate part of the expense after June 30, 1925, and others being exempt from such expense, dependent upon their status, which would be fluctuating. For example, against projects not open and those not having two-thirds of the irrigable area under water-right application, no expense would be chargeable on account of the Washington office. However, immediately they reach the time when two-thirds of the irrigable area is under water-right application they would begin paying and continue paying until such time as operation and maintenance shall be taken over, whereupon they would again cease paying. It would seem that had it been intended that the Washington office expense should be thus divided an arbitrary date, as June 30, 1925, would not have been selected, without some qualification and more definite connection with subsection G.

The cost of general investigations made before and after date of the act are, under subsection O, to be charged to the reclamation fund and shall not be charged as a part of the construction or operation and maintenance payable by the water users of the projects. There is no practical way in which effect may be given to this provision if it is to be dependent upon the transfer of operation and maintenance to the water users. Such investigations can be in nowise affected by the matter of operation and maintenance. Apparently the only possible difference would be the time credit may be applied, as sooner or later the operation and maintenance of all projects must be taken over under the law. Hence there is no possible reason for applying subsection G to this item.

It is believed that the construction that subsection G qualifies only the provisions of subsection F (and L, which is dependent upon contract adjustment under F) is a reasonable and proper one. That it will be attended with fewer complications than any other must be conceded. The accounting will be thereby greatly simplified and the expense lessened. On the whole, the administration of the act will be made much easier. Any doubt that may exist in the respects mentioned should be resolved in favor of the water user. Any other interpretation than that here suggested would work great inequality, lead to much confusion, and would defeat in part the intention of Congress.

ELWOOD MEAD,
Commissioner.

Approved:
E. C. FINNEY,
Acting Secretary.

RECLAMATION ENTRIES ON FEDERAL IRRIGATION PROJECTS—PENALTY AGAINST DELINQUENT INSTALLMENTS—ACT OF DECEMBER 5, 1924

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, D. C., March 19, 1925.

TO ALL FIELD OFFICES:

1. Subsection H, section 4 of the act of December 5, 1924 (43 Stat. 672, 703), reads as follows:

> That the penalty of 1 per centum per month against delinquent accounts, provided in section 3 and section 6 of the Act of August 13, 1914 (Thirty-eighth Statutes, page 686), is hereby reduced to one-half of 1 per centum per month, as to all installments which may hereafter become due.

2. The language makes this subsection applicable to all installments which may hereafter become due. This is true without regard to whether the operation and maintenance of the project or division has been turned over as provided in subsection G of the same act.

3. Subsection H is applicable likewise to rental charges fixed under section 11 of the Reclamation Extension Act of August 13, 1914 (38 Stat. 686), which provides that such charges shall be subject to the same penalties as provided for other operation and maintenance charges.

4. All charges other than those specifically mentioned in these regulations will be governed, as heretofore, by the contracts or provisions of law applicable.

5. Penalty of 1 per cent per month as provided by the Reclamation Extension Act will be charged against all installments becoming due prior to December 5, 1924, until paid, except of course when such penalty is modified by some of the various relief acts. On all installments becoming due after December 5, 1924, the penalty provided by subsection H will apply.

ELWOOD MEAD,
Commissioner.

Approved:
E. C. FINNEY,
Acting Secretary.

PROCEDURE RELATING TO THE ADMINISTRATION OF THE MINERAL LEASING LAWS—GENERAL LAND OFFICE AND GEOLOGICAL SURVEY

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
Washington, D. C., September 22, 1925.

THE COMMISSIONER OF THE GENERAL LAND OFFICE,
THE DIRECTOR OF THE GEOLOGICAL SURVEY:

The following outline of procedure under the mineral leasing laws is promulgated for your guidance, in view of the additional functions, duties, power, and authority vested in the Geological Survey, pursuant to Departmental Order No. 54, dated June 25, 1925, issued in conformity with the exceptions noted in Executive order of June 4, 1925.

1. Prior to the issuance of prospecting permits, leases, licenses, or patents under the mineral leasing laws, the General Land Office will refer to the Geological Survey for report the following described applications, submitting for each phosphate, coal, and oil shale application a plat showing status of mineral deposits in and adjacent to the area applied for:

(a) Coal prospecting permits, leases, and licenses.
(b) Potash prospecting permits, patents, and leases.
(c) Sodium prospecting permits and leases.
(d) Phosphate leases.
(e) Oil-shale leases.
(f) Oil and gas permits and leases.

With respect to such applications the Geological Survey will report on prospecting permits, other than for oil and gas, as to whether prospecting is necessary; on all leases, as to the leasing area, the rate of royalty, and, where necessary, the investment and production terms, discovery, and any other matters affecting the issuance of and operations under the lease; on licenses, as to whether the license should be issued; and on potash patent, as to the adequacy of the alleged discovery. Reports on oil and gas prospecting permit applications will be as to (a) relations to geologic structures of producing oil and gas fields, (b) as to other applications and interests of the same applicant on the same structure or on different structures in the same State or Territory, and (c) when necessary, as to prospective oil and gas value under paragraph 12 (c), Circular No. 672 (47 L. D. 437).

2. Subsequent to the issuance of prospecting permits, leases, and licenses under the mineral leasing laws, the General Land Office will refer to the Geological Survey for report, or submit recommenda-

tions to the Secretary through the Geological Survey and for its concurrence all applications for:

(a) Amendments, modifications, and consolidations.
(b) Cancellations other than oil and gas prospecting permits.
(c) Relinquishments.
(d) Assignments.
(e) Renewals.
(f) Working agreements.
(g) Reduction or cancellation of bonds.
(h) Relief.
(i) Sales contracts.

The Geological Survey will, upon receipt of such requests, make appropriate report or indicate its concurrence.

In oil and gas prospecting permit cases subject to cancellation the Geological Survey, on request of the General Land Office, will report as to whether any well is being drilled or has been completed on the geologic structures involving the land and whether the land may be opened to further prospecting or whether it should be held for lease.

3. Letters prepared by the General Land Office for the approval or signature of the Secretary, defining the conditions to be imposed under the mineral leasing laws or any requirements affecting the administration thereof, will be transmitted through the Geological Survey for concurrence. The Geological Survey will indicate its concurrence and forward the record to the Secretary or, if not in accord with the proposed action, and agreement can not be reached informally between the two offices, the Survey will forward the record to the Secretary with a statement of its views.

After action has been taken by the Secretary, copies of such General Land Office and departmental letters will be forwarded by the General Land Office to the Geological Survey for its files.

4. The General Land Office will forward to the Geological Survey the case record in appeals from decisions where the action of the General Land Office is based primarily on the report of the Geological Survey and that office will either report to the Secretary or return the case record with recommendation.

5. The General Land Office will promptly notify the Geological Survey of the award of each lease, will forward to the Geological Survey the small card record of approval of permits and leases, and will furnish for the files of the Geological Survey a copy of each permit, lease, license, and contract, together with copies of all material correspondence thereafter conducted by the General Land Office relative to past and future production, amount, rate and payment of royalty, the payment of rentals, assignments, extensions of time,

cancellations, relief, agreements, and information regarding the administration of the permit, lease, or license.

6. The Geological Survey will submit to the General Land Office monthly statements setting forth the oil and gas royalties due and payable or delivered in kind, and will submit quarterly statements of the royalties and rentals due and payable for all other minerals covered by the leasing laws and after the termination of each lease and coal permit and license, a final report will be made to the General Land Office by the Geological Survey.

7. The Geological Survey will refer to the General Land Office all matters regarding the appropriate surface marking of leases and permits, the underground marking of boundaries of leases in mining operations, and the tying in of mine openings with corners of the public land surveys.

8. Such additional references, reports, and interchange of information and advice shall be made by or between the General Land Office and Geological Survey as may be necessary to perpetuate or improve current practice and to accomplish economical and effective administration of the mineral leasing laws, it being the intent that under the direction of the Secretary of the Interior, the General Land Office shall be the office of record, law, and collections in mineral leasing matters while the Geological Survey shall furnish scientific or technical information and advice, supervise prospecting and mining operations, record production, and determine royalties and rentals.

E. C. FINNEY,
Acting Secretary.

LEASING OF PUBLIC LANDS NEAR OR ADJACENT TO MINERAL, MEDICINAL, OR OTHER SPRINGS—ACT OF MARCH 3, 1925

REGULATIONS

[Circular No. 1034]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 6, 1925.

REGISTERS,
UNITED STATES LAND OFFICES:

The act of March 3, 1925 (43 Stat. 1133), provides—

That the Secretary of the Interior, upon such terms and under such regulations as he may deem proper, may permit responsible persons or associations to use and occupy, for the erection of bathhouses, hotels, or other improvements for the accommodation of the public, suitable spaces or tracts of land

near or adjacent to mineral, medicinal, or other springs which are located upon unreserved public lands or public lands which have been withdrawn for the protection of such springs: *Provided*, That permits or leases hereunder shall be for periods not exceeding twenty years.

The filing of applications under the act, and action on such applications, will be governed by the following regulations:

1. *Lessees.*—Leases may issue under the act to any responsible persons or associations, which words are construed to include private corporations and municipalities.

2. *Lands to which applicable.*—Leases may issue for surveyed or unsurveyed unreserved public lands in the several States, and in Alaska, situated near or adjacent to mineral, medicinal, or other springs, which are located upon unreserved public lands and for public lands which have been withdrawn for the protection of such springs.

3. *Application for lease.*—An application for lease should be made in duplicate, should be under oath and should cover or include the following:

(a) Applicant's name and address.

(b) If applicant is a private corporation, a certified copy of the articles of incorporation.

(c) If applicant is a municipality, the law or charter and procedure taken by which the municipality has become a legal body corporate.

An application by a private corporation or municipality should show that it is legally qualified to take the lease requested and that the taking of such lease has been duly authorized by its governing body.

(d) An accurate description of the land desired. If the land is surveyed, it should be described with reference to the public land surveys. A lease may be granted for part of a legal subdivision or for more than one legal subdivision, in the discretion of the Secretary of the Interior. If the land is unsurveyed, the description thereof should conform to requirements set forth in circular of November 3, 1909 (38 L. D. 287).

(e) The names and addresses of three persons to whom reference may be made as to applicant's reputation and business standing and as to his ability, both from a financial standpoint and otherwise, to carry out the contemplated project.

(f) The period of time for which the lease is desired, not to exceed 20 years, and the purpose for which the lease is sought, whether for the erection of a bathhouse, hotel, or other improvement for the accommodation of the public. It is important that the application should specify all purposes for which it is intended or

desired to use the land, as a lease, if issued, will authorize the use of the land only for the purposes specified in the application, and its use for any other purpose will not be permitted. Thus, if an applicant for a hotel, in addition to using the land for ordinary hotel purposes, wishes to operate a billiard hall or moving-picture theater, etc., on the land, that fact should be disclosed in the application.

(g) Details as to the proposed improvements, including the estimated cost of construction and of subsequent maintenance; also the time when construction work will begin and when it will be completed if the proposed lease is granted.

4. *Fixing of rates.*—All leases issued hereunder will contain stipulations authorizing the Secretary of the Interior to fix the rates and prices for accommodations and services whenever this is deemed necessary. The charges which may be made may or may not be regulated by the Secretary of the Interior, as may be deemed proper in the particular case.

5. *Filing of application.*—An application for lease should be filed in duplicate in the district land office, should be given a current serial number, and should be duly noted on the district land office records. If it appears that the land applied for is not subject to lease, the application should be rejected, subject to the usual right of appeal. Otherwise, after notation, the register should attach to each copy of the application a statement as to the status of the land, as shown by the district land office records, and should transmit the original copy of the application to the Commissioner of the General Land Office by special letter for notation on the General Land Office records, and the duplicate copy to the division inspector for report.

6. *Action by division inspector.*—Upon receipt of an application the division inspector will cause a field examination to be made, if necessary, and thereafter he will submit report to the Commissioner of the General Land Office. The report should include the following information, if it will be of service in the consideration of the case, together with any other information which may be deemed essential:

(a) A topographic map of the areas adjacent to the spring or of the area applied for. If in the opinion of the division inspector the area should be divided, to enable the issuance of more than one lease, a proposed division should be shown.

(b) A determination of the quantity of water available from the spring and a plan of the work that should be done to develop and increase the flow, as well as to protect the spring from pollution or silting with an estimate as to the cost.

(c) An analysis of the water which may be procured from the Bureau of Chemistry.

(d) Whether the contemplated use of the land is the highest or best use to which the land may be put under the act of March 3, 1925.

(e) A statement as to the distance of the land from centers of population and as to its accessibility.

(f) A statement as to whether the contemplated project will require closer supervision than can be given by the division inspector.

The report should show whether in the opinion of the division inspector, all things considered, the application should be allowed or rejected. It should also show the amount of the annual rental which, in the opinion of the division inspector, should be charged, if the lease is granted. In order to ascertain a proper charge, the division inspector should determine what is a fair and reasonable rental of the area, taking into consideration the purpose for which it is to be used and the probable value of the lease to the applicant. The report should also state any conditions or restrictions which in the opinion of the division inspector should be incorporated in a lease, if issued. In so far as applicable, the general regulations of the Department governing the execution of contracts will be followed in the preparation of leases issued hereunder.

7. *Conflicting applications.*—From and after the filing in the district land office of an application for lease, the lands applied for will not be subject to other appropriation under the public land laws. However, applications under other laws may be received and such applications will be suspended pending final action on the application for lease, unless a prior right to the land is claimed by settlement or otherwise, in which case the subsequent applications should be transmitted to the General Land Office for consideration. If the application for lease is subsequently approved, the conflicting suspended applications will be rejected. On the other hand, if the application for lease is rejected, the conflicting suspended applications will be relieved from the suspension and will be disposed of as though the application for lease had not been filed.

8. *Further action on application for lease.*—When a report has been received from the division inspector the Commissioner of the General Land Office will make report to the Secretary of the Interior either recommending the allowance or the rejection of the application for lease. If the allowance of the application is recommended, the Commissioner will submit a form of a proposed lease for consideration. Thereafter the Department will take such further action and will give such further directions as are considered proper.

9. *Discretionary authority of the Secretary of the Interior.*—The granting of an application for lease is discretionary with the Secre-

tary of the Interior, and any application may be granted or denied in part or in its entirety as may appear to be warranted in the particular case.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

WILLIAMS v. BRENING (ON REHEARING)

Decided October 7, 1925

CONTEST—CONTESTANT—PREFERENCE RIGHT—WITHDRAWAL—HOMESTEAD ENTRY—FLORIDA.

The saving clause of the Executive order of December 8, 1924, which excepted from the operation of the withdrawal "any valid existing rights in and to" the lands on the islands off the coast or in the coastal waters of the State of Florida, withdrawn by it, protects, upon cancellation of an entry as the result of a contest, the preference right of the contestant which had been earned, although not actually awarded prior to the withdrawal.

FINNEY, *First Assistant Secretary:*

By decision of May 27, 1925, the Department affirmed the decision rendered December 17, 1924, by the Commissioner of the General Land Office sustaining the action of the local land officers and holding for cancellation the homestead entry of Louis F. Brening for the NE. ¼, Sec. 30, T. 23 S., R. 38 E., T. M., Florida, on the contest of Jennie L. Williams, alleging default in respect to the required residence and cultivation.

A motion for rehearing has been filed in behalf of the homestead entryman wherein numerous alleged errors were assigned. All of the matters now urged were fully considered and adequately discussed in the former decision, with the exception of the contention now made that the case should be considered from a different standpoint, on account of the intervening Executive order of December 8, 1924, which withdrew all islands off the coast or in the coastal waters of the State of Florida.

The argument is to the effect that the prospective preference right which would accrue to the contestant upon cancellation of the entry was destroyed by the withdrawal, and that the question of allowing the entry to stand is a matter now solely between the Government and the entryman, and that although the entryman

may be considered as in default at the time of the contest he had, it is claimed, cured such default at the time of the withdrawal.

This argument does not impress the Department as being sound. The contestant had done all required of her to earn a preferred right prior to the withdrawal. The entryman in default at the time of the contest could not therafter cure the same so as to gain rights superior to those of the contestant. In fact the rule is just the reverse of that contended for, as the question of allowing the contestant to make entry in the exercise of her preferred right, when awarded, is a matter solely between the applicant and the Government, in which the contestee has no interest. See *Arnold* v. *Burger* (45 L. D. 453).

If this were an absolute and unconditional withdrawal the contestant would be entitled to a suspended preferred right which could be exercised in case of subsequent restoration of the land to entry. See *Wells* v. *Fisher* (47 L. D. 288), and numerous citations contained therein.

But the withdrawal here in question saved "any valid existing rights in and to" the lands so withdrawn, and a preferred right which had been earned, although not actually awarded, prior to the withdrawal is entitled to protection. The withdrawal was designed to prevent the initiation of new claims and not the destruction of rights theretofore fairly earned.

The land was referred to in the hearing as a part of an island and also as part of a peninsula. It is a part of a strip between the Banana River and the Atlantic Ocean. It is not deemed important to here consider closely whether it is a portion of an island within the meaning of the said withdrawal, because if not an island it was clearly within the area withdrawn by the further order of July 3, 1925, embracing all mainland within three miles of the coast in that State. The latter order also contained the saving clause referred to above.

The motion for a new trial in respect to conditions prior to the contest was fully considered and denied in the decision on appeal. The present request for a new hearing to determine whether the homestead laws were being complied with by the contestee at the time of withdrawal must likewise be denied for the reason that the Department does not regard the rights of the contestant as defeated by the withdrawal.

COAL PROSPECTING PERMITS IN ALASKA—BONDS—PARAGRAPH 5 OF CIRCULAR NO. 744 (48 L. D. 50), MODIFIED

INSTRUCTIONS

[Circular No. 1035]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 13, 1925.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES IN ALASKA:

Paragraph 5 of the regulations of March 30, 1921, Circular No. 744 (48 L. D. 50), governing coal prospecting permits in Alaska under the act of March 4, 1921 (41 Stat. 1363), was amended by the Department on October 1, 1925, by adding a paragraph, as follows:

(g) After a permit is ready for delivery, the permittee will be notified and allowed thirty days within which to furnish a bond with approved corporate surety or two qualified individual sureties, in the sum fixed by the Secretary when the permit is granted, but not to exceed $500, conditioned upon compliance with the terms of the permit and against failure of the permittee to use reasonable precautions to prevent damage to the coal deposits or to leave the premises in a safe condition upon the termination of the permit. With bonds signed by individual sureties must be filed affidavits of justification by the sureties that each is worth double the sum specified in the undertaking over and above his just debts and liabilities, 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. Bond with additional obligations therein will be required where the permit embraces lands entered or patented with the coal reserved under the act of March 8, 1922 (42 Stat. 415).

WILLIAM SPRY,
Commissioner.

SAN JOAQUIN LIGHT AND POWER CORPORATION

Decided October 17, 1925

FOREST LIEU SELECTION—RELINQUISHMENT—DEEDS—NATIONAL FORESTS.

Where land has been conveyed to the United States under the act of June 4, 1897, acts of the prior holder, subsequent to such conveyance, can not affect the title so conveyed.

PRIOR DEPARTMENTAL DECISION ADHERED TO.

Decision of October 31, 1924 (50 L. D. 660), adhered to.

WORK, *Secretary*:

I have your [Executive Secretary, Federal Power Commission] letter of October 8, inclosing the memorandum of the chief counsel

of the Federal Power Commission concerning the petition of R. H. Peale of Salt Lake City, Utah, asking that the Commission revoke and hold for naught its action on the application of the San Joaquin Light and Power Corporation, whereby the E. ½, Sec. 36, T. 10 S., R. 27 E., M. D. M., California, was reserved for power purposes under project No. 175, and included in the license issued to that corporation under date of July 28, 1922, under the act of June 10, 1920 (41 Stat. 1063).

The Acting Secretary by letter of October 31, 1924, addressed to you, and which is reported in 50 L. D. 660, advised the Commission of the status of the land as shown by the records of this Department. It was stated in that letter that the tract described had been conveyed to the United States by C. W. Clarke as base for a selection under the act of June 4, 1897 (30 Stat. 11, 36), and that the issuance of the license to the power corporation constituted a disposition of the tract within the meaning of section 2 of the act of September 22, 1922 (42 Stat. 1017), and that under the provisions of said act the Secretary of the Interior is forbidden to quitclaim the tract to the party who conveyed it to the United States.

As appears from the memorandum the petitioner sets up a claim of title in the lands and represents that he has acquired from C. W. Clarke and wife all title of the latter to said land. As shown by the records the title is in the United States under a duly executed and recorded deed of conveyance, and the subsequent acts of the prior holder of the title could not invalidate the title thus conveyed. The record further shows that the deed which included other lands was examined and part of the lands conveyed accepted as base for selections which were afterward patented.

The chief counsel is of the opinion that the Commission is without authority to issue upon the licensee a rule to show cause, as requested by the petitioner, and this view is amply supported by the provisions of the water-power act.

In the opinion of this Department, nothing is shown by petitioner which would warrant the action requested of the Commission, in the face of the status of the land and the title thereto as shown by the records, even though authority to issue the rule existed under the law.

DENNIS ET AL. v. STATE OF UTAH

Decided October 7, 1925

PATENT—APPLICATION—MINING CLAIM.

A patent issued pursuant to the placer mining laws conveys title to the land and all minerals therein, except lodes known to exist within the boundaries of the placer at the date of the application for patent.

OIL SHALE—OIL AND GAS LANDS—MINING CLAIM.

Lands containing oil shale are to be classified as oil and gas lands for purposes of the operation of the placer mining laws.

PATENT—RESERVATIONS—SURFACE RIGHTS—MINERAL LANDS—ACT OF FEBRUARY 25, 1920.

Prior to the enactment of the act of February 25, 1920, Congress made no provision for the disposition of the minerals reserved in agricultural patents issued pursuant to the act of July 17, 1914, and on and after that date the mineral deposits named in the leasing act, reserved by such patents, became subject to disposition only in accordance with the terms of that act.

STATE SELECTION—INDEMNITY—MINERAL LANDS—SURFACE RIGHTS—RESERVATION—EVIDENCE.

Where the record contains no evidence to show that lands selected by a State are mineral in character an offer of the State to take title with the reservation of minerals to the United States can not be accepted.

FINNEY, *First Assistant Secretary:*

W. A. Dennis, *et al.*, who filed a protest in the matter of indemnity school land selection, Salt Lake City, Utah, serial 025132, embracing among other tracts the NE. ¼ NW. ¼, Sec. 23, T. 11 S., R. 9 E., S. L. M., have appealed from the decision of the Commissioner of the General Land Office, dated January 20, 1925, requiring the respective parties to furnish showing regarding the character of said land, sufficient to warrant acceptance of the consent of the State to take title subject to reservations under the provisions of the act of July 17, 1914 (38 Stat. 509).

The land has not been withdrawn or classified or reported as valuable for the deposits referred to in said act. It was, however, included within Coal Land Withdrawal Utah No. 1 by Executive order of July 7, 1910, but subsequent to the filing of the application to select by the State, was classified as noncoal land under Executive order of August 15, 1921.

The indemnity school land list embracing the land in question was filed on November 24, 1919. On February 1, 1921, W. A. Dennis *et al.* filed a protest against the approval of the selection as to this land, alleging that at the time the State filed its selection list the tract was known mineral land containing a valuable bed or deposit of oil shale, which contains petroleum and other hydrocarbons, and that it was a part of the petroleum No. 2 placer mining

claim located January 4, 1918, upon the NW. ¼, said Sec. 23, by protestant and his coclaimants. Answer was filed by the State denying the allegations of protestants as well as the validity of the alleged placer location. Hearing was set for April 23, 1921, but was continued from time to time. The case was called October 12, 1922, but no testimony was offered and the local officers were advised that the State had agreed to file a mineral waiver. On October 18, 1922, the State filed a waiver as to oil, phosphate, nitrate, gas, or asphaltic minerals under the act of July 17, 1914 (38 Stat. 509), and as to coal under the various acts applicable thereto. Thereupon the case was closed by the local officers and it was reported to the Commissioner.

Upon consideration of the record the Commissioner decided that the selection list could not be allowed subject to the provisions of the act of July 17, 1914, *supra*, in the face of the record and thereupon required the parties to furnish a showing regarding the character of the land which would be sufficient to bring the case within the provisions of said act.

It is from this action that appeal has been taken on behalf of protestants, the substance of the specifications of error being that the record before the Commissioner was sufficient as a showing in this respect.

The question raised by the appeal, therefore, is whether, contrary to the Commissioner's opinion, there is evidence in the record which would warrant acceptance of the waiver. Appellant argues that the record itself is sufficient showing and as a practical proposition the Department need not under the circumstances of the case be concerned as to whether or not the minerals reserved are to be found in the land in controversy and that it is time enough to determine that fact when applications for the deposits are filed. At any rate it is argued that theoretically, if not practically, the Government is the gainer since it has retained title to what may develop by future exploration to be valuable mineral lands.

The protestants' allegations as to the character of the land as they appear from the record may all be susceptible of proof but no evidence whatsoever was presented at the hearing. Nor has any evidence concerning the character of the land been offered at any time. The agreement of the State to file its consent to the reservation of minerals can not be accepted as proof that the allegations are true. Had the protestants put in their evidence and established a *prima facie* case as to the character of the land the situation would be different, but in the absence of any evidence either in the record or in the files of the Geological Survey the Commissioner was not in a position to accept the waiver. It was not, therefore, unreasonable for him to require the parties to the proceedings to furnish

a showing in this respect which would enable him to take appropriate action in the light of the facts.

Contrary to the contention of appellant, the Department does not find in the record sufficient evidence to determine the questions presented in this case.

The situation will readily be seen upon examination of the respective acts. In the regulations of March 20, 1915 (44 L. D. 32), concerning agricultural entries of phosphate, oil, and other mineral lands, act of July 17, 1914, *supra*, it is stated in paragraph 8:

> The act provides that the deposits reserved in agricultural patents issued thereunder shall be "subject to disposal by the United States only as shall be hereafter expressly directed by law." Although provisions are made in the act for the protection of the surface owner against damage to his crops and improvements on the land by reason of prospecting for, mining, and removing such reserved mineral deposits, these provisions can have no operation or effect until further legislation by Congress shall authorize disposition of the reserved mineral deposits and define the qualifications of those who may acquire such deposits. In the meantime there is no right to prospect, and no right to acquire such deposits can in any way be initiated.

Under the placer-mining laws, an applicant who has shown due compliance with the provisions thereof is entitled to a patent conveying title to the land and all deposits therein, the only exception being as to lodes known to exist within the boundaries of a placer at the date of application for patent.

Under the instructions to the Commissioner of the General Land Office dated May 10, 1920 (47 L. D. 548), concerning applications for patent for oil shale placer claims, the Department held:

> Oil shale having been thus recognized by the Department and by Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to have been subject to valid location and appropriation under the placer-mining laws, to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas. Entries and applications for patent for oil shale placer claims will, therefore, be adjudicated by your office in accordance with the same legal provisions and with reference to the same requirements and limitations as are applicable to oil and gas placers.

As appears above, no provision was made for the disposition of the deposits reserved in agricultural patents under the act of July 17, 1914, *supra*, and none was subsequently made prior to the enactment of the general leasing law of February 25, 1920 (41 Stat. 437). On and after that date all deposits of minerals named therein became subject to disposition only in the form and manner provided in said act, except as to the claims specified in section 37 of the act, as valid claims existent at date of passage of the act, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under said laws.

Except as to such claims as may come within the provisions of said section 37, oil-shale deposits are subject only to disposition in the form and manner prescribed by section 21 of the leasing law and departmental regulations of March 11, 1920 (47 L. D. 424).

From the foregoing it appears that unless the claim of protestants is shown to be a valid claim under the placer-mining law existent at the date of the passage of the leasing act and thereafter maintained in compliance with said law, it can not in any event proceed to patent and no disposition can be made of the deposits in the land except under the leasing law.

The issues raised by the protest can not be determined in the absence of the material facts respecting the character of the land and the status of the placer claim under section 37 of the leasing act. If the claim is valid under said section it will defeat the State selection. If not, protestants can have no rights under the placer law which the Department may recognize, but if the evidence submitted concerning the character, extent, and mode of occurrence of the oil-shale deposits, shows that the land is in fact valuable for its oil-shale content, the consent of the State may nevertheless be accepted and the selection of the land approved to it with reservation under the act of July 17, 1914, *supra*. The deposits reserved would be subject to disposal only under the leasing law.

The record presented discloses no facts which will serve as a basis for the determination of the material questions involved in the proceeding, and the Commissioner was clearly correct in requiring further showings. There was error, however, in the statement made in the decision complained of to the effect that if the consent of the State is accepted, the protestants may thereafter acquire patent under the mining law to the mineral deposits. As has been shown, however, there is no statutory authority for the disposition under the placer-mining law of any of the deposits so reserved under the act herein considered.

The respective parties will be advised of the holding herein and allowed 30 days within which to furnish a satisfactory showing as to the material facts necessary to the determination of the questions arising in this case.

In the event no action is taken by the parties within the time allowed, the division inspector will be directed to cause an examination of the land to be made for the purpose of ascertaining the facts regarding the mineral character thereof, whereupon such further action will be taken as is warranted by the facts so ascertained and reported.

As herein modified the decision of the Commissioner is affirmed.

ROBERT LEAVENS

Decided October 7, 1925

STOCK-RAISING HOMESTEAD—HOMESTEAD ENTRY—ADDITIONAL—STATUTES.

Both section 2289, Revised Statutes, and section 6 of the act of March 2, 1889, require that additional entries made pursuant thereto shall be by legal subdivisions and, inasmuch as the smallest subdivision recognized by the public land laws having reference to homestead entries is 40 acres, it follows that one who is not qualified to make an additional entry of a 40-acre subdivision under those laws, is not qualified to make an original entry under the stock-raising homestead act.

DEPARTMENTAL DECISION ADHERED TO.

Rule enunciated in the case of *Charles Makela* (46 L. D. 509), adhered to.

FINNEY, *First Assistant Secretary:*

On November 4, 1924, the application of Robert Leavens to make stock-raising homestead entry 018087 for the NE. ¼ NE. ¼, S. ½ NE. ¼, NW. ¼, N. ½ S. ½, SW. ¼ SE. ¼, Sec. 10, T. 8 S., R. 21 E., M. P. M., Billings, Montana, land district, as additional to his perfected homestead entry 2352, Bozeman series (now Billings), covering lots 8 and 9, Sec. 7, S. ½ SW. ¼, Sec. 8, T. 1 N., R. 27 E., M. P. M., was allowed by the local office.

By a decision dated February 28, 1925, the Commissioner held that the allowance of this entry as additional to homestead entry 2352 was erroneous for the reason that the land involved was more than 20 miles distant from the land embraced in the original entry, and that as the land embraced in the original entry was not designated under the enlarged homestead act, the claimant was not entitled to the benefits of the rule laid down in the case of *Charles Makela* (46 L. D. 509), under which an original stock-raising homestead entry could be made. The entryman, however, was given an opportunity to file a petition for designation under the enlarged homestead act of the land covered by his original entry, together with an affidavit showing that he was not the owner of more than 160 acres of land in the United States acquired under other than the homestead law, and to show his qualifications as an original entryman. In the event that the land embraced in the original entry was not designated under the enlarged homestead act, homestead entry 018087 was to be canceled.

The entryman did not comply with the requirements of the Commissioner's decision, but filed a motion for review in which he stated that, as his original perfected entry contained only 150.10 acres of land, he was qualified to make an additional entry under the provisions of the act of March 2, 1889 (25 Stat. 854).

The Commissioner, in a decision dated April 20, 1925, overruled this motion upon the ground that, as Leavens's right of additional

entry was only for 9.90 acres, he was not qualified to make an original stock-raising homestead entry under terms of the *Makela decision* which limited such right, in cases similar to the instant case, to one who was qualified to make an enlarged homestead entry for approximately 40 acres. The entryman has appealed.

The appellant contends that there is no justification for the rule announced in the instructions of January 27, 1917 (45 L. D. 625), quoted in the *Makela case*, which disqualifies him from making a stock-raising homestead entry for the land in question because he is not qualified to make an original or additional entry under other laws for as much as approximately 40 acres of land. In support of this contention he quotes the language of section 6 of the act of March 2, 1889, and of section 1 of the stock-raising homestead act of December 29, 1916 (39 Stat. 862), which, he states, grant no authority to the Secretary of the Interior to deny a qualified entryman the right to make an entry under the stock-raising homestead act because the shortage in acreage of an original homestead entry made by him does not approximate 40 acres.

The Department is of the opinion that the decision appealed from clearly is right. The appellant has failed to note that section six of the act of March 2, 1889, requires that additional entries made under its provision shall be "by legal subdivisions of the public lands of the United States subject to homestead entry." This requirement is also contained in section 2289, Revised Statutes. As the smallest subdivision recognized by the public land laws having reference to homestead entries is 40 acres, it necessarily follows that the fact that the appellant's original homestead entry covers only 150.10 acres does not qualify him to make an original stock-raising homestead entry for the lands involved in this case, under the rule laid down in the *Makela decision*. See also Circular No. 846, paragraph 4, subdivisions (b) and (c) (49 L. D. 266).

As the land sought to be entered by the appellant under the stock-raising homestead act is not within a radius of 20 miles from the land covered by his perfected entry, it is equally clear that he has no right to make an additional entry for the same under the provisions of the stock-raising homestead act.

The only method by which the appellant's entry 018087 could be sustained was through the designation under the enlarged homestead act of the land covered by his original entry, as stated in the Commissioner's decision of February 28, 1925.

The decision appealed from is affirmed.

LINCOLN-IDAHO OIL COMPANY

Decided October 7, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—AMENDMENT—WITHDRAWAL—RESTORATIONS.

Definition of a structure as within a producing oil and gas field is in effect a withdrawal of the lands from appropriation under section 13 of the leasing act, and a pending application to amend a previously issued permit to include lands on the structure, filed after such definition, does not confer any right upon the applicant to have his application allowed upon revocation of the definition.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—TEST WELL—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

Where a test well has been or is about to be drilled upon the geologic structure which includes lands for which an application has been filed for a permit to prospect for oil and gas under section 13 of the leasing act, the Secretary of the Interior has, in the discretion vested in him by that act, the power to withhold the lands from disposal pending the outcome of tests upon the structure.

OIL AND GAS LANDS—PROSPECTING PERMIT—WITHDRAWAL—RESTORATIONS.

Where the definition of a geologic structure is revoked, the lands will be restored to filing substantially in the manner prescribed in the departmental instructions of April 23, 1924, Circular No. 929 (50 L. D. 387), relating to cases where existing prospecting permits are canceled.

DEPARTMENTAL INSTRUCTIONS AND DECISIONS APPLIED.

Departmental instructions of June 3, 1924 (50 L. D. 546), and cases of *H. A. Hopkins* (50 L. D. 213), *Enlow* v. *Shaw et al.* (50 L. D. 339), and *Charles West, on petition* (50 L. D. 534), applied.

FINNEY, *First Assistant Secretary:*

The Lincoln-Idaho Oil Company has appealed from the decision of the Commissioner of the General Land Office dated March 31, 1925, holding for rejection its application filed May 5, 1924, to amend its oil and gas prospecting permit, Evanston, Wyoming, serial 07752, issued August 12, 1922, under section 13 of the act of February 25, 1920 (41 Stat. 437), so as to include in addition to the 893.63 acres covered thereby the E. ½ SW. ¼, and SE. ¼, Sec. 31, T. 29 N., R. 113 W., containing 240 acres.

The record discloses that this land was included in the original application for permit filed June 8, 1920, by said company, but the application was rejected as to said tracts by the Commissioner's decision of May 12, 1922, which was affirmed by the Department July 6, 1922, because the land was within the boundaries of the known geologic structure of the Dry Piney field as defined by the Director of the Geological Survey, April 2, 1920.

The Department in its unreported decision of November 20, 1924, in the case of the appeal of the Cretaceous Oil Company from the

Commissioner's decision of May 23, 1924 (A–7148 Evanston Consolidated permits 08003 *et al.*), which had denied the company's petition for cancellation of the definition of the structure, upon consideration of the data and recommendations of the Geological Survey, in a report dated October 9, 1924, reached the conclusion that the outstanding definition of the structure should be revoked and directed the Survey to take steps to revoke said definition as soon as practicable with proper consideration of the public business.

Under date of December 5, 1924, the Commissioner advised the local office that the designation was canceled as of November 20, 1924, by the decision of the Department of said date. By letter of December 11, 1924, the Commissioner directed the local office to advise certain parties who had previously applied for leases, under section 17 of the leasing act (Evanston 09534 *et al.*), of lands within the boundaries of the defined structure and whose applications had been rejected by letter of April 29, 1924, that the definition of the structure was canceled on November 20, 1924, and the vacant land was subject to appropriation under the provisions of section 13 of the leasing act.

Upon receipt of information from the Director of the Geological Survey that a test well was being drilled on Sec. 1, T. 28 N., R. 114 W., the Commissioner by telegram of December 15, 1924, addressed to the local office, vacated his order of cancellation of the designation and advised that the land was not subject to appropriation at that time.

Appellant contends that the revocation of the definition of the field having been made as of November 20, 1924, without restriction, the lands covered thereby, and particularly described in the letter of the Geological Survey to the Commissioner of the General Land Office, were thereupon subject to application under section 13 of the act of February 25, 1920, and that the telegram of the Commissioner, dated December 15, 1924, was ineffective as to all applications filed prior to that date and pending before the Department.

Appellant also contends that when the order of designation was vacated, the land involved became subject to inclusion in its existing permit by amendment and that the right of appellant remained unaffected by the delay of the Commissioner in passing upon said application to amend and by his subsequent order. In other words, when the Department decided on November 20, 1924, that the order defining the structure should be revoked and directed the Geological Survey to revoke same, the land became subject to inclusion in the existing permit by amendment, for which application had been filed May 5, 1924.

The Department can not agree with this view. It has previously been held that the definition of a structure as within a producing

oil and gas field is in effect a withdrawal of the lands from appropriation under section 13 of the leasing act and that an application for a permit even though filed prior to such definition does not confer any rights on the applicant that will inure to his benefit upon the exclusion of the lands by reason of the redefinition of the structure. See case of *H. A. Hopkins* (50 L. D. 213). It was also held in that case that where an application for a prospecting permit is denied because of the inclusion of the lands within such defined structure, such application can not be revived by reinstatement upon a subsequent restoration of the lands, but they will be open to prospecting after their restoration as though no application had been filed.

Applying the principle announced in that case, which has been uniformly followed by the Department, to the facts in this case, it is clear that appellant gained no rights through the filing, on May 5, 1924, of its application to amend its permit, which inured to its benefit upon the rendering of decision by the Department of November 20, 1924, in the Cretaceous Oil Company case, *supra*, nor upon the notation of revocation upon the records of the local office by direction of the Commissioner, and the action of the Commissioner in holding for rejection the application for amendment was correct.

The record shows that on May 9, 1925, Ben J. Atkinson filed in the General Land Office a protest against the allowance of appellant's application to amend, accompanied by an affidavit of service by registered mail upon appellant at Kemmerer. Protestant asserted a claim of superior right under his application for prospecting permit 010278, including among other lands the land in question, which application was filed in the local land office December 9, 1924, after receipt of the Commissioner's order of December 5, advising of the revocation of the designation. The protest and accompanying statement and brief were transmitted to the Department May 15, 1925, for consideration in connection with the matters set out in the appeal of the Lincoln-Idaho Oil Company. No action has been taken by the Commissioner on protestant's application for permit. In addition to asserting the superiority of his claim, protestant, however, joins with appellant in contending that the Commissioner's telegraphic order of December 15, 1924, should be held of no effect as to applications filed prior thereto and requests that the Commissioner be instructed to vacate said order.

The order of December 5, 1924, reads as follows:

> By departmental decision of November 20, 1924 (A–7148), in the case of the Cretaceous Oil Company, Evanston 08003, *et al.*, the definition promulgated April 2, 1920, of the Dry Piney structure, Wyoming, as "the known geologic structure of a producing oil field," under the provisions of the act of February 25, 1920 (41 Stat. 437), was canceled as of November 20, 1924 (describing lands).

The telegraphic order of December 15, 1924, was as follows:

Instructions December eleventh Evanston 09534 *et al.*, Dry Piney oil field designation canceled. Vacated pending result of test well Utah Oil and Refining Company on section 1, T. 28, R. 114. Stop. Land not subject to appropriation at this time.

As was stated by the Commissioner in the decision from which appeal has been taken, the order of December 15 was predicated upon the instructions of the Department of June 3, 1924 (50 L. D. 546), regarding cancellation of permits and restoration of lands to filing to the effect that where permits are canceled upon relinquishment the lands covered thereby will not be restored to further disposal under the leasing act if test wells have been or are about to be drilled upon the geologic structure which includes those lands, pending the completion of the wells. The language of the telegraphic order and the well-known facts concerning this well clearly show that the Commissioner's order was in harmony with the obvious purpose of the above-cited instructions, and there now remains the question whether protestant gained such rights through his filing six days before the issuance of said order as will entitle him to a permit notwithstanding such order.

An application for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, is in effect a mere request that a license be granted and confers upon the applicant no interest in the land or mineral deposits therein. See *Enlow* v. *Shaw et al.* (50 L. D. 339), and no such right is acquired by the filing as will prevent its allowance from being controlled by circumstances arising after its presentation or its rejection under later statutes. *Charles West, on Petition* (50 L. D. 534). The conditions which prompted the Commissioner's order of December 15 existed as well at the time of protestant's filing. There were no such changes in conditions during the brief intervening period as may be considered material within the clear meaning of departmental instructions of April 23, 1921 (48 L. D. 98), nor any subsequent delay in action upon the application which operated to deprive protestant of any substantial rights which he had at the time he filed.

The order of December 5 advised the local office of the cancellation of the definition of the structure and directed notation thereof on the records but contained no instructions regarding the disposition of the land. The purport of the telegraphic order of December 15 was to instruct the local office that because of the operations upon the test well the land was not subject to appropriation under section 13 of the leasing law. In the light of the information received by the Commissioner at the time, the action was justified and conformed to the principles announced in the departmental instructions of June 3, 1924, *supra*.

In said instructions the Department expressed the view with respect to lands which became vacant upon cancellation of permits, that in the exercise of the discretion vested in it by the leasing act, and in order to fulfill the plain purposes of such act and to conserve to the Government valuable rights, it must withhold lands from further disposal pending the outcome of tests upon the structures, and if oil or gas is discovered, hold the land for lease as contemplated by section 17 of the leasing act. The principles therein expressed are clearly applicable here and will be followed in this case.

Information regarding the progress of drilling operations upon the test well, received by the Geological Survey and the Bureau of Mines, indicates that said well has been drilled to a considerable depth without developing oil or gas to any appreciable extent. Whether or not drilling operations have been definitely discontinued and the well abandoned is not disclosed. However, the Commissioner will request reports from the above offices regarding the outcome of the drilling operations, and should it be found that the information received no longer warrants the continuance of the said order of December 15, 1924, he will revoke same and direct the local officers to fix a date when said revocation shall be effective and a time when applications for the land affected will be received, such order to be substantially in the form provided in Circular No. 929 of April 23, 1924 (50 L. D. 387), relating to cancellation of permits and restoration of the lands to filing.

The decision appealed from is affirmed. The protest of Ben J. Atkinson is dismissed and his application is rejected, and further action with respect to the lands involved in departmental decision of November 20, 1924, and Commissioner's orders of December 5, 1924, and December 15, 1924, will be taken in accordance with the views expressed herein.

OIL AND GAS REGULATIONS—PARAGRAPH 4 (C), CIRCULAR NO. 672 (47 L. D. 437), AMENDED

INSTRUCTIONS

[Circular No. 1036]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 16, 1925.

REGISTERS,
UNITED STATES LAND OFFICES:

The Department has decided that no person can, under the law, be allowed to have more than three proceedings, being, or having

originated in, applications for permits under Section 13 of the leasing act, pending or subsisting at the same time for lands in one State, and in order that applicants for oil and gas permits, may show their qualifications, as so determined, paragraph 4 (c), Circular No. 672 (47 L. D. 437), is hereby amended so as to read:

(c) A statement that the applicant is not the holder of, nor has pending applications for, more than two other oil and gas permits in the same State, nor holder of or applicant for any other permit in the same geologic structure, together with a statement of any other applications for permits or permits issued in the same State in which the applicant is directly or indirectly interested, fully disclosing the nature and extent of such interests, is required. In this connection attention is directed to the limitations and exceptions of Section 27 of the act.

In all the cases where applicants fail to show their qualifications as above indicated, you will allow them 15 days from notice thereof within which to cure the defects; but when an application is filed that shows the applicant disqualified by having three such proceedings pending in the State or one in the same geologic structure, you will reject the same subject to the right of appeal within 15 days from notice thereof.

All instructions or regulations in conflict herewith are hereby amended so as to conform hereto.

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.

AMENDMENT OF FARM-UNIT PLATS—PARAGRAPH 43 OF GENERAL RECLAMATION CIRCULAR (45 L. D. 385), AMENDED[1]

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, D. C., September 30, 1925.

Under existing regulations in paragraph 43 of the General Reclamation Circular, approved May 18, 1916 (45 L. D. 385), concerning assignment of reclamation homestead entries under the act of June 23, 1910 (36 Stat. 592), there is a hiatus in the procedure for amending plats on file in this Bureau and in the General Land Office, in cases where entrymen assign a portion of an established farm unit. To cover this point it is recommended that paragraph 43 of the

[1] Promulgated by the General Land Office by letter of October 21, 1925, to registers, United States land offices.

circular (45 L. D. 385, 396), be amended by adding after the second sentence the following:

In case of an assignment of a portion of an existing farm unit (paragraphs 37 to 39), if the evidence is found to meet the requirements of the law and regulations, the Commissioner of the General Land Office will so advise the Commissioner of the Bureau of Reclamation, who will then cause the issuance of an order amending the farm-unit plats so as to show new farm units in accordance with the assignment.

The paragraph as amended will then read as follows:

43. Assignments made and filed in accordance with these regulations must be noted on the local land office records and at once forwarded to the General Land Office for immediate consideration. Where an assignment which does not fully comply with the above regulations is presented to the local land office the register will reject same, subject to the right of appeal to the Commissioner of the General Land Office in accordance with the Rules of Practice. In case of an assignment of a portion of an existing farm unit (paragraphs 37 to 39), if the evidence is found to meet the requirements of the law and regulations, the Commissioner of the General Land Office will so advise the Commissioner of the Bureau of Reclamation, who will then cause the issuance of an order amending the farm-unit plats so as to show new farm units in accordance with the assignment. Upon the approval of an assignment, the assignee will at the proper time make payment of the water-right charges and submit proof of reclamation as would the original entryman, and after proof of full compliance with the law, may receive a patent for the land.

ELWOOD MEAD,
Commissioner.

I concur.

WILLIAM SPRY,
Commissioner of the General Land Office.

Approved October 14, 1925:

E. C. FINNEY,
First Assistant Secretary.

ASSOCIATED OIL COMPANY

Opinion, October 21, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—OPERATING AGREEMENT—ASSIGNMENT—STATUTORY CONSTRUCTION.

The restrictions of section 27 of the act of February 25, 1920, relate to the substance and not the form of assignments and contracts, and an operating agreement entered into between a permittee and an operator must be construed with reference to its legal effect rather than the purpose of the parties.

OIL AND GAS LANDS—PROSPECTING PERMIT—OPERATING AGREEMENT—ASSIGNMENT.

Any right or interest in an oil and gas prospecting permit given to an operator constitutes an assignment to the extent of the right or interest so conferred.

OIL AND GAS LANDS—PROSPECTING PERMIT—OPERATING AGREEMENT—AGENT—ASSIGNMENT—EXPENDITURES.

An agreement under which a permittee remains in sole control of the premises and responsible to the Government under the permit and the operator is merely his agent does not constitute the latter an assignee, regardless of whether reimbursement of the operator for his expenditures is to be in money or in oil produced from the land.

OIL AND GAS LANDS—PROSPECTING PERMIT—CORPORATIONS—ASSOCIATION—INDIRECT INTEREST—LIMITATION AS TO ACREAGE.

A corporation may become a member of an association and thus acquire an indirect interest in a permit subject only to the acreage limitation of section 27 of the act of February 25, 1920, but the mere conveyance to a corporation of an individual interest in a permit will not, of itself, accomplish that result.

OIL AND GAS LANDS—PROSPECTING PERMIT—OPERATING AGREEMENT—ASSIGNMENT—INDIRECT INTEREST.

An operating agreement might fall short of being an assignment in a technical sense and yet confer upon the operator such an indirect interest as would affect his qualifications under section 27 of the leasing act.

FINNEY, *First Assistant Secretary:*

I have given careful consideration to the letter to you [Joseph P. Tumulty] from Daniel W. Hone, attorney for the Associated Oil Company, of San Francisco, dated October 13, 1925, submitted for my comment by your note of October 19, 1925.

Mr. Hone desires to know "what rights and interests the Department allows a permittee to give an operator in an operating agreement and not have it considered an assignment of the permit." The answer to this is that *any* right or interest in the permit given to the operator constitutes an assignment to the extent of the right or interest so conferred. An agreement under which the permittee remains in sole control of the premises and responsible to the Government under the permit, and the operator is his agent only, would not constitute the latter the assignee, in whole or in part, of the permit; and this would be true although the agreement carried with it an arrangement whereby the operator would be entitled to reimbursement for his expenditures thereunder either in money or oil produced from the land. The determination of the question as to whether any proposed arrangement is or is not an assignment or merely an operating agreement must be made upon a full disclosure of all facts in the case and can not be reached as an abstract proposition of law.

For the reasons above given the Department has never adopted any form of operating agreement, nor would its approval of any

such instrument heretofore submitted govern its action in cases now before it or hereafter to arise. It might find that its former action was improvident or erroneous; or, that, while the agreement submitted was, in form, identical with that urged as a precedent, it was, in fact, wholly different. No proper determination of the effect of an agreement could exclude from consideration the situation, extent, and probable value of the land, the relation of the parties to each other, and such other matters as would impress the Department with the necessity for and *bona fides* of the agreement.

In this connection it may be said that an operating agreement might fall short of being an assignment in a technical sense, and yet confer upon the operator such an indirect interest as would affect the latter's qualifications under section 27 of the act of February 25, 1920 (41 Stat. 437), as, for example, where it vests in the operator the control of operations under the permit or lease.

As suggested in the last paragraph of Mr. Hone's letter, it would be possible for the Associated Oil Company to become a member of an association holding the permit, Visalia 08814–101369, and thus acquire an indirect interest therein, subject only to the acreage limitation of the law. But a mere conveyance by Burbank to the company of an undivided interest in the permit would not, of itself, accomplish that result. Obviously the restrictions of section 27 of the act of February 25, 1920, *supra*, relate to the substance and not the form of assignments and contracts. The Department is entitled to know and should have a full disclosure of all the facts relating to the formation of an association proposing to take over a permit or lease, a statement of the interest of each associate, the plan of operations, and all matters that bear upon the inquiry as to whether control of operations under or the chief interest in the permit or lease is vested in any one or more of the associates. A material inquiry would be as to the business or contractual relations of such parties.

It must not be inferred, from what has been said, that there is any present purpose to disturb any assignments or operating agreements heretofore approved by the Department upon a full and fair disclosure of fact in conformity with its requirements in the specific case; nor is there any disposition to be narrowly technical in the interpretation of the law. Where, as in the case of the Associated Oil Company, an operating agreement is submitted for consideration, the agreement must be construed with reference to its legal effect rather than the purposes of the parties.

HEIRS OF BERTIE N. DURBIN

Decided October 22, 1925

PATENT—DESCENT AND DISTRIBUTION—COURTS—TIMBER AND STONE.

Except in cases governed by section 2292, Revised Statutes, the Department does not ordinarily undertake to determine who are the heirs of a public-land claimant, but patents are issued to the heirs generally, leaving to the courts to determine who under the law is entitled to the property.

PATENT—DESCENT AND DISTRIBUTION—CHANGE OF ENTRY—TIMBER AND STONE.

Inasmuch as the provisions of the act of January 27, 1922, extend to the heirs or assigns of an entryman, the Department is charged with the duty of ascertaining who are the heirs entitled to its benefits where the application for change of entry thereunder is made by heirs, and the patent should be issued to the heirs by name.

FINNEY, *First Assistant Secretary:*

By decision of April 13, 1925, the Department approved the application of H. H. Durbin, Oliver S. Durbin, Edward L. Durbin, Taylor E. Durbin, and Augusta P. Lockhart, heirs of Bertie N. Durbin, under the act of January 27, 1922 (42 Stat. 359), to change the latter's homestead entry from N. ½ SW. ¼ and S. ½ NW. ¼, Sec. 15, T. 50 N., R. 69 W., 6th P. M., Wyoming, to SE. ¼ SW. ¼, SW. ¼ SE. ¼, Sec. 30, T. 37 S., R. 17 E., W. M., SE. ¼ NE. ¼, Sec. 17, T. 24 S., R. 9 E., W. M., and SE. ¼ NE. ¼, Sec. 10, T. 25 S., R. 9 E., W. M., Oregon. After the provisions of paragraph 6 of the regulations of March 22, 1922 (48 L. D. 595), had been complied with, final certificate issued on May 26, 1925, to "the said heirs of Bertie N. Durbin," all of whom were named in the first paragraph thereof, but Patent No. 966129 issued on September 11, 1925, to "The Heirs of Bertie N. Durbin." The patent was returned to the General Land Office with a request that it be canceled and a new one issued to the heirs by name. The Commissioner, by decision dated September 25, 1925, denied the request, and an appeal to the Department was filed.

In the decision appealed from the Commissioner held that there was no evidence of a judicial or other determination of the identity of the heirs of the homesteader.

Except in cases governed by section 2292, Revised Statutes, the Department does not ordinarily undertake to determine who are the heirs of a public-land claimant, patents, in proper cases, being issued to the heirs generally, leaving to the courts to determine who under the law is entitled to the property.

However, as the provisions of the act of January 27, 1922, *supra*, extend to the heirs or assigns of an entryman, the Department is charged with the duty of ascertaining who are the heirs or assigns entitled to its benefits, as all heirs or assigns must "file a relin-

quishment of all right, title, and interest in and to the land originally entered." The identity of assigns of an entryman are determined largely by means of abstracts of title, but the identity of the heirs must be established by such evidence as is available. If the estate of an intestate entryman has been probated, the findings of the court in the matter must be furnished. In the absence of the probate of such an estate, affidavits must be relied on. The heirs are determined in accordance with the law of the State in which the land originally entered is located, which may not be in harmony with the law of descent of the State in which the land applied for is situate, and unless the heirs are named in the patent the courts of that State might be obliged to hold that the heirs are not the persons who executed the relinquishment.

Paragraph 2 of the regulations of March 24, 1922, *supra*, provides—

> Where the application is made by heirs, satisfactory proof of heirship is required. This must be the best evidence that can be obtained, and must show that the parties applying are the heirs and the only heirs of the deceased entryman.

In the case under consideration, the Department determined that all the heirs of the entryman had joined in the application. The evidence as to heirship consisted of an affidavit by H. H. Durbin, father of the entryman, and statements made by the other heirs in the separate deeds of relinquishment.

Inasmuch as the Department necessarily determined who were the heirs of Bertie N. Durbin, no reason appears why the patent should not have been issued to the heirs by name.

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

LARS B. HARALSIDE

Decided October 22, 1925

HOMESTEAD ENTRY—CONFIRMATION—CHANGE OF ENTRY—STATUTORY CONSTRUCTION.

The act of January 27, 1922, was remedial legislation for the benefit of one, other than the original entryman, who had been permitted to enter land formerly in a confirmed entry, erroneously canceled, but it did not contemplate that the change of entry provision should extend to a claimant who is also the present holder under another form of entry.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Emanuel Wallin* (49 L. D. 544), cited and applied.

FINNEY, *First Assistant Secretary*:

The application of Lars B. Haralside for a change of entry under provisions of the act of January 27, 1922 (42 Stat. 359), has been

submitted by the Commissioner of the General Land Office to the Secretary of the Interior for appropriate action.

It appears that Haralside made homestead entry June 25, 1903, for the SE. ¼ NE. ¼, Sec. 32, N. ½ NW. ¼ and SW. ¼ NW. ¼, Sec. 33, T. 5 S., R. 19 E., M. M., Montana. The receiver's receipt upon the final entry of this tract issued September 28, 1908, but the entry was canceled August 16, 1913, upon proceedings initiated June 29, 1911, which being more than two years after the issuance of said receipt, the entryman was entitled to a patent for the land described. See section 7, act of March 3, 1891 (26 Stat. 1095, 1098), construed in *Lane* v. *Hoglund* (244 U. S. 174). It transpired that after the cancellation of said entry and on August 22, 1913, Haralside was allowed to make a second homestead entry for the same land, and after due proceedings patent issued to him thereon February 1, 1918. The act of January 27, 1922, *supra*, provides that—

> In all cases where a final entry of public lands has been or may be hereafter canceled, and such entry is held by the Land Department or by a court of competent jurisdiction to have been confirmed under the proviso to section 7 of the Act of March 3, 1891 (Twenty-sixth Statutes, page 1099), if the land has been disposed of to or appropriated by a claimant under the homestead or desert-land laws, or patented to a claimant under other public-land laws, the Secretary of the Interior is authorized, in his discretion, and under rules to be prescribed by him, to change the entry and transfer the payment to any other tract of surveyed public land, nonmineral in character, free from lawful claim, and otherwise subject to general disposition: *Provided,* That the entryman, his heirs, or assigns shall file a relinquishment of all right, title, and interest in and to the land originally entered: *Provided further,* That no right or claim under the provisions of this paragraph shall be assignable or transferable.

This act in plain terms makes an application for entry allowable only in the "discretion" of the Secretary of the Interior. It may be admitted but is not here decided that the discretion to be exercised is a legal one. Even so, the favorable exercise of that discretion upon an application invoking it, must rest upon the intent of Congress as expressed in said act. The act is remedial, and it is clear not only from the debates upon the bill but from the plain letter of the act itself, that the mischief to be remedied was that arising upon the decision of the Supreme Court of the United States in *Lane* v. *Hoglund*, *supra*, which had left subsequent entrymen and patentees of land previously embraced in the entry of another whose entry had been erroneously canceled, at the mercy of such prior claimants. The lands here involved had been earned under the law as construed but had not been patented. It had therefore become the duty of the Land Department to issue a patent to the original claimant. Because this was not done, if a qualified person other than the first entryman had entered the land, the original

claimant was in a position to proceed before the Land Department for cancellation of that entry and to demand the issuance of a patent to himself. Congress had no power to interfere with vested rights already adjudicated in principle by the Supreme Court of the United States, so the purpose was to offer these prior claimants such inducement as, if accepted, would result in protecting the subsequent claimant. This took the form of an exchange right but clearly only where the second entryman or patentee needed protection. See Administrative Ruling of December 3, 1924 (50 L. D. 684). This view is further supported by a provision in said act above quoted: "That the entryman, his heirs, or assigns shall file a relinquishment of all right, title, and interest in and to land originally entered." Manifestly, in the instant case this provision can not be complied with unless the present patentee, who is the applicant here, shall relinquish to the Government all right, title, and interest in and to said land. This provision was not to the end that the second entryman or patentee relinquish his claim as such to the land but that the first entryman, setting up a claim thereto under the act of March 3, 1891, *supra* relinquish all claim to the land so that the present claimant, or title holder, might be left secure in his holdings. In this case the original claimant and present title holder are one and the same person. His title is not disputed. He needs no protection. The act gives him none. It confers no right or privilege on him in the capacity of original claimant. See *Emanuel Wallin* (49 L. D. 544). His contention here in the last analysis means that he not only prepares to keep the patented land but asks that he be permitted to transfer his original entry thereof to another tract so that he may acquire title to that also. Differently stated, he asks that said act of 1922 be construed as an indemnity act to reimburse and satisfy him, not for his loss of the land, but for his futile efforts to secure title thereto under his first entry. No such construction can reasonably be placed upon this act.

The application is rejected.

MARTIN L. TORRES

Decided October 27, 1925

STOCK-RAISING HOMESTEAD—APPLICATION—RELINQUISHMENT.

A contract or agreement to relinquish or convey made after an application to make entry under the public land laws had been filed, but which was rescinded prior to official action upon the application, does not disqualify the applicant to make entry thereunder.

DEPARTMENTAL DECISION CITED AND APPLIED.

Rule in the case of *Blanchard* v. *Butler* (37 L. D. 677) applied.

FINNEY, *First Assistant Secretary:*

This is an appeal by Martin L. Torres from a decision of the Commissioner of the General Land Office dated February 12, 1925, rejecting his application 039071 to make stock-raising homestead entry for the W. ½ SE. ¼, S. ½ SW. ¼, Sec. 5; W. ½ and W. ½ NE. ¼, Sec. 8; and N. ½ NW. ¼, Sec. 17, T. 11 S., R. 17 E., N. M. P. M., Roswell land district, New Mexico.

Torres's application to enter the land in question, together with a petition for designation under the act of December 29, 1916 (39 Stat. 862), was filed on February 6, 1917. The application was suspended pending designation of the land under the stock-raising homestead act. The land thereafter was designated under that act, effective February 28, 1921. At that date, however, applications to make homestead entries which were partly in conflict with the application of Torres, had been filed by Teofilo Salas, and action upon application 039071 was suspended still further, pending disposition of these conflicting applications.

Later a charge was filed against Torres by a representative of the General Land Office, to the effect that he was not entitled to have his homestead application become an entry for the reason that he had not shown good faith, in that he had attempted to barter his rights by offering to sell a relinquishment to the land for the sum of $200, when the application should become an entry. Notice of this charge was mailed to Torres on December 14, 1922, and a hearing was had before the county clerk of Lincoln County, New Mexico, on July 24, 1924, at which testimony on behalf both of the Government and of the claimant was taken. The record in the case was transmitted to the General Land Office on November 20, 1924, with a recommendation by the local office that leniency be shown to Torres, as it appeared that advantage had been taken of his inability to understand English.

The Commissioner, in his decision of February 12, 1925, reviewed the evidence in the case and found that the charge made against the claimant was sustained, and, accordingly, held his application 039071 for rejection.

The chief ground of complaint upon which the charge against the appellant rests is, that as part of a contract, dated June 14, 1920, to sell other lands in which he and his half brother, William E. Brady, were interested, to one J. S. Horrell, for a consideration of $1,450, it was agreed that such consideration was to include the purchase of the relinquishment of the appellant to all lands in Secs. 5 and 8, T. 11 S., for which he had an application to make entry pending at the date of the contract. When the case was heard the Government introduced the original contract containing this provision, signed by Martin L. Torres and W. E. Brady, as parties of the first part,

and J. S. Horrell, by H. H. Horrell, as party of the second part. This contract is worded in English, bears the seals of all the parties thereto, and is witnessed by E. M. Brickley and L. E. Horrell.

The witnesses in behalf of the Government were E. M. Brickley and Priciliano Torres. Brickley who was the cashier of a bank in Carrizozo, New Mexico, prepared the contract referred to above, and he testified as to the conditions under which it was made. Priciliano Torres testified that the appellant had offered to sell the land covered by his homestead application to him for $200, but that the deal was not consummated as the appellant would not take less than $200.

Martin L. Torres, the appellant, testified in his own behalf through an interpreter. He stated, in substance, that at the time the contract to sell to Horrell was made, Horrell had told Brickley to include a clause in the contract providing for the relinquishment of the land covered by the appellant's application to make homestead entry, but that he, appellant, had directed his half brother, William E. Brady, to tell Brickley not to put such a provision in the contract as he was not selling that land. In reply to this objection Brickley had said that it would not make any difference if the relinquishment of the land was included in the contract, and that he had then proceeded to make out the contract to suit himself. The appellant stated further, that he had never offered to sell a relinquishment of the land in question to anyone since he filed on it in September, 1917.

On cross-examination the appellant testified that he understood very little English, and that he did not understand English sufficiently well to carry on a conversation in that language. He also testified positively that he had not offered to sell the land embraced in his homestead application to Priciliano Torres.

A. F. Stover and Robert Brady also appeared as witnesses for the appellant, but it is not necessary to discuss their testimony in view of the opinion which the Department entertains with reference to the merits of this case. The evidence taken as a whole makes it plain that whatever offer or agreement to sell the land, or to relinquish his entry may have been made by the appellant, such offer had been withdrawn and such agreement had been repudiated at the date of the hearing. Admitting, then, for the purposes of argument, that the Government proved its case against the appellant so far as an offer to sell and a contract to relinquish by him were concerned, the question of the effect of the subsequent withdrawal of the offer of sale and of the repudiation of the agreement to relinquish still must be considered.

A reference to the reported cases fails to disclose any published decision in which the Department has directly passed upon the ques-

tion whether an offer to sell or an agreement to relinquish made by a claimant who had filed application to make an entry under the public land laws, but which was withdrawn or repudiated prior to official action upon the application, disqualifies the claimant to make entry under such application.

It is well established that an offer or agreement to sell a relinquishment, when made after homestead entry, does not, of itself, affect the validity of the entry. *Bailey* v. *Olson* (2 L. D. 40); *Stubendordt* v. *Carpenter* (32 L. D. 139). This rule is predicated upon the fact that a claimant has the legal right to relinquish his entry, and an offer to do so, standing alone, is not evidence that the entry was made in bad faith or with speculative intent.

On the other hand, a contract or agreement to convey after final proof, made after entry, invalidates the entry. Instructions of March 11, 1922 (48 L. D. 582, 583). Such a contract or agreement is in contravention of the express terms of the statute.

A charge that an entry was speculative has been held sufficient, if sustained by evidence that, prior to entry, the claimant offered to sell a relinquishment and that, after entry, he sold the same. *Bauer* v. *Nuernberg* (46 L. D. 372).

The Department has recognized the right of an entryman to rescind an illegal agreement to convey after proof, where it appeared that the agreement was ignorantly made, and, in fact, been rescinded, and his good faith otherwise was clearly apparent. *Blanchard* v. *Butler* (37 L. D. 677); *George F. Bixler* (40 L. D. 79).

None of the cases cited, however, furnishes an answer to the question whether a contract or agreement to relinquish or convey which was made subsequent to the date of an application to enter, but which was thereafter rescinded, destroys the applicant's right to make entry under that application. The Department, for reasons given below, now holds that such a contract or agreement, after being rescinded, does not have that effect.

A charge that an applicant has entered into a contract or agreement of the character described is, in effect, a charge that he intends to make entry for speculative purposes. The validity of a charge of speculative intent must be determined by the facts at the date when the entry was made, and such a charge is not supported by evidence that the applicant made a contract or agreement to sell or relinquish but repudiated the same before his application to enter was acted upon. The Department is of the opinion, therefore, that even if it be admitted that the appellant offered to sell the land covered by his application to enter to Priciliano Torres, and that he contracted with Horrell to relinquish the entry which was to be made under that application, these facts do not disqualify him to make

entry for the land in question, as the evidence shows that, prior to action upon the appellant's application by the Land Department, he had withdrawn his offer of sale and had rescinded the contract, and in this way had regained the status of a qualified entryman.

The fact that the appellant did repudiate the contract is clearly established by the testimony of Brickley, who stated that at the time the contract was executed Horrell deposited $1,050 in the bank, which was to be delivered to the appellant and Brady when they completed their part of the agreement, but that Horrell later withdrew this money because they had failed to do so.

As a matter of fact, however, the Department is not satisfied that the evidence in the case establishes that the appellant had offered to sell the land in question, or that he had knowingly agreed to relinquish the entry which he was seeking to make. The statements of Priciliano Torres regarding the appellant's offer to sell the land are met by the direct denial of the appellant. Also, it appears that the appellant had but a slight knowledge of English and that, when the contract upon which the Government's charge is based was prepared, he was forced to depend upon the statements of others with reference both to its contents and to the binding character of its provisions. Under such conditions the appellant appears to be entitled to the benefit of the rule announced in *Blanchard* v. *Butler*, *supra*, which relieves an entryman from the consequences which are attendant upon an illegal agreement with reference to his entry, in a case where he became a party to such an agreement through misapprehension but repudiated its obligations as soon as he became aware of its illegal character.

The decision appealed from is reversed.

M. P. SMITH AND RED FEATHER OIL COMPANY

Instructions, October 28, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—TIMBER CUTTING—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

A permittee under section 13 of the act of February 25, 1920, is entitled, subject to regulation by the Secretary of the Interior under the general authority conferred upon him by section 32 of that act, to use timber standing upon the land covered by his permit for use as fuel in drilling operations.

OIL AND GAS LANDS—PROSPECTING PERMIT—TIMBER CUTTING—HOMESTEAD ENTRY—SURFACE RIGHTS.

The right of a permittee under section 34 of the act of February 25, 1920, to appropriate timber standing upon the land covered by his permit for use as fuel in drilling operations is restricted to unpatented lands upon which there is an abundance of timber and where its removal will not materially affect the use of the land by the surface entryman.

OIL AND GAS LANDS—PROSPECTING PERMIT—TIMBER CUTTING—PUBLIC LANDS.

A prospecting permittee under the act of February 25, 1920, will be granted the privilege of taking timber from other public lands outside of the permit area pursuant to the acts of June 3, 1878, and March 3, 1891, only when other fuel is not available at reasonable cost.

OIL AND GAS LANDS—PROSPECTING PERMIT—TIMBER CUTTING—RESIDENCE.

A prospecting permittee under the act of February 25, 1920, is a *bona fide* resident of the State in which the land covered by the permit is located for purposes within the operation of the acts of June 3, 1878, and March 3, 1891.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—TIMBER CUTTING—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

Under the discretionary power given the Secretary of the Interior by section 29 of the act of February 25, 1920, to dispose of so much of the surface of lands covered by permits and leases issued under that act as is not needed for the operations of the permittees or lessees, that official may authorize the cutting of timber therefrom by others pursuant to the acts of June 3, 1878, and March 3, 1891, if it is not needed for compliance with the leasing act.

FINNEY, *First Assistant Secretary:*

There is returned herewith, unapproved, your [Commissioner of the General Land Office] letter to the division inspector at Santa Fe, New Mexico, in which direction was proposed to be given that he take steps to recover for timber trespass from M. P. Smith, and the Red Feather Oil Company, the value of some 300 cords of wood cut by them from lands covered by an oil and gas prospecting permit issued under section 13 of the leasing act of February 25, 1920 (41 Stat. 437), for certain lands in New Mexico. The permit is held by M. P. Smith. This wood, it is stated, was used for fuel in drilling operations being carried on upon this land in compliance with the requirements of the permit. The drilling is being done by the Red Feather Oil Company which appears to be a drilling contractor.

Your letter states the view that this permit is only a disposition of so much of the surface of the land involved as is necessary for prospecting operations and that permits to remove timber from the land are grantable under the provisions of the act of March 3, 1891 (26 Stat. 1093), and the Department's regulations thereunder. Circular of March 25, 1913 (42 L. D. 22). Permits to cut timber from mineral lands under the act of June 3, 1878 (20 Stat. 88), and the regulations thereunder (Circular of March 25, 1913, 42 L. D. 30), were stated to be inapplicable because the lands were not "mineral lands" which were in 1878 "not subject to entry under existing laws of the United States except for mineral entry."

In addition it was suggested that this permittee, who does not reside in New Mexico, and the drilling company, which is a Colo-

rado corporation, are not eligible to secure permit to cut timber as the acts of 1878 and 1891 and the regulations thereunder, limit such rights to residents of the State in which the timber is located.

From the earliest development of public lands under both the agricultural and mineral land laws the settler, preemptor, entryman, or mineral locator in *bona fide* possession of a tract of public land has been permitted to cut and utilize such timber therefrom as was necessary to clear the land, to open and maintain mines, build homes, fences, or other improvements incidental to the use of the land in accordance with the laws under which they were claimed. Restrictive legislation, supervisory control by the Secretary, and actions for damages for timber trespass have grown out of the abuse of these privileges and were made necessary to prevent the spoliation under fictitious entries of valuable timber, properly to be held for sale or special forms of disposal by the United States. *Shiver* v. *United States* (159 U. S. 491).

The acts of June 3, 1878, and March 3, 1891, *supra*, relate to the cutting and *removal* of timber from mineral or agricultural lands for domestic use elsewhere. That is not this case. Here the lands are occupied and reserved from all disposals except such as shall be allowed by the Secretary, in his discretion, pursuant to section 29 of the act of February 25, 1920. (Instructions of July 2, 1925, 51 L. D. 166.) The ordinary rule applicable to other entries, settlements, or locations would entitle the permittee to use such timber as is necessary for the purposes for which he holds the land, i. e., for the drilling for oil.

The acts of 1878 and 1891 each authorize the taking of timber from lands not under mineral entry for use for "*mining purposes*," which would include the right to use wood for fuel in proper cases. *H. M. Gregg* (2 L. D. 827), *Morgan* v. *United States* (169 Fed. 243).

The question is, therefore, whether there is anything in the act of February 25, 1920, which shows any intention of the Congress to except permits and leases thereunder from the general rule above stated with respect to other classes of entries and locations.

The act of February 25, 1920, and the regulations thereunder permit the use, without charge, of fuel oil by permittees and lessees in drilling operations. This indicates that the intention of the Congress with respect to this form of disposal of the land was to follow the general custom of allowing the free use of resources on the land occupied in compliance with the law under which the entryman or claimant was in possession. No difference is perceived between permitting the use of oil for fuel after a discovery is made and the use of timber growing upon the land for fuel, prior to such discovery. A permittee under the act of 1920 is an

agent of the United States for certain purposes (Opinion of the Attorney General, August 29, 1925, and instructions of September 17, 1925, 51 L. D. 196), and as such would, for this additional reason, appear to be entitled to the free use of the property of the United States ordinarily given to public land claimants in other classes of entries or claims.

It is concluded that a permittee under the act of February 25, 1920, is entitled to use timber standing upon the lands covered by the permit for fuel in drilling operations, in the absence of expressed restrictions.

This right is one subject to regulation by the Secretary of the Interior under the general supervisory power given him by section 32 of the act of February 25, 1920. No regulations have been issued on the subject, and it is directed that regulations [1] adequate to the safeguarding of the timber from waste be prepared, placing the duty of immediate supervision of the use of such timber in the division inspector with the rights of appeal from his ruling to you, and thereafter to the Secretary. Upon the approval of these regulations, appropriate reference thereto will be made in such prospecting permits and leases as thereafter issue under the act of February 25, 1920.

Prospecting permits issue, in some instances, pursuant to section 34 of the act of February 25, 1920, for lands which are occupied by *bona fide* settlers, or entrymen, or patentees who have elected to take title to the land under laws reserving to the United States and its lessees and licensees the right to enter upon the lands and prospect for, mine, and remove the deposits of oil and gas reserved to the United States. *Vide* act of July 17, 1914 (38 Stat. 509), and act of December 29, 1916 (39 Stat. 862).

In cases of this kind the use of timber by prospecting permittees and lessees should be denied where title to the surface has passed from the United States, except as to the easement to use the surface so far as required for mining operations. In cases of settlers and entrymen whose entries have not been perfected, the permittee may, in special cases, be permitted to use the timber. Those cases, however, will exist only where there is an abundance of timber on the land, and the cutting will not materially affect the use of the land by the agricultural claimant. Regulations covering this usage should be prepared providing for special permits to be issued by you, after notice to the surface entryman or settler has been given.

It is noted that the division inspector asks whether permits to cut timber may be given to oil-prospecting permittees with respect to lands not covered by their permits, and whether, on the other hand, lands covered by the oil permits are subject to permits to

[1] See regulations of January 11, 1926, Circular No. 1048, post, —.

cut timber under the act of 1878 or 1891, where the persons securing the timber permits are not the oil permittees in possession of the land.

I am of the opinion that prospecting permittees are entitled to and must secure permits under the act of 1878 or 1891, dependent upon whether the lands from which the timber is to be cut are mineral or nonmineral in character before they may take fuel outside their permits and that this privilege will only be given in cases where other fuel is not available at a reasonable cost. I am further of the opinion that such permittees are *bona fide* residents of the State in which the land covered by the prospecting permit is located, and upon which operations are being carried out, within the meaning of these acts.

As hereinbefore stated, the Secretary retains the discretionary power to dispose of so much of the surface of lands covered by permits under the act of February 25, 1920, and leases under that act, as is not needed for the compliance with the requirements of the permits or leases and the right to cut timber under the permits authorized by the acts of 1878 and 1891 may be issued in proper cases although the lands are covered by oil prospecting permits or leases. The procedure in such case should be for the division inspector to notify the oil permittee or lessee to show cause why such permit to cut timber should not issue and if objection is made the matter should be referred to your office for further action, subject to the right of appeal to the Secretary.

LEE A. MEYER

Decided October 31, 1925

COAL LANDS—LEASE—RENTAL—PATENTS—RESERVATIONS—SURFACE RIGHTS.

The provision in section 7 of the act of February 25, 1920, requiring the payment of a rental on the basis of the acreage wherein coal deposits are leased, is applicable to leased coal lands the surface of which has been patented under the agricultural land laws with the reservations prescribed by the act of June 22, 1910.

COAL LANDS—LEASE—RENTAL—NOTICE.

Omission from the public notice which the departmental regulations require to be issued upon the offering of coal deposits for lease under the act of February 25, 1920, of the statement that a rental must be paid by the lessee does not excuse the lessee from the obligation to make such payment.

FINNEY, *First Assistant Secretary:*

Lee A. Meyer, applicant for a coal lease under the act of February 25, 1920 (41 Stat. 437), Billings, Montana, serial 025376, has appealed from the action of the Commissioner of the General Land

Office in his order of February 20, 1925, requiring that appellant comply with the requirements of section 15 of Circular No. 679, containing the coal land laws and regulations (47 L. D. 489), which provides, among other things, for the payment of the annual rental in advance, for the first year of the lease applied for, as fixed in accordance with the provisions of section 7 of the leasing law.

On appellant's petition and acceptance of the terms recommended by the Director of the Geological Survey, as to royalty, minimum investment, and minimum production, the Commissioner directed publication of notice of offer of lease at public auction of the land applied for, which was designated as coal leasing unit No. 531, Montana No. 108, comprising lots 18 and 19, NE. ¼ SW. ¼, and NW. ¼ SE. ¼, Sec. 6, T. 1 S., R. 62 E., M. P. M., containing 160 acres, the notice specifying:

> A lease of said unit will be made at a royalty of ten cents per ton, mine run, a minimum investment requirement of $500 during the first three years of the lease and a minimum production requirement of 1,600 tons per year, commencing with the fourth year of the lease.

There being no bidders on the day fixed for the sale, the local officers advised appellant that he would be permitted to comply with the requirements of the Commissioner's order applying to successful bidders.

Appellant calls attention to section 12 of the coal-leasing regulations, which requires that the notice will describe the land, state the amount of royalty and rental to be charged, and the minimum investment required. No mention having been made in the published notice regarding rental charge, appellant states that he is in doubt as to whether the rental mentioned in the act is actually charged on leasing units to the surface of which the United States has granted patents, and desires a decision from the Department in the matter.

The records of the General Land Office show that the NE. ¼ SW. ¼, said Sec. 6, was patented February 9, 1920, and lots 18 and 19 on August 18, 1922, under the homestead laws, with coal reservation to the United States under the act of June 22, 1910 (36 Stat. 583), together with the right to prospect for, mine, and remove the same.

In the opinion of the Department the language of the acts of Congress pertinent to this question is clear and unequivocal.

The act of June 22, 1910, *supra*, provides (Sec. 3)—

> * * * 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. * * * Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, 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.

The act of February 25, 1920, *supra*, under which application herein was made provides in Section 2—

> That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant. * * *
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> * * * * * * *
>
> Sec. 7. That for the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than $1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. * * *

The requirement that a rental be paid on the basis of the acreage wherein the coal deposits sought to be leased are found, is statutory and the fact that the land is covered by a patented entry under the agricultural land laws is immaterial, so long as such patent has been issued subject to the provisions, limitations, and reservations of the act of June 22, 1910, *supra*. The deposits belong to the United States and the right to prospect for, mine, and remove the same has been reserved. The rights of the patentee, or his successors, are protected by the provision for the payment of damages for injuries caused to crops or improvements by the mining operations and the regulations under the leasing law require the lessee to furnish satisfactory bond as a guaranty of such protection. So far as the deposits and the right to mine and remove same, are concerned, the title under the agricultural patent is without force or effect.

While the regulations provide that the amount of rental to be charged should be stated in the published notice, the omission of

such statement from the notice does not excuse the lessee from the obligation to make such payment, in the face of the express requirements of the law and the regulations. The minimum rentals prescribed by the act having been fixed by the Department as the rental charge in all cases, as appears in paragraph (2c) of the form of lease published in the regulations, and in view of the fact that the charge is uniform and is generally understood and accepted, it has not been included in the published notice in particular cases.

It must, therefore, be held that the provision of the leasing law for the payment of rental at a price per acre fixed by the Secretary of the Interior, in accordance with section 7 of said law, is applicable to cases where the deposits leased are covered by patents issued under the agricultural land laws, with the reservation provided for by the act of June 22, 1910, *supra*.

The decision of the Commissioner is accordingly affirmed.

UNITED STATES v. HURLIMAN

Decided October 31, 1925

STOCK-RAISING HOMESTEAD—MINING CLAIM—OCCUPANCY—POSSESSION.

Actual possession of a lode mining claim by one who has made no discovery and is not in diligent prosecution of work leading to discovery is no bar to the allowance of a stock-raising homestead entry which includes the part of the subdivision upon which the mining claim is located where forceable intrusion upon such possession is not necessary in order to initiate the right.

COURT DECISION CITED AND DISTINGUISHED.

Case of *Atherton* v. *Fowler* (93 U. S. 513), cited and distinguished.

FINNEY, *First Assistant Secretary:*

On August 25, 1919, Helen V. Hurliman made application, Denver serial 026548, to make additional entry under the act of December 29, 1916 (39 Stat. 862), for the S. ½ NE. ¼, N. ½ SE. ¼, Sec. 26, T. 6 S., R. 70 W. 6th P. M., which was allowed March 30, 1922. On May 11, 1923, upon her application made October 15, 1919, the entry was amended to include the SE. ¼ SE. ¼, Sec. 23, and NE. ¼ NE. ¼, Sec. 26, of the same township and range.

Adverse proceedings against this entry were instituted by the Government, charging that at the date of the application the land was not subject to entry under the act of December 29, 1916, *supra*, for the reason that the subdivisions thereof embraced subsisting mining locations. These proceedings were consolidated with like proceedings brought against the adjoining entry of James H. Perley, serial 026395. Upon the record made at a hearing of the charges the Commisioner of the General Land Office found that certain mining locations, the Lady Belle, Wonder, and Jack Oak lode

claims were valid and subsisting at the time Hurliman's application was filed; that there was sufficient evidence of mineralization within these claims to justify a reasonably prudent man in the expenditure of time and money with the hope of developing a paying mine. The entry was accordingly held for cancellation to the extent of its conflict with these claims, and a segregation survey was directed in the event the decision became final. Mrs. Hurliman has appealed, challenging the findings as to the Jack Oak claim, which claim conflicts with the land first applied for. The evidence shows that the Jack Oak claim was located June 2, 1914, by John F. Egan, the claim being monumented, posted, and a certificate of location thereof duly recorded. On February 26, 1918, Egan amended his location discarding certain land in the north portion of the claim and adding certain land to the south. He testified that at the time of the original location he encountered upon the claim in an open cut made by him a solid body which appeared to be mineralized vein matter and which seemed to be a well-defined vein in contact with country rock, whether confined to the walls he could not say; that this vein could be traced through his entire claim and for three-fourths of a mile. He stated he had assays made, one to the best of his recollection showing 0.20 ounce in gold, 3 ounces in silver, and 5% copper; that in another excavation on another vein within the claim there was a sulphide ore which had been tested years ago and ran silver, copper, and lead. He admitted that he had made no "discovery" since the time of his location, and until 1919 his work of a mining nature consisted in doing so-called annual assessment work, skipping some years and not doing the full amount in others, but making it up later. This work consisted in digging a 40-foot open cut along the vein. Annual assessment work was performed from 1919 to 1924, inclusive, consisting of the driving of a tunnel 40 feet long that did not strike the vein and digging four 10-foot shafts in prospecting, having done in all 140 linear feet of work of the value of $800 or $900. It appears that Egan has resided in the locality of his claim for 28 years, doing assessments and other work, and from the spring of 1919 he has resided upon and has been in actual possession of the Jack Oak claim, having a good house thereon and other outbuildings. The entrywoman was aware of Egan's possession at the time she filed her application, but it does not appear that she has intruded thereon.

The entry was examined casually by the Government's inspector, Berry, in 1920 and more particularly by him and mineral inspector Doyle in 1923 and 1924. They examined the surface and the old and more recent workings on the Jack Oak claim and state there are two parallel veins traversing the entry. In an open cut they

appeared to have found one sample worthy of assay, which according to the assay certificate yielded 0.01 ounce in gold of the value of 20¢, 0.23 ounce of silver of the value of 0.148¢, 0.30% copper of the value of 81¢ and 0.9% zinc of the value of $1.06; a total of $2.21 per ton. The mineral inspectors admit that the gold and silver is but a trace and would yield no return from the smelter. There is nothing to show that the insignificant copper content is valuable and the zinc is characterized as a blackjack zinc penalized at the smelter. Both mineral inspectors were of the opinion that the claim was worthy of prospecting. Berry bases his opinion on the fact that the vein is strong and persistent though not mineralized throughout, rather than upon the value of the disclosure in the mineral-bearing rock, and Doyle when asked if he would advise the expenditure of money in developing the mining claims, said that it would be warranted on the Lady Belle and Wonder but he did not mention the Jack Oak claim in his response.

Samuel Smothers, a witness for the Government, testified that he located a mining claim upon practically the same area in 1896 on a six-foot vein, obtained assays as high as $54 in value and believes the land valuable for mineral. He admits, however, that he spent $9,000 upon machinery and mining operations on this ground and never made anything out of his operations and sold the claim in 1909 for $300 to persons who worked it a while in another place and then abandoned it. The claimants of the other lode claims and others were of the opinion that the land was worthy of prospecting but contributed nothing to the evidence bearing upon discovery.

Warren C. Prosser, a mining engineer and United States mineral surveyor, testified for the defendant that he examined the excavations on the claim made on a contact with schist and hornblende schist, which showed mineralization on the contact; that the hornblende looks very much like blackjack zinc, a form of sphalerite known as marmatite; that the hornblende showed hematite and azurite and sometimes a speck of chalcopyrite, but that the showing has no earmarks of developing into a real mineral deposit and while he took samples, he found nothing that he would assay and the deposit is not extensive enough to constitute a shipping property; that he looked in vain for an intrusive porphyry which would act as a mineralizing agent; that he found yellow oxidized material that might be gold but it looked very barren as he went down the shaft; that the marmatite because of the presence of iron therein, was not acceptable at the smelter; that if the deposit was such as would be acceptable it would have to run 30% zinc, and there was no showing indicating that it would run that percentage; that it would cost $15.60 per ton to get the material to the smelter and if it was picked

out with a pair of tweezers it would not pay for the overhead expense and would yield no margin of profit upon shipment.

The history of prospecting and mining operations in the locality of this claim as detailed by the Government's own witnesses strongly corroborates the conclusion of this witness which was concurred in by other witnesses for the defendant. It is clearly shown that the mineralized rock on this claim is similar to that on adjacent unpatented and patented claims from which shipments were made by separating and discarding the zinc—the predominant deposit on this claim—which the mineral claimant admits. It is also shown that after extensive exploration going back 40 or 50 years, all mining operations have long ceased. No one made a living out of what was mined and shipped. The patented claims have been sold for taxes to homesteaders who use the land for grazing. The Government's experts practically admit that the deposit found is not mineable at present. The Government attempted to show that a new process had been devised to treat deposits of like character and the installation of an available smelter using this process was in contemplation, but the evidence on this point is vague and pure hearsay.

To constitute a valid discovery upon a lode mining claim, the following elements are necessary:

1. There must be a vein or lode of quartz or other rock in place.
2. The quartz or other rock in place must carry gold or some other mineral deposit.
3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

Many factors enter into the third element; the size of the vein, so far as disclosed, the quantity and quality of mineral it contains, its proximity to working mines, and location in an established mining district, the geologic conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not. *Shoshone Mining Co.* v. *Rutter* (87 Fed. 801); *Jefferson-Montana Copper Mines Co.* (41 L. D. 320); *East Tintic Consolidated Mining Co.* (43 L. D. 79).

In *Iron Silver Mining Company* v. *Mike and Starr Gold and Silver Mining Company* (143 U. S. 394, 405), it is stated "the amount of ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justifies exploration and working."

When these factors are considered in connection with the known conditions upon this and surrounding claims at the time of the

inception of the stock-raising entryman's rights, the justification for spending time and money in further exploration of the Jack Oak claim is not apparent. Assuming that the showings of mineralization found upon the Jack Oak claim were disclosed to the mineral claimant at the date of the inception of Hurliman's stock-raising homestead entry—subsequent discoveries being no ground for contest, *Rosetti et al.* v. *Dougherty* (50 L. D. 16)—nevertheless the Department is unable to find that a discovery as defined above had been made at such time.

The acts of Congress prescribed two and only two prerequisites to the vesting in a competent locator of a complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land, within the limits of the claim of a mineral-bearing lode and the distinct markings of the boundaries of the claim so that they can be readily traced. No appropriation of the land is made until these requirements are fulfilled. *Erwin* v. *Perego* (93 Fed. 608, 611); *Nevada Sierra Oil Co.* v. *Home Oil Co.* (98 Fed. 673, 677).

But it is held that upon the public domain a miner may hold the place in which he may be working—and in some jurisdictions he may hold to the limits of his claim—against all others having no better right, and while he remains in possession diligently working toward discovery is entitled at least for a reasonable time to be protected against forcible, fraudulent, and clandestine intrusion. *Union Oil Company of California* v. *Smith* (249 U. S. 337, 347). In *Van Dyke Copper Co.* v. *Malott* (50 L. D. 326, 328), it was held that so long as such occupancy and diligent prosecution of work continues the land is not subject to application and entry under the provisions of section 2306 of the Revised Statutes. The work of the mineral claimant in the case presented here consisted solely of desultory performance of annual assessment work prior to the inception of the stock-raising entry. The mere doing of such assessment work is not diligent prosecution of work. *McLemore* v. *Express Oil Co.* (158 Cal. 559); *Pacific Midway Oil Co. et al.* (44 L. D. 420, 435); *Mountain States Development Co.* v. *Tyler et al.* (50 L. D. 348). The mineral claimant therefore had not, and consequently does not now have, any right to perfect the title or to maintain exclusive possession of the claim under the mining laws.

The Jack Oak claim being a nullity, and the Department having the undoubted jurisdiction to declare it such, *Cameron* v. *United States* (252 U. S. 450), the question remains whether the actual possession of the claim by the mineral claimant and his use and occupation thereof under a colorable claim under the mining law precludes the inclusion thereof in a stock-raising homestead entry.

In the case of *Thallman* v. *Thomas* (111 Fed. 277), it was said:

A valid claim to unappropriated public land can not be instituted while it is in possession of another who has the right to its possession under an earlier lawful location. Risch v. Wiseman, 36 Or. 484, 59 Pac. 1111. 78 Am. St. Rep. 783; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240. Nor can such a claim be initiated by forcible or fraudulent entry upon land in possession of one who has no right either to the possession or to the title. Atherton v. Fowler, 96 U. S. 513, 516, 24 L. Ed. 732; Trenouth v. San Francisco, 100 U. S. 251, 256, 25 L. Ed. 626. But every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. Belk *v.* Meagher, 104 U. S. 279, 287, 26 L. Ed. 735; Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.), 98 Fed. 673, 680.

The observation above quoted has been frequently cited and applied. See *Pacific Live Stock Co.* v. *Isaacs* (96 Pac. 460); *Morrow* v. *Warner Valley Stock Co.* (101 Pac. 171); *San Francisco Chemical Co.* v. *Duffield* (201 Fed. 834).

In *Lindgren* v. *Shuel* (49 L. D. 653, 654), the Department said: "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." Citing *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). An examination, however, of the facts in that case and those cited in its support will disclose that they involved questions of unlawful intrusion upon possession or were cases where the claimant in possession had such equities in the land as entitled him to acquire the title under some applicable law.

An exception to the rule is made in some cases, which has application to the case at bar. It has been held that where a prior occupant has possession of a part of a governmental subdivision of public land and the claimant enters upon the unoccupied part claiming the right to enter the whole of it, and in pursuance of such claim files his declaratory statement and obtains a certificate of entry on the whole tract he will be allowed to recover possession of the part occupied by the prior possessor. *Whitaker* v. *Pendola* (78 Cal. 296; 20 Pac. 680); *Havens* v. *Haws* (63 Cal. 514).

In distinguishing the facts in the cases last cited from that before the court where a peaceable homestead entry had been made covering lands in the actual possession of another inclosed by fencing and used for agricultural purposes, the supreme court of California in the case of *Gragg* v. *Cooper et al.* (89 Pac. 346), observed:

When the reasons for the doctrine stated in *Atherton* v. *Fowler, supra,* are considered, the distinction between these cases and the others clearly appears. Where the applicant can find a part of the land unoccupied, he is

at liberty to enter thereon, and can do so without danger of the strife, altercations, violence, or breaches of the peace, such as would be invited by an entry upon the actual possession of another. The reason of the rule does not exist, and the rule ceases. Having the right to take up this part of the land, and having obtained the evidence of title to the whole thereby, his title will prevail over the person in possession who can show no title whatever, but merely possession.

The reasoning of the court in the case last quoted commends itself to the Department. There is nothing in the doctrine announced in the *Atherton* v. *Fowler* case which upholds and encourages the private appropriation of land under colorable mining locations, or which will preclude the disposition of such land under the stock-raising homestead law so long as it is in the actual possession of one under such a location, where the entry of the agricultural claimant is not attended by an intrusion upon the actual possession of such other and where such intrusion is not necessary in order to initiate the right.

The fact, then, that a part of the land for which application is made under the stock-raising homestead law, is in the actual possession of one who claims it under the mining laws but who has made no discovery and is not in diligent prosecution of work leading to discovery is no bar to the allowance of the application for such part.

In accordance with these views the adverse proceedings are dismissed and the Commissioner's decision is reversed as to the land embraced in the Jack Oak claim.

This decision determines only who has the better claim to the land. The right of possession must be enforced if necessary by resort to lawful processes of the courts. Neither does it preclude the mineral claimant from pursuing explorations for mineral upon the entry subject to conditions described in section 9 of the act under which the entry was made.

HOMESTEAD ENTRYMEN PLACED UNDER JUDICIAL RESTRAINT—CIRCULAR NO. 570 (46 L. D. 224) MODIFIED

INSTRUCTIONS

[Circular No. 1037]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 31, 1925.

REGISTERS,
UNITED STATES LAND OFFICES:

Departmental decision of July 31, 1925 (51 L. D. 174), upon the appeal of *George L. Kile*, modified instructions of October 20, 1917

(46 L. D. 224), relating to homestead entrymen who are placed under judicial restraint.

Pursuant to the said decision, General Land Office Circular No. 570 (unpublished), issued November 3, 1917, which promulgated the instructions of October 20, 1917, *supra*, is hereby amended as follows:

> Since under said decision the period of suspension of an entry is no longer to be concurrent with the period of the entryman's incarceration but is left to the discretion of the Commissioner of the General Land Office, you will hereafter, upon the filing of evidence of judicial restraint, refer the case to this office for consideration and appropriate action.

This office will then grant a period of suspension, having regard to the facts and circumstances adduced, with a view to affording the entryman full opportunity to perfect or dispose of his entry.

WILLIAM SPRY,
Commissioner.

SHOWINGS BY APPLICANTS FOR PLACER PATENTS

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 4, 1925.

REGISTER,
GLENWOOD SPRINGS, COLORADO:

In reference to applications for patents filed in your office for oil shale placer mining claims, taken by legal subdivisions of the public land surveys, your attention is called to the requirements of paragraphs 41 and 60 of the Mining Regulations, Circular No. 430 (49 L. D. 15), as to the applicant showing in detail data with regard to discovery, placer character of the land, nature, value, and location of the improvements made on the claim, etc.

Paragraph 60 provides that in placer applications, in addition to the recitals necessary in and to both vein or lode or placer applications, the applicant must furnish certain data, and that since no report of a mineral surveyor is required where the claim is described by legal subdivisions, the claimant 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. Under paragraph 41 it is provided that the application should show the precise place within the limit of each of the locations where the vein or lode has been exposed or discovered. The provisions of paragraph 41, so far as applicable, must be followed by applicants for placer mining claims,

and under this the precise point of discovery on the placer claim should be given along with the points on the claim where cuts or other work has been done by the placer claimant as patent expenditure.

You are therefore authorized and directed to require every applicant for placer mining patent where the claims are described by legal subdivision to make full showing under paragraphs 41 and 60, and any application which fails to contain the required data should be held for rejection, subject to amendment or appeal within 30 days from notice of your action. Since this data is especially valuable to the inspector who may examine the claim, it should be completed and copy furnished to the division inspector at the time you give him the usual notice of the filing of the application.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

ROBERT HILDRETH

Decided November 5, 1925

STOCK-RAISING HOMESTEAD—ADDITIONAL—ENLARGED HOMESTEAD.

One who possessed the requisite qualifications at the time he made an original homestead entry is not disqualified from making an additional entry under the enlarged or stock-raising homestead acts because of the ownership of land acquired after making the original entry.

FINNEY, *First Assistant Secretary:*

Robert Hildreth has appealed from a decision of the Commissioner of the General Land Office dated May 12, 1925, rejecting his application to make entry under the stock-raising homestead act for NW. ¼ SE. ¼, S. ½ NE. ¼, NE. ¼ NE. ¼, Tract 73, W. ½ SE. ¼, E. ½ SW. ¼, S. ½ NW. ¼, Tract 72, and S. ½ NE. ¼, Tract 75, T. 24 N. R. 13 W., M. D. M., San Francisco, California, land district.

The application was filed March 29, 1924, and was rejected because of conflict with the additional entry under the stock-raising homestead act made by George C. Bauer, the application having been filed January 26, 1923, and allowed March 1, 1925.

Hildreth contends that Bauer's entry should be canceled because he is the owner of 1,760 acres of land in Mendocino County, California.

If Bauer was qualified to make the original entry on which the additional entry in conflict is based—and it is not alleged that he

was disqualified—the fact that he acquired a larger tract of land after making the original entry would not disqualify him from making the additional entry. In making original entries under the stock-raising homestead act and under other homestead acts as well, it is necessary that the applicant show that he is not the proprietor of more than 160 acres of land in any State or Territory; whereas an applicant to make an additional entry under the stock-raising homestead act is not required to disclose whether he has acquired, by purchase, any land, for the reason that sections 3, 4 and 5 of the act are remedial and the enlargement (because of the character of the land) of an existing incomplete or a perfected homestead entry. It is because thereof that a woman who marries after making an original entry is allowed to make an additional entry under either the enlarged or the stock-raising homestead acts. *Alice C. St. John et al* (38 L. D. 577), and instructions of August 24, 1910 (39 L. D. 164).

The application in question was properly rejected. The decision appealed from is therefore affirmed.

OLIVER P. MORGAN

Decided November 5, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—AMENDMENT—RESERVATIONS—SURFACE RIGHTS—WAIVER.

One who applies for a permit to prospect for oil and gas on lands embraced within his unrestricted homestead entry must file an express consent to the amendment of his entry, subjecting it to the reservations required by the act of July 17, 1914, or suffer rejection of his application.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Arsene J. Martin* (49 L. D. 608), and *Heirs of Robert H. Corder* (50 L. D. 185), cited and applied.

FINNEY, *First Assistant Secretary:*

On April 21, 1918, Oliver P. Morgan filed application, Glenwood Springs 016196, to make additional homestead entry under the act of July 3, 1916 (39 Stat. 344), for the NE. ¼ NW. ¼, Sec. 13, T. 12 N., R. 89 W., 6th P. M. The entry was allowed without mineral reservation on August 15, 1921. On August 23, 1924, Morgan filed application 025486 for an oil and gas prospecting permit under the act of February 25, 1920 (41 Stat. 437), covering his entry and claiming a preference right to such a permit under section 20 of said act. Therein he expressed the belief that the land offered a favorable field for prospecting for oil and gas, and there was a possibility of finding such deposits.

It being a settled rule that where one has an entry without a reservation of the mineral, nobody (not even the entryman himself)

may acquire a permit so long as the entry stands in that shape (Circular No. 672, 47 L. D. 437, 470), the Commissioner of the General Land Office required Morgan to consent to an amendment of his entry, reserving the oil and gas in accordance with the provisions of the act of July 17, 1914 (38 Stat. 509), or suffer cancellation of his entry.

Morgan has appealed. The only contention in the appeal that need here be noticed is to the effect that the entry having been initiated prior to the leasing act, without mineral reservation, it is not subject thereto.

The reservation is authorized under the act of July 17, 1914. The Government has the right to classify 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. *Arsene J. Martin* (49 L. D. 608).

This application for a permit, however, constitutes an admission that the land has a prospective value for oil and gas. Hence, procedure under paragraph 12 (c) of the oil and gas regulations (Circular No. 672) requiring consent to such a reservation was unnecessary. Morgan's application for a permit, admitting the oil and gas possibilities of the land, is regarded as an election to take a patent subject to the reservations of the act of July 14, 1917, *supra* (*Heirs of Robert H. Corder*, 50 L. D. 185), and the Commissioner may have so treated it.

Amendment of the entry, subjecting it to the provisions and reservations of the act of July 17, 1914, will accordingly be made, and as so amended the entry will remain intact, but, inasmuch as Morgan has objected to the issuance of a permit subject to these conditions, he should be required to signify his desire to have the permit issued to him upon his entry as amended.

In the event he fails so to do, his permit application should be rejected and the land will become subject to a like application by others who may apply therefor. The case is accordingly remanded for appropriate action as herein indicated.

HEIRS OF ANTHONY W. PUCK

Decided November 5, 1925

TIMBER AND STONE—APPLICATION—HEIRS—FINAL PROOF—PAYMENT.

Where an applicant under the timber and stone law dies after the filing of an allowable application thereunder, his heirs will be permitted to make proof and payment.

DEPARTMENTAL DECISION OVERRULED.

Case of *Burns* v. *Bergh's Heirs* (37 L. D. 161), vacated. See regulations of September 20, 1922, Circular No. 851 (49 L. D. 288).

FINNEY, *First Assistant Secretary:*

This is an appeal by the heirs of Anthony W. Puck, deceased, from a decision of the Commissioner of the General Land Office dated June 1, 1925, holding for cancellation the final cash certificate issued to said heirs on January 27, 1925, under the application of Anthony W. Puck to purchase lots 4 and 5, Sec. 14, T. 69 N., R. 21 W., 4th P. M., Minnesota, under the so-called timber and stone law (act of June 3, 1878, 20 Stat. 89).

The application to purchase was filed in the Duluth office on March 1, 1922. The date of the death of the applicant is not given. The land and timber were appraised on June 14, 1924. Pursuant to notice of the appraisal issued October 15, 1924, the heirs of the applicant deposited the appraised price ($165), and after publication of notice submitted final proof.

In holding the entry for cancelation the Commissioner cited the departmental decision of September 14, 1908, in *Burns* v. *Bergh's Heirs* (37 L. D. 161), in which it was held (syllabus):

> No such rights are acquired by the mere filing of a timber and stone sworn statement as will upon the death of the applicant prior to notice, proof and payment descend to his heirs.

At the date of the decision cited the regulations under the timber and stone law were silent as to the rights of the heirs of a person who had merely filed a sworn statement. The revision of the regulations which was approved on November 30, 1908 (37 L. D. 289), was also silent on the subject, as was also the revision approved on January 2, 1914 (43 L. D. 37). However, the revision approved on September 20, 1922 (49 L. D. 288), and printed as Circular No. 851, contains the following under "Time, Place, and Method of Making Final Proof:"

> 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.

It must therefore be held that the rule announced in the decision relied on by the Commissioner was superseded and overruled by the paragraph of the regulations above quoted.

The decision appealed from is reversed.

CONRAD KOHRS

Decided November 9, 1925

FOREST LIEU SELECTION—VESTED RIGHTS—AFFIDAVIT.

Selections under the act of June 4, 1897, are limited to "vacant land open to settlement," and a vested right is not acquired by a selector prior to his submission of proof that the selected land is unoccupied and nonmineral in character.

FOREST LIEU SELECTION—APPLICATION—VESTED RIGHTS—AFFIDAVIT—NOTICE.

A selection under the act of June 4, 1897, becomes effective to vest a right in the selector to the selected lands immediately upon the filing of a complete application, including the nonmineral and nonoccupancy affidavit, notwithstanding that there may be delay in publication and posting of notice.

FOREST LIEU SELECTION—APPLICATION—WITHDRAWAL—FLORIDA.

An incomplete application, even though ordinarily subject to the rules relative to curing defects, is not a "valid existing right" within the meaning of the Executive order of July 3, 1925, which withdrew certain lands and islands in the States of Alabama, Florida, and Mississippi.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Gray Eagle Oil Company* v. *Clarke* (30 L. D. 570), cited and applied.

FINNEY, *First Assistant Secretary:*

At the Gainesville, Florida, land office on June 22, 1925, Conrad Kohrs applied under the exchange provisions of the act of June 4, 1897 (30 Stat. 11, 36), and the act of March 3, 1905 (33 Stat. 1264), to select the SW. ¼ SW. ¼, Sec. 28, T. 2 S., R. 21 W., T. M., in lieu of SW. ¼ NW. ¼ (or lot 2), Sec. 31, T. 37 S., R. 4 E., W. M. (40.16 acres), within the Cascade Forest Reserve, Oregon.

Notice for publication issued July 10, 1925, and proof of publication was filed September 21, 1925. A nonmineral and nonoccupancy affidavit and proof of posting on the land were filed August 24, 1925. A copy of the published notice remained posted in the local office during the period of publication.

The selected land is within three miles of the Gulf of Mexico.

By decision dated September 22, 1925, the Commissioner of the General Land Office held the selection for rejection because the selected tract was included in the Executive order of July 3, 1925, withdrawing under the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), from settlement, location, sale, entry, and all forms of appropriation, subject to valid existing rights in and to the same, pending classification and legislation, all lands (with certain exceptions not necessary to here state) on the mainland within three miles of the coast in the States of Alabama, Florida, and Mississippi, and all islands in the States of Alabama and Mississippi situated in the waters off the coast or in the coastal waters of the said States. An appeal to the Department

has been filed, contending that it was error to hold (1) that the selection was not complete on July 3, 1925, and (2) that it was not a valid existing right on July 3, 1925.

Selections under the act of June 4, 1897, *supra*, are limited to "vacant land open to settlement." Shortly after the act was approved (see 30 L. D. 568) the Department approved a form (4–643) for use in making selections in lieu of lands covered by a patent in a forest reserve, which required the selector to accompany his application with "an affidavit showing the land selected to be nonmineral in character and unoccupied."

In *Gray Eagle Oil Company* v. *Clarke* (30 L. D. 570), the Department held (page 581), referring to said form 4–643—

> * * * It is thus clearly made incumbent upon one seeking to take advantage of the offer made by this law to establish the fact that the land he selects is of the character contemplated by the law. Until this fact is established his proffer of exchange is not complete. Until then he has not made out a case which shows upon the face of the papers that he has so far complied with the conditions of the act of 1897 as to convert the offer of exchange contained in said act into a contract fully executed upon his part. To lodge in an applicant for exchange of lands under this law a vested right as against the Government or third parties, it must be made to appear that the land sought to be acquired by him is of the character contemplated by that law.
>
> * * * * * * *
>
> Ordinarily, as between the Government and the selector, there would seem to be no good ground for refusing to permit him to submit the necessary proof at a time subsequent to the date of the attempted selection; but since this proof is essential to complete a selection so as to constitute it a contract fully executed on the selector's part, his rights would have to be determined as of the date when the selection is thus completed.

Counsel for appellant refers to the regulations of August 4, 1921 (48 L. D. 172), as sustaining his contentions. The following is quoted from said regulations:

> The regulations governing selections by States of indemnity school lands and of lands under quantity grants for specific purposes (39 L. D. 39) require publication of notice of the selections to be made by the State and proof thereof filed in the local land office within 90 days after receipt by the State officials of the notice for publication as prepared by the register at the time of the acceptance of the selection. Such selections, regular in all respects when filed, and perfected by the timely filing of the requisite proofs, are effective from the date filed. If defective when presented, or not perfected by timely filing of proofs, they are effective only from the time the defect is cured or the required proofs are filed.

Being defective when presented, the selection in question was not effective until the nonmineral and nonoccupancy affidavit was filed on August 24, 1925.

The fact that publication and posting of notice of the selection was not completed prior to July 3, 1925, is not controlling. If the selector had, prior to the withdrawal, filed a complete application,

including the nonmineral and nonoccupancy affidavit mentioned in form 4–643, he would have been entitled to later furnish proof of publication and posting, and the withdrawal of July 3, 1925, would not have attached to the selected land.

An incomplete application, even though ordinarily subject to the rules relative to curing defects, is not a "valid existing right" within the meaning of the Executive order of July 3, 1925.

The decision appealed from, modified to agree herewith, is affirmed.

CONRAD KOHRS

Motion for rehearing of departmental decision of November 9, 1925 (51 L. D. 270), denied by First Assistant Secretary Finney, February 18, 1926.

MIDLAND OILFIELDS COMPANY, LTD., ET AL.

Decided November 9, 1925

OIL AND GAS LANDS—LEASE—STOCK OWNERSHIP—DIRECT AND INDIRECT INTERESTS.

Neither a holding corporation having no leasehold interest under the act of February 25, 1920, other than through ownership of stock in a subsidiary corporation, nor such subsidiary, is disqualified from acquiring and holding an indirect interest in two leases on the structure of a producing oil or gas field by reason of holding two direct leases under section 14 of that act, in the same State, but on other structures, if the acreage limitation of section 27 of the act is not exceeded.

FINNEY, *First Assistant Secretary:*

With your [Commissioner of the General Land Office] letter of October 8, 1925, you transmitted, with recommendation of approval, two drilling contracts between the Maricopa Star Oil Company and E. L. Blanck, lessees of oil and gas leases 033363 and 033366, Los Angeles, covering, respectively, the W. ½ NW. ¼ SW. ¼ and E. ½ NW. ¼ SW. ¼, Sec. 32, T. 12 N., R. 23 W., S. B. M., California, in the Sunset Oil Field, and the Midland Oilfields Company, Ltd. These contracts give the Midland company certain interests in the leases.

Upon consideration of the records the Department found that it was not clear whether the Midland company was qualified to acquire any leasehold interest under the act of February 25, 1920, as it was shown that the American Oilfields Company held practically all of the stock of the Midland; that the California Petroleum Corporation held practically all of the stock of the American Oilfields Company, in addition to having at least seven other sub-

sidiary companies; while there was no sufficient showing as to any possible leasehold interests of these various companies.

By letter of October 13, 1925, the Department returned the records with instructions that the Midland be required to furnish a full showing as to qualifications. The Department is in receipt of your letter of October 17, 1925, returning the drilling contracts for reconsideration and instructions.

From a telegram of October 14, 1925, from the president of the Midland company and from your letter it appears that the interests of the Midland company are as follows:

Oil and gas lease, Visalia 09304 (a), granted October 7, 1922, to said company under section 14 of the leasing act. Designated as addition to Buena Vista Hills Oil Field on May 18, 1923; 160 acres.

Oil and gas leases, Visalia 08868 (a) and (b), issued December 15, 1923, to said company under section 14 of the leasing act, comprising 640 acres, of which 160 acres in lease (a) were designated February 11, 1924, as addition to Buena Vista Hills Oil Field.

Oil and gas lease, Visalia 09248, granted August 16, 1920, under section 18 of the leasing act to the Nacirema Oil Company, 80 acres in McKittrick Front Oil Field. Assignment of east 412.5 feet of the S. ½ NE. ¼, Sec. 6, T. 30 S., R. 22 E., M. D. M., comprising 12½ acres, to the Midland company, approved July 16, 1921.

It also appears that apart from the interests of the Midland company neither the California Petroleum Corporation nor any of its subsidiary companies has any leasehold interest, direct or indirect, in California.

You state—

> The California Petroleum Corporation has acquired, through stock ownership in the Midland Oilfields Company, Ltd., the maximum number of leases allowed one person or corporation in a State. The Midland Oilfields Company, Ltd., has acquired direct interests in three leases in the State of California, which is maximum, but has not acquired any indirect interests through drilling contracts other than the two contracts now presented to the Department for approval, involving a total acreage of 20 acres. The direct interests represent a total acreage of 812.5 acres.

Evidence has been furnished that the Midland company acquired an interest in the NE. ¼, Sec. 6, T. 30 S., R. 22 E., M. D. M., in the year 1913, which it retained although held in trust by the Nacirema Oil Company for some years. Oil and gas lease, Visalia 09248, was granted, as has been stated, under section 18 of the leasing act, and under the conditions now shown by the record, the interest of the Midland company in said lease is also under said section 18. The facts presented may now be summarized as follows:

The California Petroleum Corporation, a holding corporation, owns all stock, except qualifying shares, of the American Oilfields Company. The American Oilfields Company owns all the shares of the Midland Oilfields Company, Ltd., except qualifying shares. The Midland company holds two Government leases under section 14 of the leasing act in the State of California, but no lease under section 14 in the Sunset structure. It now seeks the approval of two drilling contracts on two 20-acre tracts of contiguous land in the Sunset field. The California Petroleum Corporation has other subsidiaries but none of the other subsidiaries hold any Government leases, directly or indirectly, in the State.

Apart from the question as to the effect of the ownership of the stock of the Midland company by the California Petroleum Corporation, the former company would clearly be qualified to acquire the interests now sought as these are indirect and do not, in addition to its other interests, exceed or come near the acreage limitation of section 27 of the leasing act.

If we consider that the California Petroleum Corporation is the real party in interest that company may be said to hold two direct leases under section 14, in the State of California, and to be qualified to take one more direct lease in said State. But in place of any direct lease it is merely seeking indirect interests in the form of drilling contracts, whch are governed by acreage limitation. The department finds that there is no disqualification on the part of the California Petroleum Corporation or the Midland Oilfields Company, Ltd., on the facts presented.

The drilling contracts have accordingly been approved and the papers are herewith returned.

RALPH A. SHUGART

Decided November 9, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—TEST WELL—CONTRIBUTION—EXTENSION OF TIME FOR DRILLING.

Neither the leasing act of February 25, 1920, nor the extension act of January 11, 1922, authorizes the extension of the life of an oil and gas prospecting permit beyond five years, and contribution by a permittee toward the cost of a test well upon other land can not be accepted as a basis for the suspension, after the expiration of that period, of a permit under which drilling had not been commenced.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Armstrong* v. *McKanna* (50 L. D. 546), cited and applied.

FINNEY, *First Assistant Secretary:*

This is an appeal by Ralph A. Shugart from a decision by the Commissioner of the General Land Office dated October 10, 1925,

denying his application for extension of time within which to comply with the terms of his oil and gas prospecting permit and declining to recommend approval of assignment of a portion of the permit to B. E. Jones, upon the following state of facts:

The permit was granted on October 26, 1920, to Shugart, under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon the NW. ¼, Sec. 10, NE. ¼ and S. ½, Sec. 11, all of Secs. 14, 22, and 23, T. 11 S., R. 26 E., N. M. P. M., within the then Roswell (now Las Cruces), New Mexico, land district.

On October 28, 1924, the permittee filed application for extension of time until October 26, 1925, to comply with the terms of his permit. He alleged that the requirements of the first section of the permit had been complied with, that a well was being drilled on the SW. ¼ SW. ¼, Sec. 25, T. 11 S., R. 27 E., known as the Buffalo Well, which was over 2,500 feet deep and seemed to have favorable indications; that by reason of such drilling and business depressions which prevailed it had not been possible to secure capital to drill the land in question; that there was a movement on foot "to block up certain acreage," and it was believed that if such efforts should be successful a satisfactory drilling contract could be secured for development of this permit area; and that the parties interested in such blocking of acreage wished to have this permit area included therein. No action seems to have been taken on this application.

On September 12, 1925, there was filed in the local office at Las Cruces a contribution and development agreement between the permittee and B. E. Jones, which agreement appears to have been executed July 20, 1925. It appears from this agreement that B. E. Jones had entered into a "pooling contract" for the development of several permit areas which were said and believed to be upon the same geologic structure; that Shugart assigned to Jones Secs. 22 and 23 of his permit as a contribution for testing the structure by means of drilling a well upon one of the permits; that a sufficient drilling outfit would be installed upon one of the permit areas on or before August 10, 1925, the exact location of a test well to be determined by a competent geologist; that such test well would be drilled to a depth of 2,500 feet unless oil or gas in paying quantity should sooner be discovered; that if oil or gas in paying quantity should be discovered in the test well, Jones would, within 60 days from the completion of such test well, install a similar drilling outfit and proceed to drill on the contributed area of this permit.

At the same time that this agreement was filed there were also filed an affidavit by Jones, executed on August 27, 1925, in which

he alleged that the drilling of a test well was commenced on August 10, 1925, on the SW. ¼ SW. ¼, Sec. 25, T. 11 S., R. 26 E., which had been drilled to a depth of more than 300 feet, and that the rig and equipment were capable of sinking a hole to the depth of 3,500 feet; a copy of a drilling contract between Jones and the company of McNutt and Davis; and an assignment of Secs. 22 and 23, said township, from Shugart to Jones.

On September 28, 1925, there was received at the General Land Office, in addition to a bond by the assignee, a supplemental petition for extension of time in the form of an affidavit by the permittee, corroborated by the affidavit of one A. H. Tinsley. It is alleged that this permit area has a good speculative value, being what is termed "wild cat" territory; that although drilling conditions are difficult on account of gypsum water, drilling is nevertheless carried on 24 hours a day, with two shifts; that by the middle of November, 1925, there should be sufficient data available to determine the oil-bearing content of the structure; and that the structure is shown by an attached geological map.

In connection with the appeal it is shown that Jones is qualified to take and hold as assignee; that the permittee was not merely holding his permit to await the outcome of the Buffalo Well, where there has not been any discovery although a depth of 3,000 feet has been reached; and that Jones's test well is now 1,100 feet deep. Consent of the surety company of the permittee's bond to extension is also furnished.

On November 5, 1925, there was filed a copy of an agreement between the firm of C. L. Jones and Roe Newberry and B. E. Jones, made October 26, 1925. According to this agreement Jones and Newberry agree to install upon some portion of either Sec. 22 or 23, T. 11 S., R. 26 E., at a location to be designated by B. E. Jones, a suitable drilling outfit on or before October 30, 1925, "it being the intention to move such drilling outfit forthwith upon said lands, and to commence drilling such hole and prosecute the work diligently until completed." It is also agreed that the hole shall be drilled to a depth of not less than 2,000 feet unless oil or gas shall be found in paying quantity at a lesser depth.

There is an accompanying affidavit by C. L. Jones, executed October 31, 1925, who alleges that on October 30 he installed upon the SW. ¼, Sec. 22, said township, a drilling outfit and that the terms and conditions of the contract referred to are being carried out.

In transmitting these papers Shugart's attorney says—

> You will see by the reference in the contract between Shugart and B. E. Jones that if oil or gas is found in commercial quantities in the hole now being

drilled on the Franks permit in Sec. 25, that he, Jones, agrees to drill the Shugart permit.

The drilling performed upon the Franks permit in Sec. 25 can not be used as a basis for suspension of this permit. Neither in the leasing act nor in the act of January 11, 1922 (42 Stat. 356), is there any authority for extending the life of an oil and gas prospecting permit beyond five years. In certain cases the Department has held permits suspended after the expiration of five years or the full statutory period, which has virtually been the granting of extensions of time, but these have been where there has been drilling on the permit areas involved. The Department has not suspended any permit to give further time for prospecting where there has been nothing done on the permit area.

The present case is not that of a permittee, or assignee, who has expended large sums of money in drilling upon his permit area and finds himself with an unfinished test at the end of the statutory, or five-year, period.

The Commissioner correctly states in his decision that there was no showing in October, 1924, upon which an extension of time could be granted. When the additional showing for extension was filed almost five years from the date of the permit had passed, and as has been stated hereinbefore, it was not sufficient.

The contract between the drillers, Jones and Newberry, and B. E. Jones, to drill on the Shugart permit was not made until after the Commissioner had held the permit for cancellation. It was such a belated effort to comply with the terms of the permit as the Department failed to recognize in the case of *Armstrong* v. *McKanna* (50 L. D. 546, 610). When the drilling outfit was moved upon the Shugart permit it was after the five-year period had elapsed. It is apparent that although this drilling outfit was moved upon the land in question, nevertheless the test of the structure was being made upon the Franks permit.

The case has been given careful consideration, and the Department is of the opinion that there is no sufficient ground upon which this permit can be suspended.

The decision appealed from is consequently affirmed. The applications for extension of time and for approval of the assignment are denied, the permit is canceled, and the case is closed. The record is herewith returned.

EXTENSION OF TIME FOR BEGINNING DRILLING OPERATIONS UNDER OIL AND GAS PERMITS—CIRCULAR NO. 946 SUPPLEMENTED

INSTRUCTIONS

[Circular No. 1041]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 11, 1925.

REGISTERS,
UNITED STATES LAND OFFICES:

On November 4, 1925, in a letter addressed to this office, the Department issued as supplemental to the instructions contained in Circular No. 946 (50 L. D. 567), the following regulations:

Contribution development programs should be submitted to the Department at their inception in order that it may be determined whether, upon the facts disclosed in a given case, any and all permittees proposing to contribute may do so with the assurance that so long as the test is diligently prosecuted through their efforts, but limited to the period provided for in the leasing act and the act of January 11, 1922, *supra*, drilling on their own permits will be excused.

In cases of individual applications for extension of time, every applicant must show by legal subdivisions, section, township, and range where the test well is being, or is to be drilled.

Every application of this nature will be referred to the Geological Survey for report. If the Survey shall report unfavorably the application will be rejected by you, subject to appeal. If the Survey shall report that it is without sufficient data as to structures in the region upon which to base any recommendation only contributions by permittees the greater portions of whose permit areas are within a six mile square formed by going three miles in each cardinal direction from the northeast corner of the legal subdivision on which the test well is found, or from the corner nearest which the test well is shown to be found, will be recognized. This is of necessity, a rule of administration, but it is warranted upon the reasoning and holding in the case of *Helen F. Cairns* (50 L. D. 353).

The purchase of capital stock of a corporation which is drilling for oil or gas in unproven territory and which is dependent upon the sale of its stock for the continuation of its drilling operations, by the holder of a prospecting permit for lands upon the same structure as that where the drilling is carried on may be considered a contribution towards the cost of proving the structure which will warrant allowance of extension of time in which to comply with the terms of his permit, if contribution may be considered acceptable in other respects, and if the stock does not have a market value or is not salable. Clearly, if the stock has a market value the stock is in itself a consideration for the purchase price and there is no contribution as contemplated here. Purchase money for stock which does not go to the corporation or which is not needed or used to meet the cost of testing the structure, is not a contribution which can be accepted as sufficient in this connection.

In order to make the purchase of stock acceptable as a contribution as applicable in the matter under consideration, the Department must be satisfied that the purchase induced the corporation to begin, or to continue drilling, when in the absence of such purchase it would not have begun, or continued to drill. That does not mean, of course, that the purchase of stock by one permit holder must be sufficient, in and of itself, as an inducement but that several permit holders may join in making contributions by means of purchasing stock.

While no rule can be laid down which will govern every case of this nature, the Department will insist that contributions shall be substantial, taking into consideration the contributing permit holder's area, the amount that has been expended in the test or the estimated cost thereof, and the sources of means therefor.

As heretofore instructed in Circular No. 946, all applications for extension filed in your office, when complete, will be transmitted to this office with your report thereon.

You will give the widest publicity to the above regulations that may be possible without expense to the United States.

WILLIAM SPRY,
Commissioner.

PROCEDURE IN PUBLIC SURVEY OFFICES

INSTRUCTIONS

[Circular No. 1042]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 13, 1925.

TO THE SURVEYING SERVICE
OF THE GENERAL LAND OFFICE:

For administrative purposes, each local or branch office under the jurisdiction of the supervisor of surveys—former office of the surveyor general—will be designated "Public Survey Office" at the place in which the office is located.

The returns of all classes of surveys executed by the surveying service of the General Land Office will be prepared for the approval and certification of the supervisor of surveys at Denver, Colorado. All classes of surveys executed by other agencies, such as mineral surveys, forest homestead entry surveys, and all records prepared from the files of the public survey offices which are not the direct result of field operations but require certification, such as supplemental plats, segregation diagrams of mineral surveys, certified copies of records, etc., will be approved or certified to as the case may be by the office cadastral engineer. This procedure will relieve

the supervisor of surveys at Denver and the district cadastral engineers from attention to matters which are handled by the public survey office from the beginning and to which the office cadastral engineer is competent to certify.

PROCEDURE RELATIVE TO MINERAL SURVEYS

Application for appointment as United States mineral surveyor should be addressed to the public survey office in the district for which appointment is desired. Here a thorough examination will be made of the applicant's technical qualifications to fill the position, and if passed in a satisfactory manner, the application will be forwarded to the division inspector for report as to the applicant's general reputation and fitness. Upon receipt of favorable report, recommendation for appointment will be made to the supervisor of surveys, who will issue the appointment through the public survey office and the applicant will be called upon to file the customary bond. The bond, if executed in proper form, will be forwarded to the supervisor of surveys for approval, together with the report of the division inspector, and these papers passed on to this office for acceptance of the bond. Notice of acceptance will be mailed to the public survey office, with copy to the supervisor of surveys, and the surveyor advised at once by the public survey office. Adverse report, as heretofore, will be sent direct to this office by the division inspector, but with notice at the same time to the public survey office.

In the matter of reappointments, notification should be given the surveyor sixty days prior to the expiration of his bond, with request that he signify his intentions regarding its renewal. If answered in the affirmative, the division inspector will be called upon for the customary report. Favorable report will be followed by notice to file renewal bond, the approval and acceptance of which will follow the regular procedure for original bonds.

With proper notation retained in each public survey office, the biannual report as to sufficiency of sureties and calls for renewal of expiring bonds can be made by the office cadastral engineer. In case of failure to file renewal bond, resignation, or death, the name of the deputy should be dropped from the list in any district, and this office notified of the action through the office of the supervisor of surveys.

Application for the survey of a mining claim, accompanied by the necessary certified copy of location certificate and requisite deposit, should be made to the public survey office for the district in which the claim is located. The office cadastral engineer will receipt for the deposit, issue the order for survey, if appropriate, administer all work in connection therewith, approving plat and field

notes of such survey, and otherwise perform the duties prescribed by mining regulations to be performed by the former surveyor general, including certification as to expenditure made upon the claim.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

HARRIS MILLER [1]

Decided November 13, 1925

PATENT—TRANSFEREE—AMENDMENT.

The transferee of one to whom a patent had been issued describing a different tract of land than the one actually entered, selected, or located, is entitled, upon the execution of a deed reconveying to the Government the land erroneously patented, to a new patent in his own name for the land intended to be conveyed.

COURT AND DEPARTMENTAL DECISIONS HELD NOT IN POINT.

Cases of *Hawley* v. *Diller* (178 U. S. 476), and *Nicholas Van Gass* (44 L. D. 139), held not in point.

FINNEY, *First Assistant Secretary:*

By decision of April 3, 1925, unreported, the Department affirmed your [Commissioner of the General Land Office] decision of September 24, 1924, rejecting the application of Minnie C. Coleman to make homestead entry for NW. ¼ SE. ¼, Sec. 29, T. 2 N., R. 20 W., N. M. M., New Mexico.

The decision was based on evidence to the effect that the tract applied for was in the possession of Harris Miller, claiming as a remote transferee of Mancel H. Thompson, to whom a patent for NE. ¼ SE. ¼, Sec. 30, said township, issued July 31, 1903, under a forest lieu selection filed April 17, 1901.

On September 15, 1922, said Miller applied to so amend the patent as to make the description read NW. ¼ SE. ¼, said Sec. 29. Your office has reached the conclusion that the application to amend is in conformity with the regulations, but instructions have been informally requested as to whom the amended or supplemental patent should issue, it being stated that, under the long-established practice of your office, the patent would issue to Mancel H. Thompson. The cases of *Hawley* v. *Diller* (178 U. S. 476) and *Nicholas Van Gass* (44 L. D. 139) are cited in support of your practice.

Prior to the amendment of section 2372, Revised Statutes, by the act of February 24, 1909 (35 Stat. 645), there was no law under

[1] Amplified by *Balsiger, transferee of Chambers*, post, —.

which an application by the transferee of a patented selection could be entertained. As amended by the act cited, said section provides—

> In all cases where an entry, selection, or location has been or shall hereafter be made of a tract of land not intended to be entered, the entryman, selector, or locator, or, in case of his death, his legal representatives, or when the claim is by law transferable, his or their transferees, may, in any case coming within the provisions of this section, file his or their affidavit, with such additional evidence as can be procured showing the mistake as to the numbers of the tract intended to be entered, * * * with the register and receiver of the land district in which such tract of land is situate, who should transmit the evidence * * * to the Commissioner of the General Land Office, who, if he be entirely satisfied that the mistake has been made * * * is authorized to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered. * * *

Under the regulations, an application for amendment filed by the transferee of a patented entry, selection, or location must be supported by an abstract of title, showing present ownership by the applicant of the tract sought to be eliminated from the patent, and a duly recorded conveyance to the United States of the tract erroneously entered and patented. Miller has filed such abstract and reconveyance, and unless a patent for the tract to which the selection is amended is issued to him, he will not thereby acquire a merchantable title, even though the patent recites the reason for its issuance, but he will be put to the trouble and expense of applying to the local courts to quiet his title.

By dealing with Miller as the transferee of the patented tract, and accepting his conveyance thereof, you became bound to issue to him a patent for the tract which he has shown he thought he purchased and which the selector thought was the land he was occupying and had transferred to Miller's remote transferor.

I find nothing in the cases of *Hawley* v. *Diller* and *Nicholas Van Gass*, *supra*, which has any bearing upon the question presented in this case.

RATE OF ROYALTY AFTER APPLICATION FOR LEASE IS FILED

Instructions, November 14, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—APPLICATION—ROYALTY.

A permittee under the act of February 25, 1920, who applies for an oil and gas lease is entitled to the benefit of the five per cent royalty provision of the act from the date of the filing of the application for lease unless and until his application shall be rejected.

FINNEY, *Acting Secretary:*

The Department is in receipt, by reference from the Commissioner of the General Land Office, of your [Director of the Geological

Survey] letter of October 23, 1925, requesting to be advised whether royalty should be calculated on a 5 per cent or a 20 per cent basis on the production had, subsequent to the date of application for lease, under oil and gas prospecting permit, Great Falls 053168, in connection with which application for lease was filed May 19, 1925.

This permit was issued under section 20 of the leasing act and covers 160 acres. The application for lease has not been examined, but if the applicant is qualified a 5 per cent lease will undoubtedly be issued to him. See paragraph 7, Circular No. 823 (49 L. D. 104).

Section 15 of the leasing act (41 Stat. 437) requires that until the permittee shall apply for lease he shall pay to the United States 20 per cent of the gross value of all oil or gas secured by him from the lands embraced within his permit and sold or otherwise disposed of or held by him for sale or other disposition.

Prior to examination of the application for lease and passing upon the qualifications of the applicant it can not be determined whether a lease will be issued, but it is clear that he is entitled to a 5 per cent royalty from the date of filing his application for lease *unless and until that application shall be rejected.*

COMPUTATION OF ROYALTY UNDER SECTION 15, ACT OF FEBRUARY 25, 1920

Decided November 19, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—ROYALTY.

Section 15 of the act of February 25, 1920, does not require payment of royalty on the oil or gas used for production purposes on permit lands, or that is unavoidably lost.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *M. P. Smith and Red Feather Oil Company* (51 L. D. —), cited and applied.

FINNEY, *First Assistant Secretary:*

With your [Consaul and Heltman] letter of October 26, 1925, you presented a memorandum brief dealing with the question of computation of 20 per cent royalty under the provisions of section 15 of the leasing act of February 25, 1920 (41 Stat. 437). You have stated the question as follows:

In computing the royalty due under said section, should the computation include the value of oil or gas used upon the permit area for production purposes; that is, in further drilling of the permit area, or, on the other hand, should the computation be restricted to the value of oil or gas secured by permittee, *and by him sold,* or similarly disposed of, or by permittee held for *sale* or similar disposition?

Sections 18 and 19 of the leasing act (two of the relief sections) provide for certain rates of royalty upon "all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost." This exception is not found in any other section of the act, but the Department has made it applicable to all oil and gas leases. In the form which has been adopted by the Department for all oil and gas leases provision is made for royalty as follows:

* * * a royalty of — per cent of the value of oil or gas produced from the land leased herein (except oil or gas used for production purposes on said lands or unavoidably lost), or, on demand of the lessor, — per cent of the oil or gas produced (except oil or gas used for production purposes on said lands or unavoidably lost), * * *.

Section 15 of the leasing act is as follows:

That until the permittee shall apply for lease to the one-quarter of the permit area heretofore provided for he shall pay to the United States 20 per centum of the gross value of all oil or gas secured by him from the lands embraced within his permit and sold or otherwise disposed of or held by him for sale or other disposition.

It appears that the Bureau of Mines and the Geological Survey have construed this section as obligating permittees to pay a royalty of 20 per cent of the gross value of the oil or gas secured from the lands, regardless of whether used, sold, or otherwise disposed of.

In the absence of any regulation or expression of opinion on the subject by the Department such construction of the law has been fully warranted. In commenting upon the brief referred to, the Director of the Geological Survey says:

The amount and rate of such occurrence of oil or gas, in gross, is a determining factor in the matter of adequacy of discovery and of the right to lease earned by the permittee. Deduction from the amount of gross production by reason of use, loss, or other disposal to determine a basis for computation of royalty would reduce by so much the penal character of the 20 per cent royalty provision applicable to permits and thereby tend, at least in a minor degree, toward delay in making application for lease.

In its opinion of October 28, 1925, in the matter of *M. P. Smith and Red Feather Oil Company* (51 L. D. 251), the Department said:

The act of February 25, 1920, and the regulations thereunder permit the use, without charge, of fuel oil by permittees and lessees in drilling operations. This indicates that the intention of the Congress with respect to this form of disposal of the land was to follow the general custom of allowing the free use of resources on the land occupied in compliance with the law under which the entryman or claimant was in possession. No difference is perceived between permitting the use of oil for fuel prior to such discovery. A permittee under the act of 1920 is an agent of the United States for certain purposes (Opinion of the Attorney General, August 29, 1925, and instructions of September 17, 1925, 51 L. D. 196), and as such would, for this additional reason, appear to be entitled to the free use of the property of the United States ordinarily given to public-land claimants in other classes of entries or claims.

It is concluded that a permittee under the act of February 25, 1920, is entitled to use timber standing upon the lands covered by the permit for fuel in drilling operations, in the absence of expressed restrictions.

It is clear that the only purpose of the higher royalty rate provided for in section 15 is for the purpose of compelling permittees to apply promptly for leases. The Department is of the opinion that the lower royalty rates obtained as soon as application for lease is made are in themselves sufficient inducement for permittees to apply promptly for leases. It seems that the rulings of the Department would be inconsistent if it were to hold that permittees, applicants for lease, and lessees are not required to pay royalty on oil or gas, or to pay for timber, used for production purposes, but that after discovery and prior to application for lease permittees must pay a royalty of 20 per cent on oil or gas used for production purposes in addition to such royalty rate on all oil or gas sold or otherwise disposed of or held for sale or other disposition. Hereafter the payment of royalty, under said section 15, will not be required on the oil or gas used for production purposes on the permit lands, or unavoidably lost.

ALLEN v. PILCHER

Decided December 2, 1925

AFFADIVIT—OATH—EVIDENCE—STATUTORY CONSTRUCTION.

As a general rule where a statute prescribes no specific form of affidavit in proceedings or pleadings that have to be verified by oath, the fact that the oath was administered may be shown by extrinsic evidence if no rights are prejudiced thereby.

OATHS—APPLICATION—OIL AND GAS LANDS—PROSPECTING PERMIT—EVIDENCE.

While the requirement in the act of February 25, 1920, that an application for an oil and gas prospecting permit must be sworn to is mandatory, yet an application which does not appear upon its face to have been under oath is not a nullity, if the oath was properly and timely administered and that fact is later satisfactorily shown.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Hiram T. Hunter* (2 L. D. 39), cited and applied.

FINNEY, *First Assistant Secretary:*

This is an appeal by T. F. Allen from a decision of the Commissioner of the General Land Office, dated May 6, 1925, dismissing his protest against the allowance of application, Visalia 011585, made by B. Chris Pilcher under the act of February 25, 1920 (41 Stat. 437), for an oil and gas prospecting permit covering the NE. ¼, SW. ¼ SE. ¼, lots 3, 4, 5, 6, and 7, Sec. 19, T. 27 S., R. 19 E., M. D. M.

It appears that cancellation of a prior permit covering the land became effective by notation thereof on the local records on January 10, 1925. At that time there were nine applications for a similar permit for the land which were treated as having been filed simultaneously and a drawing was held to determine priorities. Pilcher drew No. 1 and Allen, who made application 011586, drew No. 2. All acquiesced in that action except Allen, who protested to the Commissioner upon the ground that Pilcher's application was not under oath and his evidence of citizenship was not sufficient.

The Commissioner held that Pilcher's application was regular, was under oath, and the evidence of his citizenship sufficient. Allen in his appeal calls attention to Pilcher's application and contends that no claim of priority can be predicated thereon and that he, having filed a regular and sufficient application and as drawer No. 2, should be preferred in the issuance of a permit for the land. Departmental decision in the unreported case of Pool *v.* Fleck of May 2, 1925, is cited as a precedent for the request made.

Upon inspection it is found that Pilcher's application has affixed an acknowledgment only before a notary public. The application does not show on its face that it was sworn to, nor does it by its language purport to be made under oath. The Commissioner obviously erred in finding to the contrary.

It is true, section 33 of the act prescribes: "that all statements, representations, or reports required by the Secretary of the Interior under this act shall be under oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require," and the Secretary has specified that applications for oil and gas permits shall be under oath although no specific form of application is required. Oil and gas regulations, paragraph 4, Circular No. 672 (47 L. D. 437). The requirement of an oath to an application is, therefore, mandatory and no application is properly allowable unless it is verified by oath and so shown to be. An application under this act is not, however, a nullity or fatally defective because the evidence that it was sworn to does not appear thereon, if the oath was administered and that fact is later satisfactorily shown. The liberal policy of the several States in respect to amendments in judicial proceedings is followed by the Department in so far as amendments do not affect rights (*Hiram T. Hunter*, 2 L. D. 39). As a general rule where a statute prescribes no specific form of affidavit in proceedings or pleadings that have to be verified by oath, the fact that the oath was administered may be shown by extrinsic evidence and an affidavit, if in fact sworn to at the proper time and before the proper officer, is generally admitted by the courts where no rights are prejudiced. See Corpus Juris, Vol. 2,

p. 260, note 52, and American Digest, Century Edition, Vol. 2, p. 45, for cases in point. The omission may have been due to an oversight or inadvertence on the part of a notary public to whom the paper was presented for certification. It is, therefore, within the sound discretion of the Department to permit the same to be shown if such was the fact. No rights of Allen would be prejudiced thereby. His statement that the filing of his application was due to the fact that Pilcher's application was not verified is not acceptable in the light of the record, which discloses that there were nine other applicants, each with a chance of success at the drawing, and that his application was filed at 9 a. m., whereas Pilcher's was filed at 9.10 a. m.

Neither is the case cited by him a precedent for the rejection of Pilcher's application. In that case a prior application which had been used in a prior drawing for entirely different land was by a so-called amendment thereof and without a new verification or the payment of a new fee used in a subsequent drawing.

If in fact Pilcher made oath to his application before the officer and upon the date stated in the certificate of acknowledgment to his application, he will have the privilege of so showing before disposition is made of the protest. He should accordingly be permitted, if such was the fact, to file an affidavit corroborated by George M. Cook, the notary public who affixed the certificate to his application, setting forth an explanation for the omission of the oath and stating that an oath thereto was administered to him by said notary at the time shown in said certificate of acknowledgment. If he shall fail to make the showing required within a period prescribed by the Commissioner his application will be finally rejected and Allen will be accorded the preferred right under the drawing held, if otherwise regular, his application being next in order for consideration.

The case is accordingly remanded to the Commissioner for appropriate action, due notice thereof to be given to the protestant.

WATTIS, ASSIGNEE OF GRAVES AND BARNISH (ON PETITION)

Decided December 2, 1925

SOLDIERS' ADDITIONAL HOMESTEAD—ASSIGNMENT—DESCENT AND DISTRIBUTION—STATUTES.

The soldiers' additional right granted by section 2306, Revised Statutes, must be accorded the quality of inheritability and, if not exercised or transferred by the donee, passes to his estate as other property, subject only to the exercise of the rights given by section 2307, Revised Statutes, to the widow and minor orphan children.

ADMINISTRATIVE RULING AND DEPARTMENTAL DECISIONS VACATED AND OVERRULED.

Administrative Ruling of February 15, 1917 (46 L. D. 32), and letter of December 24, 1917 (46 L. D. 274), vacated; cases of *Hoy, assignee of Hess* (46 L. D. 421), and *Henrietta P. Prescott* (46 L. D. 486), overruled.

FINNEY, *First Assistant Secretary:*

A petition for the exercise of supervisory authority has been filed on behalf of Edmund O. Wattis in the matter of his application to make entry under sections 2306 and 2307, Revised Statutes, for N. ½ SE. ¼, Sec. 20, T. 43 N., R. 62 E., M. D. M., Elko, Nevada, land district, wherein the Department, by decision of July 25, 1918 (unreported), affirmed a decision of the Commissioner of the General Land Office dated February 18, 1918, rejecting the application. A motion for rehearing was denied by decision of October 2, 1918. Final action on the application has been suspended because of suits pending in court.

The application was based on the assignment of 1.72 acres of the adjudicated right of George W. Graves and a further assignment of 78.28 acres of the claimed right of James H. Barnish. The latter died October 1, 1895, without having exercised his additional right. He left a will whereby the residue of his personal property was left to his nephew, Samuel Barnish Glover, who was also named as his executor. The executor made the assignment, which was executed September 12, 1917.

The application was rejected, subject to the filing of a further right or rights to take the place of the claimed right of Barnish, on the ground that the latter's right did not descend to his devisee, under the interpretation of the law contained in the Administrative Ruling of February 15, 1917 (46 L. D. 32).

The Administrative Ruling referred to was the subject of a decision by the Supreme Court of the United States, rendered November 16, 1925, in the case of *Clarence A. Anderson* v. *James W. Clune*, on a certificate from the United States Circuit Court of Appeals for the Ninth Circuit. The opinion of the court, delivered by Mr. Justice Sutherland, follows:

In 1872, A. K. Johnson, an honorably discharged soldier of the Civil War, made a homestead entry of 80 acres. He died in 1875, leaving a widow, who died in 1917, neither having disposed of the husband's additional homestead right. Johnson also left four children, all over the age of 21 years at the date of the death of the widow; and they, together with the widow of a deceased son, sold and assigned the right to one Mason who sold and assigned it to the extent of 20.49 acres to Clune. By virtue of the latter assignment, Clune entered a tract of public lands in the United States Land Office in California; but the entry was rejected by the General Land Office on the ground that "the assignment of the soldier's additional homestead right had not

been made by the soldier or his widow or his heirs prior to the administrative ruling of the Department of the Interior February 15, 1917 (46 L. D. 32), and rulings and decisions of the Land Office, which construed sections 2306 and 2307 of the Revised Statutes as limiting a soldier's additional homestead right to the exercise thereof (1) by the soldier himself entering the land, or indirectly by conveying his right to entry to an assignee during his lifetime; (2) by the widow while her status as widow of the soldier continues; (3) in the absence of appropriation by the soldier or his widow, then by the minor orphan children during their minority acting through their guardian." In October, 1923, Anderson entered the lands in controversy under an assignment of the additional soldier's homestead right of one Dunn, and patent issued to him therefor. Anderson's entry was made with full knowledge that Clune had made prior entry thereof, under which he was claiming the land. Alleging these facts, suit was brought by Clune against Anderson to have it adjudged that the latter held the lands in trust for the former. The trial court overruled a motion to dismiss the bill and rendered a decree in favor of Clune. An appeal followed to the circuit court of appeals and that court has certified (Judicial Code Section 239) the following question upon which instruction is desired:

"Under the Revised Statutes of the United States, sections 2306 and 2307, is a soldier's additional homestead right limited to the exercise thereof by the soldier himself entering the land, or indirectly by transfer of his right to an assignee during his lifetime, and to his widow while her status as widow of the soldier continues, and in the absence of the appropriation by the soldier or his widow during their lives, then by his minor orphan children during their minority acting through a guardian?"

By section 2304 R. S., Johnson was given the right to enter and receive patent for 160 acres of public lands subject to homestead entry. Having entered only 80 acres, he became entitled to the benefits conferred by section 2306 R. S., which provides that every person entitled under the provisions of section 2304 to enter a homestead, who may have entered a quantity of land less than 160 acres, "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred sixty acres." Section 2307 R. S. provides:

"In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if unmarried, 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 improvements therein contained; * * *"

It was held in *Webster* v. *Luther*, 163 U. S. 331, that Congress intended by section 2306 R. S. to vest a property right in the donee as a sort of compensation for his failure under section 2304 to obtain the full quota of 160 acres; that residence on or cultivation of the lands to be taken was not required as in the case of the original homestead entry; and that it was immaterial to the government whether the original donee should exercise the right or should transfer it to another. And the property right thus vested was held to be assignable. The rulings of the Land Office prior to this decision had been that the right was essentially personal and nonassignable—to be exercised only by the original donee or his widow or his minor orphan children through a

guardian. After the decision, the rulings of the department were uniformly to the effect that the right not only was assignable but inheritable; that in case a soldier entitled to the right died without exercising it, leaving no widow or minor orphan children, the right to entry vested in his personal representatives, *Williford Jenkins*, 29 L. D. 510; *Fidelo C. Sharp*, 35 L. D. 164, and other cases; but if the right passed to the minor children it became absolute in them, in no way conditioned upon an appropriation by the guardian during their minority. *John H. Mason*, 41 L. D. 361.

This view was adhered to until 1917, when the Secretary of the Interior by an administrative ruling held that the right must be used by the soldier in his lifetime, either by entering the land or assigning the right, or by the widow while her status as such continued, or by the minor orphan children during their minority, acting through their lawful guardian; and that if not exercised as thus indicated the right lapsed and ceased to exist. The officers of the land department were expressly instructed that no soldier's additional right assigned by the heirs or administrator of the estate of a deceased soldier or of his widow, or of his minor orphan children, or directly by such "minor children" after they had reached majority, should be recognized as a basis for the entry of public land. 46 L. D. 32. In a subsequent letter reviewing these instructions, 46 L. D. 274, 275, the Secretary of the Interior said: "The benefit of Section 2306, indeed, is not before its acceptance property at all, and hence is not capable of inheritance. It is a mere offer, which upon its acceptance by a designated beneficiary during his term of qualification as such becomes property, and convertible into specific land by entry under it."

This is plainly in the face of the decision of this Court in *Webster* v. *Luther*, *supra*. See also, *Mullen* v. *Wine*, 26 Fed. 206; *Barnes* v. *Poirier*, 64 Fed. 14, 18. The grant of the statute (Section 2306), *ipso jure*, vests a property right in the donee which he may exercise or sell and transfer. A property right, the ownership of which may be conveyed to and vested in a purchaser, must be accorded the quality of inheritability, which usually attaches as an incident of ownership, in the absence of some provision of law to the contrary; and we, therefore, hold that the soldier's additional homestead right, if not exercised or transferred by the donee, passes to his estate as other property, subject only to the exercise of the rights given by section 2307 to the widow and minor orphan children.

The question certified is answered in the negative.

Pursuant to the above decision, the departmental decisions herein of July 25 and October 2, 1918, are recalled and vacated, and the decision appealed from is reversed. Furthermore, the Administrative Ruling of February 15, 1917, is vacated, and all departmental rulings based thereon—including the letter of December 26, 1917, addressed to Hon. Francis J. Heney (46 L. D. 274), and the decisions in *Hoy, Assignee of Hess* (46 L. D. 421), and *Henrietta P. Prescott* (46 L. D. 486)—are overruled.

Inasmuch as the application in question has been pending since June 4, 1917, the Commissioner of the General Land Office will take *immediate* action thereon.

STATE OF LOUISIANA

Decided December 7, 1925

SWAMP LAND—MINERAL LANDS—OIL AND GAS LANDS.

The acts of March 2, 1849, and September 28, 1850, which granted to the States named therein the swamp and overflowed lands, rendered unfit for cultivation, did not exclude from those grants lands valuable for their mineral deposits.

DEPARTMENTAL DECISIONS AND INSTRUCTIONS OVERRULED AND VACATED, SO FAR AS IN CONFLICT.

Cases of *State of Florida* (47 L. D. 92 and 93), *State of Louisiana* (47 L. D. 366), *State of Louisiana, on petition* (48 L. D. 201), overruled so far as in conflict; instructions of May 25, 1918 (46 L. D. 389), no longer followed in so far as they pertain to the original acts of March 2, 1849, and September 28, 1850.

FINNEY, *First Assistant Secretary:*

In the case of the State of Louisiana involving certain tracts in T. 18 N., R. 14 W., L. M., the Department by decision of September 16, 1921 (48 L. D. 201), held, in harmony with its prior rulings in such cases, that lands valuable for mineral deposits do not inure to the State under the swamp land grants, and rejected the swamp land selections of the State because the tracts were embraced in a subsisting petroleum withdrawal, and the State, after due opportunity, had failed to show that the lands are not mineral in character. Thereafter, the State brought suit to restrain the Secretary of the Interior from enforcement of that decision.

Decisions favorable to the plaintiff were rendered by the lower courts, and the case was carried to the Supreme Court of the United States. By decision of November 23, 1925, that court held in *Work, Secretary of the Interior*, v. *State of Louisiana* in part as follows:

> We conclude that the swamp land Acts granted to the States the swamp and overflowed lands, rendered unfit for cultivation, without reference to their mineral character; and that in requiring the State to establish the nonmineral character of the lands in question the Secretary exceeded the authority conferred upon him by the Acts and attached this condition to the prosecution of the claim of the State without warrant of law.

The action of the Department was thus reversed by eliminating from consideration the mineral question in passing upon the claim of the State under the swamp acts. The court further expressly recognized the authority of the Secretary otherwise to determine whether the lands were in fact swamp lands.

Since the former decision was rendered the Department caused a contour survey to be made showing the former high-water mark of Soda and Cross Lakes in said township, which line was fixed at

elevation 172 feet above mean gulf level. Of the lands originally involved in the suit, it appears that only 118.39 acres lie above the former beds of the lakes. In comparatively recent decisions it has been recognized that the beds of the lakes below elevation 172 feet passed to the State as an incident of sovereignty upon its admission to the Union in the year 1812, being covered by waters of navigable lakes. See 49 L. D. 452 and 50 L. D. 180; also case of *Slattery* v. *Arkansas Natural Gas Company* (70 So. 806).

Such areas as inured to the State by virtue of its sovereignty will not, of course, be regarded as lands subject to the operation of the swamp grants. Any unpatented conflicting claims thereto under the public land laws should, however, be removed and canceled of record.

The former action of the Department in this case is vacated, and you will readjudicate the selections consistently with the true status and character of the lands and in harmony with the said court decision in the premises.

It necessarily follows also that the departmental decision in the case of *State of Louisiana et al.* (47 L. D. 366), together with the decisions in *State of Florida* (47 L. D. 92 and 93), are overruled so far as in conflict with the views expressed by the United States Supreme Court, and the instructions of May 25, 1918 (46 L. D. 389), will no longer be followed in so far as they pertain to swamp lands granted by the original acts of March 2, 1849, and September 28, 1850.

HEIR OF ALWIN v. WINTERS

Decided December 8, 1925

HOMESTEAD ENTRY—RELINQUISHMENT—REINSTATEMENT—ABANDONMENT—HEARING.

A homestead entry should not be canceled upon a relinquishment executed by, but not filed until after the death of the entryman, yet, where such entry has been canceled, a subsequent entry will not be disturbed for the purpose of reinstating the former entry unless it be shown that, at the date of the entryman's death, he was complying with the law and had not abandoned the land for a valuable consideration.

DEPARTMENTAL DECISIONS CITED, APPLIED, AND DISTINGUISHED.

Case of *Wilson* v. *Holmes* (38 L. D. 475), cited and applied; case of *Truman* v. *Bradshaw* (43 L. D. 242), distinguished.

FINNEY, *First Assistant Secretary:*

This is an appeal by William Winters from a decision of the Commissioner of the General Land Office dated June 12, 1925, holding his entry 07560, for the SW. ¼ SE. ¼, Sec. 19, T. 3 S., R. 5 E., W. M., Portland, Oregon, land district, for cancellation.

The facts of this case are, that William H. Alwin made homestead entry for the land in question on June 16, 1922; that this entryman thereafter visited the office of Malcolm J. Anderson, who was engaged in the business of buying and selling relinquishments, and left a signed but undated form of relinquishment with him (whether or not this form was filled in with a description of the land is not clearly established); that Alwin died on August 4, 1923; that on August 9, 1923, Pearl E. Alwin, who had been the divorced wife of the entryman, gave personal notice of his death at the local land office, and that fact, with the address of Mrs. Alwin was duly entered upon the serial register; that on September 4, 1923, Mrs. Alwin filed an affidavit with the local office, stating that she had been appointed administratrix of the entryman's estate, and that she intended to make final proof under his entry in behalf of his only heir, their son, a boy ten years of age, and a notation of this affidavit also was made upon the serial register; that on April 4, 1924, the relinquishment of Alwin's entry, which then bore date of February 1, 1924, was filed in the local office by Frank Taylor, a business partner of Anderson; and that on the same date William Winters made application 07560 to enter the land in question, which was allowed on April 9, 1924.

The Commissioner of the General Land Office in his decision of June 12, 1925, referred to the case of *Wilson* v. *Holmes* (38 L. D. 475), but stated that the ruling in that case had been superseded by the decision of the Department in the case of *Truman* v. *Bradshaw* (43 L. D. 242). Because of the fact that Alwin's relinquishment was filed subsequent to his death, and upon the supposed authority of *Truman* v. *Bradshaw* and of *Robertson* v. *Messent's Heirs* (18 L. D. 301), which is cited in *Truman* v. *Bradshaw*, the Commissioner held Winters' entry for cancellation.

In an affidavit filed with his appeal Winters states that he communicated with Anderson and Taylor, who it appears conducted business as the Oregon Homestead Bureau, and that he purchased the relinquishment of Alwin from them for $250; that he had no knowledge that Alwin was dead at the time he purchased the relinquishment and filed on the land; that since establishing his residence on the land on May 6, 1924, he had fenced 20 acres with 2 and 3 wire fence, cleared and cultivated 5 acres, built a chicken house, almost completed a 12 by 20 2-room log house with shingled roof and front and back porches, partly dug a well to a depth of 20 feet, fenced a garden of about one-eighth of an acre with 6-foot chicken netting, and set out 300 strawberry plants which were bearing when his appeal was filed; that he had 3 acres of growing oats and three-quarters of an acre in potatoes besides grain and other vegetables, and had put in a year's personal work and ex-

pended $300 in addition to the value of his own labor; that during the time he lived on the land he had occupied a small house which was on the land when he went there; that he had been informed that Alwin never lived on the land for more than two weeks; that Alwin left the land on June 12, 1922, and never returned except for one day when he came with a truck, and that a few days later he moved everything away except some barbed wire which he sold; that Alwin's family never lived on the land and that he never complied with the law as to cultivation, improvements, and residence; that Alwin deserted the land with no intention of returning thereto; and that he never had complied with the law up to the time of his death.

The Department is not in accord with the Commissioner's decision.

The principles announced in the case of *Wilson* v. *Holmes*, *supra*, were not superseded by the decision in the later case of *Truman* v. *Bradshaw*, *supra*. In *Wilson* v. *Holmes* it was decided that a homestead entry, made in good faith, would not be canceled for the purpose of reinstating a former entry that had been canceled upon a relinquishment, delivered to effectuate a contract made by the former entryman in his lifetime after he had abandoned his entry with the intent not to return thereto, though such relinquishment was filed after his death. It was held that under such conditions the heirs of the decedent did not have any equities as against a succeeding entryman. This decision has never been overruled and is authority in cases where it is proposed to cancel an entry for the purpose of reinstating a former entry and it is not alleged or shown that the law had been complied with as to such former entry prior to the death of the entryman. It has always been the policy of the Department to sustain an entry, however irregular its allowance, unless it be shown that someone else has actual and *bona fide* claim to the lands which must be recognized.

The facts in the case of *Truman* v. *Bradshaw* were in no way similar to those in the case of *Wilson* v. *Holmes*. In the case first named Bradshaw presented an application to make homestead entry for certain land, and filed therewith a relinquishment by Truman (who was then dead) of his entry covering the same. Prior to the date when this application was presented to the local office a protest on behalf of Truman's heirs had been placed on file, stating that the relinquishment of Truman had been executed by him while he was not in his right mind, and that the relinquishment was to be filed for the purpose of depriving his heirs of their interest in the land. In this state of facts Bradshaw's *application* to make entry was rejected.

The facts of the instant case, as stated by Winters, bring it within the principles announced in the case of *Wilson* v. *Holmes*. In neither case should the former entry have been canceled upon a relinquishment filed after the entryman's death; but that entry having been canceled, it will not be reinstated nor will a subsequent entry be disturbed unless it be shown that, at the date of his death, the former entryman was complying with the law, and had not abandoned the land for a valuable consideration. In the case at bar, if Winters's statements are correct they show that his entry should not be canceled and thus raise an issue which can be properly determined only after a hearing between the adverse parties.

The decision appealed from accordingly is reversed, and the case is remanded with directions that a hearing be ordered and that at least 30 days' notice thereof be given to each of the parties in interest.

MOSS AND McCORMACK v. HUMPHREYS

Decided December 3, 1925

HOMESTEAD ENTRY—COAL LANDS—LEASE—RESERVATION—SURFACE RIGHTS.

A homestead entry is a contract which can not be set aside until shown to have been unlawfully, fraudulently, or irregularly made or subsequently violated, even before the entryman's inchoate right thereto ripens into an equitable title.

HOMESTEAD ENTRY—COAL LANDS—LEASE—RESERVATION—SURFACE RIGHTS.

A surface entry which has been allowed under existing regulations pursuant to section 29 of the leasing act subsequent to the granting of a lease of the coal deposits will not be canceled merely because the lessee needs the surface and the use thereof by the entryman may cause inconvenience in the conduct of the mining operations.

COURT DECISIONS CITED AND APPLIED.

Cases of *Parsons* v. *Venske* (164 U. S. 89), *James* v. *Germania Iron Company* (107 Fed. 597), and *Howe* v. *Parker* (190 Fed. 738), cited and applied.

FINNEY, *First Assistant Secretary:*

On August 3, 1923, Renon Humphreys made homestead entry, Montgomery 011504, subject to the provisions and reservations of the act of June 22, 1910 (36 Stat. 583), embracing the N. ½ SW. ¼, Sec. 11, T. 14 S., R. 10 W., Huntsville Meridian, Alabama.

The said tract with other lands is included in coal lease 011495 issued on October 5, 1923, to Clarence L. Moss and George B. McCormack, jr., trading as Moss and McCormack, a copartnership, right thereto being initiated by purchase on July 24, 1923, at public auction held pursuant to the provisions of section 2 of the act of February 25, 1920 (41 Stat. 437), and regulations thereunder.

The right of the coal claimant being first initiated, on June 16, 1924, the homestead entryman, in compliance with a requirement laid by the Commissioner of the General Land Office, filed a waiver of a right to compensation for the use of the surface in so far as it is necessary in extracting and removing the mineral deposits under the provisions of section 29 of the aforementioned act.

The coal lessees protested against the allowance of the homestead entry. The Commissioner dismissed the protest as insufficient, whereupon the coal lessees have appealed. The grounds for the protest are:

(*a*) The lands sought to be entered are necessary for the use of the mineral claimants in the mining and removal of the coal from under said property and other adjoining property covered by said lease for the building of houses for the employees engaged in working said mines.

(*b*) That the timber and water on said land will be necessary and useful for the proper mining of the coal.

(*c*) For the disposal of slate and other débris from said mine and its use for tipples.

(*d*) For tram roads and entries useful and necessary for working the Corona seam of coal which outcrops on said land.

(*e*) Said Corona seam has a shallow top and it will be necessary to leave a large amount of coal in pillars in order to protect the surface.

The Department is in receipt of a report by the Geological Survey expressing the opinion that the exercise of surface rights upon the N. ½ NW. ¼ of Sec. 11, by the homestead entryman will substantially embarrass and hinder legitimate operations under the coal lease, particularly on the NW. ¼ SW. ¼, and that it would be a distinct advantage to the Government if the homestead entry were canceled.

The facts, briefly stated, in support of this opinion are as follows: That the coal lessees are now engaged intensively in developing the leased premises, have made six openings on the coal crop and installed substantial facilities for mining and shipping coal, and it is estimated production can begin within 30 days; that all of the improvements, including dwelling houses, are located within the S. ½ SW. ¼, Sec. 2; and that while the necessity for the use of the land included in Humphreys's entry for dwelling houses is not definitely established, it may become so with the extension of the underground workings to the surface in the vicinity of section 11; that Humphreys's entry is thickly wooded, and the timber would be useful to the lessees for mine props and mine ties; that the lessee proposed to wash the small coal; that the water supply is, however, limited and must be obtained from numerous shallow holes sunk in suitable places to obtain a maximum supply; that there are no workable coal crops on Humphreys's entry except on the extreme northeast corner of the SW. ¼ and that it is evident the surface of

such entry is not necessary for the disposal of slate and débris from the mine, or for the erection of tipples, though it may prove of advantage to construct surface trams and other structures thereon; that the cover over the coal bed varies from a few feet in the northeast corner to 125 feet in the west 40, and in the extraction of coal considerable subsidence will result, rendering it necessary to leave a large percentage of coal in pillars to protect the surface if claims for damages by the surface owner are to be avoided; that the lessees have undertaken to mine beds of coal 21 to 24 inches in thickness, which if successful will result in large revenues to the Government, but which will require the exercise of rigid economy; that the costs of the lease have been comparatively heavy, in the large cash bonus paid, in the acquisition of a railroad right of way, in expensive high-class equipment, in the purchase of surface lands for camp and tipple sites, and if they now have to cope with the surface entry it will result in considerable embarrassment to the lessees in their operations.

Report also states that Humphreys has a one-room frame house, 14 by 14 feet, on the NW. ¼ SW. ¼; that he has cleared 3½ acres, part in cotton, part in corn and the remainder in garden and pasture; that the uncleared portion is hilly and heavily wooded; that the soil is a shale clay, not first-class farming land; and that information obtained is to the effect that Humphreys has maintained continuous residence since January 30, 1924.

As to certain of the Geological Survey's findings it may be observed that, while the question of the right to damages for injuries to the surface by the coal claimant is one for the courts, the Department is not aware of any case presenting the situation as occurs here where such rights to damages have been upheld, occurring by reason of legitimate operations under a coal lease. As to the surface and the water originating thereon, the Department has expressed the view that as between the surface and mineral claimants the latter's right is paramount to so much thereof as is necessary to conduct operations under the lease. *Carlin* v. *Cassriel* (50 L. D. 383). As to the use of the timber upon an unperfected surface entry in conducting mining operations under a permit or lease covering the same, under the leasing act, the Department has likewise expressed the view that where there is an abundance of timber and the cutting will not materially affect the agricultural claimant's use of the land, a special permit may be issued to the permittee or lessee under regulations to be hereafter promulgated. See instructions to the Commissioner of the General Land Office of October 28, 1925, *M. P. Smith and Red Feather Oil Company* (51 L. D. 251).

Nevertheless, it is recognized that the reasons given by the Geological Survey are sufficiently cogent under the existing regulations to justify the Department, in the exercise of its discretionary power, in rejecting an application to make surface entry of the land leased were it a question of the allowance of such an entry and not one of its cancellation. This entry appears to have been regularly and properly allowed under the regulations and established practice existing at the time of such allowance. The entryman appears to have complied with all the regulations then existing governing the initiation of his right and the land was subject to such entry, and in reliance upon the validity thereof, he has, in so far as this record shows, established residence, made improvements, and cultivated the land in compliance with the homestead law.

An entry is a contract, voidable it is true, if fraudulently or unlawfully made. *Parsons* v. *Venske* (164 U. S. 89, 92). As such, it must be respected until it is shown that the entry was unlawfully, fraudulently, or irregularly allowed or that the contract has been violated. Nothing of that kind appears in the protest in this case. The equitable title to land acquired by lawful entry can not be divested or affected by subsequent ruling or modifications of Rules of Practice therein. *James* v. *Germania Iron Company* (107 Fed. 597, 602); *Howe* v. *Parker* (190 Fed. 738, 757). Although the surface enrtyman in this case has not perfected his equitable title, his inchoate right thereto was lawfully initiated and no sufficient warrant appears to divest him of the same.

In accordance with the provisions of section 2 of the act, the lease issued to the appellants grants—

> The right to construct all such works, buildings, plants, structures, and appliances as may be necessary and convenient for the mining and preparation of the coal for market, the manufacture of coke or other products of coal, the housing and welfare of employees, and subject to the conditions herein provided, to use so much of the surface as may be reasonably required in the exercise of the rights and privileges herein granted.

Under section 29 of the act, the lease among other things reserves—

> The right to sell, lease or otherwise dispose of the surface of said lands or any part thereof under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in the mining and removal of the coal therein, and to lease other mineral deposits in the lands, under the provisions of said act.

Under the reservation last quoted, the coal lessees took the lease with notice that rights in and to the surface might be accorded to others. Such right has now been lawfully initiated and subsists and while the coexistence of such right with that granted under the coal lease may lead to vexatious controversies—though none

actually appear to exist in this case—there is no conflict in a legal sense between the rights, interest, and estate of the mineral and agricultural claimants, and need not be in fact.

The right of the coal lessees to the use of so much of the surface as is necessary in the mining and removal of the coal exercised strictly within the terms of the lease is paramount. The homestead entryman's use of the surface is subordinate to such right. Under the terms of the lease the coal lessee has the right to employ and construct upon the land such means and facilities as may be reasonably necessary in coal mining operations. The entryman having entered the land subject to mineral reservations and having waived his right to compensation for injuries arising from the use of the surface in accordance with the terms of section 29 of the leasing act is not entitled to damages for injury to his crops and improvements or for other impairment of the use of the surface that may flow from the operations of the coal lessees conducted within the terms of the lease.

The question as to what particular acts of the parties would be within, or go beyond, the rights they may exercise under their respective estates is one in case of dispute for the courts.

In accordance with these views the protest must be and is hereby dismissed. The Commissioner's decision is therefore affirmed.

EDWARD LEE AND VIOLA CONKLIN

Decided December 8, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—WORDS AND PHRASES.

By the terms of the leasing act of February 25, 1920, the rights of a "person" or an "association" are coextensive with those of a corporation.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—APPLICATION—WORDS AND PHRASES.

An application for a permit or lease by two or more persons jointly under the act of February 25, 1920, is *prima facie* an application by an "association" within the meaning of section 27 of that act.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—DIRECT AND INDIRECT INTERESTS—STATUTES.

Section 27 of the act of February 25, 1920, does not preclude an individual or an association from holding interests in more than one permit or lease on a structure, or three in a State, as a member of an association or of several associations, provided that the interests, both direct and indirect, do not exceed the acreage limitation.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Rule enunciated in cases of *Denver Exploration and Development Company, assignee of Roy F. Smith et al.* (50 L. D. 652), and *Midland Oilfields Company* (51 L. D. 272), applied.

FINNEY, *First Assistant Secretary:*

Edward Lee and Viola Conklin have appealed from a decision of the Commissioner of the General Land Office, dated May 13, 1925, holding for rejection their application, Pueblo 046573, for an oil and gas prospecting permit, made May 16, 1924, under the act of February 25, 1920 (41 Stat. 437), covering the SW. ¼ SE. ¼, Sec. 4, N. ½ NW. ¼, NW. ¼ NE. ¼, S. ½ SW. ¼, Sec. 9, SE. ¼, Sec. 10, SW. ¼, Sec. 12, E. ½, Sec. 19, all of Secs. 20 and 21, the E. ½, S. ½ SW. ¼, Sec. 30, T. 25 S., R. 61 W., 6th P. M., Colorado, containing approximately 2560 acres.

These same applicants hold jointly an oil and gas permit 046103, issued September 17, 1924, covering approximately 2560 acres of land reported by the Geological Survey to be on the same structure.

This appeal draws in question the meaning of section 27 of the act which reads as follows:

> That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State; no person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field; no corporation shall hold any interest as a stockholder of another corporation in more than such number of leases; and no person or corporation shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, which, together with the area embraced in any direct holding of a lease under this act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, for any kind of mineral leased hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under this act. * * *

It is presumed, nothing to the contrary appearing, that Lee and Conklin are persons united and acting together by mutual consent or compact for the purpose of prospecting the land covered by permit 046103, and that such is their relationship as to application 046573. *Prima facie* they are a single entity, to wit, an association. As such, they are applying for a second permit covering the geological structure upon which they now hold a prior like permit, which is forbidden by section 27, no matter what may be the acreage interests on the structure that each may hold as a member of this association.

Even if each of them is considered as falling within the category of a "person" within the meaning of the act, his case is no better, for the reason that as a person each would have obtained directly

one permit on the structure, and he may not take or hold a second, no matter what may be the acreage he may hold as his sole and separate interest.

This is not to say that either of the applicants, because he is a member of this association, may not acquire indirectly interests in other permits and leases upon the same structure, as a member of another association or as a stockholder in a corporation, provided his aggregate interests on the structure do not exceed 2,560 acres; nor to say, if in fact these applicants are an association, and their interests in the existing permit are those of members of the association, that they may not individually acquire a permit or lease upon the same structure, provided the aggregate interest in such permit or lease, together with the acreage interest held as a stockholder of a corporation and as a member of an association or associations does not exceed 2,560 acres.

In the case of *Denver Exploration and Development Company, assignee of Roy F. Smith et al.* (50 L. D. 652, 655), the Department held in construing this provision of the act that—

> There is no such expressed limitation preventing a corporation, if authorized by its charter, from becoming interested, as a member of an association, in more than one lease (or permit) on a geologic structure and in more than three such leases (or permits) in a State, provided its interests, both direct and indirect, do not exceed in the aggregate 2,560 acres on a geologic structure, or 7,680 acres in a State.

The same view is disclosed in the instructions of the Department of November 9, 1925, in the matter of *Midland Oilfields Company, Ltd., et al.* (51 L. D. 272).

By the terms of the statute it necessarily follows that a "person" or an "association" has the same right which these decisions recognize with respect to a corporation.

As a general rule, then, under section 27, one whose interest in a permit or lease is that of a member of an association is held to hold an indirect interest; but the holding of more than one permit or lease on a structure, or more than three in a State, by one person or association, is forbidden, irrespective of the area, though an individual or association may hold an interest in more than one permit or lease on a structure, or three in a State, as a member of an association or of several associations.

Applying these views to the application under consideration, it must be denied.

The Commissioner's decision is affirmed.

FRED PERRY

Decided December 10, 1925

TIMBER AND STONE ENTRY—VESTED RIGHTS—WITHDRAWAL.

The regulations of September 20, 1922, which changed the prior existing regulations by requiring that an appraisal be made before an application to purchase under the timber and stone act can be completed, became operative as to applications then pending for unappraised lands, filed less than nine months prior to that date, and applicants under such applications acquired no vested rights that would defeat withdrawal of the lands at any time prior to their appraisal.

FINNEY, *First Assistant Secretary*:

This is an appeal by Fred Perry from a decision of the General Land Office dated April 25, 1925, rejecting his application 04926 to purchase lots 5, 6, and 7, Sec. 17, and fractional Sec. 20, T. 65 N., R. 34 W., Michigan Meridian, Marquette, Michigan, under the provisions of the timber and stone law. The application was filed July 5, 1922, but the land, which is situated in Isle Royale, Michigan, never has been appraised.

By Executive order of March 22, 1924, the public lands in Isle Royale were withdrawn, pending determination as to the advisability of including such lands in a national monument. On December 10, 1924, the local office rejected the applicant's application 04926 for that reason.

The Commissioner affirmed the action of the local office in his decision of April 25, 1925, which is the subject of this appeal.

The appellant claims to have acquired a vested right to the land in question by virtue of his application to purchase, and he invokes rule 19 of the regulations under the timber and stone law as they existed at the time his application was filed, in accordance with which failure to appraise land covered by an application under that law within nine months from the date of the application permitted the applicant to proceed with his application to purchase as though an appraisement had been regularly made. The appellant contends, in substance, that the omission of this provision from the revised regulations of September 20, 1922 (49 L. D. 288), which were promulgated during the pendency of his application, did not affect the rights which he already had acquired.

The appellant's application was filed July 5, 1922. The privilege of proceeding with an application to purchase under the timber and stone law, in the event that the Land Department failed to have an appraisement made within nine months from the date of such application, ceased to exist September 20, 1922, and thereafter an

actual appraisement of the land became necessary in all cases before an application to purchase under that law could be completed. As but two and one-half months elapsed between the filing of Perry's application and the revision of the regulations, and as it is conceded that no appraisement of the land has ever been made, it is clear that at the date when the land was withdrawn from entry by the Executive order of March 22, 1924, the applicant had not acquired a complete right under either the regulations in force on July 5, 1922, or the revised regulations of September 20, 1922.

As the land in question has not been subject to purchase under the timber and stone law since March 22, 1924, the appellant's application was properly rejected.

The decision appealed from is affirmed.

FRED PERRY

Motion for rehearing of departmental decision of December 10, 1925 (51 L. D. 302), denied by First Assistant Secretary Finney, January 22, 1926.

ANNA L. SCHRAM

Decided December 12, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—SURVEY—WITHDRAWAL.

An oil and gas prospecting permit application filed after the withdrawal of the lands for resurvey because of irregularities in, and extensive obliterations of the original survey, must describe the lands by metes and bounds, and a description of subdivisions in terms of the original survey will not entitle the applicant to take those subdivisions wherever found according to the approved plat of resurvey.

WITHDRAWAL—PRACTICE.

Unless otherwise specified the date of issuance, not the date of its promulgation, marks the commencement of the effective operation of an Executive order.

FINNEY, *First Assistant Secretary:*

Anna L. Schram has appealed from a decision of the Commissioner of the General Land Office, holding for rejection her application, Las Cruces 029252, for an oil and gas prospecting permit covering certain tracts in T. 12 S., R. 22 E., N. M. P. M., which she described by legal subdivisions and requiring her to supply a metes and bounds description and an affidavit as to settlers on the tracts

in accordance with the prescriptions of Circular No. 932 of April 28, 1924 (50 L. D. 400).

The application was filed November 28, 1924. T. 12 S., R. 22 E., was withdrawn for resurvey by Executive order of November 7, 1924. The applicant alleges that there was no notation of this withdrawal on the plat of survey, on the records of the local land office, nor upon any public records thereof and she contends—

That any withdrawal of said township of said range, did not become effective nor could the same disturb any right initiated by applicant, until notice thereof was received in the local land office, noted on the records of said office, and notice thereof given in the usual and customary form provided by law.

That applicant should not be put to the unnecessary expense of a metes and bounds survey under the state of the records existing at the time of the filing of her application in the local land office.

That applicant should be protected in the matter of protecting her rights, at the least expense to her, by a suspension of action thereon pending resurvey of said township and range by the Government.

Assuming that the state of the record was as alleged, there is no merit in the contention. A withdrawal, unless otherwise limited as to the time of its taking effect, is operative from the time it is made. *Emma F. Zumwalt* (20 L. D. 32), *Currie* v. *State of California* (21 L. D. 134), *Hiram C. Smith* (33 L. D. 677).[1] The reasons and authority for the rule are set forth in the last cited case and need not here be repeated.

The records of the General Land Office disclose that the withdrawal for resurvey was because the surveys were wholly inadequate as a basis for further disposal, owing to irregularities in, and extensive obliterations of, the original surveys, few of the original corners being possible of identification. There is no warrant then for assuming that the land the applicant chose for prospecting operations could have been correctly designated by her as being of a particular survey description according to the original survey. The description furnished is, therefore, uncertain and indefinite and for those reasons insufficient to afford a basis for segregation of the land upon the records.

The applicant is not entitled to take for prospecting the subdivisions mentioned in her application wherever the same may be according to the approved plat of resurvey. There is no warrant, therefore, for the suspension of the application pending such resurvey.

The Commissioner's decision is accordingly affirmed.

[1] See also *Almeda Van Nostern* (51 L. D. 161).—Ed.

WINDSOR RESERVOIR AND CANAL COMPANY v. MILLER (ON REHEARING)

Decided December 12, 1925

RIGHT OF WAY—RESERVOIR SITE.

The title of a right of way grantee is the same; that is, a base or qualified fee, whether the grant is made pursuant to the act of March 3, 1875, or to the act of March 3, 1891.

OIL AND GAS LANDS—PROSPECTING PERMIT—RIGHT OF WAY—RESERVOIR SITE.

The department is without authority to issue an oil and gas prospecting permit for land covered by the water of a reservoir held under a grant made pursuant to the act of March 3, 1891.

DEPARTMENTAL DECISION OVERRULED SO FAR AS IN CONFLICT—DEPARTMENTAL INSTRUCTIONS MODIFIED.

Case of *Homer L. Brayton* (31 L. D. 364), overruled so far as in conflict; instructions of April 10, 1916 (45 L. D. 27), modified.

FINNEY, *First Assistant Secretary:*

There has been filed on behalf of Frank C. Miller a motion for rehearing of the Department's decision of January 10, 1925 (51 L. D. 27), in the above-entitled case, whereby in affirmance of the decision of the Commissioner of the General Land Office, dated August 13, 1924, it was held that Miller could not be granted a permit under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon a tract of land occupied by the water of a reservoir constructed in pursuance of a right of way granted under the act of March 3, 1891 (26 Stat. 1095, 1101).

The Department held that it had no authority to grant a permit to prospect for oil and gas upon a tract which was entirely within a reservoir site, on the ground that such a title had passed under the grant of right of way that the right to prospect on the land could not be given. In support of this holding there were cited, among other cases, *United States* v. *Whitney et al.* (176 Fed. 593), *Rio Grande Western Railway Company* v. *Stringham* (239 U. S. 44), and *Kern River Company et al.* v. *United States* (257 U. S. 147).

It is not disputed that the Supreme Court of the United States has clearly held that the right of way granted by the act of March 3, 1875 (18 Stat. 482), and similar acts, is not a mere easement, but a limited fee; nor can it be disputed that the same construction has been given to the acts granting rights of way for railroads and to the act of March 3, 1891.

But the brief and argument in support of the motion are mainly devoted to an endeavor to show that the grants made by the act of March 3, 1891, differ widely from those made by the act of March 3, 1875, and similar acts; that the grant made by the former act is

really no more than an easement which leaves in the United States the title to the deposits beneath the surface as well as the surface, so that the Department is without authority to deny the granting of prospecting permits under conditions such as are here involved.

The Department is of the opinion that no such distinction can be made between the acts. In each act it is provided "That the right of way through the public lands of the United States is hereby granted" * * *.

In the case of *United States* v. *Whitney et al.*, *supra*, the court said (p. 594):

> In its general features the act of March 3, 1891, is very similar to the railroad right of way act (Act March 3, 1875, c. 152, 18 Stat. 482). The language of section 18 is:
>
> "That the right of way through the public lands and reservations of the United States is hereby granted * * * to the extent," etc.
>
> Section 19 provides that, upon the approval of the map by the Secretary of the Interior, such approval shall be noted upon the plats in the local land office, "and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way." It is accordingly held that as in the case of a railroad right of way the grant is *in præsenti*, and that title to the land shown upon the applicant's maps vests in him upon the approval thereof by the Secretary of the Interior.

The case of *Homer E. Brayton* (31 L. D. 364) is cited as authority in support of Miller's contentions. In that case the Department held that a soldiers' additional homestead entry could be allowed subject to the right of an irrigation company to use the land for the purpose of a reservoir. It is stated:

> The approval of the map did not have the effect to vest the title to the land in the company, but it still remains in the United States, the company having the right only to use the land, which may be disposed of subject to that right.

As authority for its ruling the Department quoted part of section 19 of the act of March 3, 1891, to the effect that after approval of the map and notation upon the plats of the local office "all such lands over which such rights of way shall pass shall be disposed of subject to such rights of way." The Department also quoted a portion of paragraph 2 of the regulations of June 27, 1900 (30 L. D. 325), wherein it is stated that the act of March 3, 1891, is not in the nature of a grant of lands. But these regulations were modified by those of June 6, 1908 (36 L. D. 567), wherein it is stated that "the right granted is not in the nature of a grant of lands, but is a base or qualified fee."

It is to be noted that in section 4 of the act of March 3, 1875, it is provided—

> * * * upon approval thereof (a profile of the road) by the Secretary of the Interior, the same shall be noted upon the plats in said office; and

thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

And the reservation of such rights of way need not be inserted in final certificates and patents issued for lands traversed thereby. *Dunlap* v. *Shingle Springs and Placerville Railroad Company* (23 L. D. 67). See also *West Elk Land and Live Stock Company* v. *Telck* (45 L. D. 460).

Nevertheless the Department has held that entry and patent of a legal subdivision crossed by a railroad right of way carries no interest or title to the right-of-way strip, and that upon abandonment of the right of way the title thereto reverts to the United States and does not pass to the owners of the subdivisions through which the right of way runs. *E. A. Crandall* (43 L. D. 556). Congress has clearly recognized the soundness of this ruling in passing the act of March 8, 1922 (42 Stat. 414).

The Department is of the opinion that it has no more right to grant an oil and gas prospecting permit for land covered by the water of a reservoir held under the act of March 3, 1891, than it would have to grant effectively a permit thus to prospect upon land covered by a right of way for station buildings and machine shops held under the act of March 3, 1875.

The motion for rehearing is denied, and the decision of January 10, 1925, is adhered to.

The case of *Homer L. Brayton*, *supra*, is overruled, and the instructions of April 10, 1916 (45 L. D. 27), are modified, in so far as said case and instructions are in conflict with this decision.

FEDERAL WATER POWER ACT—CIRCULAR NO. 729 (47 L. D. 595), AMENDED

INSTRUCTIONS

[Circular No. 1044]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 14, 1925.

REGISTERS,
UNITED STATES LAND OFFICES:

So much of Circular No. 729, of November 20, 1920 (47 L. D. 595, 597), Federal Water Power Act of June 10, 1920 (41 Stat. 1063), which reads—

> If the application alleges discovery or location prior to the date of the act, it should be accompanied by corroborated affidavit, attesting the fact, and transmitted to this office for consideration, *without allowance.*

is hereby amended so as to read—

If the application alleges a valid location made prior to the date of the act and is accompanied by corroborated affidavit attesting the fact, the patent proceedings may be prosecuted to completion. The proof should be considered upon its merits, and, if found regular, final certificate may issue although a protest may have been filed by the division inspector; but the claimant should be advised in such cases that patent will be withheld by the General Land Office pending a report by the division inspector upon the *bona fides* of the claim; also, that when the case is adjudicated in the General Land Office determination will be made whether or not the claim is subject to the provisions of section 24 of the act.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

ASSOCIATED OIL COMPANY

Opinion, December 15, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT—OPERATING AGREEMENT—DIRECT INTEREST.

Where the effect of an arrangement under an operator's agreement in fact transfers the obligation of the permit or lease, and control thereunder, to the operator, so as to amount to an assignment thereof, the interest of the operator must be regarded as a direct holding under the act of February 25, 1920.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT—OPERATING AGREEMENT—EVIDENCE.

The application of the limitations of section 27 of the act of February 25, 1920, to interests in an oil and gas permit or lease acquired by an operator under an operating agreement is a question of fact to be ascertained from the evidence in each case.

PRIOR DEPARTMENTAL OPINION AMPLIFIED.

Departmental opinion of October 21, 1925, *Associated Oil Company* (51 L. D. 241), amplified.

FINNEY, *First Assistant Secretary*:

I have before me your [Joseph P. Tumulty] letter of December 9, 1925, with which you transmitted a letter of inquiry by your client, the Associated Oil Company, concerning interpretations by the Department of the limitations of section 27 of the leasing act of February 25, 1920 (41 Stat. 437), with respect to operating agreements affecting oil and gas prospecting permits issued under that act.

The letter stated that under the usual operating agreement made by the Associated Oil Company, the company is given control of

the land subject to conditions set out in the agreement, and the following specified questions were asked:

1. A, B, and C each hold permits on the same structure. A has 640 acres; B has 1,280 acres; and C has 800 acres. They offer us operating contracts upon their permits at a certain royalty, which would leave us, say, ⅞, out of which we must pay all expenses, and get our profit, if there is any. The aggregate area of the three permits on this structure is 2,720 acres. If our ⅞ interest in what is produced is changed to acreage on the structure, we would be getting ⅞ of 2,720 acres, or 2,258 acres, that is, the production from that area.

Question. Can we make such operating contracts with these three permittees, under the law?

2. Following the first question, and assuming that our attorneys are correct in advising us that interests acquired under operating agreements are *indirect*, and having in mind the limitation in the leasing act, of three permits or leases in a State, a further question suggests itself, viz:

Can we enter into similar operating agreements in other parts of the same State, so long as what may be called acreage equivalent which we would acquire, would amount to not more than 7,680 acres in that State?

The question presented is whether operating agreements described in the letter will vest in the operating company any interests, within the purview of section 27 of the act of February 25, 1920, and if such interests are acquired, whether they are direct or indirect interests. An opinion, M. 13831 (unreported), dated October 14, 1924, referred to in the letter, pointed out that direct holdings were those in which there was a direct contractual relation with the United States either through direct grant of a prospecting permit or lease, or subrogation to permittee or lessee status, through an approved assignment. Indirect interests were defined as those derived through ownership in corporations or membership in associations. In that letter it was stated, as a general proposition, that operating agreements were not *direct holdings*, but constituted the operator an associate of the permittee or lessee.

In my opinion of October 21, 1925 (51 L. D. 241), to which your client also referred, it was pointed out that an operating agreement which gave the operator anything more than compensation for services rendered as employee or agent of a permittee or lessee constituted an interest or holding under the act of February 25, 1920. It was further pointed out that in order that there be an association composed of permittee or lessee and drilling contractor or operator, a *bona fide* joint venture must be shown, and it was suggested that an operating agreement which made the operator the real party in interest as to a permit or lease, with the permittee or lessee, merely holding a reserved royalty, would be construed as an assignment, despite its form. While this letter did not so state, it follows that if the effect of the arrangement was in fact to transfer the obligation of the lease or permit, and control thereunder, to the operator,

so as to amount to an assignment thereof, the Government would be obligated to treat the interest as such and regard it as a *direct* holding. From what has been stated in the opinion of October 21, 1925, and herein, it must be apparent that your client has not so disclosed the proposed relations between the parties as to enable me to express an opinion in the matter. The operating agreement and all other facts in the matter, including identification of the permits involved, will have to be furnished before any specific information can be given.

I appreciate that occasions often arise in which the company must act promptly in order to secure operating contracts, but the situation presented by section 27 of the act of February 25, 1920, will not permit me to make any rulings in advance of a specific case. General principles only may be stated, and they have been fully set forth in the letter referred to by your client.

Contracts with permittees are not required to be submitted for approval until after oil is discovered and a lease is sought and the Department has been, and will doubtless continue to be, as liberal as it may, having in mind the purpose of section 27 of the act, in the matter of allowing interests, both direct and indirect, to be acquired up to the maximum allowed by the act.

The plan which your client submitted, while insufficient, as to details, to warrant a definite finding, suggests a situation where the company would control each permit in its entirety and would have direct interests in more than one permit on the structure and in more than 2,560 acres thereon.

UTICA OIL COMPANY

Decided December 30, 1925

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—APPROXIMATION—ROYALTY.

An oil and gas permittee may invoke the rule of approximation in order to conform his selection of the 5 per cent royalty area to legal subdivisions in fulfillment of the requirement of section 14 of the act of February 25, 1920, but, where that rule can not be applied, the selection of aliquot parts of regular subdivisions may be permitted.

FINNEY, *First Assistant Secretary:*

The Department has considered your [Commissioner of the General Land Office] letter of December 17, 1925, with reference to oil and gas prospecting permit Cheyenne 029690, issued on November 17, 1921, to the Utica Oil Company, under section 19 of the act of February 25, 1920 (41 Stat. 437), embracing 1,680 acres of land.

It appears that on July 25, 1925, an application was filed by said company for an oil and gas lease, in which the land desired at the

5 per cent royalty rate was described as the N. ½ and N. ½ SE. ¼, Sec. 25, and S. ½ SE. ¼ SE. ¼, Sec. 24, T. 26 N., R. 88 W., 6th P. M., containing 420 acres, exactly one-fourth of the permit area.

In construing the requirement of section 14 of said act of February 25, 1920, that the 5 per cent area selected by the permittee shall, if surveyed, be "described by the legal subdivisions of the public-land surveys," the practice, sanctioned by the Department, has been to apply the rule of approximation. In the instant case that rule can not be invoked, since the excess, were the 20-acre tract in Sec. 24 included, is precisely equal to the deficiency were it omitted.

The provision of law whereby the permittee shall, upon discovery, be entitled to "a lease for one-fourth of the land embraced in the prospecting permit," can not be disregarded in construing the requirement above quoted, as to the area to be embraced in the lease at the 5 per cent royalty. It was for the purpose of harmonizing those provisions that the rule of approximation has been applied in proper cases. Where, as here, that rule can not be invoked, there is no apparent reason why the practice followed in placer mining claims with respect to aliquot parts of regular subdivisions may not be followed, and the application approved.

REGULATIONS GOVERNING THE FREE USE OF TIMBER BY OIL AND GAS PROSPECTING PERMITTEES AND LESSEES

[Circular No. 1048] [1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 11, 1926.

TO OIL AND GAS PROSPECTING PERMITTEES AND LESSEES AND DIVISION INSPECTORS OF THE INTERIOR DEPARTMENT:

In accordance with the authority conferred upon the Secretary of the Interior by section 32 of the act of February 25, 1920 (41 Stat. 437), the following rules and regulations shall govern the free use of timber for fuel in drilling operations by oil and gas permittees and lessees:

1. Any oil and gas prospecting permittee, lessee, or their assignees, desiring timber to be used for fuel in drilling operations on a prospecting permit or lease not within a national forest, shall file application therefor, with the division inspector for the division within

[1] See instructions of October 26, 1925, in the matter of *M. P. Smith and Red Feather Oil Company, ante*, p. 251.—Ed.

which the permit or lease is situated, upon a form furnished by him on request.

2. Upon the filing of an application required by the preceding paragraph the division inspector will cause investigation to be made, and permission to cut the timber applied for may be granted by him, *Provided* the timber is not taken from lands occupied by a settler or embraced in an unperfected homestead entry.

3. The applicant shall be notified by registered mail of the decision by the division inspector, in all cases where the permit applied for is not granted and he shall be allowed 30 days from service of notice within which to appeal from such decision to the Commissioner of the General Land Office.

4. Where the land involved in the oil and gas prospecting permit or lease is occupied by a settler or is embraced in an unperfected homestead entry, the applicant must serve notice by registered mail, on the settler, or entryman, showing the amount and kind of timber he has applied for.

(*a*) Evidence of service of such notice must be furnished the division inspector.

(*b*) The settler or entryman shall be allowed 30 days from service of notice within which to show cause why the permit should not be granted.

(*c*) The division inspector will transmit the application to the Commissioner of the General Land Office, together with any protests against the issuance of the permit that may be filed by the settler or entryman, and his report and recommendation as to the issuance of said permit.

(*d*) Permits in such cases will be issued only where there is an abundance of timber on the land, and the removal thereof, will not materially affect the use of the land by the agricultural claimant.

5. The applicant shall be notified by registered mail of the decision of the Commissioner of the General Land Office, in all cases where the permit applied for is not granted and the settler or homestead entryman shall be notified in a like manner before the issuance of the permit in all cases where protests are filed against the issuance of such permit. An appeal to the Secretary of the Interior from the Commissioner's decision may be filed within 30 days from service of notice.

6. No permit will be issued where title to the surface has passed from the United States.

7. A permit granted under these regulations, shall embrace no land not included in the oil and gas prospecting permit or lease, issued or assigned to the applicant.

8. All rights and privileges under a permit issued under these instructions, shall terminate upon the expiration or cancellation of

the oil and gas prospecting permit or lease, or upon the discovery of oil in sufficient quantity for use as fuel in drilling operations.

9. Timber cut under a permit issued under these instructions may be used for fuel in drilling operations conducted on the land embraced in the oil and gas prospecting permit or lease, used as a basis for such permit only, and all brush, tops, lops, and other débris made in felling and removing the timber shall be disposed of as best adapted to the protection of the remaining growth, and in such manner as shall be prescribed by the division inspector and failure on the part of the permittee to comply with this requirement will render him liable for all expenses incurred by the division inspector in putting this regulation into effect.

10. Where permits are secured by fraud or timber is not used in accordance with these rules and regulations, the Government will enforce the same civil and criminal liabilities as in other cases of timber trespass upon public lands.

11. The cutting of timber for sale and speculation, or for use by others than the permittee, is strictly prohibited by these rules and regulations.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

TIDAL OSAGE OIL COMPANY ET AL.

Decided January 14, 1926

OIL AND GAS LANDS—OSAGE INDIAN LANDS—LEASE—ROYALTY.

A gas lease in which the lessee agrees to develop and maintain a minimum quantity of gas, and to utilize same or pay royalty thereon, is a lease on a minimum royalty basis, and obligates absolutely the lessee to pay the minimum royalty, without deduction for gas used or sold for operating purposes.

EDWARDS, *Assistant Secretary:*

December 1, 1925, you [Commissioner of Indian Affairs] transmitted a letter from Mr. W. C. Franklin, vice president and general manager of the Tidal Osage Oil Company, requesting reconsideration of departmental decision of July 17, 1925, regarding the extent of liability of the Tidal Company and the Oklahoma Natural Gas Company under their respective gas leases covering Osage Indian lands.

The claim of the Tidal Company that consideration of its lease with that of the Oklahoma Natural Gas Company at the same time and in the same connection resulted in confusion as to its rights does not appear to be well founded for the reason that the conclusions of the Department as to the liability of the Tidal Company were based entirely on the material provisions of its lease and the facts presented, to which full consideration was given. The company further contends, however, that the decision complained of was written with an erroneous impression of the provisions of its lease and of the law governing the construction of such instruments.

The pertinent parts of the lease read as follows:

2. (*a*) The lessee agrees to pay or cause to be paid to the Superintendent of the Osage Indian Agency, Pawhuska, Oklahoma, for the lessor, as royalty, the sum of 16⅔ per cent of the value of said gas at the well determined as hereinafter provided, after first deducting the gas used for fuel in drilling and operating the lease by either oil or gas lessee; (The lease thereafter fixes the value of the gas at 18 cents per thousand cubic feet so that the royalty to the tribe is one-sixth of eighteen cents or three cents per thousand).

3. Lessee covenants and agrees that it will within one year from and after the date of approval of this lease by the Secretary of the Interior expend the sum of at least one hundred and fifty thousand ($150,000) dollars in the actual drilling and equipping of gas wells or dry holes, none of such expenditure to include the drilling or equipping of oil wells for which gas lessee will be reimbursed nor in the cost of pipe lines or other facilities for marketing gas, unless the expenditure of a less amount of money results in the development of gas wells with an open flow capacity of not less than 50,000,000 cubic feet of gas per day; and not more than 20 per cent of the open flow capacity of any such gas well shall be utilized unless otherwise authorized by the Inspector.

Lessee further covenants and agrees that it will expend annually not less than one hundred thousand ($100,000) dollars during the life of the lease in developing or in maintaining a production of 10,000,000 cubic feet of available gas per day on the basis of a utilization of not more than 20 per cent of the open flow capacity of any well as hereinbefore set forth, unless the expenditure of a less sum be sufficient to maintain such production; Provided, That should such expenditure during any one year not result in obtaining the required minimum quantity of gas, lessee shall utilize, beginning eight months from date of approval of this lease or pay royalty on a basis of 20 per cent of the open flow capacity of all commercial gas wells; Provided, That should the expenditure of the sums hereinbefore provided result in the development of fifty million cubic feet of gas or more than that amount, the lessee shall not be required to utilize in any one year, beginning eight months from the approval of this lease, more than an annual average of ten million cubic feet per day or pay a royalty on more than such annual daily average, if not utilized * * *

* * * * * * *

14. The gas lessee shall furnish the oil lessee, free of royalty, sufficient gas for drilling and operating purposes at a rate to be agreed upon, or on failure to agree the rate shall be fixed by arbitration.

During the year ending December 19, 1923, the period in controversy, the Tidal Company made the annual expenditures required by the lease in developing and maintaining a production of 10,000,000 cubic feet of gas per day. It sold commercially during that year 2,585,054,000 cubic feet of gas on which the royalty due the tribe was paid and used for operations on the lease and for sale to other operators 718,397,000 cubic feet of gas. It therefore contended that having utilized 3,303,451,000 cubic feet of gas, the unpaid royalty, if any, was represented by 3¢ a thousand on the difference between 3,650,000,000 cubic feet, the minimum required to be utilized, and 3,303,451,000 cubic feet, or $10,396.47. The decision complained of held that the company was obligated by the lease to pay royalty to the tribe during the period in question on 10,000,000 cubic feet of gas per day (3,650,000,000 for the year), whether that amount was utilized or not. In other words, there was still due the tribe as royalty over and above the amount already paid by the company the sum of $31,948.38.

The company contends that the position thus taken entirely disregards the language of the lease providing that the gas used for operations by the gas lessee and that sold to the oil lessee for operating purposes shall be royalty free and insists that such language be given full effect. But the question presented involves not the interpretation of the language referred to apart from other provisions of the agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. As was said by the Supreme Court of the United States in the case of *United States* v. *Stage Company* (199 U. S. 414, 423), it is necessary, in giving a proper construction, to examine the entire contract and to consider the relation of the parties and the circumstances under which it is signed. Looking at the contract as a whole we find that the company took the lease on a specified royalty of one-sixth of the value of the gas and engaged to expend a certain amount annually in developing and maintaining a minimum quantity of gas. Having developed and maintained the minimum amount, the agreement of the lessee is to utilize same or pay royalty thereon. This is clearly a lease on a minimum royalty basis. Mining leases of this character are frequently made and the courts, when called upon to construe them, have held that the obligation to pay the minimum royalty is absolute. See *Berwind White Coal Mining Company* v. *Martin* (124 Fed. 314); *Bamford* v. *Lehigh Zinc Company* (33 Fed. 677, affirmed 150 U. S. 665). This being so, it is unnecessary further to consider the language of the lease relating to the use of gas for operating purposes other than to say that the conditions existing at the time the lease was signed strongly indicate that the presence of that language in the lease was in part responsible for the incorporation in the instrument of a minimum

royalty provision. On the Osage reservation separate leases are had which frequently cover all or parts of the same acreage for the development of the oil and gas deposits. The gas leases embrace large areas within which there may be many oil leases, the latter being limited to 160-acre tracts. Manifestly, under these conditions the demands for gas for operating purposes might be so great that a lease giving the right to use the gas for such purposes royalty free would, in the absence of a minimum royalty provision, materially reduce the royalty, if not wholly deprive the Osage Tribe of any compensation for its property.

Much emphasis is placed by the company on the meaning of the word "utilize," but even under the liberal construction which the company urges that the word should receive, the minimum quantity of gas was not utilized by it during the year in question. Having developed a production of 10,000,000 cubic feet of gas per day, the plain direction of the lease is that that quantity shall be utilized or royalty paid thereon, with no provision for allowing the lessee credit for gas used or sold for operating purposes.

Being convinced that the decision of July 17, 1925, is sound, fully supported by the provisions of the lease and in accordance with the law governing the construction of such contracts, it will be adhered to and the request of the Tidal Osage Oil Company is accordingly denied.

STATUS OF SWAMP LANDS CONTAINING MINERALS UNDER THE SWAMP-LAND GRANT TO THE STATES OF MINNESOTA AND OREGON

Instructions, January 15, 1926

SWAMP LAND—MINNESOTA—OREGON—RESERVATIONS—WORDS AND PHRASES—STATUTES.

Section 2490, Revised Statutes, repealed and superseded the act of March 12, 1860, which extended the swamp-land grant to the States of Minnesota and Oregon, except as to rights which accrued under the prior law, and the omission in that section of the word "reserved" used in the proviso to section one of the act has the effect of precluding reservations in derogation of the swamp grant.

SWAMP LAND—MINERAL LANDS—MINNESOTA.

Mineral lands in the State of Minnesota have never been subject to the operation of the mining laws and inasmuch as the act of March 12, 1860, which extended the swamp-land grant to that State, contained no reservation of minerals, mineral lands were not excepted from the grant.

SWAMP LAND—MINERAL LANDS—OREGON.

The reservation of mineral lands in the Oregon donation acts of September 27, 1850, and February 14, 1853, was in effect such a reservation of lands of that character as to bring them within the class of lands "reserved" and excepted from the operation of the swamp-land grant to that State by the proviso to section 1 of the act of March 12, 1860.

SWAMP LAND—SELECTION—LIMITATIONS—FORFEITURE.

Querry: Does failure to select within the time specified in section 2490, Revised Statutes, forfeit the grant?

FINNEY, *First Assistant Secretary*:

Reference is made to your [commissioner of the General Land Office] letter of December 9, 1925, requesting instructions in respect to a question stated as follows:

> In the light of the decision of the Supreme Court of the United States rendered November 23, 1925, in the case of *Hubert Work, Secretary of the Interior, Appellant*, v. *The State of Louisiana*, in which it is ruled that the swamp-land acts of March 2, 1849, and September 28, 1850 (9 Stat. 352 and 9 Stat. 519), granted to the States the swamp and overflowed lands without reference to their mineral character, instructions are asked whether or not the same principle may be applied to the act of March 12, 1860 (12 Stat. 3), extending the benefits of the swamp-land grant to the States of Minnesota and Oregon.
>
> While it is held by the court that at the time of the passage of the swamp acts of 1849 and 1850 no settled public policy existed which would warrant the assumption that Congress intended to reserve mineral lands from the swamp grants in the absence of express words of reservation in the granting acts, may it be conceded that in the subsequent interval of approximately 10 years before the passage of the act of March 12, 1860, no settled public policy developed which should be taken into consideration in construing the latter act in its application to the States of Minnesota and Oregon.
>
> The information is desired in connection with a case now pending before this office involving State of Oregon swamp selections, some of which have possibilities of mineral value.

The act of March 12, 1860, provided in part as follows:

> That the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

It is believed that according to the doctrine announced in the decision referred to there was no general reservation of mineral lands prior to the extension of the swamp-land grant to Oregon and Minnesota by the act of March 12, 1860. No special act applicable to Minnesota making such reservation has been found. Moreover, the act of February 18, 1873 (17 Stat. 465), now section 2345, Revised Statutes, expressly excepted mineral lands in that State from the operation of the mining laws and provided for their disposal under the agricultural land laws. It therefore seems quite clear that the mineral value is not a factor to be considered in determination of the rights of the State of Minnesota under the swamp-land laws. However, the adjustment of that grant has been under suspension for several years on account of alleged erroneous patents issued to the State for reserved lands, not subject to selection, and the matter is now pending in the Supreme Court of the United States.

It remains to be considered whether certain prior laws locally applicable to Oregon had reserved the mineral lands so that the extension of the swamp grant to that State in 1860 would not include mineral lands.

The so-called donation act of September 27, 1850 (9 Stat. 496), which granted lands to settlers in Oregon provided in section 5 "That no mineral lands shall be located or granted under the provisions of this act." Section 9 provided that no donation right upon section 16 or 36 should be allowed if the residence and cultivation upon which same is founded commenced after survey of the same. Section 10 granted to the Territory the quantity of two townships to be selected in legal subdivisions after survey to aid in the establishment of a university. Section 11 donated certain other lands for the benefit of a university. The concluding fourteenth section of the act also contained the following provision: "That no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act."

That act was amended by the act of February 14, 1853 (10 Stat. 158), liberalizing the law in certain respects for the benefit of settlers and also providing for the disposal of lands at public sale and private entry, excepting mineral lands, after April 1, 1855, where not otherwise disposed of or reserved.

Upon admission of the State into the Union by act of February 14, 1859 (11 Stat. 383), it was provided that the State shall be granted sections 16 and 36 in every township of the State where not otherwise disposed of, for use of schools, and in case of prior disposal the right to select other lands equivalent thereto was provided. No specific exception of mineral lands was contained in the grant. In the case of *United States* v. *Morrison* (240 U. S. 192) it was held that the State grant for school purposes was not a grant *in praesenti* and did not attach until identification of those sections by approved official survey; that at any time prior to such identification Congress had power to cause them to be reserved or otherwise disposed of and that the inclusion of such sections in a forest reservation prior to identification by survey prevented the school grant from attaching thereto. The court cited with approval the case of *Heydenfeldt* v. *Daney Gold and Silver Mining Company* (93 U. S. 634), wherein it was held that the school grant to the State of Nevada did not attach to lands patented under the mining laws prior to identification of the section by official survey. In that connection it was said: "Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them." In the *Morrison case*, *supra*, the court stated: "We regard the decision in the *Heydenfeldt case* as establishing a definite rule of construction."

In *Mining Company* v. *Consolidated Mining Company* (102 U. S. 167), the court construed the effect of the school grant to the State of California by the act of March 3, 1853 (10 Stat. 244), in respect to lands valuable for mineral. The clause which granted sections 16 and 36 to the State did not contain an express exception of mineral lands, but in providing for certain other forms of disposal by the same act, mineral lands were excepted. The court held that the act, taken as a whole, showed an intention to except mineral lands from the school grant. That decision was followed in the case of *United States* v. *Sweet* (245 U. S. 562), involving the school grant of Utah by the act of July 16, 1894 (28 Stat. 107). These two latter decisions were noticed and commented upon by the court in the recent decision in the *Louisiana Swamp Land case*. In regard to the first it was said that the decision was not based upon the ground that there was at the time of the California grant a settled and general policy of reserving mineral lands but on the ground that a local policy with reference to that State had been adopted, as shown by other provisions of the act. In respect to the decision in the *Sweet case*, involving the Utah grant, it was said that the decision was based on the ground that prior to that grant in 1894 a settled and general policy had been established of disposing of mineral lands only under laws especially including them. The court accordingly expressed the view that these decisions were not in conflict with its conclusion in respect to the original swamp-land grants of 1849 and 1850, as no general policy of reserving mineral lands had been adopted prior thereto. Reference was also made to the Oregon donation act above cited in the following language:

> And while the act of September 27, 1850, providing for the disposal of public lands in the Territory of Oregon to settlers, expressly excepted "mineral lands," it is manifest that this one local act, approved the day before the swamp-land act of 1850, was insufficient to establish a settled public policy in reference to the reservation of mineral lands prior to the latter act. And the fact that immediately after the subject of mineral lands had been thus brought to the attention of Congress, it did not except mineral lands from the grant of swamp lands to the several States, indicates that no reservation of such lands was intended.

The swamp-land grant as applied to Oregon was very exhaustively considered by the supreme court of that State in *Morrow et al.* v. *Warner Valley Stock Company* (101 Pac. 171). That decision and others in related cases decided at the same time had the effect of nullifying certain patents which had been issued to the State under its swamp grant and vesting title in the adverse claimants under the preemption and homestead laws. Theretofore that court had held that the grant was one *in præsenti* as of March 12, 1860, and that any subsequent grant or sale of the swamp lands

by the Government other than to the State was void. In the case cited, however, the prior decisions were overruled, and it was held that the proviso contained in the grant of March 12, 1860, was a distinct departure from the terms of the original swamp act of 1850 applicable to Arkansas and other States. The effect of the provision was stated by the court to be as follows:

> The grant to the State of Oregon, therefore, does not, *proprio vigore*, invest the grantee immediately on the date of the enactment with a title, but it is a limited and conditional grant, to invest the State with title only to such lands as the Government may not have reserved, sold, or disposed of prior to confirmation of title. Nor is there any language in the grant that necessarily withdraws such lands from settlement and entry, under other general laws, by qualified citizens of the United States, but, on the other hand, the language of the proviso expressly retains in the general Government the fee-simple title, with the right to reserve, sell, or dispose of any thereof.

If that decision be a sound interpretation of the swamp grant of March 12, 1860, it follows that any reservation of mineral lands or disposal of same prior to confirmation thereof to the State under the swamp grant would prevent the grant from attaching thereto, even if it were held that the mineral lands in Oregon were not reserved prior to March 12, 1860. That decision held not only that the Government could reserve or dispose of swamp lands subsequent to March 12, 1860, in Oregon, under laws of prior enactment, but also that Congress had power to pass general laws of later date under which such lands could be disposed of other than to the State at any time before the selection and approval under the swamp grant. Doubtless, Congress had such power. The grant, being a mere gratuity, could have been revoked altogether at any time before the rights of the State thereunder attached. But any such unusual course would have to be clearly indicated. The disposal of school sections under subsequent legislation rests upon a different basis, as Congress provided for the selection of other lands in lieu of those lost in place. The question presented, however, does not depend upon any supposed curtailment of the grant by legislation subsequent to March 12, 1860. On the contrary, it is rather more necessary to consider whether, in fact, the grant was enlarged by its reenacted form, as contained in the Revised Statutes.

Examination of section 2490, Revised Statutes, discloses that the word "reserved" was omitted from the exceptions contained in the proviso to section 1 of the original act. In considering the effect of this omission, the court in the decision last above cited, held that it should be regarded merely as an accidental omission and not intended as an amendment of the original law; that it was not the duty of the revisers to change the law, but only to consolidate, simplify,

and correct imperfections and to omit only redundant and obsolete enactments. It was therefore concluded that the section should be read as though it contained the word "reserved" or that the term "disposed of" should be interpreted as its equivalent.

The Department is not disposed to accept this view of the matter. The Revised Statutes constitute not merely a compilation of laws in existence on December 1, 1873, but are also a revision and repeal of prior laws inconsistent therewith. The effect of the Revised Statutes was to repeal the act of March 12, 1860 (12 Stat. 3), and in lieu thereof the grant is governed by the provisions of section 2490, Revised Statutes, effective June 22, 1874, except as to any rights which accrued under the prior law. These propositions are fully fortified by the express provisions contained in the several sections to Title 74, designated as "Repeal Provisions."

The better view of the state of the law would seem to be that prior to June 22, 1874, the State was entitled to all swamp lands not reserved, sold, or disposed of, under any law, enacted prior to March 12, 1860, before confirmation of title to be made under the authority of said act, and that from June 22, 1874, the grant as revised extends to all swamp lands within the State which the Government may not have sold or disposed of under any law, enacted prior to March 12, 1860, before confirmation of title to the State under the grant, excepting, however, lands properly reserved prior to the repeal of the original act. In other words, while reservations could not be made after June 22, 1874, in derogation of the swamp grant, the lands thertofore properly reserved were not affected by the revision.

As indicated above, it is believed that the several provisions of the laws referred to in the enactments prior to March 12, 1860, constitute effective reservation of mineral lands in the State of Oregon so that the swamp grant can not be applied thereto.

It is deemed proper to observe further that in the case now pending in the Supreme Court involving the Minnesota grant, the Government is contending that failure of the State to make timely selection as provided by section 2490, Revised Statutes, results in forfeiture. Therefore, while this Department has heretofore acted upon a different theory in respect to that provision, in harmony with an opinion by the Attorney General (37 L. D. 397), yet it seems now advisable to suspend action on any swamp-land claims in Minnesota or Oregon dependent upon that issue until decision shall have been rendered by the Supreme Court on the question.

MARCO ISLAND

Decided January 19, 1926

SURVEY—LAND DEPARTMENT—JURISDICTION.

Where a tract of land had been officially surveyed and the Government had patented all the lands returned by the surveyor, the Land Department is without authority to order a corrective survey notwithstanding the tract actually contains an area greatly in excess of the amount returned.

BOUNDARIES—SURVEY.

In matters of boundaries it is a general rule that monuments, natural or artificial, prevail over calls for course, distance, or quantity.

FINNEY, *First Assistant Secretary:*

Reference is made to letter of December 8, 1925, by the Assistant Commissioner of the General Land Office, transmitting a report showing the information obtained by a field investigation concerning the survey of Marco Island in T. 52 S., Rs. 26 and 27 E., T. M., Florida, in order to determine whether there are unsurveyed public lands within that area, it having been asserted by certain alleged settlers that a strip approximately one mile wide from north to south which extends across the central portion of the island, running east and west, was omitted from the original survey.

The original survey in question was made in 1876, and title to all of the lands comprised therein has passed from the Government, based upon that survey record. Therefore the only question left open for determination is whether certain areas were omitted from the original survey.

This island is quite irregular in shape, being indented by bays and inlets. Its total area according to the original survey is 4,156.29 acres. Its true area was found by the recent examinations to be approximately 6,800 acres, according to the traverse lines as run along the edge of the open water. Properly, of course, the traverse should run along the mean high tide level, but for purposes of comparison the examiners adopted the line of elevation which appears to have been followed by the original surveyor. A large portion of the area embraced within the said traverse line is below mean high tide and much of the remaining part is swampy, about two-thirds of the total area being tide or swamp lands.

One corner of the original survey was positively identified on the island, being the corner for Secs. 8, 9, 16, and 17, T. 52 S., R. 26 E. A local quarter-section corner of Secs. 8 and 9, and also a corner set by a local surveyor for Secs. 5, 6, 7, and 8 were found, neither of which was altogether in harmony with the identified corner of Secs. 8, 9, 16, and 17, but fairly approximating the correct locations which they were intended to represent. Just south of

Marco Island the position of the original corner of Secs. 21, 22, 27, and 28 on Horrs Island, was identified. A summary of facts given by the cadastral engineer who reported the results of the examination is as follows:

(1) The western portion of the island is approximately one mile wider in a north and south direction than the record distance across the island, and the southern portion is 60.00 chs. east of its reported position with reference to the meanders of the north shore of the island.

(2) The island contains approximately 6,800 acres compared to the record area of 4,156.29 acres, making an excess of approximately 2,600 acres over and above that originally surveyed and disposed of as public land.

(3) The southern portion of the western end or the main body of the island is properly related to the position for the original corner of Secs. 21, 22, 27, and 28, which was identified.

(4) The northern portion of the western end or the main body of the island is properly related to the position for the original corner of Secs. 8, 9, 16, and 17, which was identified.

(5) The position for the original corner of Secs. 8, 9, 16, and 17 is not properly related to the position for the original corner of Secs. 21, 22, 27, and 28.

(6) No system of control can be carried across the eastern portion of the island and be properly related to topographic features which can be identified.

(7) Certain claims in Secs. 10 and 15 can be identified by improvements. These claims are not properly related to any direct evidence of the original survey except the calls for topography.

(8) About two-thirds of the actual area of the island is covered with mangrove. The mangrove area in all cases is low swamp land or tide lands.

(9) Deputy Henderson did not meander Marco Island at the edge of mean high tide.

(10) A considerable area in the eastern portion of the island which was included in the original survey should have been classed as "tide land."

(11) The actual shore line of Marco Island conforms in a general way with the record shore line except for the mile excess in latitude and the 60 chs. offset in an easterly and westerly direction extending through the island. Practically all the bays and points of land shown on the plat of the original survey can be positively identified on the ground.

(12) Numerous islands shown on the plat of the original survey, in the vicinity of Marco Island, have been identified. The islands in most cases are properly related to one another in the same general locality and to the actual shore line of Marco Island.

(13) There has been no material change in the shore line of Marco Island since 1845, when Florida was admitted into the Union, and in 1876, when the original survey was executed.

(14) The distance from the extreme east end of Marco Island, westerly to the Gulf shore is approximately 5¼ miles compared with the record distance of about 5½ miles.

(15) The south end of Marco Island from the Gulf to Barfield Bay, is approximately 20 chs. wider than indicated in the record of the original survey.

Accepting the above as the correct representation of the facts, there remains for consideration the question whether the Department now has authority by process of a corrective survey to cut out and identify the excess area for disposal as public lands of the United States. It

is well settled that after the Government has conveyed its title to lands it has no further jurisdiction to "intermeddle with them in the form of a subsequent survey." *Kean* v. *Calumet Canal Company* (190 U. S. 452); *United States* v. *State Investment Company* (264 U. S. 206).

Section 2396, United States Revised Statutes, provides:

> The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:
>
> First. 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; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.
>
> Second. 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. And the boundary-lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary-lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water-course, Indian boundary-line, or other external boundary of such fractional township.
>
> Third. 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; and the half-sections and quarter-sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part.

In the case of *Cragin* v. *Powell* (128 U. S. 691) it was held, *syllabi*:

> When lands are granted according to an official plat of their survey, the plat, with its notes, lines, descriptions, and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and, so far as limits are concerned, controls as much as if such descriptive features were written out on the face of the deed or grant.
>
> * * * * * * *
>
> When the General Land Office has once made and approved a governmental survey of public lands, the plats, maps, field notes, and certificates having been filed in the proper office, and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased in good faith from the Government, against the interferences or appropriations of subsequent corrective resurveys made by the Land Office.

The south boundary line of Secs. 16 and 17 can be readily determined from and correlated to the evidences of the original survey of the tracts southward thereof. The north boundary can be like-

wise placed by recognizing the control of the only corner on the island definitely identified, namely, the corner for 8, 9, 16, and 17, and by the other unquestioned call for the prominent topographical feature known as Clam Bay at the northwest corner of Sec. 17. Thus both the north and south boundaries are well authenticated. The difficulty is the excess distance between these lines and the lack of alignment of the corresponding corners on the two lines. There is a large excess of land in these two sections and a similar condition exists to some extent in respect to the area eastward, which however, is much broken by bodies of water and contains very little dry land.

Section 16 passed to the State under its school grant upon identification by survey. All of Sec. 17 has been disposed of according to the original survey. There are at least three important points of control for that section in the original survey: First, there is the undisputed northeast corner found in place. Second, there is Clam Bay cutting slightly into the section at the northwest corner. Third, there is Robert's Bay invading the section at the southeast corner. Thus it is practically surrounded by evidences of the original survey.

The general rule is that monuments natural, or artificial, prevail over calls for course, distance, or quantity. *Ewart* v. *Squire* (239 Fed. 34); *Silver King Company* v. *Conkling Company* (255 U. S. 151); *United States* v. *State Investment Company*, *supra*. Distance and quantity are least important and the last guides to be resorted to in the location of a survey.

It is apparent that the Department has no authority to disturb either the north line or the south line of the area in question. And some of the claims as patented extend from the one to the other. While the courts in a number of cases have sustained the action of the Government in making supplemental surveys of considerable areas omitted from the original surveys by erroneous meanders of bodies of water, they have not allowed invasion of an area embraced by the former survey under which the land was disposed of regardless of demonstrated error in the former survey. *Burt* v. *Busch* (46 N. W. 790); *Spawr* v. *Johnson* (31 Pac. 664); *United States* v. *State Investment Company*, *supra*.

The case last above cited involved a Mexican grant which was patented in 1876 under a survey made in 1861. The Government made a resurvey of the west boundary in 1909, and placed the line more than three miles eastward from the original line as identified by calls for natural objects and monuments on the ground definitely located. The Government contended that the original survey was so erroneous as to be fraudulent and that the large area there involved was public land left outside the patented grant, but the court held that the

calls for distance must yield to the line identified by natural and artificial monuments.

Since the whole area within the lines of the old survey has passed from the Government any portion thereof may be recovered only, if at all, by proceeding in equity for reformation of the evidences of title in the manner adopted by the Government in the case last cited. After considerable search, however, no case has been found comparable to this where the Government has been sustained in its claim for lands after their disposal in accordance with the official survey then in force. Therefore, the Department is constrained to hold that no further action should be taken in the premises. The papers are returned herewith.

TOM PAVATEA

Opinion, January 20, 1926

INDIANS—STATUTORY CONSTRUCTION.

Ordinarily legislation of a general nature or of *prima facia* general application does not extend to the Indians in the absence of some clear intent to include them.

TAXATION—UNALLOTTED TRIBAL INDIANS—RESERVATION.

Incomes derived by unallotted tribal Indians, residing upon a reservation set apart for their benefit, from sources almost entirely, if not exclusively, within such reservations, are not subject to a Federal income tax under existing laws.

ATTORNEY GENERAL'S OPINIONS CITED AND APPLIED.

Opinions of the Attorney General (34 Ops. Atty. Gen. 275, 303, 439, and 35 Ops. Atty. Gen. 1), cited and applied.

McDOWELL, *Acting Solicitor:*

My opinion has been requested as to whether the income of Tom Pavatea, an Indian of the Hopi Tribe, Arizona, and other Indians in a like situation are subject to an income tax under our internal-revenue laws.

The amount in question, asserted to be due by the Internal Revenue Bureau, aggregates $367.50, being $294 in taxes for the years 1918, 1919, and 1920, and $73.50 in penalties assessed against this Indian for failure to file returns for the years mentioned and subsequent years.

The Indians of the Hopi Reservation are unallotted tribal Indians in the fullest sense of that term. They occupy a reservation approximating 2,500,000 acres in northern Arizona, set apart in 1882 for the use and benefit of these Indians in common. This reservation lies adjacent to and almost surrounded by the Navajo Reservation, also unallotted, containing in round numbers some 12,000,000 additional acres. The vast domain occupied by these Indians is largely

arid, or at best semiarid, being valuable mainly for grazing purposes. Extensive areas therein are of but scant value even for that purpose. Essentially the Indians of these tribes are herdsmen rather than agriculturists, the conditions surrounding their habitat of necessity forcing them to be so. Dependent chiefly on sheep, goats, and cattle for a means of livelihood, the Indians of these two tribes, exceeding some 30,000 in number, afford possibly the best remaining illustration of the old tribal Indian as yet but lightly touched by the hand of civilized man. Tom Pavatea is a full-blood, reported as "never having been away to school," residing at Polacca, in the heart of the Hopi Reservation; uneducated, unable to read or write, and with such a scant knowledge of the English language as to be almost unable to speak it intelligently. In addition to some interests in sheep and cattle raised on the reservation, he conducts a small trading post among his fellow tribesmen at Polacca. His income, here sought to be taxed, is derived mainly from those sources, augmented in part by a stage line conducting tourists over the Hopi Reservation and the adjacent Navajo country. He keeps no books or records of his financial transactions; in fact, personally he is unable so to do.

From the inception of sovereignty by this country the Indians have ever been treated as wards of the Nation, entitled to its protection and support, dependent upon it, during earlier times at least, for their daily food, and wholly dependent on the legislative powers of Congress for their political and civil rights. *Cherokee Nation* v. *Georgia* (5 Pet. 1); *United States* v. *Kagama* (118 U. S. 375, 383); *United States* v. *Rickert* (188 U. S. 432, 437); *United States* v. *Sandoval* (231 U. S., 28, 45). According to a similar rule legislation affecting the Indians is to be construed in their favor (215 U. S. 278, 279), and an intention to make a radical departure is not lightly to be inferred (241 U. S. 591, 599). It has even been held that legislation of a general nature or of *prima facie* general application does not extend to the Indians in the absence of some clear intent to include them (109 U. S. 556, 571; 112 U. S. 94, 99–100; 241 U. S. 602, 605, 606). "The Indian has always been the object of special legislation. Never has it been the practice to legislate for him generally along with the rest of the people" (34 Ops. Atty. Gen. 444). In *Choate* v. *Trapp* (224 U. S. 665, 675), the Supreme Court said:

> * * * In the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the Nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.

Even as to income taxpayers other than Indians the same court has also held that doubts must be resolved in favor of the taxpayer rather than in favor of the Government. *Gould* v. *Gould* (245 U. S. 151); *United States* v. *Merriam* (263 U. S. 179). From the former case we read (p. 153):

> In the interpretation of statutes levying taxes it is the established practice not to extend the provisions by implication beyond clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out.

When we come to examine our internal-revenue acts of September 8, 1916 (39 Stat. 756); February 24, 1919 (40 Stat. 1057); November 3, 1921 (42 Stat. 227), and June 2, 1924 (43 Stat. 253), they are wholly silent as to the Indians or the income derived by the Indians from restricted or governmentally controlled sources. The hearings on these bills disclose no reference to the Indians or any understanding that in framing those statutes Congress had in mind the imposition of a tax on these dependent wards of the Nation.

The Attorney General has had occasion recently to consider the applicability or rather the nonapplicability of our internal-revenue laws to the Indians (34 Ops. Atty. Gen. 275; id. 303; id. 439); also an opinion dated November 11, 1925, relating to the Kaw Indians in Oklahoma (35 Ops. Atty. Gen. 1). In each of these it was held that the statutes mentioned do not apply to the incomes flowing to restricted Indian allottees from their restricted property or from sources controlled for their benefit by the Government. It was also held (34 Ops. Atty. Gen. 303, 306), that an Indian's claim for refund for such taxes erroneously paid or collected is not barred by the statutes of limitation or lapse of time within which such claims are required by law to be filed. The situation here is possibly best summed up in the Attorney General's opinion of March 20, 1925, wherein, after citing the internal-revenue acts referred to, it was said (p. 445):

> No specific reference, however, is made in these acts to Indians and their property. We have seen that none of the treaties or statutes dealing with the Quapaw Indians contains any provision subjecting their lands to State or Federal taxation. On the contrary by the Quapaw allotment act Congress, instead of providing a way to compel the Indians to contribute out of their property to the support of the Federal Government immediately concerned itself with a provision of law securing to them the continued possession and enjoyment of their lands by making the same inalienable. In order to make this restriction against alienation properly effective, it would seem that inalienability and nontaxability should go hand in hand, at least until Congress clearly provides otherwise. At any rate, I am unable, by implication, to impute to Congress under the broad language of our internal-revenue acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the Nation; property

the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.

We are here dealing with unallotted tribal Indians residing on a large "reservation" set apart for their use, the legal title to which rests not in the Indians, either individually or as a tribe, but in the United States. Appropriations by Congress have annually been used for many years past for the protection, welfare, and betterment of these and other dependent Indians similarly situated. Appropriations by Congress have also been used annually for the education, civilization and support of these Indians; all looking to their civic advancement.

The income here in question accruing to Tom Pavatea was derived from sources almost entirely, if not exclusively, within the reservation set apart for the use of the tribe of which he is a member, and for the reasons herein given I am of the opinion that such income is not taxable under existing internal-revenue laws.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

FRED E. HARGIS

Decided January 21, 1926

REPAYMENT—RECLAMATION HOMESTEAD—RELINQUISHMENT—MILITARY SERVICE.

The right of a veteran to refund under the act of February 21, 1925, of charges paid by him on a reclamation homestead entry which he relinquishes prior to receipt of final certificate and within one year after the passage of the act is not defeated by action of the Government in canceling the entry, for sufficient reasons, independently of the relinquishment.

WORDS AND PHRASES—STATUTES.

The word "after" in line 5, section 2, of the act of February 21, 1925, is meaningless, was inadvertently retained in the process of legislation, and should be ignored.

FINNEY, *First Assistant Secretary:*

This is an appeal by Fred E. Hargis from decision of November 9, 1925, by the Commissioner of Reclamation rejecting his application for refund of moneys paid to the United States in connection with his homestead entry No. 011880, Lander, Wyoming, series for the S. ½ SW. ¼ (farm unit E), Sec. 11, T. 57 N., R. 98 W., 6th P. M., Shoshone Irrigation Project.

The application was presented under the provisions of the act of February 21, 1925 (43 Stat. 956), section 2 of which provides:

SEC. 2. (a) Any veteran—who at any time since April 6, 1917, has made entry upon a farm unit within a Federal irrigation project under the reclamation law and (1) who no longer retains such entry because of cancellation by, or relinquishment to, the United States after or (2) who, prior to receipt by him of a final certificate in respect of such entry, but in no case more than one year after the date of passage of this Act, desires to relinquish such entry—may, in accordance with regulations prescribed by the Secretary of the Interior, file application for the refund provided in subdivision (b). A veteran who has been compensated, in cash or otherwise, for any such relinquishment shall not be entitled to the benefits of this act, and before payment of such refund the Secretary of the Interior, under such regulations as he may prescribe, shall require proof that the veteran has not been so compensated.

(b) Upon receipt of such application the Secretary of the Interior is authorized to investigate the facts and, in his discretion, to pay as a refund to any such veteran entitled thereto, a sum equal to all amounts paid to the United States by such veteran, or for his account, as construction charges and as interest and penalties on such charges in respect of such unit. Every such refund so approved by the Secretary of the Interior shall be paid from the appropriation for the project on which the entry in question was made.

The applicant appears to be a veteran as defined in section 1 of the act, and the entry was made March 17, 1920. In his application, dated October 16, 1925, and executed under oath October 20, 1925, he states that he has not been compensated in cash or otherwise on account of relinquishing the said farm unit. He filed with his application a relinquishment of the entry executed under date of October 6, 1925. The application appears to be in full conformity with the provisions of the act and the administrative instructions of April 17, 1925, issued thereunder.

The entry was canceled by the General Land Office on October 22, 1925, for failure to submit final proof within the statutory period. In forwarding the application for refund the superintendent of the project reported that the entryman paid the initial construction charge of $357.54 at the time of filing his application for entry, and that upon examination of the application for refund it appeared that the claimant was entitled to refund of said amount.

In the decision appealed from the ground of rejection was stated as follows:

The act of February 21, 1925, provides for refund of charges paid by veterans who no longer retain their entries on the date of the act because of cancellation or relinquishment, or to those who within one year after the passage of the act relinquish their entries prior to receipt of final certificate. No provision is made for refunds to entrymen whose entries are *canceled* after the date of the act.

The Department is unable to concur in this view of the case. This entryman, desiring to relinquish his entry and procure refund, filed

his application in the manner provided by the regulations. That action may have been taken because of the impending cancellation, but it was before the entry was actually canceled. This feature of the matter, however, is not deemed an important factor, as the act does not indicate a purpose to defeat the right of refund solely because the Government may have canceled an entry independently of and prior to relinquishment by the entryman. There is no race of diligence in this regard between the Government and the entryman. The reason assigned for the rejection of this application seems untenable and no other ground for such action is observed. It is deemed appropriate, however, in this connection, to further consider certain features of the act which may be brought into question in the adjudication of other pending or prospective claims.

The definition of the classes of claims comprehended by the said relief measure is somewhat involved and has been found difficult to clearly interpret. The principal ambiguity is encountered in the word "after," which is contained in the phrase "who no longer retains such entry because of cancellation by, or relinquishment to, the United States after," etc. The word as it stands in the printed statute is either meaningless or incongruous in effect if any application of it be attempted. The peculiarity of the language arrested attention in this examination and prompted research for an explanation as to its lodgment in the law, and the mystery of its existence has been found. This legislation arose out of S. 2397, Sixty-eighth Congress, first session, which was changed from its original form in several particulars in harmony with the report thereon made by the Department. As originally introduced, the bill proposed to include cases where the veteran made entry prior to the passage of the act and lost same by cancellation or relinquishment after April 1, 1817. In reporting on the bill, the Department recommended a number of changes, including the following:

> The first change is a limitation of the application of the bill to entries made after April 6, 1917, or, in other words, within the World War period. This may be done by changing in section 2, lines 9 and 10, the words "prior to the date of passage of this act," to read, "since April 6, 1917," and by deleting in section 2, line 14, the words and figures "after April 1, 1817."

The Senate committee thereafter amended the bill, apparently intending to adopt fully the recommendations of the Department, and did so except in one small particular, namely, the word "after" was not struck through, although the date to which it referred was thus deleted. However, on the floor of the Senate, the said section was amended, and, as passed by that body, it read in part as follows:

> SEC. 2. (a) Any veteran—who at any time since April 6, 1917, has made entry upon a farm unit within a Federal irrigation project under the recla-

mation law and (1) who no longer retains such entry because of cancellation by, or relinquishment to, the United States, or (2) who, prior to receipt by him of a final certificate in respect of such entry, but in no case more than one year after the date of passage of this act, desires to relinquish such entry—may, in accordance with regulations prescribed by the Secretary of the Interior file application for the refund provided in subdivision (b). (Page 8864, Congressional Record, May 15, 1924.)

It is further shown that the House committee in its report on the bill after it passed the Senate (No. 1299, 68th Congress, second session), recommended that it pass without amendment, recited this feature of the bill in the language adopted by the Senate, and appended the full text of the report made on the bill to the Senate by the Department as quoted in part above. It appears though that the House committee used the form of the bill as amended by the Senate committee, which, as above shown, inadvertently retained the word "after," instead of the form in which it passed the Senate. The result was that it passed the House in that form. Thus, this hapless orphan, a castaway in the Senate and a stowaway in the House, obtained unwonted passage.

In view of this condition and the fact that the word "after" as it stands in the law has no acceptable relation to the date of the act, the date of cancellation of the entry, the issuance of final certificate, or any other date contemplated by the legislation, it should be ignored. This is fully warranted under the rules of statutory construction. (Lewis's Sutherland on Statutory Construction, sec. 384.)

Stripped of this ambiguity, the act authorizes, in the discretion of the Secretary of the Interior, refund in cases where the veteran made such entry after April 6, 1917, and who at the date of the act had lost his entry because of cancellation by, or relinquishment to, the United States, or who, prior to receipt by him of a final certificate, relinquishes such entry within one year from the date of the act in order to obtain refund of the sum paid as construction charges, interest, and penalties on such charges, provided, however, that refund in no case is allowable if the entryman has received compensation for his relinquishment.

The mere fact that the Government may have forestalled the action of an entryman, and canceled the entry within the one-year period after the date of the act, for sufficient reasons, independently of relinquishment, affords no ground for denial of the benefits intended for the veteran who acted within the time prescribed. Such result could only be accomplished by exercise of the discretionary authority conferred upon the Secretary which, of course, should not be invoked for arbitrary action contrary to the plain purpose of this relief measure.

So far as shown by the record, the application here involved is within both the letter and the spirit of the act. In the absence of other objection it will be allowed. The decision appealed from is accordingly reversed.

ANTHONY, LEGAL REPRESENTATIVE OF MIDDLEBROOK (ON REHEARING)

Decided January 22, 1926

REPAYMENT—STATUTE OF LIMITATIONS.

All claims for repayment which come within the purview of the act of December 11, 1919, are subject to the two-year limitation therein contained, notwithstanding that they may have been presentable under the act of June 16, 1880, which did not contain that limitation.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *National Fuel Company* (51 L. D. 66), cited and applied.

FINNEY, *First Assistant Secretary:*

By decision of September 28, 1925, the Department affirmed the decision of the Commissioner of the General Land Office rendered May 2, 1925, rejecting the application of W. E. Anthony, legal representative of Clem B. Middlebrook, for repayment of the money paid by the latter in commutation of his homestead entry for the SW. ¼ NW. ¼, NW. ¼ SW. ¼, Sec. 26, T. 23 N., R. 5 E., L. M., Louisiana, containing 79.90 acres, for the reason that the application was not filed within the two-year limitation provided by law. A motion for rehearing has been filed by counsel for the claimant.

The original homestead entry was made January 24, 1901, and the final commutation proof was submitted January 16, 1902, payment being made at the rate of $1.25 per acre, and final receipt and final certificate issued July 25, 1902. Upon consideration of the final proof after its transmission to the General Land Office it was found to be insufficient, and by letter of February 26, 1904, it was rejected, and by further letter of October 24, 1904, the said cash entry was canceled. The original entry was canceled January 6, 1913, for failure to submit satisfactory final proof within the statutory period of seven years from date of entry.

The application for refund of the purchase money paid in connection with the final commutation proof is based on the provisions of the act of June 16, 1880 (21 Stat. 287), which authorized repayment where an entry was erroneously allowed and could not be confirmed.

There can be no doubt that this entry is of the class referred to in the said act as an entry erroneously allowed and which could not be confirmed. In the absence of other legislation the claim would clearly be payable under that act.

A supplemental repayment law was passed March 26, 1908 (35 Stat. 48). That act was broader than the act of June 16, 1880, and provided for repayment in some cases not covered by the prior law. Generally speaking, however, the conditions prescribed for allowance of repayment were of such substantial similarity that most cases would be found to satisfy the conditions of either act. As there was no time limit for filing claims under either act, it was not important to make close distinction in the application of the respective acts. It may be assumed that the act of June 16, 1880, was usually if not uniformly applied in making repayment in cases such as this, where the entry was erroneously allowed and could not be confirmed. It is now important, however, to consider whether the situation has been changed by the further act of December 11, 1919 (41 Stat. 366), whereby section 1 of the said act of 1908 was amended to read as follows:

> 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: *Provided*, 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 issue in the case is closely drawn. In essence it involves solely the question whether the act of June 16, 1880, is still operative in full force and effect irrespective of later conflicting legislation. Counsel invokes the familiar doctrine that repeal by implication is not favored and argues that inasmuch as no words of express repeal are contained in subsequent legislation, the earlier act should be applied to all cases coming within the definitions therein contained, and that the later act of 1919 should be applied only in those instances where the case is within the description of the classes of claims therein provided for and which are not also within the purview of the act of June 16, 1880. The position of the Department is just the reverse of that contended for. It holds that all cases coming within the classes of claims provided for by the act of 1919 are subject to the two-year limitation contained in that act. It does not contend that the act of 1880 has been repealed or in any manner affected except as to claims covered by the later act. The rules of statutory construction, including some cited by counsel, support this position. For instance, he quotes the following from Sutherland:

It is not enough to justify the inference of repeal that the later law is different. It must be contrary to the prior law. It is not sufficient that the subsequent statute covers some or even all the cases provided for by the former, for it may be merely affirmative, accumulative or auxiliary. There must be positive repugnancy and even then the old law is repealed by implication only to the extent of the repugnancy.

The gist of this controversy could not be stated in more compact form. This quotation contains a complete word picture of the state of the law. The last sentence indicates the situation under the act of 1919. The prior portion states it as it was under the act of 1908.

It has become well settled by numerous decisions of this Department that a claim within the purview of the act of 1919 is subject to the two-year limitation therein contained even though it be of a class also within the purview of the act of 1880. In the instructions of April 24, 1923 (49 L. D. 541, 544), it was said:

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.

See also *National Fuel Company* (51 L. D. 66); and the unpublished decisions of Bertha Ault, April 3, 1919, and Oro Iron Company, April 13, 1925.

The former decision in this case must be and is hereby adhered to and the motion is accordingly denied.

BALSIGER, TRANSFEREE OF CHAMBERS

Instructions, January 22, 1926

PATENT—HOMESTEAD ENTRY—AMENDMENT—TRANSFEREE.

Where amendment of a homestead entry which was transferred after the issuance of final certificate was allowed upon request of the transferee because of error in the description of the land, patent will be issued in his name, as transferee.

PRIOR DEPARTMENTAL DECISION AMPLIFIED.

Case of *Harris Miller* (51 L. D. 281), amplified.

FINNEY, *First Assistant Secretary:*

Reference is made to your [Commissioner of the General Land Office] letter of January 13, 1926, asking instructions in regard to the issuance of patent on an amended homestead entry where the land was transferred after issuance of final certificate, and where no patent has issued.

The entry referred to was made by Everett Chambers for land described as lots 1 and 2, E. ½ NW. ¼ and NE. ¼, Sec. 30, T. 17 S., R. 54 W., 6th P. M., Colorado. Final certificate issued May 15, 1919,

but no patent has issued. The land has been transferred to Oris L. Balsiger.

A resurvey of this township shows error in the description of the tracts held under this entry, and the proper description is given by the surveyor as lots 3 and 4, E. ½ SW. ¼ and SE. ¼, Sec. 30, said township, which calls for lands one-half mile south of that given in the entry. Mr. Chambers requested amendment in accordance with the new survey.

The question presented is whether it would be proper in issuing patent on this entry when amended, to issue same in the name of the transferee, or whether it should issue in the name of the entryman.

In the case of *Harris Miller*, decided November 13, 1925 (51 L. D. 281), which involved amendment of a patented entry to embrace lands of a different survey description from that given in the entry as patented, the Department held that the new patent should issue in the name of the transferee. The reason for that ruling was that the transferee would not have a merchantable title for the land under the new description unless patent issued to him, and would be put to the trouble and expense of applying to the courts to quiet his title. It seems that the same reasoning would apply in the instant case and that the rule should be the same even though patent has not been heretofore issued in his case.

The land was subject to transfer after issuance of the final certificate, and the description proposed for the patent is for lands which do not satisfy the description contained in the transfer. In case the evidence of title in the transferee be sufficient to justify his recognition for amendment of the entry at his request, it is deemed proper to issue the patent in his name as transferee. By designating him as transferee of the original entryman, the identity of the basic claim will be indicated. The decision in the *Harris Miller case*, *supra*, should be applied in the same manner.

MARY PEXTON

Decided January 27, 1926

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—RESERVATION—WAIVER—GEOLOGICAL SURVEY—EVIDENCE.

A permit application, accompanied with consent of the entryman to a reservation of the oil and gas deposits in his unrestricted homestead entry, does not authorize the Department to impose such a mineral reservation where the lands have been reported by the Geological Survey as being without prospective value for oil and gas and in the absence of a showing on the part of the permit applicant sufficient to overcome the conclusions of the Geological Survey as to the character of the land.

FINNEY, *First Assistant Secretary:*

On May 7, 1924, Mary Pexton made application, now Cheyenne 040369, for an oil and gas prospecting permit covering, among other lands, the SE. ¼ SE. ¼, Sec. 4, E. ½ NE. ¼, Sec. 9, SW. ¼ NW. ¼, Sec. 10, T. 36 N., R. 68 W., 6th P. M., Wyoming. These tracts are embraced in homestead entry, Cheyenne 027081, made without mineral reservation on October 19, 1920, by Maud Mooney.

On December 16, 1924, the Geological Survey reported that the land is without prospective oil and gas value as contemplated by paragraph 12 (c) of the oil and gas regulations and is properly subject to classification as nonoil and nongas land at the present time. Thereupon the Commissioner of the General Land Office held the application for rejection. On January 28, 1925, there was filed a document executed by the entrywoman at the instance of the permit applicant in form following:

> I, Maud A. Mooney, of Janet, Wyo., who made homestead entry No. 027081 for the SE. ¼ SE. ¼, Sec. 4, E. ½ NE. ¼, Sec. 9, Section 4-9, Township 36, Range 68, W. 6th Principal Meridian, do hereby consent to have said application allowed subject to the reservation to the United States of the mineral sought to be acquired by the mineral claimant, and the right of such permittee or lessee under any permit or lease which has been or may hereafter be granted, to prospect for the mineral sought ON THE LAND IN CONFLICT, where the right of such permittee was initiated prior to the homestead filing, and to use so much of the surface thereof as may be necessary in prospecting for, mining, and removing the mineral deposits without compensation to the homestead claimant therefor, in accordance with Sec. 29, act of February 25, 1920.

By decision of August 13, 1925, the Commissioner held that this document was not a waiver in proper form of rights to the oil and gas; that it gave no rights to the permit applicant; that the land is not withdrawn, classified, or reported to be valuable for oil or gas or other minerals, and adhered to his former action rejecting the application. The permit applicant has appealed.

It has become axiomatic by numerous departmental decisions that where one has an entry in which the minerals have not been reserved, no one, not even the entryman, can obtain a prospecting permit covering the land so entered while the entry subsists in that shape. The question that arises in this case is whether the data presented warrant the Department in impressing this homestead entry with such a reservation. The authority to impose a mineral reservation is conferred by the act of July 17, 1914 (38 Stat. 509), and under section 3 thereof it may be exercised as to entries and other forms of appropriation there specified that have been made upon lands which are subsequently withdrawn, classified, or reported as being valuable for oil and gas or for the other minerals therein particularized.

Together with the mineral, there is reserved the right to prospect for, mine, and remove the same. This indicates that lands warranting prospecting operations to establish the actual existence of the mineral specified in the act, are to be considered as "valuable for" such deposits, and a report that they have such prospective value is a proper basis for a requirement that an entryman of such lands consent to a reservation of the particular deposits in accordance with said act. *Utah* v. *Lichliter et al.* (50 L. D. 231); *Foster* v. *Hess* (50 L. D. 276, 279).

In the present case, there is no withdrawal or reservation of the oil and gas. The Geological Survey reports that the land is without such prospective value, and it appears that neither the entrywoman nor the permit applicant has expressly represented that the land has such prospective value. A report by the Geological Survey that land within an unpatented mineral entry allowed without any reservation of oil and gas, has no prospective value, for such deposits is sufficient cause for the rejection of a prospecting permit application filed by one other than the entryman. *Bertram N. Beal* (51 L. D. 162). The mere fact that a particular applicant consents to a reservation of the oil and gas in his patent would not authorize the insertion of such a reservation therein. *Joseph E. McClory* (50 L. D. 623, 626).

The authority therefor must be derived from the statute. Such authority under the act of July 17, 1914, exists where there has been a withdrawal, classification, or report that the land is prospectively valuable for oil or gas. There being no withdrawal or classification, is there anything shown in this case that can be characterized or operate as a report that the lands are so valuable? The Department has frequently held, notably in *Heirs of Robert H. Corder* (50 L. D. 185) and *Oliver P. Morgan* (51 L. D. 267), that where an entryman files an application for a prospecting permit, expressing the belief that the lands contain oil, this expression constitutes an admission that the land has a prospective oil and gas value, rendering unnecessary procedure under paragraph 12 (c) of the oil and gas regulations as a basis for requiring the entryman to consent to such reservation and may be regarded as an election to take patent with mineral reservations under the act of July 17, 1914. In other words, the application for permit, coupled with a representation by the entryman that the land is prospectively valuable for oil or gas, warrants the assumption that the land is of the character subject to the reservation. In these cases, however, the Department was not confronted with a positive official report that the land was nonoil and nongas land. There was no *prima facie* presumption to overcome that the lands were not of the class subject to the reservation, and for that reason these cases are inapposite.

The document executed by the entrywoman, according to common intendment of the language used, does not import an intention to consent without qualification to an oil and gas reservation. It is rather an attempt to restrict the right to a permit to applicants who filed their applications before her homestead rights were initiated; a matter in which the entrywoman has no voice. So that, if mere consent by the entrywoman to a reservation is sufficient to impose it, the paper filed can not be accepted as such.

However, the fact that the document expresses a willingness that a permit under certain conditions may be granted covering the land justifies the assumption that the entrywoman and the permit applicant consider the land worthy of prospecting for oil and gas. Under these circumstances, the latter may be permitted within a time specified by the Commissioner to submit a showing, preferably the reports of opinions of qualified experts supported by as complete and accurate geological data as may be procurable, tending to show that the conclusion of the Geological Survey is not well founded, and she should further be required to file in proper form an unqualified and unequivocal consent by the entrywoman in writing to a reservation of the mineral content of the land, together with the right to prospect, mine, and remove the same. Upon submission of such report, action will be taken as the facts warrant. Failing in this, the application will be finally rejected.

The Commissioner's decision is to this extent modified, and the case is remanded for procedure in accordance with this decision.

ALASKA COAL-LEASING REGULATIONS AMENDED

INSTRUCTIONS

[Circular No. 1049]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 27, 1926.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES IN ALASKA:

Under date of January 20, 1926, the Department amended paragraph 9 of the general regulations of May 18, 1916 (45 L. D. 113 and 287), governing coal-land leases in the Territory of Alaska under the act of October 20, 1914 (38 Stat. 741), and section 1 of article IV of the lease form provided by said regulations, to read as follows:

(9) An actual bona fide expenditure on the land for mine operation, development or improvement purposes of $100 for each acre included in the lease

is adopted as the minimum basis for granting leases, with the requirement that not less than one-fifth of the required investment shall be expended in development of the mine during the first year, and a like amount each year for the four succeeding years, the investment during any one year over such proportionate amount for that year to be credited on the expenditure required for the ensuing year or years. If the investment to be made is fixed at more than $50,000, the lessee shall furnish a bond with approved corporate surety in the sum of $10,000, conditioned upon the expenditure of the specified amount of investment and upon compliance with the other terms of the lease. If the investment is fixed at $50,000, or less, a bond similarly conditioned in the sum of $5,000 must be furnished. After the required investment has been made, the lessee may substitute in lieu of the bond originally furnished a like bond in the sum of $5,000, conditioned upon compliance with the terms of the lease.

In lieu of corporate surety, the applicant may deposit United States bonds of a par value equal to the amount of his bond, pursuant to section 1320 of the act of February 24, 1919 (40 Stat. 1057, 1148–49), under Treasury circular No. 154 of June 30, 1919. When United States bonds are thus submitted, the same shall be accompanied by a bond and power of sale duly executed by the applicant.

SECTION 1. To invest in actual mining operations upon the leasing block included herein the sum of_____dollars, of which sum not less than one-fifth shall be so expended during the first year succeeding the execution of this instrument, and a like sum each succeeding year for the period of four years, unless sooner expended; to submit annually, at the expiration of each year for the said five-year period, an itemized statement as to the amount and character of the expenditure, and to furnish a bond in the sum of_____conditioned upon making said investment within said period and compliance with all other conditions of this lease, and when said expenditure shall have been fully made, the lessee may submit a bond in the sum of $5,000 conditioned upon compliance with the terms of this lease as a substitute and in lieu of the original bond furnished at the time of the execution of this instrument.

WILLIAM SPRY,
Commissioner.

WOODROW v. WEEKS

Decided January 11, 1926

NOTICE—OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT.

A monument upon which a notice of an application for an oil and gas prospecting permit is posted, erected upon a site which is neither prominent nor open, nor convenient of access, is not in a "conspicuous place" within the meaning of section 13 of the act of February 25, 1920, and no preference right to a permit can be initiated by such posting and monumenting.

NOTICE—WORDS AND PHRASES—STATUTES.

The words "conspicuous place" as used in statutes requiring the posting of notices are equivalent in meaning to open to view; catching the eye; easy to be seen; manifest; seen at a distance; clearly visible; prominent and distinct.

FINNEY, *First Assistant Secretary:*

This is an appeal by Wilbur A. Woodrow from a decision of the Commissioner of the General Land Office affirming the recommendations of the local land officers and rejecting his application, Lander 014348, for an oil and gas permit made under the act of February 25, 1920 (41 Stat. 437), covering certain lands in Ts. 44 and 45 N., Rs. 98 and 99 W., 6th P. M., Wyoming, to the extent that it overlapped a prior like application 014338 filed by William R. Weeks.

Weeks filed his application on May 9, 1923, amended it on May 11, 1923, in the latter alleging a posting and monumenting of the land on May 10, 1923. Woodrow filed his application on May 19, 1923, claiming a preference right to a permit by virtue of posting and monumenting the land on April 21, 1923. In his application he made all the essential averments in proper verified form that he did the acts required to be done under paragraph 5 of the oil and gas regulations (Circular No. 672) to entitle an applicant to a preference right for 30 days as therein provided, the only averment that bears on the issue here raised being that he "located the same by erecting upon said lands at a conspicuous place thereon a substantial stone and wood monument not less than four feet in height."

On November 17, 1923, Weeks filed a sworn statement corroborated by other affidavits, wherein it is alleged in substance that on May 10, 1923, he and two experienced civil engineers made a thorough examination of the lands included in his permit and contiguous lands to ascertain whether any person had posted and monumented the land and they were not able to discover such monumenting or posting, and if such monumenting existed it was in a hidden and obscure place; that a main-traveled road extended along a high bench through certain named sections from which all of said lands are plainly visible and any post or monument erected thereon would have been plainly visible from such road; that after notice of Woodrow's application his monument and notice were found near the center of the NE. ¼ of Sec. 5. The site of the monument mentioned is relatively near the north boundary of the land applied for by both applicants.

By reason of these allegations, a hearing was ordered by the Commissioner and duly held, testimony was taken by deposition and before the local officers, Woodrow, under protest, being required to submit his evidence first. The local officers found that the monument erected by Woodrow was not in a conspicuous place, and held that he had no preference right, and recommended that his applications be rejected to the extent of his conflict with the application of Weeks. The Commissioner in his decision extensively set out the evidence relevant to the question, which is the

sole issue in the case, as to whether the monument was in a conspicuous place, and arrived at the same conclusion.

The words "conspicuous place" as used in statutes requiring the posting of notices have been frequently construed by the Department and the courts and held to be equivalent in meaning to "open to view; catching the eye; easy to be seen; manifest; obvious to the sight; seen at a distance; exposed to view; clearly visible; prominent and distinct." *Williams* v. *Central Railway Company of New Jersey* (88 N. Y. Supp. 434). In defining these words as they occur in section 2325, Revised Statutes, requiring the posting of a notice and plat in connection with application for patent to mining claims, the Department held that they meant "prominently, openly, and conveniently to the public." *Tom Moore Consolidated Mining Company et al.* v. *Nesmith* (36 L. D. 199).

Section 13 of the act of February 25, 1920, prescribes that an applicant for a permit who seeks a preference right "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." The plain and unmistakable purpose of this requirement is to provide a means whereby those whom it may concern may with ordinary care and observation in examining the land ascertain that a preference right is sought under the act and the nature and extent thereof. The acts of the applicant in monumenting and posting of the lands should plainly reflect an intent to carry out this purpose, particularly as to the selection of a site for the required monument and notice.

The testimony, photographs, and maps and other exhibits have been carefully reviewed by the Department. There is some conflict of evidence and controversy as to the degree of visibility of the monument erected, the extent to which the hills and knolls obstruct, and the vegetation obscures a view of the monument from various points upon the area applied for, but the Department is clearly of the opinion that Weeks established by a preponderance of evidence, and so finds, that the monument in question was erected in a shallow depression near the end of a horseshoe-shaped draw or swale bordered by low hills near the northeast boundary of the land; that these hills prevent the monument from being seen with the naked eye on all sides, except at close range varying at 150 to 500 feet therefrom; that it was away from and not observable from the traveled road which would ordinarily be used by those journeying to the land; that there were many other places on prominent hilltops and level benches on the land where the monument could have been plainly seen and readily would have attracted the attention of those seeking evidence of that character. The site of the monument was neither prominent, open, nor convenient of access, taking into consideration the topography, surface, and natural means of approach to the more

than 2,500 acres that Woodrow's application covered. It was therefore not in a conspicuous place as required by the statute, and no preference to the land in conflict was gained thereby.

The appellant specifies as error the action of the local officers in requiring him to take the affirmative at the hearing and asserts that the burden of proof was upon Weeks, the appellee, to prove his allegations. As it is here held that Weeks successfully sustained the burden of proof, appellant was not prejudiced by the requirement that he introduce his evidence first even though such ruling was wrong. In view of the foregoing conclusions the Commissioner's decision is affirmed.

FRED J. BENZER

Decided January 16, 1926

OIL AND GAS LANDS—PROSPECTING PERMIT—NOTICE—RESTORATIONS—PRACTICE.

An applicant for an oil and gas prospecting permit is charged with notice of the established practice and existing regulations governing the cancellation of permits and the restoration of the lands to further disposition.

OIL AND GAS LANDS — PROSPECTING PERMIT — RECORDS — NOTICE — PREFERENCE RIGHT—EQUITY.

The notation upon the local records of the cancellation of an oil and gas permit made contrary to existing regulations is without effect, and those seeking like permits for the land are put on notice as to the authority therefor and are not entitled to rely thereon in support of a claim of priority, though such notation, if in fact relied on, may be given equitable consideration in the absence of adverse claims.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Martin Judge* (49 L. D. 171) and *Harvey V. Craig* (50 L. D. 202), cited and applied.

FINNEY, *First Assistant Secretary:*

Fred J. Benzer, who on May 15, 1925, made application, Visalia 013378, for an oil and gas prospecting permit covering Sec. 6, lots 1 to 10, inclusive, lots 13 to 17, inclusive, lot 20, Sec. 7, T. 27 S., R. 19 E., M. D. M., California, has appealed from a decision of the Commissioner of the General Land Office dated September 11, 1925, holding for rejection said application for the reason that the lands were embraced in uncanceled permit 09263, issued to Karl D. Schwendener.

On February 21, 1925, the Commissioner promulgated departmental decision of December 20, 1924, affirming his action in holding Schwendener's permit for cancellation, stating in his letter that "formal cancellation of the permit is withheld pending reports from the Geological Survey and Bureau of Mines re the restoration of the land." Those bureaus later signified that they had no objection to

the cancellation of the permit, whereupon the Commissioner, by letter of July 22, 1925, canceled the permit, directed the notation of such cancellation on the local records, and authorized the receipt of application and a drawing between conflicting applicants on August 12, 1925, in harmony with the instructions of April 23, 1924, Circular No. 929 (50 L. D. 387). Available records further show that pursuant to the regulations mentioned a competitive drawing between 35 permit applicants took place and that Charles B. Utting was the successful applicant.

The appellant alleges that because of errors made by the local office and by the General Land Office he was deprived of his right to participate in the drawing held. Briefly stated, these errors are specified as follows:

(a) Failure of the Commissioner to direct the local office in his letter of February 21, 1925, to withhold cancellation of permit 09263.

(b) Cancellation of permit 09263 had been noted on the local records when appellant's permit was filed.

(c) Failure to return his application to the local office so that he might participate in the drawing.

(d) Failure to post notice of the holding of the drawing between conflicting applicants for 30 days as required by the regulations.

It is further contended that the leasing act does not authorize the regulations requiring that drawings be held to determine the disposition of lands open to application by the cancellation of oil and gas permits, and that the decision of the Commissioner of February 21, 1925, is in violation of preferential rights conferred by section 13 of the act.

Specification (a) is based on a mistake of fact. The Commissioner did direct that cancellation of the permit on the local records be withheld. Specification (d) is a mistake of law. The regulations do not require the notice of cancellation of a permit nor the right to file applications for the land and the disposition of conflicting applications by a drawing to be posted for 30 days, as alleged. See Circular No. 929, *supra*.

As to specification (b), the Department is not advised that cancellation of permit 09263 was erroneously noted on the local records at the time appellant filed his application. The presumption is that the local officers' action was legal and in accordance with the existing regulations. Unsworn statements to the contrary do not overcome this presumption. But, assuming that inquiry would verify appellant's statement as to the state of the local record, such a circumstance would not impart any validity to his application. If permit 09263 had been noted as canceled by the local officers at the

time Benzer filed his application, such notation was unauthorized and without effect. The authority to consider and determine the merits and validity of such applications, in the first instance, resides in the Commissioner of the General Land Office, and the functions of the local officers in this connection are of a ministerial nature only. *Harvey V. Craig* (50 L. D. 202, 204). Nor was the appellant entitled to rely on such erroneous notation. He is charged with notice of the established practice and then existing regulations governing the cancellation of permits and the restoration of the land to further disposition, and such a notation as alleged should have put him on inquiry as to the authority therefor. While such error if committed by the local officers might be given equitable consideration and under certain circumstances afford a basis for a relaxation of the established rule in the absence of adverse claims, it can not be considered in the presence of adverse applications lawfully initiated and such exist in the present case.

Benzer, having filed his application prior to the cancellation of an outstanding permit covering the land, gained no rights. *Martin Judge* (49 L. D. 171); *Harvey V. Craig*, *supra*. There was no error, therefore, in the failure of the Commissioner to allow Benzer to participate in the drawing held, hence no merit in specification (c).

Appellant's further assertions challenging the statutory authority for the regulations prescribed for the disposition of land upon the cancellation of outstanding permits are not sufficiently impressive to require discussion.

It follows from the views herein expressed that the decision appealed from must be affirmed.

LAWRENCE W. CREHORE

Decided January 27, 1926

REPAYMENT—CONSTRUCTION CHARGES—IRRIGATION—PUBLIC LANDS.

The act of February 21, 1925, is applicable only to public lands and does not authorize refund of charges paid on a water-right application for the irrigation of land in private ownership.

FINNEY, *First Assistant Secretary:*

Lawrence W. Crehore has appealed from the decision of the Commissioner of Reclamation dated December 16, 1925, rejecting his application under the act of February 21, 1925 (43 Stat. 956), for refund of construction charges paid on a water-right application for the irrigation of land in private ownership under the Newlands Federal irrigation project in Nevada.

The record shows that on December 27, 1919, the claimant made water-right application for the SW. ¼ (farm units J and K), Sec. 13, T. 19 N., R. 27 E., M. D. M., and the initial construction charge of $309 was paid thereon. The said application was canceled by the Commissioner of Reclamation December 3, 1924, on account of default in the payment of three installments of operation and maintenance charges.

The land involved was not entered under the reclamation act, but was in private ownership, having been acquired from the Central Pacific Railroad Company. The application for refund was rejected on the ground that the act of February 21, 1925, is applicable only to public lands.

Section 2 of the act provides for refund of construction charges, interest, and penalties thereon in cases where a veteran, as defined by section 1, made entry under the reclamation law at any time since April 6, 1917, and who at the date of the act no longer retained the same because of cancellation or relinquishment, or who within one year after the date of the act, and prior to issuance of final certificate, desires to relinquish under the conditions therein specified.

Section 3 provides that anyone receiving the benefits of the act shall be deemed to have relinquished all right, title, or interest in such farm unit and any improvements thereon.

Even if the Department were to construe the word "entry" in such a broad and unusual sense as to include within its meaning a mere water-right application, there would still be the greater difficulty of applying the provisions of section 3 to such a case. It would be far beyond the allowable limits of liberal interpretation, even of a remedial act, to hold that the relinquishment or cancellation of a water-right application for land in private ownership would effect the result contemplated by section 3 of the act under which the title to the land and all improvements thereon are returned to the United States.

Conceding that somewhat similar hardships may exist in cases of this kind comparable to those relieved by the act in question, the Department is not at liberty to grant relief except as provided by law.

The decision appealed from is accordingly affirmed.

JESSE E. GORRELL

Decided January 27, 1926

CONFIRMATION—HOMESTEAD ENTRY—FINAL PROOF—FINAL RECEIPT—FEES—PAYMENT.

The proviso to section 7 of the act of March 3, 1891, does not operate to confirm a canceled homestead entry where no receipt was issued, and the claimant was not entitled to receipt, for moneys tendered with his final proof and merely held subject to his order until the proof should be perfected.

PRIOR DEPARTMENTAL DECISIONS REAFFIRMED.

Case of *Mattie J. Baird* (49 L. D. 492), and that portion of the case of *Veatch, heir of Natter* (46 L. D. 496), not previously overruled, reaffirmed.

FINNEY, *First Assistant Secretary:*

This is an appeal by Jesse E. Gorrell from a decision of the Commissioner of the General Land Office dated June 18, 1925, denying application for reinstatement of his homestead entry embracing the SE. ¼ Sec. 15, T. 4 S., R. 5 E., B. H. M., Pierre, South Dakota, land district.

It appears that the land is within the Harney National Forest (formerly Black Hills Reserve) created by proclamation of September 19, 1898 (30 Stat. 1783). The tract is reported to contain a heavy stand of timber. The entry was allowed by the register and receiver November 28, 1900, and final proof in support thereof was submitted January 14, 1901, which proof was immediately suspended and held in the local office pursuant to a report from a special agent, dated December 17, 1900, to the effect that the entry was fraudulent in its inception, and that claimant had not complied with the law. Gorrell stated in his proof that he established residence July 9, 1895, maintained his home on the land continuously until 1898, and that his residence the two succeeding years consisted of periodical visits amounting to about a month each year. He claimed improvements to the value of $500, and that he had cultivated five acres the first year and half an acre for each of the succeeding three seasons.

In April, 1901, pursuant to directions from the Commissioner of the General Land Office dated March 28, 1901, a rule was laid upon the claimant to show cause why his entry should not be canceled because of the prior appropriation of the land for a forest reserve. Gorrell responded saying that he had been misinformed about the filing of the plat of survey and was not aware that an entry could be made for the land at an earlier date.

In April, 1902, a special agent reported to the Commissioner that he had made an examination of the land; that it contained no improvements whatever; that claimant never established residence

thereon, and that the tract was unfit for cultivation, if cleared. Thereafter, under date of February 18, 1904, pursuant to the Commissioner's order, charges to this effect were served upon the entryman and he was allowed a period of thirty days within which to apply for a hearing. He filed no answer to the charges, which were taken as confessed, and his entry was canceled June 27, 1904.

January 22, 1923, Gorrell, through his attorney, filed an application asking that the entry be reinstated and that patent issue to him on the ground that it was confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095). 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 under the ruling of the Supreme Court of the United States in the case of *Lane* v. *Hoglund* (244 U. S. 174), and *Stockley et al.* v. *United States* (260 U. S. 532).

The Commissioner denied the application on authority of the case of *Mattie J. Baird* (49 L. D. 492), because no receipt issued for the final commissions tendered at the time claimant presented his proof.

In his appeal the applicant contends that there is a receipt on file in the case showing that the proper payments were duly made when final proof was submitted; that after final payment was made the failure to issue the final papers to which he was entitled could not operate to deprive him of the benefits of the act of March 3, 1891, *supra;* that the limitation began to run when he paid the commissions and that the case is controlled by the decisions of the Supreme Court above referred to.

The paper in the record which the appellant denominates a receipt is a slip of paper torn from a pad or blotter, bearing only the penciled notation "Com. paid—unoffic." This memorandum bears no date or signature and nothing to indicate how or when it became a part of the file. It is not and does not purport to be a receipt. It apparently has reference to a deposit or conditional payment of $4 made on January 14, 1901, on account of commissions in connection with homestead final proof for the SE. ¼, Sec. 15, T. 4 S., R. 5 E., as evidenced by the Rapid City, South Dakota, abstract of "unearned fees and unofficial moneys," for the month of January, 1901, which is in the files of the General Land Office.

This sum was not received as public money. It was not authoritatively accepted. It did not belong to the Government and it did not belong to the receiver. It was not earned or applied in connection with the accompanying proof and was not credited to the United States in the receiver's accounts. It was not his duty to account for and pay to the United States moneys so deposited. It was the prac-

tice in such cases where the application or proof was incomplete, or the entry could not be allowed for any reason, to hold the amount subject to the order of the applicant until the application or proof was perfected or completed.

It is clear, therefore, that not only did the receipt not issue, but neither was the claimant entitled to a receipt under the practice then in force, and in this respect the facts in the case are identical with those disclosed in the case of *Veatch, Heir of Natter* (46 L. D. 496), and *Mattie J. Baird, supra.*

The case is not within the purview of the statute invoked and is not controlled by the decision of the United States Supreme Court in the case of *Stockley et al.* v. *United States, supra.* In the latter case a receipt actually had issued and the court held that this was the decisive factor which started the running of the statute. 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.
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> * * * * * * *
>
> 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. * * *

The conclusion in the *Veatch case* 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 proof was overruled by the Department February 27, 1923, in the case of *United States* v. *Heirs of Elizabeth Suvery and Anton Schafer, transferee* (49 L. D. 461), following the decision of the Supreme Court in the *Stockley case* (but the principle of the *Veatch case* that the statute can never become operative where no receipt was in fact issued, has never been reversed or modified. In the *Suvery case* which overruled the *Veatch case* so far as in conflict, the Department considered and gave full effect to the decision of the Supreme Court in the *Stockley case;* and in the *Baird case* decided March 19, 1923, the Department also carefully considered the court's decision in the *Stockley case*, and its own decision in the *Veatch case*, and after quoting from each of those decisions reaffirmed the rule that the statute does not apply where no receipt was issued. True, in the *Stockley case*, the Supreme Court referred approvingly to the Department's instructions of June 4, 1914 (43 L. D. 323), relative to the purpose and effect of the statute, but the decision of the court should

not be enlarged by implication or intendment beyond the meaning of its terms when read in the light of the issue, and the purpose for which the suit was brought. The decree in that case was grounded upon the *issuance* and *delivery* of a receipt to Stockley, and in the course of its decision the court observed that the sole inquiry was whether the receipt issued to Stockley falls within the words of the statute. The Department adverted to this in the *Baird case* with the comment that the court nowhere said that the statute applied where the receiver's receipt had not issued. Moreover, in the *Veatch case* and in like manner in the *Baird case*, which was subsequent to the court's decision in the *Stockley case*, the Department noticed the language of the instructions of June 4, 1914, *supra*, and held that there was no intention to go beyond the purport of the decisions therein referred to and that neither the letter nor the spirit of the law justifies a ruling that the mere tender of money in connection with 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.

The situation which called for this statute discloses its singleness of purpose. It specifies the instrument which is to start the running of its provisions, viz, "the receiver's receipt upon the final entry," and the statute makes it plain that if at the expiration of two years from the date of this receipt there is no "pending contest or protest" against the entry, its validity may no longer be called in question. The statute is one of limitation and repose, restraining the right of the Government to institute proceedings to test the validity of an entry after the lapse of the two-year period. Statutes of limitation should be strictly construed. In the case of *United States* v. *Whited and Wheless, Limited, et al.* (246 U. S. 552), the Supreme Court had under consideration the scope of the limitation provision found in section 8 of the act here invoked. At page 561 the court said:

> Fundamental to the interpretation of the statute which the answering of this question renders necessary lies the rule of law settled "as a great principle of public policy" that the "United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound" (*United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125), and also the fact that this principle has been accepted by this court as requiring not a liberal but a restrictive, a strict, construction of such statutes when it has been urged to apply them to bar the rights of the Government. Thus, in *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355, 367, the limitation in the Act of March 2, 1896, c. 39, 29 Stat. 42, was held not applicable to a patent erroneously issued for Indian lands under a railroad grant, and in *La Roque* v. *United States*, 239 U. S. 62, 68, the general language of the very act we are considering was held not applicable to a trust patent for Indian reserved lands.

The language of section 7 of the act of March 3, 1891, *supra*, is clear and unambiguous, and it will not be extended to any other than the cases expressly provided for. Gorrell's application to reinstate his entry is therefore denied, and the decision appealed from is affirmed.

JESSE E. GORRELL

Motion for rehearing of departmental decision of January 27, 1926 (51 L. D. 347), denied by First Assistant Secretary Finney, March 15, 1926.

UNIVERSITY OF HAWAII

Opinion, February 9, 1926

TERRITORIES — HAWAII — AGRICULTURAL COLLEGES — AGRICULTURAL EXPERIMENT STATIONS—PAYMENT—STATUTES.

The act of March 2, 1887, as supplemented by the acts of March 16, 1906, and February 24, 1925, authorizing appropriation of amounts annually for the support of agricultural experiment stations, in connection with the colleges established pursuant to the act of July 2, 1862, permits Territories of the United States to participate in its benefits, where appropriations therefor have been made, but the benefits of that law have never been extended to Hawaii; in lieu thereof, however, separate comparable appropriations have been made for similar expenditures in that Territory and other outlying Territories and possessions.

PATTERSON, *Solicitor:*

There has been submitted for opinion the question whether the University of Hawaii is entitled to participate in the benefits of the act of March 2, 1887 (24 Stat. 440), and supplemental acts authorizing appropriation of amounts annually for the support of agricultural experiment stations as therein described.

There are numerous congressional acts to be considered in this connection, but the precise controversial point presented is whether the benefits thus conferred are confined to such institutions within the several States or whether they apply to Territories also.

The basic act of July 2, 1862 (12 Stat. 503), sometimes called the First Morrill Act, granted to the several States a quantity of land or, in lieu thereof, land scrip for the endowment, support, and maintenance of colleges teaching such branches of learning as are related to agriculture and the mechanic arts. That act was amended by the act of July 23, 1866 (14 Stat. 208), to provide that where any Territory shall become a State and be admitted into the Union such new State shall be entitled to the benefits of the said act of July 2, 1862, upon establishment of such college and by expressing acceptance of the grant as therein specified.

There is no question that this grant of land or land scrip applied only to the States and not to the Territories, and it has also been held as to new States that the grant did not become effective without further legislation where the method for determining the area of the grant as specified in the original act had become obsolete. See *State of Oklahoma* (45 L. D. 543). However, this particular grant of land or scrip is not claimed by Hawaii, and it is merely referred to here because the subsequent acts appropriating sums of money for experimental stations in the several States and Territories expressly provide that such stations shall be established under the direction of the colleges established by the act of July 2, 1862.

One view is that such station could not exist or operate in a Territory, because no agricultural college could be established there under the act of July 2, 1862. It is believed, however, that this view is too technical and superficial for reasons hereinafter stated, but this point will be found of minor importance in the practical application of the several provisions of law to be considered herein. Closer examination of the act of March 2, 1887, will be given in connection with the consideration of subsequent legislation in *pari materia*.

The act of August 30, 1890 (26 Stat. 417), made a permanent appropriation, to be available annually, of specified sums to each State and Territory for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts "now established, or which may be hereafter established, in accordance with an act of Congress approved July second, eighteen hundred and sixty-two." The amount thus appropriated was $15,000 to each State and Territory for the first year, with an increase of $1,000 each succeeding year for a period of 10 years, after which it was to be $25,000. These sums were to be certified by the Secretary of the Interior to the Secretary of the Treasury as to each State and Territory entitled to receive its share of the annual appropriation, and the amounts were to be paid out of the proceeds of the sale of public lands. It will be observed that this provision was for colleges and not for experiment stations; also that the appropriation was permanent and operated without further congressional authority.

The act of March 2, 1887, *supra*, was not effective unless the sum authorized be "specially provided for by Congress in the appropriations from year to year."

The act of March 16, 1906 (34 Stat. 63), increased the amount to be paid each State and Territory for agricultural experimental stations by $5,000 for the fiscal year 1906, $7,000 for the next year, and so on at an increase of $2,000 per year over the preceding year

until and inclusive of the year 1911, when it was to be $15,000, in addition to the sum provided by the act of March 2, 1887, and thereafter the total sum was to be $30,000. This was to be certified by the Secretary of Agriculture to the Secretary of the Treasury out of any money in the Treasury not otherwise appropriated. This act appeared to make such appropriation permanent and generally provided a procedure quite analogous to that contained in the said act of August 30, 1890, in respect to agricultural colleges, except that the sums for the colleges were to be certified by the Secretary of the Interior while the sums for the experiment stations were to be certified by the Secretary of Agriculture; also the latter were to be paid out of the general fund of the Treasury while the former were payable out of funds arising from the sale of public lands.

The said act of March 16, 1906, as passed, could have been given the effect of supplanting and superseding the act of March 2, 1887, but this was promptly changed by a construing provision contained in the appropriation act of June 30, 1906 (34 Stat. 669, 696), which limited its application to the increases therein provided for the years 1906 to 1911, inclusive.

The act of March 4, 1907 (34 Stat. 1256, 1281), contained provisions modifying the act of August 30, 1890, *supra*, in respect to agricultural colleges, providing for more complete endowment by increasing the yearly benefits to a maximum of $50,000 and making the permanent appropriation payable out of the general fund.

Section 1891 of the Revised Statutes provides—

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States.

Section 5 of the act of April 30, 1900 (31 Stat. 141), to provide a government for the Territory of Hawaii provides substantially to the same effect.

It has become well settled that the law making appropriation for agricultural colleges has application to Territories. This subject was thoroughly considered by the Comptroller of the Treasury in his decision of February 21, 1908, unpublished, holding that the Territory of Hawaii is entitled to the benefits of the said appropriation, and stating in part as follows:

> The act of August 30, 1890, applies to colleges of the kind provided for "now established or which may hereafter be established."
>
> The act of March 4, 1907, applies by its terms to colleges "now established or which may hereafter be established." It makes the appropriation "to each State and Territory." The laws making these appropriations for the "more complete endowment" of colleges organized in accordance with the

act of July 2, 1862, are made applicable by section 1891 of the Revised Statutes to every Territory hereafter organized.

This has been the practical construction placed upon the act of August 30, 1890, and I am of the opinion that it is the correct construction.

The subject was again considered by the Comptroller in his decision of April 10, 1908, unpublished, holding that Porto Rico is entitled to participate in the said appropriation for the more complete endowment of agricultural colleges.

In harmony with these decisions each of the Territories, Hawaii, Alaska, and Porto Rico, has been given the benefits of the act of March 4, 1907, *supra*, in the specified sum of $50,000 yearly for agricultural college support. As a mere matter of statutory construction and applying said rulings of the Comptroller in respect to the act of March 4, 1907, *supra*, it is fair to conclude that the acts of March 2, 1887, and March 16, 1906, *supra*, had application to Territories, and as a matter of fact they have been so applied, as will be hereinafter shown. But this broad question has become academic and does not fully cover the particular and practical question whether Hawaii is entitled under present legislation to certification of the benefits under said acts.

It is observed that Congress in making its yearly appropriations for the satisfaction of the act of March 2, 1887, *supra*, indicated that such benefits were not confined to the respective States because it has constantly appropriated the sum of $720,000 which was just sufficient to permit payment of the specified sum of $15,000 to each of the 48 States and Territories then constituting the continental and contiguous major political subdivisions of the Nation. This was done at the time when some of the subdivisions which are now States were then Territories. This precludes the thought that Territories, as such, were excluded. By the same token it indicates that other Territories were not included.

The intention of Congress with respect to Alaska, Hawaii, and Porto Rico is shown by making separate provision for them in legislation of this character. For instance, in the appropriation act of April 23, 1897 (30 Stat. 1, 6), the sum of $755,000 was appropriated to carry into effect the act of March 2, 1887, and to enforce the execution thereof, $30,000 of which was for administration and $5,000 for investigation as to the agricultural resources of Alaska "with reference to the advisability and feasibility of the establishment of agricultural experiment stations in said Territory, as has been done in other States and Territories."

It will be noted that this appropriation provided $720,000 for distribution in the 48 States and Territories of $15,000 each, not including Alaska. The next annual appropriation (30 Stat. 330, 335), was the same except that $10,000 was appropriated for investi-

gation in respect to Alaska. The next amount (30 Stat. 947, 953) was the same except that the amount of $12,000 was appropriated for investigation and establishment of an agricultural experiment station in Alaska.

It would be tedious to trace out the precise provisions of each and every such appropriation, but it is sufficient to say that such stations have been provided in Alaska, Hawaii, Porto Rico, Guam, and the Virgin Islands to be administered by the Department of Agriculture, and specific annual appropriations have been made for this purpose. A typical example of these appropriations is found in the act of March 4, 1911 (36 Stat. 1235, 1261), making appropriation for the fiscal year ending June 30, 1912. That act appropriated $720,000 to carry into effect the act of March 2, 1887, and a like amount to carry into effect the act of March 16, 1906, and separately appropriated $30,000 for experiment stations in Hawaii, and also amounts for other outlying Territories and possessions. See also similar acts of August 10, 1912, March 4, 1913 (37 Stat. 269, 297; 828, 851), and February 10, 1925 (43 Stat. 822, 824). The last act cited appropriated $54,940 for Hawaii.

The recent act of February 24, 1925 (43 Stat. 970), which is generally similar to the act of March 16, 1906, *supra*, provides in section 1 as follows:

> That for the more complete endowment and maintenance of agricultural experiment stations now established, or which may hereafter be established, in accordance with the Act of Congress approved March 2, 1887, there is hereby authorized to be appropriated, in addition to the amounts now received by such agricultural experiment stations, the sum of $20,000 for the fiscal year ending June 30, 1926; $30,000 for the fiscal year ending June 30, 1927; $40,000 for the fiscal year ending June 30, 1928; $50,000 for the fiscal year ending June 30, 1929; $60,000 for the fiscal year ending June 30, 1930; and $60,000 for each fiscal year thereafter, to be paid to each State and Territory; and the Secretary of Agriculture shall include the additional sums above authorized to be appropriated in the annual estimates of the Department of Agriculture, or in a separate estimate, as he may deem best. The funds appropriated pursuant to this Act shall be applied only to paying the necessary expenses of conducting investigations or making experiments bearing directly on the production, manufacture, preparation, use, distribution, and marketing of agricultural products, and including such scientific researches as have for their purpose the establishment and maintenance of a permanent and efficient agricultural industry, and such economic and sociological investigations as have for their purpose the development and improvement of the rural home and rural life, and for printing and disseminating the results of said researches.

To carry that act into effect the deficiency act of March 4, 1925 (43 Stat. 1313, 1324), appropriated the sum of $960,000, which is just sufficient to pay each of the 48 States the $20,000 specified for the fiscal year 1926. As already noted, the general appropriation act for the fiscal year ending June 30, 1926, appropriated the usual

$720,000 to carry into effect the act of March 2, 1887, a like amount to make effective the act of March 16, 1906, and various specific sums for the respective outlying Territories. The sum of $54,940 was provided for the express purpose of enabling the Secretary of Agriculture to establish and maintain agricultural experiment stations in Hawaii, $10,000 of which sum may be used in agricultural extension work in Hawaii.

This review of pertinent legislation certainly demonstrates that there is no permanent appropriation for the support of agricultural experiment stations, such as provided for agricultural colleges, but that such appropriations are provided annually; that in providing such funds in lump sums for distribution on certification by the Secretary of Agriculture the amounts thus appropriated have been just sufficient to allow each of the 48 States the amount of $30,000 contemplated by the acts of March 2, 1887, and March 16, 1906, and the $20,000 each under the acts of February 24, 1925; that Hawaii and other incontiguous Territories have been separately provided for in specific sums comparable to the prorated amounts.

I am convinced that the Secretary of Agriculture is right in taking the position that no funds have been provided for Hawaii under the acts of March 2, 1887, March 16, 1906, or February 24, 1925. If entitled to the benefits of these acts, she would have received $50,000 for the fiscal year ending June 30, 1926, whereas the greater specific sum of $54,940 was appropriated for experiment stations in Hawaii, a portion of which may be used for agricultural extension work. The only ground for claim of unjust discrimination, if any, would appear to be that the appropriation is to be expended under the jurisdiction of the Secretary of Agriculture instead of the school authorities. This, however, is a question of policy for consideration by Congress and is not involved in the interpretation of existing law.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

OFFERINGS AT PUBLIC SALE—SECTION 2455, REVISED STATUTES—ACT OF MARCH 28, 1912

[Circular No. 684]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, February 25, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

The sale of isolated tracts of public land is authorized by section 2455 of the Revised Statutes, as amended by the act of June 27, 1906 (34 Stat. 517); tracts which are mountainous or too rough for cultivation, though not isolated, may be sold under the first proviso to the act of March 28, 1912 (37 Stat. 77), see page 361; special provisions as to lands in western Nebraska are found in the act of March 2, 1907 (34 Stat. 1224).

The present instructions constitute a revision of those of April 16, 1920 (47 L. D. 382).

GENERAL REGULATIONS

1. Applications to have isolated tracts ordered into market must be filed with the register of the local land office for the district wherein the lands are situated except in the States of Kansas, Illinois, Indiana, Iowa, Michigan, Mississippi, Missouri, Ohio, and Wisconsin. These States have no district land office, and applications for land therein should be forwarded to the Commissioner of the General Land Office, Washington, D. C.

2. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so, the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased under section 2455, Revised Statutes, or the admendments thereto, isolated tracts, the area of which when added to the area now applied for will exceed approximately 160 acres; and that he is a citizen of the United States, or has declared his intention to become such. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

These provisions are modified, however, in the class of cases referred to in paragraph 5 (*b*).

3. The affidavits of applicants to have isolated tracts ordered into market and of their corroborating witnesses may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the applications are situated. Affidavits relating to lands in those States having no local office may be executed anywhere within the State.

4. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained upon the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

5. (*a*) No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands the area of which, when added to the area applied for, shall exceed approximately 160 acers.

(*b*) Where one or more tracts, each not exceeding 120 acres in area, are entirely surrounded by land owned by the applicant and have been isolated for five or more years, an offering may be allowed without regard to the limitations as to extent of purchases by the applicant, set forth in paragraphs 2 and 5 (*a*), provided the lands sought are not valuable for farming but are chiefly valuable for grazing or for special use in connection with the adjoining lands. Applicants under this subparagraph must furnish proof of ownership of the land surrounding that applied for; also detailed evidence as to the character of the land applied for, particularly with respect to its comparative values for farming, grazing, and special use in connection with the adjoining lands, which evidence must consist of an affidavit by the applicant corroborated by the affidavits of not less than two disinterested persons having actual knowledge of the facts. In other respects these cases are governed by the general regulations.

6. No tract exceeding approximately 160 acres in area will be ordered into the market. An application may include several incontiguous tracts provided their aggregate area does not exceed 160 acres. Each tract will be offered separately and certificates will be issued under different numbers unless they are bought by the same person.

7. No tract of land will be deemed isolated and ordered into the market unless, at the time application is filed, the said tract has been subject to homestead entry for at least two years after the surrounding lands have been entered, except in cases where some extraordinary reason is advanced sufficient, in the opinion of the Commissioner of the General Land Office, to warrant waiving this restriction.

8. The register will, on receipt of applications, note same upon the tract books of his office, and if the applications are not properly executed or not corroborated he will reject the same, subject to the right of appeal. Applications found to be properly executed and corroborated will be disposed of as follows:

(*a*) If the applicant does not show himself qualified, or if the tract appears not to be subject to disposition under the provisions of paragraph 7, or if all the land is appropriated, the register will reject the application subject to the usual right of appeal; if part of the tract is appropriated, he will reject the application as to that part, and, in the absence of an appeal after the usual notice, he will eliminate the description thereof from the application and take further action as though it had never been included therein. Where an appeal is filed, the Commissioner of the General Land Office, if he decides to order into market a part, or all, of the lands, will call upon the register and the division inspector for the reports as next provided for, concerning the value of the land.

(*b*) If all the land applied for is vacant and not withdrawn or otherwise reserved from such disposition and the status of the surrounding lands is such that a sale might properly be ordered under paragraph 7, the register, after noting the application on his records, will promptly forward the same to the division inspector for report as to the value of the land and any objection he may wish to interpose to the sale, and the register will make proper notations on his schedule of serial numbers in the event the application is not returned in time to be forwarded with the current returns. Upon receipt of the application from the division inspector with his report thereon, the register will attach his report as to the status of the land and that surrounding, the value of the land applied for, if he has any knowledge concerning the same, and any objection to the sale known to him, and forward the papers to the General Land Office with the current returns.

9. An application for sale will not segregate the land from entry or other disposal, for such lands may be entered at any time before the receipt in the local land office of the letter authorizing the sale and its notation of record or, as to land in those States having no local officer, before the date of the order of sale. If any or all of the land applied for be entered or filed upon while the application for sale is in the hands of the division inspector, the register will so advise him; if all the land be thus entered or filed upon he will request the return of the application for forwarding to the General Land Office.

If all of the land applied for be entered or filed upon at any time prior to receipt of a letter from the General Land Office authorizing an offering, the register will at once close the case on his records, notify the applicant of the action, and promptly report the facts to said office, where the matter will be closed on its records without letter; similarly, a case will be closed in part and like notice and report will be sent if an entry or filing be made for part of the land involved.

10. Upon receipt of letter authorizing the sale the register will at once examine the records to see whether the tract, or any part thereof, has been entered. If the examination of the record shows that all of the tract has been entered or filed upon, the register will not promulgate the letter authorizing the sale, but will report the facts to the General Land Office, whereupon the letter authorizing the sale will be revoked. If a part of the land has been entered, he will so report and note on the tract book, opposite such portion of the tract as is found to be clear, that sale has been authorized, giving the date of the letter. Thereupon the land will be considered segregated for the purpose of sale. The minimum price set by the order for sale should also be noted on the records. In the event no sale is had the price so noted will be effective as to any subsequent application for offering, filed within three years after the date of the report of the division inspector.

The register will prepare a notice for publication on the form hereinafter given, describing the land found to be unentered, and fixing a date for the sale, which date must be far enough in advance to afford ample time for publication of the notice, and for the affidavit of the publisher to be filed in the local land office prior to the date of the sale. The register will also designate a newspaper as published near-

est to the land described in the notice. The notice will be sent to the applicant with instructions that he must publish the same at his expense in the newspaper designated by the register. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the register he must issue receipt therefor and immediately return the money to the applicant by his official check, with instructins to arrange for the publication of the notice as hereinbefore provided.

If evidence of publication is not filed at or before the time set for the offering, the register will close the case on his records, and will report the default to the General Land Office, which will, without letter, close the case on its records.

11. Notice must be published for 30 days preceding the date set for the sale, and a sufficient time should elapse between the date of last publication and the date of sale to enable the affidavit of the publisher to be filed in the local office. The notice must be published in the paper designated by the register as nearest the land described in the application. If this be a daily paper, the publication must be inserted in 30 consecutive issues; if daily except Sunday, in 26; if weekly, in 5; and if semiweekly, in 9 consecutive issues. The register will cause a similar notice to be posted in his office, such notice to remain posted during the entire period of publication. The applicant must file in the local office, prior to the date fixed for the sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher, accompanied by a copy of the notice published.

12. At the time and place fixed for the sale the register will read the notice of sale and allow all qualified persons an opportunity to bid. Bids may be made through an agent personally present at the sale, as well as by the bidder in person. The register conducting the sale will keep a record showing the names of the bidders and the amount bid by each. Such record will be transmitted to this office with the other papers in the case.

When all persons present shall have ceased bidding, the register will, in the usual manner, declare the sale closed, announcing the name of the highest bidder; the highest bid will be accepted and the offerer thereof (or his principal) will be declared the purchaser, provided he immediately pay to the register the amount of the bid; in the absence of such payment the register will at once proceed with the sale, excluding bids by him, and starting with the highest bid not withdrawn. The accepted bidder must, within 10 days after the sale, furnish evidence that he is a citizen of the United States or has declared his intention to become such; also, a nonmineral affidavit or (in the States where that is sufficient) a nonsaline affidavit. Upon the filing of these papers the register will issue final certificate.

13. No lands will be sold at less than the price fixed by law, nor at less than $1.25 per acre; but a minimum price will be set by the letter ordering the sale, based upon the report of the division inspector. Should any of the lands offered be not sold, the same will not be regarded as subject to private entry unless located in the State of Missouri (act of March 2, 1889, 25 Stat. 854), but may again be offered for sale in the manner herein provided.

14. After each offering where the lands offered are *not* sold, the register will close the case on his records and report by letter to the

General Land Office. No report by letter will be made when the offering results in a sale; but the register will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in his current returns. With the papers must also be forwarded the affidavit of publisher showing due publication and the register's certificate of posting. In all cases where no sale is had the land will, in the absence of other objections, become subject to entry or filing at once without action by this office.

ACT OF MARCH 28, 1912 (37 STAT. 77)

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That section twenty-four hundred and fifty-five of the Revised Statutes of the United States be amended to read as follows:

"SEC. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than one dollar and twenty-five cents an acre, any isolated or disconnected tract or parcel of the public domain not exceeding one-quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: *Provided,* That any legal subdivisions of the public land, not exceeding one-quarter section, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of said commisioner, be ordered into the market and sold pursuant to this act upon the application of any person who owns lands or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this act: *Provided further,* That this act shall not defeat any vested right which has already attached under any pending entry or location."

REGULATIONS UNDER FIRST PROVISO TO ACT OF MARCH 28, 1912

15. The first proviso to the act copied above authorizes the sale of legal subdivisions not exceeding one-quarter section, the greater part of which is mountainous or too rough for cultivation, upon the application of any person who owns or holds a valid entry of lands adjoining such tract and regardless of the fact that such tract may not be actually isolated by the entry or other disposition of surrounding lands. Applications will be disposed of by you in accordance with the "General Regulations," except paragraph 7, which is not applicable. Applications may be made upon the form provided (4–008b) and printed herein, properly modified as necessitated by the terms of the proviso. In addition the applicant or applicants must furnish proof of his or their ownership of the whole title to adjoining land, or that he holds a valid entry embracing adjoining land, in connection with which entry he has met the requirements of the law; also detailed evidence as to the character of the land applied for, the extent to which it is cultivable, and the conditions which render the greater portion unfit for cultivation; also a description of any and all lands theretofore applied for under the proviso or purchased under section 2455 or the amendments thereto. This evidence must consist of an affidavit by the claimant, corroborated by the affidavits of not less than two disinterested persons having actual knowledge of the facts.

No person will be allowed more than one application under this proviso except that two or more applications may be allowed to the same person if all the lands sought adjoin the same body of land owned by the applicant or included in his pending entry. An application will be rejected in all cases where the applicant has pur-

chased under section 2455, or the amendments thereto, an area which, when added to the area applied for, shall exceed approximately 160 acres.

In acting on applications for offering under the proviso, regard will be had to the character of each subdivision applied for, as reported by the division inspector, and offering of an entire tract will not be had upon the ground that the greater part is of the character contemplated thereby, if taken as a whole.

16. In the notices for publication and posting, where sale is authorized under the proviso, you will add after the description of the land, "This tract is ordered into the market on a showing that the greater portion thereof is mountainous or too rough for cultivation."

ISOLATED TRACTS OF COAL LAND

17. The act of Congress approved April 30, 1912 (37 Stat. 105), provides:

> That * * * unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall * * * be subject * * * to disposition * * * under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in all such lands so * * * sold, and of the right to prospect for, mine, and remove the same in accordance with the provisions of the act of June 22, 1910, and such lands shall be subject to all the conditions and limitations of said act.

An application to have coal land offered at public sale must bear on its face the notation:

> Application made in accordance with and subject to the provisions and reservations of the act of June 22, 1910 (36 Stat. 583).

Where such an application does not bear this notation, you will afford applicant an opportunity to consent thereto and will reject the application if this requirement be not complied with.

In the printed and posted notice of sale will appear the statement:

> This land will be sold in accordance with, and subject to, the provisions and reservations of the act of June 22, 1910 (36 Stat. 583).

The purchaser's consent to the reservation of the coal in the land to the United States will not be required, but the cash certificate and patent will contain respectively the provisions specified in paragraph 7 (*b*) of the circular of September 8, 1910.

TRACTS CONTAINING PHOSPHATE, ETC.

18. The act of Congress approved July 17, 1914 (38 Stat. 509), provides:

> That * * * lands * * * withdrawn or classified as * * * phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to * * * purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such * * * purchase shall be made with a view to 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.

An application for offering of the lands referred to in said act must bear on its face the notation:

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

If an application for such mineral land does not bear that notation, you will afford the applicant opportunity to consent thereto, and if he fails to do so, you will reject the application.

In the printed and posted notice of sale will appear the statement:

This land will be sold in accordance with and subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509).

The purchaser's consent to the reservation of the minerals in the land to the United States will not be required, but the cash certificate and patent will contain, respectively, the provisions specified in paragraph 6 of the circular of March 20, 1915 (44 L. D. 32, 34).

19. All applications for the sale of public lands under these regulations must be rejected where it appears that the land applied for is within the limits of a producing oil or gas field or is embraced in an existing oil or gas prospecting permit or lease under act of February 25, 1920 (41 Stat. 437), or an application for such permit or lease, and an application for such permit or lease filed before the land becomes segregated in the manner indicated in paragraph 9 hereof will defeat the application hereunder.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

(Form 4–008b)

APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
----------,
----------, 19--

To the COMMISSIONER OF THE GENERAL LAND OFFICE:

----------, whose post-office address is ----------, respectfully requests that the ---------- of section ------, township ------, range ------, be ordered into market and sold under sec. 2455, Revised Statutes, at public auction, the same having been subject to homestead entry for at least two years after the surrounding lands were entered, filed upon, or sold by the Government.

Applicant states that he is a ---------- (here state whether native-born or naturalized citizen of the United States, or has declared his intention to become a citizen, as the case may be); that this land contains no salines, coal, or other minerals, and no stone except ----------; that there is no timber thereon except ------ trees of the ------ species, ranging from ------ inches to ------ feet in diameter, and aggregating about ------ feet stumpage measure, of the estimated value of $----; that the land is not occupied except by ---------- of ---------- post office, who occupies and uses it for the purpose of ----------, but does not claim the right of occupancy under any of the public-land laws; that the land is chiefly valuable for ----------, and that applicant desires to purchase same for his own individual use and actual occupation for the purpose of ----------, and not for speculative purposes; that he has not heretofore purchased public lands sold as isolated tracts, the area of which when added to the area herein applied for will exceed approximately 160 acres. The lands heretofore purchased by him under said act are described as follows: ----------

If this request is granted, applicant agrees to have notice published at his expense in the newspaper designated by the register.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tract above described? If so, describe the land by section, township, and range.

Answer. _____

Question 2. To what use do you intend to put the isolated tract above described should you purchase same?

Answer. _____

Question 3. If you are not the owner of adjoining land, do you intend to reside upon or cultivate the isolated tract?

Answer. _____

Question 4. Have you been requested by anyone to apply for the ordering of the tract into market? If so, by whom?

Answer. _____

Question 5. Are you acting as agent for any person or persons or directly or indirectly for or in behalf of any person other than yourself in making said application?

Answer. _____

Question 6. Do you intend to appear at the sale of said tract if ordered, and bid for same?

Answer. _____

Question 7. Have you any agreement or understanding, expressed or implied, with any other person or persons that you are to bid upon or purchase the land for them or in their behalf, or have you agreed to absent yourself from the sale or refrain from bidding so that they may acquire title to the land?

Answer. _____

_____

(Sign here with full christian name.)

We are personally acquainted with the above-named applicant and the land described by him, and the statements hereinbefore made are true to the best of our knowledge and belief.

_____

(Sign here with full christian name.)

_____

(Sign here with full christian name.)

I certify that the foregoing application and corroborative statement were read to or by the above-named applicant and witnesses in my presence before affiants affixed their signatures thereto; that I verily believe affiants to be credible persons and the identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me at my office, at _____, this _____ day of _____, 19__

_____,

_____

(Official designation of officer.)

(Form 4—348)

ISOLATED TRACT—PUBLIC LAND SALE

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

_____,

_____, 19__

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of sec. 2455, Revised Statues, pursuant to the application of _____, Serial No. _____, we will offer at public sale, to the highest bidder, but at not less than $_____ per acre, at _____ o'clock __m., on the _____ day of _____ next, at this office, the following tract of land: _____

The sale will not be kept open, but will be declared closed when those present at the hour named have ceased bidding. The person making the highest bid will be required to immediately pay to the receiver the amount thereof.

Any persons claiming adversely the above-described land are advised to file their claims or objections on or before the time designated for sale.

_____,

Register.

REGULATIONS UNDER TIMBER AND STONE LAW

[Circular No. 851]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 25, 1926.

REGISTERS, 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 were revised September 20, 1922 (49 L. D. 288) are hereby revised and modified, as follows:

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 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.

All applications for timber and stone entries for lands which are also embraced in applications for oil and gas prospecting permits or permits granted or in applications for phosphate, sodium, oil shale or potash permits or leases or in permits or leases granted, if accompanied by the required consent under the act of July 17, 1914, and a satisfactory waiver of claim to compensation, should be received,

noted upon the records and the applicant for prospecting permit or the permitee or lessee as the case may be should be advised that he will be allowed 30 days from receipt of notice within which to show why the nonmineral application should not be allowed subject to the reservation to the United States of the minerals sought to be acquired by the mineral claimant and with a waiver of claim to compensation in accordance with section 29 of the act of February 25, 1920 (41 Stat. 437), except in cases of applications for potash permits or leases or permits or leases granted, in which case the waiver should be in accordance with section 6 of the act of October 2, 1917 (40 Stat. 297); which showing must bear evidence of service of notice on the nonmineral applicant hereunder. You will reject all applications for lands in areas which have been designated by the department as within the geological structure of producing oil or gas fields, or within a naval petroleum reservation or within oil or gas leases, and otherwise proceed in accordance with the instructions in Circular No. 1021 (51 L. D. 167).

The terms used in the first paragraph of this section (2) 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 a 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 register 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 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 or land district in which the land is situated, or before any officer of the classes named who resides nearest or most accessible to the land, although he may reside outside the county and land district in which the land is situated. If the application is executed before a qualified officer within the boundaries of either the county or land district in which the land is located, no additional showing as to nearness or accessibility of such officer need be made, but if executed outside of both the county and land district the applicant must show by affidavit satisfactory to the Commissioner of the General Land Office that the officer before whom the application was executed was, because of topographic or geographic condi-

tions, nearer or more accessible to the land. An application is not acceptable if executed more than 10 days before its deposit in the mails for filing in the local land office. Each applicant must, at the time he presents his application and sworn statement, deposit with the register a filing fee of $10.

As there is no local land office in the States of Kansas, Illinois, Indiana, Iowa, Michigan, Mississippi, Missouri, Ohio and Wisconsin, the application and sworn statement covering land in any of those States must be mailed directly to this office within the specified time.

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 will at once forward one copy of the application to the division inspector having jurisdiction of the land described, who, if he finds legal objection to the allowance of the application, will return it to him with report thereon. The register will, if he concurs in an adverse recommendation of the division inspector, dismiss or deny the application, subject to the applicant's right of appeal; but if he disagrees with the recommendation he will forward the record to the Commissioner of the General Land Office, with his report and opinion thereon, for such action as the commissioner may deem advisable.

If the division inspector 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 division inspector under whose supervision it was made, and not to the applicant. Each appraisement upon which an

entry is to be allowed must be approved, respectively or conjointly, as provided in these regulations, by the division inspector under whose supervision it was made, by the register who allows the entry, or by the Commissioner of the General Land Office.

APPRAISEMENT: DISAGREEMENT BETWEEN APPRAISING AND APPROVING OFFICERS: HOW DETERMINED

13. The division inspector will return to the appraiser, with his objections, an appraisement 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 division inspector will either approve the schedule as then submitted or forward the papers to the register with his memorandum of objection. The register will thereupon consider the case. If he approves the appraisement, he will sign the certificate appended thereto and advise the division inspector thereof. If the register approves the objection of the division inspector he will so indicate, and if the appraising officer is an employee of the Interior Department, under the supervision of the division inspector, he will return the papers to the division inspector who will thereupon order a new appraisement by a different officer. If, however, the register approves the objection of the division inspector when the appraiser is an officer of another bureau of this department or of another department, he 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 appraisement is completed, the register will note the price on his 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 division inspector for report and recommendation as to whether the conditions then existing demand a new appraisal.

NOTICE OF APPRAISEMENT: PAYMENT OR PROTEST

15. If the appraisement shows the land, or any subdivision thereof, to be subject to entry, the register will note its appraised price on his records, and will immediately inform the applicant (using Form 4–524) that he must, within 30 days from service of notice, deposit with the register, either in lawful money, in post-office money orders payable to the register, in certified checks drawn in favor of the register 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 register a sum sufficient to defray the expenses of a reappraisement (which sum, not less than $100, must be fixed by the register and specified in the notice to the applicant), together with his application for reappraisement at his own expense.

16. If the register rejects 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 division inspector and the register. 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 shall close the case on his 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 the reappraisement, or such part thereof as is necessary, may be expended therefor, without any claim on his part for a refund or return of the money thus expended.

REAPPRAISEMENT

18. Upon the receipt of a protest against appraisement and application for reappraisement conforming to the regulations herein, the register will transmit such protest and application to the division inspector, who will cause the reappraisement to be made by some officer other than the one making the original appraisement. The procedure provided herein for appraisement will be followed for reappraisement, except the latter, if differing from the former, must, to give it effect, be approved both by the division inspector and the register, or, in case of disagreement between them, by the Commissioner of the General Land Office.

NOTICE OF APPRAISEMENT

19. When a reappraisement is finally effected, the register will note the reappraised price on his 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 register the amount fixed by such reappraisement 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 reappraisement shall be paid from the amount deposited with the register 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 appraisement, for his services for the time he was engaged in making and returning the reappraisement. The register 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 register for such services. The register will return to the applicant the amount, if any, remaining on deposit with him after paying the expenses of said reappraisement.

FINAL PROOF

21. After the appraisement or reappraisement and deposit of purchase money and fee have been made the register will fix a time and place for the offering of final proof[1] 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 will, if no protest or contest is pending, allow a final entry.

[1] Similar action will be taken by this office on applications for land in those States having no local land office.

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 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 reappraisement under these regulations shall acquire thereby no right or privilege except that of purchasing the lands at their reappraised value, if he is qualified, and if the lands are subject to sale under his application; and he must otherwise comply with these regulations, but shall not, in any event, be entitled to the return of any money deposited by him and expended in such reappraisement.

33. The Commissioner of the General Land Office may at any time direct the reappraisment 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 quantites 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 right 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 contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made except in the hands of bona fide purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agriculture, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided,* That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

* * * * * * *

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, Nebraska, and Washington Territory," and the amendment thereto, 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.)

SIMONSEN v. TOH-LA-ZHINIE-BEGA

Decided February 26, 1926

INDIAN LANDS—ALLOTMENT—CITIZENSHIP—STATUTES.

The right to an allotment under section 4 of the act of February 8, 1887, is one of the rights reserved to the Indians by the proviso to the act of June 2, 1924, which conferred citizenship upon them generally.

PRIOR DEPARTMENTAL DECISIONS DISTINGUISHED.

Opinion of the Assistant Attorney General of June 28, 1902 (31 L. D. 417), and cases of *Martha Head* (48 L. D. 567), and *Clark* v. *Benally* (51 L. D. 91), distinguished.

FINNEY, *First Assistant Secretary:*

Lee Simonsen, to whom oil and gas prospecting permit was issued in 1922, appealed from decision of the Commissioner of the General Land Office, dated August 19, 1925, requiring him to show cause why the allotment application of Toh-la-zhinie-bega filed August 4, 1924, under section 4 of the act of February 8, 1887 (24 Stat. 388), as amended, for the S. ½ NE. ¼ and N. ½ SE. ¼, Sec. 7, T. 43 S., R. 17 E., S. L. M., Utah, should not be allowed subject to the provisions, conditions, and reservations of the act of July 17, 1914 (38 Stat. 509), as to the oil and gas content in the land and to waiver by the applicant of the right to compensation under section 29 of the act of February 25, 1920 (41 Stat. 437).

It appears that the consent of the Indian applicant has been furnished, but the mineral claimant, as stated, has appealed from the rule laid upon him.

The sole contention made in the appeal is that the Indian allotment application having been filed after the passage of the act of June 2, 1924 (43 Stat. 253), granting citizenship to Indians, can not be accepted or an allotment allowed thereunder, for the reason that the applicant was at the time a citizen of the United States, and as such not entitled to an allotment under section 4 of the act of February 8, 1887. The act of 1924 provides—

> That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

The proviso to the above act saving the right of any Indian to tribal or other property is in itself decisive of the question raised by the appeal. Prior to the passage of that act Congress had at different times and under certain conditions, granted citizenship to Indians. Among other instances, an Indian who was allowed a tract of land on the reservation of his tribe and to whom trust patent issued is declared to be a citizen. An Indian to whom a fee

patent is issued at the expiration of the trust period provided by law or prior to that time, where he is found to be competent, becomes a citizen. Also an Indian living apart from his tribe or whether he is a member of any tribe or not and has adopted the habits of civilized life, is declared to be a citizen. A few instances will suffice to illustrate the policy of Congress in this respect.

The act of March 3, 1865 (13 Stat. 541, 562), gave to certain chiefs, warriors, and heads of families of the Stockbridge Munsee Tribe the right to become citizens of the United States upon their dissolving all tribal relations, adopting the habits of civilized life, becoming self-supporting, and learning to read and speak the English language, and then declared that they should not be deprived thereby of the annuities to which they were or might be entitled.

The act of March 3, 1875 (18 Stat. 402, 420), extended the benefits of the general homestead law to "any Indian born in the United States, who is the head of a family, or who has arrived at the age of 21 years, and who has abandoned or may hereafter abandon, his tribal relations," and then provided "that any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands and other property, the same as though he had maintained his tribal relations."

The act of February 8, 1887, *supra*, after authorizing allotments in severalty to any tribe or band of Indians located upon a reservation provided in section 4 thereof—

> That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations. * * *

In section 6 of said act of February 8, 1887, it was declared—

> * * * And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians herein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

The court in the case of *Oakes* v. *United States* (172 Fed. 305, 311) said in reference to the above act—

> For many years the treaties and legislation relating to the Indians proceeded largely upon the theory that the welfare of both the Indians and the whites required that the former be kept in tribal communities separated from

the latter, and while that policy prevailed effect was given to the original rule respecting the right to share in tribal property; but Congress later adopted the policy of encouraging individual Indians to abandon their tribal relations and to adopt the customs, habits, and manners of civilized life, and as an incident to this change in policy statutes were enacted declaring that the right to share in tribal property should not be impaired or affected by such a severance of tribal relations, whether occurring theretofore or thereafter. * * *

The act of August 9, 1888 (25 Stat. 392), declared that a tribal Indian woman thereafter marrying a citizen of the United States should become thereby a citizen of the United States without impairing or in any way affecting her right to any tribal property or any interest therein.

In the act of March 3, 1901 (31 Stat. 1447), citizenship was extended to the Indians of Indian territory, section 6 of the act of 1887 being amended by insertion after the words "civilized life" the words "and every Indian in Indian territory." By the act of March 3, 1921 (41 Stat. 1249, 1250), citizenship was extended to all members of the Osage Tribe of Indians. But there has never been any question in theory or practice that Congress in thus conferring citizenship upon the Indians of Indian territory or the members of the Osage Tribe intended thereby to impair or in any manner affect the property rights of such Indians. The purpose and scope of the act of June 2, 1924, is thus set forth in the House Report on the bill:

> At the present time it is very difficult for an Indian to obtain citizenship without either being allotted and getting a patent in fee simple or leaving the reservation and taking up his residence apart from any tribe of Indians. This legislation will bridge the present gap and provides means whereby an Indian may be given citizenship without reference to the question of land tenure or the place of his residence, and your committee has unanimously recommended the enactment of this measure.

It will hardly be contended that it was the purpose of Congress in the act of June 2, 1924, declaring all noncitizen Indians to be citizens of the United States to wipe out all laws and treaties and to withdraw the Government's protection of property rights of individual Indians. The provisions and conditions contained in treaties and statutes are not destroyed by making the Indians citizens. *Eells* v. *Ross* (64 Fed. 417). The fact is that the act of 1924 in expressly saving the property rights of the Indians regardless of citizenship was but in keeping with the former policy of Congress.

Under the operation of previous acts of Congress, Indians became citizens without their property rights being in any manner affected. The act of 1924 was but another and final step granting citizenship to all Indians who had not theretofore become citizens under various prior acts having the same purpose in view, it being again declared

that the granting of such citizenship was not in any manner to impair or otherwise affect the right of any Indian to tribal or other property. The right of a tribal Indian not residing upon a reservation to take an allotment of land on the public domain, under section 4 of the act of February 8, 1887, is clearly a property right not intended to be impaired or affected by the act of June 2, 1924, granting citizenship to noncitizen Indians.

The Supreme Court in a series of decisions has held that a mere grant of citizenship does not affect the protective power of the Government over the rights of the Indians; that such citizenship is not incompatible with tribal existence or the continued guardianship of the Government over its wards. *United States* v. *Holliday* (3 Wall. 407); *Cherokee Nation* v. *Hitchcock* (187 U. S. 294, 307–8); *United States* v. *Rickert* (188 U. S. 432); *United States* v. *Celestine* (215 U. S. 278); *Tiger* v. *Western Investment Co.* (221 U. S. 286, 311–316); *Hallowell* v. *United States* (221 U. S. 317); *United States* v. *Sandoval* (231 U. S. 28); *United States* v. *Nice* (241 U. S. 591, 598); *United States* v. *Waller* (243 U. S. 452, 459).

It was said in (5 Comp. Gen. 86, 87), referring to the act of June 2, 1924:

> * * * there is for consideration the matter of guardian and ward relationship between the Federal Government and the Indians and the matter of State responsibility since the enactment of the act of June 2, 1924, 43 Stat. 253, in which all noncitizen Indians born within the territorial limits of the United States were given citizenship in the United States with the proviso that "the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."
>
> It may be stated as a general rule that the granting of citizenship to Indians does not alter the relationship of guardian and ward between such Indians and the Federal Government in a case where property is held in trust for them, or they are living on a reservation set aside for their use, or are members of a tribe or nation accorded certain rights and privileges by treaty or by Federal statutes. * * *

To be entitled to an allotment under section 4 of the act of February 8, 1887, the applicant must show that he is a recognized member of an Indian tribe or nation, or is entitled to be so recognized. This is implied by the words that any Indian "for whose tribe no reservation has been provided" may take an allotment. The law also requires a showing of settlement. The Commissioner of Indian Affairs has certified that the applicant herein Tohla-zhinie-bega is an Indian of the Navajo Tribe, and as such entitled to take an allotment on the public domain under the provision of the act of February 8, 1887, if otherwise qualified. The applicant has furnished a corroborated affidavit that he settled upon and has improved the land applied for in allotment. The Commissioner of the General Land Office apparently deems the evidence of settle-

ment sufficient to justify allowance of the application subject to certain conditions hereinbefore set out to which the Indian has agreed. The right of this Indian to take an allotment on the public domain under the fourth section was not affected by the act of 1924, as it was clearly not intended thereby to destroy tribal relations or individual rights conferred by prior acts and treaties. If an Indian were qualified to take an allotment under that section prior to the act of 1924, he was thereafter equally qualified for the reason that under the express terms of said act the granting of citizenship does not impair or otherwise affect his right. Notwithstanding the gift of citizenship, the applicant remains an Indian by race. *United States* v. *Celestine* (214 U. S. 278, 290). Then, too, it is a familiar rule that legislation affecting the Indians is to be construed in their interest and the purpose to make a radical departure is not lightly to be inferred. *United States* v. *Celestine* (215 U. S. 278, 290); and *United States* v. *Nice* (241 U. S. 591, 599). This is especially true since the privilege of taking an allotment on the public domain is offered tribal Indians to induce them to abandon their tribal relations and separate themselves from the tribe.

It would seem, in view of the qualifications required of an Indian applicant for an allotment on the public domain—"any Indian not residing upon a reservation"—that he is already a citizen under the declaration of citizenship in the sixth section of said act—"every Indian * * * who has voluntarily taken up * * * his residence separate and apart from any tribe of Indians"—but "without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property." The latter is practically the same language as that used in the act of June 2, 1924—"that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." As previously set out herein, similar provisions saving to the Indian his right to tribal or other property regardless of citizenship, are also found in what are known as the Indian homestead acts of March 3, 1875 (18 Stat. 402, 420), and July 4, 1884 (23 Stat. 76, 96), as well as in other acts, it thus being rendered perfectly clear what the real intention of Congress was in the latest legislation on the subject, to wit, the act of June 2, 1924. The reasoning in support of the appeal in this case with respect to fourth-section allotments, carried to its logical conclusion, would also debar an Indian from taking an allotment on the reservation of his tribe, as he would not be authorized, being a citizen as distinguished from an Indian, to take an allotment of reservation lands. The same act, that of February 8, 1887, which authorized Indian allotments on the public domain, also provided for reservation allotments. Con-

sequently, both classes are equally within the saving provisions of the act of 1887, and the similar provision in the act of June 2, 1924. At the time of the passage of the latter act, perhaps one-half or more of the Indians in the country were already citizens under prior legislation, but it has never been seriously contended that their property rights were affected by such status.

Reference is made in the appeal to several cases in alleged support of the contention that since the act of June 2, 1924, granting citizenship to Indians generally, the present applicant is not entitled to an allotment on the public domain. On account of the conclusion hereinbefore expressed, it is not deemed essential to consider the cases referred to, as in the view of the Department the fact that an Indian is a citizen and the process by which he becomes a citizen are immaterial as in any manner affecting his right to tribal or other property if otherwise qualified. However, as it is asserted in the appeal that departmental decisions on the question of Indian citizenship have not been entirely harmonious, it may be well to review the situation to a limited extent. Whatever confusion there may have been was due to the different acts of Congress on the same subject and to its changed policy in respect to the Indians hereinbefore alluded to. Even the construction placed by the Attorney General and the courts upon these acts have not always been the same. For example, it was held in the *Heff case* (197 U. S. 488), that under the act of February 8, 1887, an Indian who has received an allotment and trust patent is no longer a ward of the Government, but a citizen of the United States, and that this emancipation from Federal control is not affected, among other things, by the provision in that act guaranteeing him an interest in tribal or other property. That case, however, was expressly overruled in *United States* v. *Nice* (241 U. S. 591), as not being within the intention of Congress as reflected in other and later enactments.

Any difference in decisions as alleged was particularly true of the acts of March 3, 1875, and July 4, 1884, *supra*, extending the benefits of the general homestead laws to Indians, and the fourth section of the act of February 8, 1887, authorizing Indians to take up public lands in allotment. An Indian desiring to exercise the homestead privilege under the acts of 1875 and 1884 had to do so as an Indian as distinguished from a citizen. The situation in respect to these acts was somewhat complicated by the passage of the act of 1887, in that under the declaration of citizenship contained in section 6 of that act an Indian might either take an allotment on the public domain as an Indian or make entry and proof under the homestead laws like any other citizen. Even to-day it is sometimes difficult to determine whether it is the intention of the Indian to take up public lands as an Indian, under the act of 1875, or 1884, or to make entry

under the regular homestead law. No difficulty is presented where the Indian regularly and clearly applies for an allotment on the public domain under section 4 of the act of 1887. This situation was reviewed at some length in instructions (37 L. D. 219) and (47 L. D. 613, 616), it being stated in the latter case, referring to section 6 of the act of 1887—

> The Department has held that this declaration necessarily includes the privilege on the part of an Indian possessing the necessary qualifications to make entry under the provisions of the regular homestead law just as any other citizen. The fact is that prior to the acts of 1875 and 1884 Indians as such, although living apart from their tribe and whether they were members of a tribe or not, could not take up public lands under the homestead law. The Supreme Court in the case of *Elk* v. *Wilkins* (112 U. S. 94), referring to said acts, stated that "the recent statutes concerning homesteads are quite inconsistent with the theory that Indians do or can make themselves independent citizens by living apart from their tribes," and the court held:
>
> "An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the Government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who has not been naturalized, or taxed, or recognized as a citizen, either by the United States or by the State, is not a citizen of the United States, within the meaning of the first section of the fourteenth article of amendment of the constitution."
>
> After the passage of the acts of 1875 and 1884 Indians could exercise the homestead privilege under said acts as fully and to the same extent as citizens of the United States but they had to do so as Indians as distinguished from citizens. In fact, under the terms of the act of 1875, they must show that they are members of an Indian tribe and have abandoned their tribal relations. They are forbidden alienation, or title to the lands is held in trust for specific periods. This situation is further shown by the provision in the act of 1884, which excuses them from paying fees and commissions on account of their entries and proofs, for the obvious reason that they are Indians. But under the act of 1887 an Indian who is living apart from any tribe, or whether he is a member of any tribe or not and has adopted the habits of civilized life, is declared to be a citizen and is entitled to make entry under the regular homestead law, and upon showing compliance with said law in the matter of residence and cultivation is entitled to fee patent like any other citizen.

In none of the cases cited in support of the appeal do the facts parallel those of the instant case. The opinion in 31 L. D. 417 involves the question as to whether or not an Indian woman married to an Indian man, who entered land under the regular homestead laws, was entitled to an allotment under the fourth section of the act of 1887, where the marriage took place prior to the act of August 9, 1888 (25 Stat. 392). That act expressly provided that an Indian woman who married a citizen of the United States thereby becomes a citizen of the United States, but further provided "that nothing in this act contained shall impair or in any way affect the right or title

of such married woman to any tribal property or any interest therein." The property rights protected in that act are those relating to tribal property and not those arising under section 4 of the act of 1887, involving allotments in the public domain. The opinion referred to had under consideration an Indian husband, who, in view of separation from his tribe, was declared by section 6 of the act of 1887 to be a citizen of the United States, entitled to all the rights, privileges, and immunities of such citizen, among which was the right to make entry under the regular homestead law the same as any other citizen. Under the circumstances, in view of the fact that the act of August 9, 1888, has reference to tribal lands, and the further fact that the husband had exercised the privilege of the regular homestead laws as a citizen, it was held that the wife was not entitled to an allotment on the public domain under the fourth section, whether the marriage took place prior to or after said act of 1888. However, when the question was subsequently presented for opinion as to the right of an Indian woman, married to a white man, a citizen of the United States, and of the children of such a marriage to allotments on the public domain under the fourth section, it was held in instructions (43 L. D. 125), as follows (syllabus):

An Indian woman married to a white man, a citizen of the United States, and the children born of such marriage, if recognized as members of an Indian tribe or entitled to be so recognized, are entitled to allotments on the public domain under section 4 of the act of February 8, 1887, as amended by the act of February 28, 1891, if otherwise within the terms and conditions of that section.

Those instructions went back to the construction originally placed upon the fourth section of the act of 1887, in the regulations of September 17, 1887, as follows:

Indian women, married to white men, or to other persons not entitled to the benefits of this act, will be regarded as heads of families. The husbands of such Indian women are not entitled to allotments, but their children are.

and in that connection it was said—

Here is a recognition, amounting to a construction of the law, that an Indian woman married to a white man, a citizen of the United States, and the children born of such a marriage, are entitled to allotments under the fourth section, regardless of the fact that the woman is so married and although such recognition may not be in harmony with the general rule that among free people the children of married parents follow the status or condition of the father in the matter of citizenship.

The fact is that the differences of opinion in respect to Indian citizenship arose primarily in connection with the rights of children born of a marriage between an Indian woman and a white man, a citizen of the United States. It was originally held that such chil-

dren followed the status of the father in the matter of citizenship. *Black Tomahawk* v. *Waldron* (13 L. D. 683). But in a subsequent decision of the same case (19 L. D. 311), a different rule was established, as follows (syllabus):

A claim of membership in an Indian tribe may be established by the laws and usages thereof, although such recognition may not be in harmony with the general rule that among free people the child of married parents follows the condition of the father.

But in the case of *Ulin* v. *Colby* (24 L. D. 311) it was held (syllabus):

Children born of a white man, a citizen of the United States, and an Indian woman, his wife, follow the status of the father in the matter of citizenship, and are therefore not entitled to allotments under section 4, act of February 8, 1887, as amended by the act of February 28, 1891.

However, in instructions of May 3, 1907 (35 L. D. 549), the case of *Ulin* v. *Colby* was expressly overruled, and the principle expressed in *Black Tomahawk* v. *Waldron* (19 L. D. 311), has since been followed in deciding questions of allotment.

Furthermore, the fourth section was subsequently construed in modified regulations, as follows:

An Indian woman married to an Indian man, who has himself received an allotment on the public domain or is entitled to one, is not thereby deprived of the right to file an application in her own name, provided she is otherwise entitled.

In reference to the case of *Martha Head* (48 L. D. 567), it is sufficient to say that it was clearly unnecessary in that case to pass upon the question of citizenship at all. The decision in that case was based primarily on the construction given the fourth section of the act of 1887, in regulations of September 17, 1887, which was soon after its passage, as follows:

The fourth clause above cited, "To each other single person under eighteen years now living," etc., will be construed to embrace children who may be born prior to the date of the parent's application for an allotment.

As stated in the *Head case*, "An Indian parent is not entitled to select an allotment on behalf of the child born after he applies for an allotment for himself under the fourth section of the act of 1887, because the law as construed in the regulations was against such a selection. This is sufficient reason of itself." The additional reasons given in that connection, namely, that as the law declares the parent to be a citizen upon allotment being made to him, a child thereafter born to him has the status of a citizen and not that of an Indian, was not essential to the proper disposition of the case and perhaps not strictly correct.

The foregoing is particularly true also of the case of *Clark* v. *Benally* (51 L. D. 91), where without any qualification or differentiation the statement was made in reference to the act of June 2, 1924, "it is true that the Department has held that Indians who are citizens of the United States are not entitled to allotments under the fourth section of the act of 1887." That this was not essential to the matter involved in that case is fully shown by the further statement therein, "that question is not here presented for determination, however."

The present case of Toh-la-zhinie-bega is further distinguished from those cited on appeal by the fact that the applicants in those cases were children whose rights were dependent upon the status of persons who had already exercised their allotment or homestead rights with consequent citizenship. Whereas the present applicant is seeking an allotment in his own right, of which he can not be and was not intended to be deprived by the act of June 2, 1924, conferring citizenship generally upon noncitizen Indians, and such rights being expressly saved in the proviso to said act.

The appeal herein from the rule to show cause is denied and the action taken by the Commisisoner of the General Land Office is hereby affirmed.

REGULATIONS FOR THE SALE AND REMOVAL OF PINE TIMBER ON CHIPPEWA INDIAN LANDS, MINNESOTA

[Circular No. 1052]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 27, 1926.

1. The merchantable pine timber on the lands described in the accompanying descriptive lists [omitted] of ceded Chippewa lands in the State of Minnesota will be offered for sale, under sealed bids, under section 5 of the act of January 14, 1889 (25 Stat. 642), as amended and modified by the acts of June 27, 1902 (32 Stat. 400), May 23, 1908 (35 Stat. 268), and section 27 of the act of June 25, 1910 (36 Stat. 855, 862). Said descriptive lists give the quantity of the pine timber reported by the examiners as having been found on each legal subdivision. Schedule A gives the estimate of timber within the Minnesota National Forest, on which 90 per cent of the timber is to be sold, and Schedule B gives the estimates of timber on land outside of the Minnesota National Forest, all of which timber is to be sold.

2. Bids for the timber on these lands will be opened at the district land office at Cass Lake, Minnesota, at 10 o'clock a. m., on June 11,

1926. In order to receive consideration, all bids must be filed in said district land office before the hour fixed for the opening of bids. The bids shall be in accordance with forms furnished said district land office. The right is reserved to reject any or all bids.

3. No bids will be received for a sum less than at the rate of $4 per 1,000 feet for Norway pine and $5 per 1,000 feet for white pine.

4. Bids may be for the timber on any separate section, and also on groups of 10 contiguous sections of land; the bids for timber on groups of sections may be in addition to bids for timber on separate sections. With a view to facilitating a comparison of bids, group bids have been arranged under the caption "recapitulation," with the areas of the lands embraced in each group stated, as well as the amount of timber. Bidders are not required to follow these groups, but it is recommended that they do so. Awards will be made to the highest bidders for said groups unless it clearly appears that more money will be realized by accepting bids differently grouped. Preference will be given any combination of bids which will realize the most money for the Indians and at the same time sell the most of the timber.

5. Each bid shall be accompanied by cash or a certified check for 20 per cent of the amount of such bid, according to the value of the timber, to be ascertained by multiplying the amount of timber to be sold, which in Schedule A is only 90 per cent of the Government estimate, by the price bid per 1,000 feet, the deposit to be retained and credited as part payment of the purchase price for the timber included in such bid should the bid be accepted and applied as provided in rule 24 below, but to be retained by the United States as a forfeit if the bid be accepted and the bond and agreement required by these rules and regulations be not furnished. In case cash accompanies the bid the register will deposit the same as a special fund in the nearest United States depository. The certified check and certificate of deposit referred to in this rule should be made out in favor of the Secretary of the Interior.

6. The register will number the bids consecutively as they are received, beginning with No. 1, noting on each bid the date and hour of its receipt. On opening the bids the register will indorse on the inclosures the number of the bid and the name of the bidder. He will make a list of the bids and will without delay forward the list, bids, and accompanying checks or certificates of deposit to the General Land Office.

7. Within 10 days from receipt of notice by telegraph that his bid has been accepted by the Secretary of the Interior each successful bidder will be required to enter into and file an agreement and bond on forms approved by the Secretary of the Interior, copies

of which will be furnished by the General Land Office, the penalty of the bond to be of an amount which shall be 50 per cent of the value of the timber, ascertained as provided in Rule 5, embraced in his accepted bid and purchase. There is no authority for reducing the penalty of a bond after partial performance. The bidder may submit a separate agreement and bond for each bid, or one agreement and bond for all the timber purchased by him, described in either Schedule A or Schedule B, as the case may be, the agreement and bond for the timber in each schedule to be separate, the agreement and bond to sufficiently identify and describe all the land. The bond shall be conditioned for the payment for said timber and for the faithful performance of said agreement, and for the observance of these regulations. The agreement and bond may be acknowledged by the purchaser of the timber, and the bond by sureties, before any officer authorized to take the acknowledgment of deeds in the State or Territory where executed, and the sufficiency of individual sureties must be certified by the United States judge or district attorney of the district where such sureties reside. In case of individual sureties, the parties will be required to justify in accordance with the special rules in regard thereto provided by the Department.

8. Upon the filing in his office of said agreement and bond, duly executed, the register will immediately forward them to the General Land Office for transmission to the Secretary of the Interior. The right is reserved to reject any bond submitted.

9. Written notice of intention to begin removal of timber must be given by the purchaser to the superintendent of logging, Chippewa Indian lands, Cass Lake, Minnesota, at least 10 days in advance.

10. The superintendent of logging and his assistants, appointed under the said act of January 14, 1889, as amended by said act of June 27, 1902, shall supervise the cutting, scaling, and removal of the timber sold under the provisions of said act. It shall be their duty to see that the rules and regulations are fully complied with; to see that no timber other than pine is cut, except as is allowed by the Secretary, and that no logs are removed from the place where banked until paid for; to see that all tops and refuse are promptly and properly burned or removed to prevent fire; to see that Indian labor is employed where practicable; and to supervise and direct the labor of the scalers. The superintendent shall make monthly reports of the progress of such work and of the time, habits, and competency of his assistants and of the scalers, and he and his assistants shall generally perform such services in and about the sale of the pine timber on said lands and the cutting of the same therefrom and the care and protection of all timber on said lands as may be required of them by the said Secretary.

11. The scalers shall see that before being removed from the tract where cut every stick of timber is marked on both ends by the logger with a "U. S." marking hammer, and also that it is bark marked; and such scalers shall number and scale, under Scribner's rules, in the log after being cut and before the same is removed from the place where banked, all logs cut under the application and agreement under said act. Said scalers shall keep in suitable books for reference a record of the marks, also a complete list of numbers of all logs, with the scale of each log set opposite its number, said scale books to be open to the inspection of the check scaler or to any authorized Government representative at all times.

12. All timber must be scaled on the banking ground, landing, or skidway, and before it is placed on cars or put into the water.

13. The rules and regulations provided by the Forester, and approved by the Secretary of the Interior, which are printed herewith, will govern in the cutting and removal of the timber from lands within the Minnesota National Forest. The superintendent of logging will, as provided by law, supervise the cutting and scaling of the timber on said national forest, and see that the rules and regulations prescribed by the Forester are complied with.

14. All trees shall be cut with a saw whenever practicable and as low down as practicable. In no case shall the height of the stump exceed the thickness or diameter of the tree 2 feet above the ground.

15. The maximum length for measurement of all white-pine logs shall be 16 feet and of all Norway pine logs shall be 18 feet. Upon logs 24 inches or less in diameter, 2 inches additional length, and upon logs over 24 inches in diameter, 3 inches additional length, shall be allowed for trimming off battered and discolored timber. Longer logs shall be scaled as two or more logs. The length of logs shall be so varied that all merchantable timber 6 inches and over at the top end shall be utilized.

16. All merchantable pine timber in felled trees which is 6 inches or over at the small end shall be logged. Any such timber left in the woods shall be scaled under the direction of the superintendent of logging and paid for by the purchaser of the timber at double the regular stumpage rate. No tree shall be left lodged in process of felling.

17. Merchantable pine timber used for booms, skids, dams, bridges, for building camps, or for any other purpose, shall be scaled and paid for by the purchaser of the timber at the regular stumpage rate. All trees cut for booms shall be carefully measured, and the booms shall be cut in such lengths as will allow all the timber to be cut into merchantable logs. Sufficient green timber, other than pine, may be cut and used for purposes incidental and necessary to the economical conduct of said logging operations upon payment there-

for at such rate as may be fixed by the Secretary of the Interior. However, the use of timber for any of the purposes mentioned shall, whenever possible, be confined to unsalable material and to dead and down timber.

18. The location of log landings, loading works on the shores of lakes or streams, or along railroads, and of railroad sidetracks, outside of the Minnesota National Forest, shall be subject to the approval of the superintendent of logging.

19. So far as reasonable all branches of the logging operations shall keep pace with each other. In no instance will the brush piling or burning be allowed to fall behind the cutting and removing of logs. It is the duty of the superintendent and of his assistants under his direction to see that the cutting is as far as practicable on consolidated areas and is not distributed here and there over the entire tract.

20. All tops, brush, chunks, knotty sections, litter, or other unutilized portions of trees on lands outside of the Minnesota National Forest must be burned at the time of cutting, under the supervision of the superintendent of logging and his assistants, excepting tops, brush, etc., cut during the months of April, May, June, July, August, September, and October, which shall be piled at the time of cutting, the piles being compact and large enough to burn clean without repiling. The piles must not be near standing trees so as to endanger them and must be placed where there is least danger of the fire spreading. The burning is to be done at such time as the weather and conditions will permit and when it is safe to do so without danger of forest fires. The superintendent of logging and his assistants are to be the judges and to be consulted as to the proper time of burning, and the work must be done under their direction.

21. In case of the failure of a purchaser to comply with the directions of the superintendent of logging and his assistants in the matter of the piling and the burning of the brush and débris, the superintendent of logging shall have the same properly piled and burned and charge the expense thereof to the purchaser of the timber in the next monthly scale bill, first, however, giving the purchaser written notice of his intention to pile and burn the brush and débris and allowing him 10 days from the date of such notice to comply with his instructions.

22. All instructions and demands from the superintendent or his assistants to or upon the loggers or purchasers shall be made in writing, including the demand for payment to be made when due, as hereinafter provided for.

23. The parties whose bid or bids may be accepted shall be required to cut and remove not less than 50 per cent of the timber embraced in their bid or bids on or before July 1, 1927, and the

remainder by July 1, 1928. The entire amount of the timber in each such bid and contract must be cut and removed from the land where located on or before July 1, 1928. Failure to comply with any part of this regulation shall be sufficient cause to warrant the Secretary of the Interior to declare the bid and contract hereunder forfeited.

24. The money for the timber cut and scaled during each month shall become due and payable in monthly installments at the end of such month, or oftener, in the discretion of the superintendent of logging, and shall be paid before said logs are removed from the place where banked: *Provided*, That on the last payment required to be made on each bid or contract the 20 per cent deposit made at the time of the bid shall be applied as part payment, and in case the 20 per cent deposit exceeds the amount of the last payment required to be made on such bid or contract the excess of the 20 per cent deposit shall be applied as part payment of any other payments required to be made by the same purchaser. The timber may, by permission of the Commissioner of the General Land Office, be removed before the actual payment of the money in all cases where such course is recommended by the superintendent of logging and is approved by the proper Indian agent. If not paid when due, or within 30 days thereafter, and after written demand from the superintendent of logging, the contract and the money paid thereunder may be declared forfeited by the Secretary of the Interior, and the timber may be banked, shipped, and sold by the superintendent, under the direction of the Secretary of the Interior, and the deposit made at time of bid and the net proceeds, after deducting expenses of banking, shipping, and selling, applied to the amount due therefor from such purchaser or logger, and any excess shall be paid to him. If excess be due from the logger after such sale by the Secretary, he shall pay the same upon demand from the superintendent.

25. The scale bills must be approved by the superintendent of logging, and such approval confirmed by the superintendent of the Consolidated Chippewa Indian Agency, at Cass Lake, Minnesota, for the timber cut, after examination thereof and of the check scale, if any, and thereupon the superintendent shall demand payment, and such payment must be made to said Indian agent, who shall account therefor to the Commissioner of Indian Affairs, and also report the several amounts paid to the Commissioner of the General Land Office.

26. The decision of the superintendent of logging shall be final in the execution of the foregoing rules.

27. The violation of any of these rules, if persisted in, shall be deemed a sufficient cause for annulling the contract and canceling

the sale of the stumpage. In case of damages caused by such violation of the rules and annulment and cancellation of the contract and sale, demand for the amount thereof after ascertainment and approval by the Secretary of the Interior, shall be made by the superintendent of logging, and the purchaser will be allowed 30 days from such notice within which to pay the amount due.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

RULES AND REGULATIONS OF THE FORESTER OF THE DEPARTMENT OF AGRICULTURE, OF OCTOBER 21, 1903, AS AMENDED ON JUNE 23, 1910, FOR THE CUTTING AND REMOVAL OF 90 PER CENT OF THE PINE TIMBER ON CEDED CHIPPEWA LANDS WITHIN THE MINNESOTA NATIONAL FOREST.

1. No tree shall be cut that is stamped with the letters "U. S."

2. No white pine or Norway (red) pine, 10 inches and under in diameter, 3 feet from the ground, shall be cut for any purpose, except where absolutely unavoidable in necessary logging operations.

3. All trees shall be cut with a saw whenever practicable.

4. In no case shall the height of the stump exceed the thickness or diameter of the tree 2 feet above the ground.

5. No tree shall be left lodged in process of felling.

6. So far as reasonable, all branches of the logging shall keep pace with each other. In no instance will the brush piling be allowed to fall behind the cutting and removing of logs.

7. All tops and litter from trees cut under these rules must be burned so as to be safe against fire, under the supervision of the inspector of the Bureau of Forestry, and at such time as he shall select, but the burning of tops or other material larger than 8 inches in diameter, or of tops or litter not made by logging under these rules will not be required. The piles must be compact and large enough to burn clean without repiling, and must not be so near young growth or standing green trees as to endanger either of them, and must be placed where there is least danger of the fire spreading.

If the purchaser fails to comply with the instructions of the supervisor of the Minnesota National Forest or of any of his assistants regarding the piling and burning of brush and débris, the superintendent of logging shall cause the same to be properly piled and burned and charge the expense thereof to the purchaser of the timber in the next monthly scale bill: *Provided*, That the purchaser shall first be given written notice that such action will be taken by the superintendent of logging and shall be allowed 10 days from the date of the notice within which to comply with said instructions.

8. Unnecessary damage to young growth or trees left for seed must be carefully avoided.

9. As few log roads as practicable shall be cut, nor shall they be made wider than is actually necessary.

10. All merchantable pine timber in felled trees which is 6 inches or over at the small end shall be logged. Any such timber left in the woods shall be

scaled under the direction of the superintendent of logging and paid for by the purchaser of the timber at double the regular stumpage rate.

11. The use of timber in constructing corduroys and bridges or for road work shall be confined, whenever possible, to unsaleable material and to dead and down timbers.

12. Merchantable pine timber used for booms, skids, dams, bridges, for building camps or for any other purpose, shall be scaled, and paid for by the purchaser of the timber at the regular stumpage rate.

13. The location of log landings, loading works on the shores of lakes or streams, or along railroads, and of railroad side tracks, shall be subject to the approval of the inspector of the Bureau of Forestry.

14. All trees cut for booms shall be carefully measured, and the booms shall be cut in such lengths as will allow all the timber to be cut into merchantable logs.

15. The maximum length for measurement of all white pine logs shall be 16 feet, and of all Norway pine logs shall be 18 feet. Upon logs 24 inches or less in diameter 2 inches additional length, and upon logs over 24 inches in diameter 3 inches additional length shall be allowed for trimming off battered and discolored timber. Longer logs shall be scaled as two or more logs.

16. The length of logs shall so be varied that all merchantable timber 6 inches and over at the top end shall be utilized.

17. The decision of the inspector of the Bureau of Forestry shall be final in the execution of the foregoing rules.

18. The violation of any of these rules, if persisted in, shall be deemed a sufficient cause for annulling the contract and canceling the sale of the stumpage.

THOMPSON v. ROGERS

Decided March 2, 1926

STOCK-RAISING HOMESTEAD—TIMBER AND STONE ENTRY—TIMBER LANDS.

Lands which contain 25,000 feet, or more, of saw timber, or its equivalent, to each 40-acre tract, are lands containing merchantable timber within the meaning of the stock-raising homestead act and should be excluded from designation thereunder.

TIMBER AND STONE ENTRY—TIMBER LANDS—TANBARK.

The value of growing timber for tanbark and fence posts may be taken into account in determining whether land is valuable chiefly for timber within the meaning of the timber and stone act.

FINNEY, *First Assistant Secretary:*

On February 19, 1917, Eli B. Rogers filed application 03151, now Sacramento 015267, to make additional stock-raising homestead entry for six noncontiguous tracts of land, among which was the SW. ¼, Sec. 32, T. 3 S., R. 6 E., Humboldt Meridian, Eureka, California, land district. This application stated that the lands applied for contained no timber, while the petition for designation which accompanied the application stated that they contained no valuable timber.

As a result of interlocutory proceedings which did not involve any question now before the Department, Rogers's application was

withdrawn as to a portion of the land originally applied for, including that in Sec. 32, and patent was issued to him for the remaining tracts. Thereafter Rogers filed application to amend his entry so as again to include the SW. ¼, Sec. 32, as well as other lands. The Commisioner, in a decision dated June 25, 1924, held that this could not be done, but that Rogers might file an application to reinstate his application 03151 to the extent of these additional lands.

On May 7, 1924, Sadie A. Thompson filed timber and stone application 04335, now Sacramento 015573, to purchase the said SW. ¼, Sec. 32, and her application was accepted through oversight on the part of the local office.

By decision dated November 10, 1924, the Commissioner allowed Mrs. Thompson 30 days within which to show cause why her timber and stone application should not be rejected because of conflict with Roger's application to amend his entry; in default of such action on her part, Roger's application was to be reinstated so as to include the said SW. ¼, Sec. 32.

On November 26, 1924, Mrs. Thompson answered the rule to show cause, stating that the land in question was more valuable for the timber thereon than for grazing purposes, and that, on August 11, 1924, an appraiser of the field division of the General Land Office had appraised the timber upon the land as having a value of $280, and had appraised the land itself as having a value of only $140. She requested that her timber and stone application be held in abeyance until a further investigation could be made.

In a decision dated April 28, 1925, the Commissioner stated that the appraiser's report referred to corroborated the statements of Mrs. Thompson, and that it appeared that the land in question properly was subject to disposal under the timber and stone law. The Commissioner, accordingly, held Roger's application to reinstate his entry 03151 for rejection as to the SW. ¼, Sec. 32, but gave him the right to amend his application so as to include some other tract in lieu of the land in question, subject to the further consideration of the General Land Office. Rogers has appealed to the Department from this decision.

The appellant contends that the land in question is not actual timber land, or such land and timber as is contemplated by the act of June 3, 1878 (20 Stat. 89). The appraiser in arriving at the respective values of the timber on the land, and of the land exclusive of timber, included the value of fence posts and of tanbark in the total value assigned to the timber; exclusive of these items, the value of the land would have been greater than that of the timber. The appellant contends that the action of the appraiser in this respect was erroneous, and that the comparative values of the timber

and the land should be determined without considering the value of the fence posts and of the tanbark.

The stock-raising homestead act was passed on December 29, 1916. On June 14, 1917, the Secretary of the Interior addressed a series of instructions to the Director of the Geological Survey for his guidance in classifying stock-raising lands (46 L. D. 252). In the course of these instructions he was advised that the act required the exclusion from designation of lands which contained merchantable timber, which the Secretary defined to be timber which is "fit to be sold." The Secretary stated that the presence of a small amount of timber on land to be classified would not exclude it from designation, and that a 40-acre tract which contained less than 25,000 feet of saw timber, or its equivalent in poles, posts, or cordwood, might, therefore, be designated.

In the case of *Dominguez* v. *Cassidy* (47 L. D. 225) the Department held that after a stock-raising entry had been allowed it was not subject to contest on a charge that the designation of the land was improperly or erroneously made, provided there was no charge that the entryman had induced the designation by deception or fraud.

The decision in *Dominguez* v. *Cassidy* was followed by the departmental decision in the case of *James B. Stokes and Amos H. Eckert* (48 L. D. 104), in which it was stated, in effect, that the rule announced in *Dominguez* v. *Cassidy* was applicable only in a case where a stock-raising entry actually had been allowed, and that it did not apply in a case where an issue was raised between rival applicants to make entry. As to a case of the latter kind, it was held that a stock-raising homestead entry would not be allowed over the protest of an adverse claimant without affording an opportunity to such adverse claimant to be heard.

In the instant case, therefore, both the question whether the land in controversy properly was designated under the stock-raising homestead act and the question whether this land is subject to entry under the timber and stone law must be considered.

The appraisal of the land, which was based upon personal examination by an employee of the field division of the General Land Office who was qualified to speak with authority, makes it plain that no one of the 40-acre tracts in the SW. ¼, Sec. 32, properly was subject to designation under the stock-raising homestead act, as interpreted in the Secretary's instructions of June 14, 1917, *supra*. The northeast, northwest, and southeast tracts each contained saw timber considerably in excess of the 25,000 board feet specified in the Secretary's instructions. While the southwest tract contained no saw timber, it did contain trees sufficient to supply 1,000 oak posts and ten cords of tanbark, having a total value greater than the value

of the saw timber growing on any one of the three other tracts, and which, therefore, may be considered as the equivalent of such timber within the meaning of the Secretary's instructions.

As regards the remaining question in the case, it appears from the appraisal that the land in the northeast tract contains saw timber which gives it its chief value, and that therefore it is subject to entry as timberland. As to the three other tracts, however, this result follows only in the event that posts and tanbark are proper items for consideration in determining the value of the timber on those tracts. That posts may be considered as timber is well settled, but the question with reference to tanbark appears to be an open one so far as the reported decisions of the Department are concerned.

The decisions of the courts show that the term "timber" is one which has a very elastic meaning, and that it has been given various definitions in accordance with the facts of the particular cases which involved its interpretation. While no decision has been found which discussed the question now under consideration, it probably is true that stripped bark taken alone would not be considered as timber within the ordinary commercial meaning of that term. In a state of nature, however, wood and bark are the intimate parts of a tree and each lends it a specific value.

Irrespective of the classification as an article of commerce which bark properly has when stripped from the parent trees, the Department is of the opinion that the value of the bark of growing trees may be taken into account in determining whether the land upon which they grow is valuable chiefly for timber within the meaning of the timber and stone act. It follows, accordingly, that all the tracts in the SW. ¼ of said Sec. 32 are subject to timber and stone entry by Mrs. Thompson.

The decision appealed from is affirmed.

REPORTS BY GEOLOGICAL SURVEY ON RAILROAD AND STATE SELECTIONS, SCRIP APPLICATIONS, AND NONMINERAL ENTRIES

Instructions

Department of the Interior,
Washington, D. C., March 13, 1926.

The Commissioner of the General Land Office:

I have your letter ("A"–CAO) of February 23, 1926, requesting instructions relative to the class of cases in which reports by the Geological Survey should be secured.

All prior instructions on the subject are hereby revoked, and in the future you will be governed by the following:

You will call upon the Geological Survey for a report on all railroad and State selections, and on all soldiers' additional and scrip applications, as to whether the lands applied for are valuable for coal or other mineral deposits, or whether they are valuable for power and reservoir purposes, or needed in connection with any contemplated power or reservoir-site withdrawal, except in cases where a special agent or an inspector has made a field investigation and submitted a report covering the subject.

A report by the Geological Survey on lands embraced in a homestead or desert-land entry should be requested only if the land has been reported or is believed to be valuable for coal or other minerals and the report of a field investigation is not available.

E. C. FINNEY,
First Assistant Secretary.

ALLEN v. MOUNTFORD

Decided March 15, 1926

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—COMPACTNESS—RESTORATIONS.

Where the cancellation of more than one oil and gas prospecting permit becomes effective on the same day the lands will become subject to application without regard to the particular areas embraced in each of the canceled permits, and where, in such cases, drawings are required, a single permit may be awarded to prospect all of the lands, if conformable to the rules and regulations as to acreage and compactness.

FINNEY, *First Assistant Secretary:*

The cancellation of four oil and gas prospecting permits became effective at 10 o'clock a. m., July 2, 1925, involving, among others, the following described lands in the Visalia, California, land district:

The SW. ¼ SE. ¼, Sec. 3, N. ½ NE. ¼, SE. ¼ NE. ¼, NE. ¼ SE. ¼, Sec. 10, NW. ¼, Sec. 12, T. 27 S., R. 18 E., lots 1, 2, 7 to 20, inclusive, Sec. 18, lots 1 and 2, Sec. 19, T. 27 S., R. 19 E., M. D. M.

Many permit applications were filed between the hours of 9 and 10 that day for the land described or portions thereof, and a drawing was held at 2 o'clock in the afternoon in accordance with existing regulations.

In the drawing, Howard S. Mountford, who had applied for all the land in question, drew No. 1 and was declared the successful applicant. The next number to be drawn was that of Beatrice D. Allen, who had applied for the NW. ¼, Sec. 12, T. 27 S., R. 18 E. She filed a protest against the award to Mountford on the grounds that his application included several incontiguous tracts, covering a

radius of several miles in two different townships, and covering about 988 acres; that any one of these tracts separately would justify any reasonable person in making application for a prospecting permit; that many persons did make applications for the separate tracts and were deprived of their rights under the leasing act by reason of the acceptance by the local land office of Mountford's application; that the action of the local land office in accepting said application was in violation "of the regulations and policy of the Department of the Interior as set forth in the third paragraph on page 36 of Circular 672." The protestant therefore asked that Mountford's application be rejected in its entirety or in part and that her application covering the NW. ¼, Sec. 12, T. 27 S., R. 18 E., be given first place and accepted.

By decision dated September 2, 1925, the Commissioner of the General Land Office dismissed the protest, and from this action the protestant has appealed to the Department.

It appears that there were no intervening unappropriated tracts between the incontiguous tracts involved when these applications were filed.

In the case of *Helen F. Curns* (50 L. D. 353), it is said:

> The Department has heretofore held on numerous occasions, as pointed out in the case of Fred Mathews (48 L. D. 239), that a general area equal to a township, that is, an area six miles square, represents the maximum over which prospecting can be carried on under one permit, pursuant to the leasing act.

In the present case the tracts involved are within an area less than four miles square, and the Geological Survey has reported that the lands are of the character subject to application for prospecting permits.

Circular No. 966, approved November 13, 1924 (50 L. D. 669), contains the following:

> Where the cancellation of more than one permit becomes effective on the same day the land will be opened to applications for permits without regard to the particular areas embraced in each of the canceled permits; and where, in such cases, drawings are required, all allowable applications filed within the prescribed time for the areas opened should be included in a single drawing.

Mountford has proceeded regularly according to law and regulations. He did not include in his permit application a greater area than allowable, and there can be no objection on the ground of want of compactness. The protest is without merit and is hereby dismissed.

The decision appealed from is affirmed. The case is closed and the papers are herewith returned to the General Land Office.

BESSIE R. McDONALD (ON REHEARING)

Decided March 15, 1926

DESERT LAND—RESIDENCE—CITIZENSHIP—STATUTES.

The desert-land law requires that one applying to make entry thereunder must be at the time that the application is filed an actual resident citizen of the State or Territory in which the land sought to be entered is located, and mere intention to establish residence is not sufficient.

FINNEY, *First Assistant Secretary:*

A motion for rehearing has been filed on behalf of Mrs. Bessie R. McDonald in the matter of her application to make desert-land entry for N. ½, Sec. 27, T. 6 N., R. 16 W., G. & S. R. M., Arizona, wherein the Department, by decision of December 22, 1925, affirmed a decision of the Commissioner of the General Land Office dated April 25, 1925, rejecting the application.

The motion contends that the Department erred in rejecting the application without affording applicant an opportunity to be heard; that applicant was denied the right to show, by competent evidence, that she is a *bona fide* resident of the State of Arizona within the meaning of the desert-land laws; that the Department has denied the applicant the right of showing by competent evidence that the land is irrigable and subject to reclamation, and that, if the decision of December 22, 1925, is adhered to, the applicant will be deprived of her property without due process of law.

The act of March 3, 1877 (19 Stat. 377), providing for the making of desert-land entries, was amended by the act of March 3, 1891 (26 Stat. 1095), section 8 of which 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 sought to be entered is located."

In her application and in her appeal Mrs. McDonald stated that it was her intention to become a resident of the State of Arizona. The Department would not be warranted in accepting intentions in place of the actuality prescribed by Congress.

The applicant never had any property right in and to the tract applied for, hence the Department did not deprive her of any property or property right. It has been found and held, based on Mrs. McDonald's statements, that she was not a resident citizen of Arizona at the date of her application—October 14, 1924—and that she had not, so far as the record showed, removed to that State from her home in California. It would be a waste of time and money to hold a hearing on a matter which can be presented in the form of affidavits, and the Department has at no time restricted the ap-

plicant in the number of affidavits which could be filed. She has had every opportunity to make such showing as the facts warranted, but has been insistent that the Department should accept her intentions, vaguely expressed. Not being qualified to make a desert-land entry, whether or not the land is irrigable becomes immaterial, so far as concerns the application under consideration.

The decision of December 22, 1925, is adhered to, the motion for rehearing being denied.

ARTHUR F. PRIBOTH

Decided March 15, 1926

WATER EXPLORATION PERMIT—NEVADA—STATUTE OF LIMITATIONS—LAND DEPARTMENT—JURISDICTION.

The limit of time for the performance of the conditions imposed by the act of October 22, 1919, as amended by the act of September 22, 1922, under a water exploration permit, is mandatorily fixed by statute and can not be further extended by the Land Department.

FINNEY, *First Assistant Secretary:*

On June 20, 1921, permit No. 012825 was issued to Arthur F. Priboth, under the act of October 22, 1919 (41 Stat. 293), entitled "An act to encourage the reclamation of certain arid lands in the State of Nevada." The lands involved are situated in T. 21 N., R. 34 E., and T. 21 N., R. 35 E., M. D. M., Carson City, Nevada, land district.

Priboth's first progress report was duly submitted. He failed to submit a second progress report, however, and his permit was canceled after notice, but was reinstated on July 5, 1923. On August 6, 1923, an extension of time until June 20, 1924, within which to submit a second progress report was granted under the provisions of the act of September 22, 1922 (42 Stat. 1012). On July 7, 1924, an additional extension of time to and including June 20, 1925, was allowed.

On June 29, 1925, Priboth again made application for an extension of time within which to complete his development work. This application was denied by the Commissioner in a decision dated July 20, 1925, for the reason that the time limited by statute for completing the work under the permit had been exhausted, as but four years were allowed for that purpose, two years under the act of October 22, 1919, *supra*, and two years additional under the act of September 22, 1922, *supra*. The case is now before the Department on an informal appeal by Priboth.

The Department finds that the Commissioner's decision was correct. The time within which development work must be com-

pleted under a permit of the kind involved in this case, is fixed by statute, and the Land Department is without authority to grant an extension of time beyond the statutory period. As the appellant already has been granted all extensions to which he was lawfully entitled, his application for an additional extension must be denied.

The decision appealed from is affirmed.

UNITED STATES v. CENTRAL PACIFIC RAILWAY COMPANY

Decided March 15, 1926

PATENT—RAILROAD LAND—MINERAL LANDS—LAND DEPARTMENT—JURISDICTION.

Where patent was inadvertently issued for lands involved in proceedings before the Land Department, its jurisdiction over the lands thus patented is thereby lost, and further proceedings for the purpose of making inquiry into the character of the lands will not be entertained on request of the patentee while the patent remains outstanding.

COURT DECISION CITED.

Case of *Germania Iron Company* v. *United States* (163 U. S. 379) cited.

FINNEY, *First Assistant Secretary:*

This is the appeal of Central Pacific Railway Company from a decision of the Commissioner of the General Land Office, June 22, 1925, declining to reopen Government contest No. 207 except on condition that the company reconvey to the United States the SE. ¼ NW. ¼, W. ½ NE. ¼, SE. ¼ NE. ¼, Sec. 17, T. 32 N., R. 46 E., M. D. M., Elko land district, Nevada.

Adverse proceedings were directed May 21, 1919, against certain lands covered by the company's selection list No. 5, serial 03173, among which were the lands above described, on the charge that said lands are "mineral in character, containing valuable deposits of gold, silver, lead, zinc, and copper." That contest was given number 207. Hearing was ordered, covering all of the land included in the charge, but the company failed to deny the charge and issue was not joined as to the lands above described, it being admitted that they apparently had some mineral value. November 11, 1924, the company's said list was canceled as to such lands, they being then classified as mineral in character, and the case closed as to them. In the meantime and notwithstanding the fact that these adverse proceedings were pending against the land described, patent No. 924470 issued to the railway company inadvertently and erroneously November 24, 1923, as on Nevada clear list 300, approved October 27, 1923, covering the above-described land. November 19, 1924, the Commissioner of the General Land Office called on the company to reconvey these lands because of such inadvertent and erroneous patent-

ing. The company, responding to this rule, set up, among other things, that, after receipt of the demand for reconveyance, it had had a further examination by mining engineers made of these lands, which disproved its admissions upon the original investigation as to the character of the land, and also that since that time further prospecting in the locality has proven the absence of mineral values therein. It is further submitted that the company is entitled to this land under its grant and that although the patent was under the circumstances inadvertently issued by the United States, yet, considering the actual character of the land, the company was entitled to receive a patent for it; that if the company should now reconvey the land to the United States as demanded, the result would be to place it forever beyond the possibility of the company again applying for patent. For these reasons the company submits it would be unwise for it to reconvey the land and unjust for the United States to insist upon a reconveyance. However, in appreciation of the fact that the actual character of the land has not been proven in or as the result of said contest No. 207, the company is therefore willing and consents that said contest, in so far as it relates to these particular tracts, may be reopened and a hearing had in accordance with the usual practice and decision rendered in due course, classifying the land in accordance with the evidence that may be produced at such hearing. The company expressed its willingness to abide by the conclusions then reached and in the event the land or any portion of it is proven to be mineral in character, it undertakes to make an appropriate reconveyance of the area so proven to be mineral. Considering the case thus presented, the General Land Office disposed of the matter as follows:

> This office has carefully considered the company's proposition, but does not believe that the demand for reconveyance is unjust to the company. If the company reconveys the land and such reconveyance is accepted, letter "H" of November 11, 1924, will be recalled and vacated as to the tracts involved, the company's list, Elko 03473, will be reinstated, a new hearing ordered, and the question whether a new patent be issued be determined by the final result of such hearing.

It is not perceived that there was any error in the Commissioner's ruling. There was certainly none prejudicial to the company. The Land Department is charged with the disposal of the public lands and Congress has invested the officers of that Department with exclusive jurisdiction in determining issues of fact in connection with such disposition. It is admitted that through inadvertence and mistake a patent has been issued for the lands in question and the legal effect of that action was to transfer the legal title and to remove from the jurisdiction of the Land Department the authority to inquire into and consider the disputed question of fact as to the min-

eral character of these lands. The matters of fact involved in this proceeding must be settled by the Land Department. "When through inadvertence and mistake a patent has been wrongfully issued by which the jurisdiction of the Land Department over this question 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." *Germania Iron Company* v. *United States* (165 U. S. 379, 385.)

It is true that in that same case it was held that a "court might properly decline to set aside a patent when it affirmatively appeared that immediately after such action it would be the duty of the Department to issue a new one." That principle is relied on in part in support of the appeal herein, but it is not perceived how the principle there stated will be of any use to the appellant in this proceeding. It does not appear, affirmatively or otherwise, that after a reconveyance of the lands herein erroneously patented, it would become the duty of the Department to issue a new patent. The question whether the company would be entitled to a further patent for the lands in controversy would depend upon inquiry as to their mineral character. Giving effect to the broad doctrine of the case of *Germania Iron Company* v. *United States*, *supra*, it must be held that the Land Department is without jurisdiction or authority to make the necessary inquiry so long as this patent remains outstanding. It is true that it might institute such further investigation as it deemed necessary for the ascertainment of facts to support a recommendation to the Department of Justice that suit be instituted to cancel said patent, because that would be a matter within the necessary administrative duty of the Department and within its jurisdiction. However, in this case, no such further investigation would be necessary. The classification of this land as mineral is a matter of record and the erroneous and inadvertent patenting thereof is admitted. Should the company decline to make a reconveyance, recommendation for suit would be made without further inquiry.

Inasmuch as the Commissioner of the General Land Office has ruled that upon reconveyance of the land the company's list will be reinstated and the question whether a new patent be issued will be then determined by the final result of a hearing, it is not perceived wherein the railway company has cause of complaint on the ground of injustice, nor does it appear just what the company means by saying that it will not be permitted again to select the land. That objection is obviated by a proposed reinstatement of the company's list.

The decision appealed from was correct, and is, accordingly, affirmed.

WALKER BASIN IRRIGATION COMPANY, JOHN E. MORSON, RECEIVER

Instructions, March 15, 1926

CAREY ACT—SELECTION—EQUITABLE TITLE—VESTED RIGHTS—LAND DEPARTMENT—JURISDICTION—PATENT

Equitable title to lands selected under the Carey Act vests when the State has fully complied with the law and regulations and has completed its proofs in connection with its list for patent, but the power of the Land Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed.

PRIOR DEPARTMENTAL RULE DISTINGUISHED.

Departmental ruling of July 13, 1921 (48 L. D. 160), distinguished.

FINNEY, *First Assistant Secretary:*

With your [Commissioner of the General Land Office] letter of February 8, 1926, you transmitted a report from the division inspector at Portland, Oregon, concerning the acts of John E. Morson, receiver for the Walker Basin Irrigation Company, in permitting the use for grazing purposes, for agreed sums, of certain lands in the west unit of the company's project, included in Oregon Carey Act segregation list No. 11. You express the view that the agreements under which the use of the lands for such purposes has been permitted are in plain violation of the terms of the Carey Act; that the practice should be discontinued, and that the money thus far paid the receiver should be recovered by the United States. You request instructions as to the manner of settling the matters involved, whether through recommendation of suit on behalf of the United States, or by amicable adjustment through the authorities of the State.

As pointed out in your letter, section 4 of the act of August 18, 1894 (28 Stat. 372, 422), commonly known as the Carey Act, provides that the State shall not be authorized to lease any of said segregated lands or to use or dispose of the same in any manner whatever, except to secure their reclamation, cultivation, and settlement. A specific provision to that effect is also included in the regular form contract prescribed by the regulations to be entered into between the State and the United States when the segregation is made.

The report indicates that the receiver has endeavored to justify his action on the alleged ground that the primary purpose of the agreement is to protect the lands and ditches from cattle running at large, and the agreements require the parties who have secured grazing privileges to repair all damage to ditches and banks caused by grazing activities. It also appears that the receiver has secured an

authorization from the State court to enter into the agreements complained of.

The specific agreements referred to in the report were made in 1924 and 1925, one involving a consideraion of $300 and the other a consideration of $750, or an aggregate of $1,050.

In concluding your letter you call attention to certain matters which render doubtful the advisability of direct action in the premises by suit on the part of the United States, and the reasons stated seem to justify a conclusion that such course should not be adopted but rather that the matter should be brought to the attention of the State authorities for appropriate action. Under the law, the Government is authorized to enter into an agreement with the State under which the latter undertakes the reclamation of the lands and is obligated under the terms of the agreement to accomplish this end in conformity with the provisions of the law. In consideration of full performance on the part of the State, the Government agrees to issue patents to the State when the requirements of the law have been fulfilled. While the State is authorized to employ others to effectuate the purposes of the act under agreements, its own obligations under its agreement with the Government are not lessened thereby. In the administration of the Carey Act, the Government must look to the State for fulfillment of the agreement, and it is not believed that any action should be taken in the matter considered in the report until the State authorities have been fully advised.

But there is another question presented in your letter and in the report which must be considered before such action is taken. You advise that on December 26, 1923, the State filed its application for patent (Lakeview 012141) for 9,646.36 acres embraced in the selection list. The list for patent has not yet been approved and patent has not issued. It appears, however, that examination is being made in the field to determine whether the requirements of the act have been met and whether the State is entitled to patent for any or all of the lands embraced in the application.

You state that you are of the opinion that the Government's title remains in effect until the State furnishes satisfactory proof according to such rules and regulations as may be prescribed by the Secretary, showing compliance with the law and that until such proofs are examined and found sufficient, it can not be said that they are satisfactory, and such sufficiency is not determined or announced until final approval of the patent list, citing *State of Wyoming* (38 L. D. 508, 511). In accordance with this view you state that you are of the opinion that equitable title to said lands has not passed and that, as patent has not issued, it is certain that legal title is still vested in the United States; and, further, that if equitable title were vested in the State, the Department would still have juris-

diction over the land until the legal title has passed, citing *Cameron* v. *United States* (252 U. S. 450, 460–461).

The question of jurisdiction is important in consideration of the questions presented in your letter and will be dealt with at some length.

Since the decision in the *Wyoming case* was announced, which followed a long line of decisions of the Department, the Supreme Court, in the cases of *Payne* v. *Central Pacific Railway Company* (255 U. S. 228), *Payne* v. *New Mexico* (255 U. S. 367), and *Wyoming* v. *United States* (255 U. S. 489), has announced the doctrine with respect to selections under the public land laws, that when such selections have been duly made and completed in full conformity with the act and regulations, the equitable title to the lands selected passes to the selector.

In the *State of Wyoming case* the court said, at page 498:

> And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership.

In 48 L. D. 160, page 161, the Department said with respect to Carey Act selections—

> It is accordingly the opinion of the Department that the rulings of the Supreme Court in the cases cited are not applicable in the matter of segregations under the Carey Act and that until such time as the right to title has been fully earned, the lands listed under a Carey Act selection may be subject to withdrawal and to disposition by the United States of the mineral deposits contained therein.

It will be noted that in the case considered by the Department a mere selection list was involved where title had not yet been earned, but here the situation may be different, as the State in presenting its list for patent and proofs alleges that it has complied with the requirements of the law.

The case of *Cameron* v. *United States*, *supra*, is not inconsistent with the later decisions of the Supreme Court, it being therein held that the power of the Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed. In that case the court said—

> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. This is well illustrated in *Orchard* v. *Alexander*, 157 U. S. 372, 383, where in giving effect to a decision of the Secretary of the Interior cancel-

ing a preemption claim theretofore passed to cash entry, but still unpatented, this court said: "The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he can not be arbitrarily dispossessed. His interest is subject to State taxation. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department." And to the same effct is *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 593, where in giving effect to a decision of the Secretary canceling a swamp land selection by the State of Michigan theretofore approved, but as yet unpatented, it was said: "It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius* v. *Kassel*, 128 U. S. 456; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *Parsons* v. *Venzke*, 164 U. S. 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed."

It is plain from the decisions discussed, that if the State has fully complied with the law and regulations and has completed its proofs in connection with its list for patent, equitable title has passed from the Government, together with jurisdiction over the matters presented in the report. It appears that the records in the case are now with the division inspector and that an examination of the land in connection with the list for patent has been directed, for the purpose of determining whether the State has, in fact, complied with the requirements of the law. If it is affirmatively determined that title was earned at the time application for patent was filed, the patent must issue in due course.

It is therefore believed essential that the facts regarding the list for patent should be ascertained before any further action is taken in the matter presented in your letter, for if equitable title has passed under the State's application filed in 1923, the matter will no longer be a subject for consideration by this Department.

STATE OF NEW MEXICO

Decided March 18, 1926

SURVEY—PLAT—BOUNDARIES—SELECTION—INDEMNITY—NEW MEXICO—STATUTES.

A deficiency in acreage caused by alleged gross inaccuracies in the surveys is not a ground for adjustment of a State grant, inasmuch as section 2396, Revised Statutes, declares that in the disposal of the public lands the official surveys are to govern, and that each section or subdivision thereof shall be held and considered as containing the exact quantity shown on the plat.

FINNEY, *First Assistant Secretary*:

This is an appeal by the State of New Mexico from the decision of the Commissioner of the General Land Office dated May 12, 1925, denying its claim for credit in the amount of 4,439 acres on account of an alleged deficiency in the area of certain tracts or sections in T. 5 S., R. 11 W., and T. 6 S., Rs. 11, 12, and 13 W., N. M. P. M., selected and certified as school indemnity lands, or under grants in quantity for specific purposes.

It appears that the Commissioner had previously been urged to take some remedial action respecting the surveys in this locality, showing being presented to the effect that they were defective and inaccurate; that a material discrepancy existed between the distances on the ground and the length of the lines as shown on the plat, especially with regard to the section lines closing upon the first standard parallel south, where a shortage was alleged of about 34 chains, as a result of which the actual areas of the several sections adjacent to said standard parallel in this locality are much less than those established by the official governmental survey and plat. The deficit is alleged to be approximately 270 acres in each of said sections. In denying the request for correction of the alleged erroneous or defective surveys, the Commissioner observed that the facts reported, and to a certain extent corroborated by the findings of the United States Geological Survey as exhibited upon the Pelona Quadrangle sheet (1915–1916) were such as to create the presumption that unsatisfactory or defective conditions prevailed in the region referred to, and while the townships involved might theoretically be eligible for resurvey, the public interest did not demand that the work be undertaken and administrative necessity did not warrant it since there was no particular governmental purpose to be subserved. Attention was invited to the requirements governing resurvey applications based upon the provisions of the act of March 3, 1909 (35 Stat. 845), and the act of September 21, 1918 (40 Stat. 965), as outlined in Circulars Nos. 520 and 629 (45 L. D. 603; 46 L. D. 504), and it was suggested if conditions warranted such procedure that the State pursue the matter as provided by law. The State concluding that it was not feasible or advisable to apply for resurvey under the provisions of the statutes mentioned, but still insisting that its interests were adversely affected and that the shortage amounted to approximately 4,439 acres in the four townships in question, thereupon requested that it be allowed credit in the adjustment of its grants for this alleged deficiency. This request was supported by evidence in the form of a map or plat compiled in the State land office showing the results

of surveys made by licensed engineers. It appears from this map that there is a shortage, as alleged, of about 34 chains in the section lines closing upon the first standard parallel south, affecting the north tier of sections in T. 6 S., Rs. 11, 12, and 13 W. In the western *range* of sections in T. 5 S., R. 11 W., there is also an apparent shortage of approximately 34 chains in the east and west lines closing upon the western boundary of the township, the actual area of the several sections in this range being much less than that expressed upon the plat. Of this range of sections the State owns 5, viz, 7, 18, 19, 30, and 31. In the north tier of sections in T. 6 S., R. 11 W., the State is the owner of Sec. 4; E. ½, Sec. 5, and about 480 acres in Sec. 6, described as lots 1, 2, 3, 4, 5, 6, E. ½ SW. ¼ and SE. ¼. The State owns the six sections comprising the north tier in T. 6 S., R. 12 W., and owns all of the north tier in T. 6 S., R. 13 W., except Sec. 6. The State estimates its loss as follows, T. 5 S., R. 11 W., 1,320 acres; T. 6 S., R. 11 W., 333 acres; T. 6 S., R. 12 W., 1,426 acres; T. 6 S., R. 13 W., 1,360 acres. There are approximately 18 sections involved. Of these 18 sections, 10 were selected and approved as school indemnity or lieu lands, one is a school section (2) granted in place, and 7 were selected and certified under Sec. 6 of the act of June 21, 1898 (30 Stat. 484), granting 100,000 acres for improvement of the Rio Grande in New Mexico.

In denying the State's claim for credit on account of the alleged deficiency, the Commissioner held that 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 that the design and purpose of this statute was to establish beyond dispute all lines and monuments of accepted official surveys; to obviate inquiry and contention with respect to survey inaccuracies and place a statutory bar against attempts to alter the same or to set up complaints of deficiency of areas as a basis for resurvey. The Commissioner observed that aside from this statutory limitation, administrative reasons precluded the granting of the State's claim; 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, and if transactions involving the disposition of public lands were not made final, and the Government was obliged to open up for readjudication the question as to the area of a particular tract or tracts granted and patented, controversies would be constantly arising and resurveys and readjudications would be interminable.

The appeal presented by the State, while in effect admitting the correctness of the Commissioner's conclusion as a matter of law, insists that this statutory rule can not be universally applied; that the circumstances and conditions here are exceptional; that the surveys are grossly inaccurate; that the State is equitably entitled to an adjustment and should be allowed to take the full quantity of land granted by Congress.

The Department has carefully considered the matter and finds no reason to differ with the conclusion reached by the Commissioner. The provisions of section 2396, Revised Statutes, 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. True, the alleged shortage in this case looms to a figure of impressive proportions, but the very purpose of the declaration of law above referred to was to obviate inquiry and contention in regard to survey inaccuracies. Moreover, the recognition of right to an adjustment in this instance would establish a far-reaching precedent and afford a basis for similar claims by other States, and a multitude of claims by individuals who had purchased Government lands and found the area short of that expressed on the plat of survey. Also, the rule works both ways, in favor of and against the United States. Manifestly the Government has no basis for claim to readjustment of boundaries or for further payment, or for restitution in those cases of certified or patented lands where there was an excess of acreage over that paid for or taken in harmony with the survey returns at the time of disposal. And if the returns are conclusive against the Government they must also be conclusive in its favor. Take the present case; the Government can not inquire into the contents of the school sections and subdivisions assigned by the State as basis for its indemnity selections, but accepts them as containing the exact quantity expressed in the return. Examination might disclose a deficiency in the area of these sections; frequently, no doubt, exchanges have been made of unequal areas, the discrepancy being in favor of the State, but the law gives these transactions repose and they can not be disturbed. Otherwise endless confusion would ensue.

For the reasons stated it is believed the Commissioner reached a just conclusion and the decision appealed from is, therefore, affirmed.

MATT MECHALEY

Decided March 20, 1926

HOMESTEAD ENTRY—FINAL PROOF—OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT.

An entryman who initiates a homestead entry under the conditions prescribed by section 20 of the act of February 25, 1920, is entitled to a preference in the award of a permit to prospect for oil and gas on the entered land, if the entry was intact at the time that the permit application was presented, although statutory expiration notice for submission of final proof had issued prior thereto, and the entry was canceled for default before the permit was granted.

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—STATUTES.

Section 20 of the leasing act is, in its nature, a relief measure, designed to recognize the equities of entrymen who made agricultural entries in good faith and prior to the classification of the lands as valuable for oil and gas, and should be liberally construed.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—HOMESTEAD ENTRY—PREFERENCE RIGHT.

A homestead entryman is entitled to a lease of the oil and gas contents in the land embraced in his entry, where those lands have been classified as within the known structure of a producing oil and gas field, if, except for such classification, he would have been entitled to a preference right to a prospecting permit under section 20 of the leasing act.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—HOMESTEAD ENTRY—PREFERENCE RIGHT—ROYALTY—STATUTES.

Congress intended that the only effect that a classification of land as within the known geologic structure of a producing oil and gas field should have upon the rights of an entryman otherwise entitled to a preference right permit under section 20 of the leasing act, was that, instead of being awarded a permit and subsequently, as a reward for discovery, the reduced royalty authorized by section 14 of the act, he, like all others, should receive only a lease at a higher royalty rate.

FINNEY, *First Assistant Secretary:*

Matt Mechaley has appealed from the decision of the Commissioner of the General Land Office dated July 6, 1925, which held for rejection his application under the act of February 25, 1920 (41 Stat. 437), for a permit to prospect for oil and gas upon the SE. ¼, Sec. 10, and SW. ¼ SW. ¼, Sec. 11, T. 32 N., R. 82 W., 6th P. M., Wyoming, because of a conflict with a similar application filed on March 11, 1924, by Rose George, under section 13 of the act of February 25, 1920, for the land described.

This appellant points out that he claims a preference right to a prospecting permit for the land involved, based upon his homestead entry made April 15, 1919, for the land involved.

The records disclose that appellant filed his application for prospecting permit on May 27, 1924. They also disclose that on April 18, 1924, the local officers held appellant's enlarged homestead entry

for cancellation for failure to submit final proof within five years, as required by the homestead laws. That notice was served upon appellant on May 17, 1924, and allowed him 30 days from such service within which to show cause why his entry should not be canceled. The appellant took no action with respect to showing compliance with the homestead law but, instead, on May 27, 1924, and within the 30-day period allowed by the local officer, filed his permit application, asserting a preference right under section 20 of the leasing act of February 25, 1920, based upon his homestead entry.

It also appears that a contest was initiated against this homestead entry shortly after the issuance of notice to make final proof and that a hearing was had thereon. For reasons hereafter to be set forth, it is not necessary to consider the effect of this contest. On October 9, 1924, the Commissioner dismissed the contest because of the prior adverse action by the Land Department and canceled the entry on statutory expiration notice. That cancellation was not appealed from by the entryman and is final.

The facts in this case bring it squarely within the rule stated in the case of *Heryford* v. *Brown* (49 L. D. 248), in which it was held that an agricultural entryman whose entry was initiated under the conditions prescribed by section 20 of the act of February 25, 1920, as necessary to entitle the entryman to a preference right, was entitled to such preference under said section provided his entry stood intact at the time of application for prospecting permit, although the entry, prior to that time, had been contested for noncompliance with the homestead law and was relinquished by the entryman prior to action upon his application for a permit.

In this case the entry stood intact during the entire 30-day period allowed by the local officers and cancelation of the entry did not become effective until the Commissioner's decision of October 9, 1924. (*Young* v. *Peck*, 32 L. D. 102.)

It is true that the appellant has never filed a waiver of the oil and gas content of the lands embraced in his entry pursuant to the act of July 17, 1914, but it must be held that his filing of an application for a prospecting permit while said entry stood of record was the equivalent of such a waiver. (*Heirs of Robert H. Corder*, 50 L. D. 185; *Olive P. Morgan*, 51 L. D. 267; *Mary Pexton*, 51 L. D. 336.)

It appears, however, that the SW. ¼ SW. ¼, Sec. 11, is within the known geologic structure of the Iron Creek oil and gas field, as defined by the Director of the Geological Survey on September 17, 1920, and is not properly subject to prospecting under permits, pursuant to the act of February 25, 1920.

This raises the question whether the entryman is entitled to a preference right to a lease for this 40-acre tract pursuant to section

20 of the act of February 25, 1920. That section was designed to recognize the equities of entrymen who made their agricultural entries in good faith and prior to the classification or withdrawal of lands as valuable for oil and gas (*Charles R. Haupt*, 47 L. D. 588; 48 L. D. 355; and *Johnson* v. *Patten*, 49 L. D. 613), and said section is to be liberally construed, as its provisions are in the nature of relief provisions.

Section 20 of said act refers only to a "preference right to a permit and to a lease, *as herein provided, in case of discovery*," [italics supplied] and also provides that "Leases executed under this section and embracing only lands so entered shall provide for the payment of a royalty of not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled *under section 14 hereof*." [Italics supplied.]

Section 17 of the act of February 25, 1920, contains the provisions for leasing of oil and gas deposits and lands containing them which are within the known geological structures of producing oil or gas fields. That section is expressly limited to "unappropriated deposits of oil and gas * * * and the *unentered* lands containing the same, not subject to *preferential lease*." [Italics supplied.] The exception as to preferential lease is broad enough to include a lease under section 20 of the act, and there is no apparent reason why the fact of a discovery of oil or gas upon a geologic structure which includes lands of an entryman who, except for that discovery, would have a preference right to a permit, should operate to deprive him of all claim to the oil and gas deposits. Section 20 of the leasing act did not place any limitation upon the time allowed an entryman to assert a preference under said section and that limitation as enforced by the regulations (section 12–c, Regulations March 11, 1920, 47 L. D. 437; *Shaw* v. *Rink*, 50 L. D. 405, 409) is governed wholly by the presentation of adverse applications under other sections of the act.

It seems clear from all the circumstances that Congress intended that the only effect which a classification of land as within the known geologic structure of a producing oil and gas field should have upon the rights of an entryman otherwise qualified to acquire a preference right permit under section 20 of the act, was that, instead of being entitled to a prospecting permit and to the reduced royalty provided for in section 14 of the general leasing act as a reward for discovery, the entryman, like all others, was thereafter entitled only to a lease at a much higher royalty.

It is concluded that this appellant has a preference right to a prospecting permit under section 20 of the act of February 25, 1920, as to the SE. ¼, Sec. 10, and will be entitled to a lease for the SW.

¼ SW. ¼, Sec. 11, upon furnishing a proper bond and otherwise complying with the regulations governing applications for leases under said act. It appears that the adverse claimant, Rose George, was not served with a copy of this appeal and her application will, accordingly, be held for rejection and disposed of prior to favorable action upon appellant's application.

W. T. MORRIS

Decided March 20, 1926

COAL LANDS—PERMIT—LICENSE—ROYALTY—OIL AND GAS LANDS—PROSPECTING PERMIT.

Individuals and associations of individuals, but not corporations, may be granted permits or licenses to obtain coal from the public lands without payment of royalty for their use as agents of the United States in prospecting for oil or gas in accordance with the provisions of the leasing act, but not for sale.

OPINION OF THE ATTORNEY GENERAL AND DEPARTMENTAL INSTRUCTIONS APPLIED.

Opinion of the Attorney General (34 Ops. Atty. Gen. 535), and departmental instructions of September 17, 1925 (51 L. D. 196), applied.

FINNEY, *First Assistant Secretary:*

On May 11, 1925, W. T. Morris filed application for a license to prospect for, mine, and remove coal from the SW. ¼ SE. ¼, Sec. 22, T. 12 N., R. 100 W., 6th P. M., Glenwood Springs, Colorado, land district, stating that—

> The coal to be mined under this license is to be used for the purpose of providing fuel for the drilling of a deep test well for oil and gas in the acreage covered by oil and gas prospecting permit, Glenwood Springs, Colorado, serial No. 022169, and as fuel in connection with such development work. Approximately 1,000 tons will be required annually.

It appears that Morris is the assignee of an oil and gas prospecting permit for fractional Secs. 13, 14, 15, N. ½, Sec. 22, N. ½, Sec. 23, N. ½, Sec. 24, E. ½, Sec. 25, T. 12 N., R. 100 W., and Sec. 18, T. 12 N., R. 99 W., 6th P. M. It is further shown that the tract in question is included in an oil and gas prospecting permit held by Collins Gillett, who alleges that he is contributing to the cost of the test well on the Morris permit area.

By decision of May 25, 1925, the Commissioner of the General Land Office held the application for rejection for the reason that—

> Coal licenses are issued only for the production of coal for domestic purposes—that is, for household use. Attention is invited to Sec. 8 of the leasing act.
>
> In the present case it appears that the coal is wanted for commercial purposes, and the application does not therefore come within the meaning or intent of the law regarding licenses.

The applicant has appealed. He shows that the test well is being drilled upon the NE. ¼, Sec. 22, T. 12 N., R. 100 W., and that the cost of coal at that point, obtainable from any source other than the tract for which a coal license is applied for, is about $25 a ton.

Section 8 of the leasing act of Feburuary 25, 1920 (41 Stat. 437), reads in part as follows:

> That in order to provide for the supply of strictly local domestic needs for fuel, the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue limited licenses or permits to individuals or associations of individuals to prospect for, mine, and take for their own use, but not for sale, coal from the public lands without payment of royalty for the coal mined or the land occupied, on such conditions not inconsistent with this act as in his opinion will safeguard the public interests: *Provided*, That this privilege shall not extend to any corporations * * *

In its regulations under said section 8 the Department states (47 L. D. 489, 502)—

> Attention is called to the fact that, under this section, an individual or an association of individuals may mine and take coal under such licenses for his or their own strictly domestic needs for fuel, whatever such use may be, but in no case for barter or sale.

The act of February 25, 1920, and the regulations thereunder, permit the use, without charge, of fuel oil by permittees and lessees in drilling operations. A permittee under the act of 1920 is an agent of the United States for certain purposes (34 Ops. Atty. Gen. 535, and instructions of September 17, 1925, 51 L. D. 196), and it would seem that as such he should be held entitled to the free use of the resources of the United States to any extent consistent with private rights and public interests.

While Congress has not specifically authorized the granting of licenses to mine coal under circumstances as here disclosed, it is believed that individuals or associations of individuals may be granted licenses to mine and take coal from the public lands without payment of royalty for their use as agents of the United States in prospecting for oil and gas, but not for sale. In providing for the leasing of mineral lands, a novel and untried method for the development of the public domain, Congress could not have foreseen all the circumstances and conditions that would arise, and the authority of this Department must be held to embrace the adoption of rules and regulations with respect to the use of coal by oil and gas permittees, in harmony with its practice in analogous situations and the policy of Congress as expressed in the leasing act and in acts providing for the necessary use of fuel from the public lands.

The decision appealed from is reversed and the record is returned for further and appropriate action in accordance herewith.

MAUDE E. HUFFMAN PULLEN

Decided March 20, 1926

HOMESTEAD ENTRY—SETTLEMENT—WIDOW; HEIRS; DEVISEE—DESCENT AND DISTRIBUTION—FINAL CERTIFICATE.

While the facts may be such as to constitute a claim against the estate of a deceased settler in favor of one of his children who perfected a homestead entry as his heir, yet they can not alter the established rule of law which requires that the final certificate, when issued, must be to the heirs generally.

FINNEY, *First Assistant Secretary:*

On July 14, 1919, Maude E. Huffman Pullen, a married woman, filed application 019233 to make homestead entry under section 2289, Revised Statutes, for 95 acres of land located in Secs. 12 and 13, T. 2 S., R. 12 W., N. M. P. M., Las Cruces, New Mexico, land district.

The application contained the statement that the applicant was one of the heirs of J. W. Huffman, her late father, who made application for the restoration of the land in question which was located in a forest reserve, who settled upon the same in April, 1918, and who resided thereon until December 20, 1918, when he died. The application was allowed on February 26, 1920, and final certificate was issued in the name of Mrs. Pullen on April 15, 1925, pursuant to final proof offered by her.

By a decision dated June 9, 1925, the Commissioner of the General Land Office required Mrs. Pullen to furnish a corroborated affidavit showing that her father, who had settled upon the land prior to its restoration to entry under the act of June 11, 1906 (34 Stat. 233), would have been qualified to enter the same had he lived, and showing her own qualifications with respect to citizenship. The Commissioner also required her to show cause why the final certificate should not be corrected by substituting the heirs of J. W. Huffman as the parties entitled to patent, in the place of herself, in view of the fact that the record showed that her father also was survived by four sons.

Mrs. Pullen, in compliance with the Commissioner's requirement, submitted satisfactory evidence that both her father and she were qualified to make entry under the homestead law. She also made an answer to the rule to show cause, which has been treated as an appeal to the Department.

Mrs. Pullen states in her answer that her father at the time of his death was, and for one year prior thereto had been, an invalid and an inmate of her home, and had been dependent upon her family for home nursing and practically for financial support; that his heirs

other than herself, have shown no interest in the homestead and have never been upon the same; that all improvements placed upon the land since her father's death, amounting to several hundred dollars in value, were at her instigation and expense; that the taxes upon the same have been paid solely by herself; that her family has lived upon, cared for, improved, and cultivated the homestead since her father's death; that she has a permit in the forest in which the land is located, and is running cattle with the homestead as her only location for the industry; and that none of the other heirs of her father have made any claim to the land.

The law of succession which controls in the instant case is summarized in paragraph 21 of regulations of January 16, 1922, Circular No. 541 (48 L. D. 389, 396), as follows:

> If a homestead settler dies without having filed application for entry, the right to enter the land covered by his settlement passes to his widow. If there be no widow, said right passes to his heirs or devisee.

While the statements made by Mrs. Pullen present facts which may constitute a claim in her favor against the estate of her late father, they can not alter the established rule of law which governs in this and all like cases. It follows, accordingly, that the Commissioner's requirement that the final certificate be corrected in favor of heirs of J. W. Pullen was proper.

The decision appealed from is affirmed.

MISSION CLAIMS WITHIN THE FORT BELKNAP INDIAN RESERVATION

Opinion, March 24, 1926

STATUTORY CONSTRUCTION—REPEALS.

Ordinarily, in the absence of some legislative intent to the contrary, statutes of a general nature are not to be regarded as repealing a prior special enactment relating to the same subject matter.

MISSION CLAIMS—PATENT—FORT BELKNAP INDIAN LANDS—STATUTES.

The provision in the Indian appropriation act of September 21, 1922, which relates to the issuance of patents to religious organizations for lands within Indian reservations generally, did not repeal the proviso to section 3 of the special act of March 3, 1921, as to the form of patent to be issued or the quantity of land granted to such organizations within the Fort Belknap Reservation, Montana.

CEMETERIES—PATENT—STATUTES.

There is no existing law authorizing the issuance of patent for lands within an Indian reservation, not attached to any particular church organization, but used in part by it in conjunction with the Indians for cemetery purposes.

PATTERSON, *Solicitor:*

My opinion has been requested in the matter of issuing patents in fee simple for lands on the Fort Belknap Reservation, Montana, set apart to religious organizations for mission or school purposes.

The question here turns primarily, if not exclusively, on certain provisions in the act of March 3, 1921 (41 Stat. 1355), relating to lands within this reservation which, among other things, authorizes allotments in severalty to the Indians there. Other legislation of a general nature, however, dealing with these so-called "mission or church lands," may have some bearing on the matter, and, hence, is to be considered. Section 3 of the act specifically referred to reads in part—

> That the Secretary of the Interior is hereby authorized to reserve from allotment lands chiefly valuable for the development of water power and such reasonable areas as may be needed for Indian agency, school, *religious, cemetery,* and administrative purposes, to remain reserved as long as needed, and as long as agency, school, and religious institutions are maintained thereon for the benefit of said Indians. Should any such lands be abandoned said lands so abandoned shall revert to the tribe and become available for allotment or other disposition. * * * *Provided,* That a patent in fee simple *for not exceeding ten acres* may be issued to the duly authorized missionary board or other proper authority of any religious organization heretofore engaged in mission or school work on said reservation for such lands thereon (not included in any town site provided for herein) as have *heretofore been set apart* to such organization and are now used for *mission or school purposes,* or which any such organization has heretofore made application to have set apart for such purposes. [Italics supplied.]

It will first be observed that under the foregoing the Secretary of the Interior is authorized to reserve such reasonable areas as may be required for the various purposes specified, and that such areas are to remain reserved as long as needed, but when abandoned will revert to the tribe. Other than such as may be found in the word "reasonable" no limitation has been placed by the statute on the Secretary's authority to reserve lands for the purposes mentioned. When we come to the question of issuing patents to religious organizations, however, for lands so set apart or reserved to them, regard must be given to the limitations set up in the proviso last-above reproduced. Such patents are to be confined to lands theretofore (that is, prior to March 3, 1921) set apart and then being used for "mission or school purposes," or for which applications to have so set apart were then pending; in either event, not exceeding ten acres.

Digressing for a moment for the purpose of discussing general legislation relating to this subject matter, it is well known that various religious organizations have been laboring among the Indians

since an early date, looking to their moral, educational, and civic advancement. Wherever possible, cooperation in such work has been extended by this Department and other branches of the Federal Government. To this end, from time to time, suitable tracts of land on numerous reservations have been reserved or set apart to various religious organizations engaged in missionary work among the Indians. Authority for so doing will be found in section 5 of the general allotment act of February 8, 1887 (24 Stat. 388). This, however, did not specifically authorize the issuance of patents for such lands. But an item in the Indian appropriation act of March 3, 1909 (35 Stat. 781, 814), reads:

> That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority, of any religious organization engaged in mission or school work on *any* Indian reservation, for such lands thereon as have been *heretofore* set apart to and are now being used and occupied by such organization for mission or school purposes. [Italics supplied.]

This latter measure has since been superseded by the act of September 21, 1922 (42 Stat. 994), section 3 of which provides:

> That the Secretary of the Interior is hereby authorized and directed to issue a patent to the duly authorized missionary board or other proper authority, of any religious organization engaged in mission or school work on any Indian reservation for such lands thereon as have been heretofore set apart to and are now being actually and beneficially used and occupied by such organization solely for mission or school purposes, the area so patented to not exceed one hundred and sixty acres to any one organization at any station: *Provided*, That such patent shall provide that when no longer used for mission or school purposes said lands shall revert to the Indian owners.

The scope of these two provisions of law last referred to were discussed somewhat briefly in 50 L. D. 676 and 51 L. D. 170. With the act of March 3, 1909, *supra*, we are not here greatly concerned, but the one of September 21, 1922, being subsequent to the special act of March 3, 1921, relating to the Fort Belknap Reservation, the effect, if any, of subsequent general legislation on the earlier special statute is to be regarded. Ordinarily, in the absence of some legislative intent to the contrary, statutes of a general nature are not to be regarded as repealing a prior special enactment relating to the same subject matter. Possibly this is best summed up in *Rodgers* v. *United States* (185 U. S. 83, 87), wherein the Supreme Court said:

> It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—

the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.

The rule so announced was referred to with approval and upheld in principle by the same court in *Washington* v. *Miller* (235 U. S. 422, 428). These holdings but illustrate that other familiar rule to the effect that repeals by implication are not to be favored. Hence, where each statute—the one general and the other special—can operate in its own particular field without conflict, they are to be construed independently rather than concurrently or conjointly. With this in mind, we may dismiss from further consideration for the time being the subsequent general legislation and look only to the earlier statute for guidance.

In bringing this matter to the attention of the Department, the Commissioner of Indian Affairs refers to three tracts of land on the Fort Belknap Reservation occupied or used by the board of home missions of the Presbyterian Church. One of these comprises ten acres in Sec. 24, T. 31 N., R. 24 E., used continuously since 1904 for cemetery purposes in connection with a mission station or site on a 40-acre tract in the adjoining Sec. 13 of the same township and range. In 1904, authority for the temporary use of forty acres in said Sec. 13 as a mission site was granted to the Presbyterian Church, but for some reason not now altogether clear this station was never actively developed or utilized for that purpose. The church removed its activities at this station to some 17.54 acres described by metes and bounds in section 3 of the same township and range, which mission site was locally known as the "Savoy Church," and was formally set apart to the Presbyterian Church by this Department on December 28, 1920.

The third tract comprises 12½ acres in the Big Warm Creek district, consisting of 10 acres described as the NW. ¼ NW. ¼ SE. ¼, Sec. 14, T. 26 N., R. 25 E., and an adjoining 2½-acre tract used for cemetery purposes. When the allotting agent who handled the field work on this reservation reached this district, he found on the 10-acre tract just described a church conducted under the auspices of the board of home missions of the Presbyterian Church. For these lands, however, no "reservation" or setting apart had theretofore formally been had. The allotting agent, however, placed appropriate legal descriptions of these lands on the allotment schedule, as being reserved to the Presbyterian Church for these purposes,

and on September 28, 1923, the 10-acre tract last-above described was formally set apart by this Department to the church.

Testing the right of the church to patents for the areas referred to, by the requirements in section 3 of the act of March 3, 1921, it will be seen that a patent for not exceeding 10 acres may now properly be issued for the mission site in section 3, T. 31 N., R. 24 E., those lands having been set apart for use of the Presbyterian Church in 1920, and were on March 3, 1921, being used for such purposes. As to the detached 10-acre cemetery site described as the NW. ¼ NW. ¼ NW. ¼, Sec. 24, same township and range, those lands have never been set apart to any church organization, but simply stand on the allotment schedule as reserved for "cemetery purposes." In fact, this seems to be an Indian cemetery, not attached to any particular church organization, but used, in part at least, by the Presbyterian Church. Under these circumstances, it is not seen wherein the issuance of a patent therefor would be warranted under existing law. Of the 12½-acre reservation in the SE. ¼, Sec. 14, T. 26 N., R. 25 E., of which 10 acres appears to have been in use by the Presbyterian Church for missionary purposes on March 3, 1921, no application to have those lands set apart was presented by the church prior to the date mentioned; hence, it must likewise be held that the church is not entitled to a patent at this time. It should be borne in mind that the rights of the church are in no way being jeopardized by so holding, for as to those lands now reserved for mission or school purposes, they are "to remain reserved as long as needed and as long as agency, school, and religious institutions are maintained thereon for the benefit of said Indians."

Even if it should be held that the subsequent general act of September 21, 1922, *supra*, is applicable to the situation here at hand, it would not avail the church to any extent in the matter, because the 10-acre cemetery site in Sec. 24, T. 31 N., R. 24 E., has not heretofore been set apart to any church organization, and of the 12½-acre site in the Big Warm Creek district, the setting apart of those lands to the Presbyterian Church did not occur until September 28, 1923, which was subsequent, of course, to the act of September 21, 1922.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

POTASH REGULATIONS—SECTION 6, CIRCULAR NO. 594 (46 L. D. 323), AMENDED

INSTRUCTIONS

[Circular No. 1056]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 27, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

Section 6 of the potash regulations, Circular No. 594, approved March 21, 1918 (46 L. D. 323), under the act of October 2, 1917 (40 Stat. 297), is hereby amended to read—

(6) The lands in class (B), if containing potash in some or any of the forms specified in said act, will thereupon become subject to lease, with a preferential right of the permittee thereto upon such reasonable royalty as shall be fixed by the Secretary, on condition that the permittee shall apply for lease at the time he applies for patent, else he will be held to have waived his preference right to a lease. If not made the subject of such a preferential lease, such lands may be offered for leasing by publication for a period of thirty days in a newspaper designated by the register of the proper land district, published at the capital of the State, inviting applications therefor, on or before a date specified. Applications for such excess permit lands will be considered without further notice, and leases awarded thereunder in general accordance with the provisions of paragraph 5 herein. Lands once included in a published notice of leasing offer, remaining unleased, may thereafter be applied for without publication of notice.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

EMPIRE GAS AND FUEL COMPANY

Decided January 21, 1926

COAL LANDS—WITHDRAWAL—OIL SHALE LANDS—MINING CLAIM.

Lands classified as coal, and valuable therefor, are not subject to placer location on account of oil shale deposits contained therein.

COAL LANDS—WITHDRAWAL—SURFACE RIGHTS—MINING CLAIM.

The act of June 22, 1910, authorizes only agricultural entries on lands withdrawn or classified as coal lands or which are valuable for coal, and it can not be invoked in favor of one claiming other mineral deposits in those lands.

OIL SHALE LANDS—MINING CLAIM—DISCOVERY.

In determining whether the physical exposure of an oil shale deposit within the limits of an asserted oil shale placer mining location, is sufficient to

constitute an adequate discovery of mineral to render the location valid, the Department will apply to such particular deposit the rule as to thickness and oil content adopted by the Geological Survey in its regulations of April 3, 1916, for the classification of lands with respect to their oil shale character.

OIL SHALE LANDS—MINING CLAIM—DISCOVERY—PATENT—EVIDENCE.

A recital in a showing filed in support of an application for patent to an oil shale placer mining claim to the effect merely that there has been exposed within the limits of the claim a deposit of oil shale containing petroleum in commercial quantities can not be accepted as fulfilling the requirements of the rule adopted by the Geological Survey April 3, 1916.

FINNEY, *First Assistant Secretary:*

April 11, 1924, the Empire Gas and Fuel Company filed application 09934 for patent to the following named oil shale placer mining claims embracing the tracts described after each, all in T. 18 N., R. 106 W., 6th P. M., Evanston land district, Wyoming:

Cranfill #1, NW. ¼, Sec. 22.
Cranfill #2, SW. ¼, Sec. 22.
Cranfill #3, SE. ¼, Sec. 22.
Cranfill #4, NE. ¼, Sec. 22.
Cranfill #5, SW. ¼, Sec. 14.
Cranfill #6, SE. ¼, Sec. 14.
Cranfill #7, NE. ¼, Sec. 14.
Cranfill #8, NW. ¼, Sec. 14.
Kanda #7, NE. ¼, Sec. 8.
Kanda #10, SW. ¼, Sec. 4.
Kanda #11, SE. ¼, Sec. 4.
Kanda #12, Lots 5 and 6 and S. ½ NE. ¼, Sec. 4.
Kanda #13, Lots 7 and 8 and S. ½ NW. ¼, Sec. 4.
Bitter Creek #1, Lots 5 and 6 and S. ½ NE. ¼, Sec. 2.
Bitter Creek #2, Lots 7 and 8 and S. ½ NW. ¼, Sec. 2.
Bitter Creek #3, SW. ¼, Sec. 2.
Bitter Creek #4, SE. ¼, Sec. 2.
Bitter Creek #5, NE. ¼, Sec. 10.
Bitter Creek #6, NW. ¼, Sec. 10.
Bitter Creek #7, SW. ¼, Sec. 10.
Bitter Creek #8, SE. ¼, Sec. 10.
Bitter Creek #9, NW. ¼, Sec. 12.
Bitter Creek #10, NE. ¼, Sec. 12.
Cranfill #9, SW. ¼, Sec. 12.
Empire #52, NW. ¼, Sec. 28.
Bitter Creek #11, NE. ¼, Sec. 28.
Bitter Creek #12, SW. ¼, Sec. 28.
Bitter Creek #13, SE. ¼, Sec. 28.

These claims all purport to have been located on various dates in 1918 and 1919, each by eight persons. Proof appears to have been submitted on or prior to July 17, 1924, and payments made for the lands, but certificate of entry has not issued.

Upon considering the application the Commissioner of the General Land Office, by decision of July 22, 1925, found that on May 26, 1910, all of Sec. 2, the SE. ¼ NE. ¼, and E. ½ SE. ¼, Sec. 4, all of Secs. 10, 12, 14, and 22, and the E. ½, E. ½ NW. ¼, SW. ¼ NW. ¼ and SW. ¼, Sec. 28, were classified as valuable for coal and appraised at prices ranging from $20 to $45 per acre; that by Executive order of April 19, 1912, the SE. ¼ SW. ¼ and S. ½ SE. ¼, Sec. 12, N. ½ NE. ¼, SW. ¼ NE. ¼, S. ½ NW. ¼ and W. ½ SW. ¼, Sec. 14, and N. ½ N. ½, Sec. 22, were withdrawn as Public Water Reserve No. 3 under the act of June 25, 1910 (36 Stat. 847). Holding that under the provisions of the withdrawal act of 1910, as amended by the act of August 24, 1912 (37 Stat. 497), the lands withdrawn for water-reserve purposes were not subject to location and patent under the mining laws on account of nonmetallic minerals, and that under the decision of the Department in *Arthur K. Lee et al.* (51 L. D. 119) lands classified as coal, and valuable therefor, are not subject to such disposition. He declared the application rejected as to all of the lands embraced therein, except the N. ½ NE. ¼, SW. ¼ NE. ¼, W. ½ SW. ¼ and W. ½, Sec. 4, NE. ¼, Sec. 8, and NW. ¼ NW. ¼, Sec. 28, embraced in the Kanda Nos. 7, 10, 11, 12, and 14, and the Empire No. 52 claims. Finding that the tracts last described constitute three noncontiguour areas, he held that the application must be rejected as to two of said areas and directed that the applicant be afforded 30 days within which to elect as to which of said areas it would retain in its application. He further directed that the applicant be required to furnish a detailed showing as to the improvements, or parts of improvements, it desired to have applied to the claim, or claims, it might elect to have retained in the application.

From the decision of the Commissioner the applicant appeals and in its appeal challenges the correctness of the classification of the lands described, or any portion of them, as coal in character. Attached to the appeal is a report submitted to the applicant company by Albert W. Dickinson, mining engineer, holding the position of general superintendent of the Union Pacific Coal Company mines, operated with headquarters at Rock Springs, Wyoming, in which report it is stated that—

> Observation in the field develops that the easternmost of the land withdrawn from entry lies four miles west of the coal outcrops at Rock Springs. The formation at this line is the Green River, and the White Mountain rises to

the north of Bitter Creek, adding a thousand feet to the overburden of any coal beds which might occur at extreme depth.

At Rock Springs the coal beds have a pitch to the west of approximately seven degrees (7°) near the outcrop, and as the beds proceed to depth the pitch increases as in old Union Pacific Coal Company No. 1 mine, where the coal was pitching at twenty-two degrees (22°) at the time of the abandonment of the property. It may also be of interest to state that the property was abandoned because of "bumps" and uncontrollable roof movements after the advice of most able coal mining men had been sought and secured in an effort to find a means of carrying on in the conduct of mining at this depth.

From the above it will be seen that at a point four miles west of Rock Springs there can be no thought of mining, as the coal at that line would lie at a depth of from 3,500 feet on. Also the mountainous nature of the surface increases the cover to a thickness of, in places, 1,000 feet over that named.

He further reported that any coal that might possibly exist under the land in question lies at such a great depth as to render mining thereof impossible.

In response to this showing the Director of the Geological Survey, to whom the report of Dickinson was submitted for consideration, reported under date of January 4, 1926, after briefly describing the geology of the region, that—

Although the "Laramie" and the Mesaverde strata are prolifically coal bearing in the Rock Springs uplift and are undoubtedly present beneath the tracts specified at depth, the coal classification of those tracts is based entirely on a group of coal beds, known as the Black Rock group, in the lower part of the Wasatch formation. This group crops out in Secs. 4, 9, 16, 20, 21, 28, 29, 31, and 32 of the adjoining township to the east, and its base underlies the tracts listed at depths of 2,200 to 4,500 feet, depending on the topography and the distance from the outcrop.

Because of poor exposures the Black Rock group of coal beds was not examined in 1908 in as much detail as the lower Almond and Rock Springs coal groups in the Mesaverde formation, and supplemental data in the form of core drill records or the results of considerable outcrop prospecting are necessary before any revision of the classification based on the Black Rock coal is warranted.

Observations in Ts. 16, 17, 18, and 19 N., R. 105 W., in 1908, led, however, to the conclusion that seven or more coal beds, aggregating 25 feet or more of high-grade subbituminous coal with a fuel value between 11,000 and 11,650 B. T. U., are present in the Black Rock group on the west flank of the Rock Springs uplift. Lands underlain by the uppermost bed of the Black Rock group within approximately 2,000 feet of the surface were accordingly classified coal land on May 9, 1910.

Under the regulations approved February 20, 1913, the depth limit for coal of this type in beds 6 feet or more in thickness is 3,660 feet. This limit, instead of that of 2,000 feet in effect May 9, 1910, would prevail in the event of a reclassification of the area now on the basis of the 1908 field observations and would apparently afford warrant for extending the present limits of the area classified as coal land considerably farther west into oil-shale territory. Whether or not the thickness and continuity of the Wasatch coals are in fact such as to warrant the action suggested can be ascertained as stated above only by detailed field investigation supplemental to those of 1908.

As the showing submitted by the Empire Oil and Gas Company relates to the Rock Springs group of coal beds, which is admittedly at a depth too great to affect the classification of the tracts listed, and includes no data concerning the Black Rock coals on which the classification of the tracts is actually based, it provides no grounds for disturbing the present classification of those tracts as coal land.

The Department concurs in the Director's conclusion, and in the absence of proof that no coal bed of the Black Rock group, fulfilling the requirements as to thickness, quality, and depth beneath the surface, of the coal classification regulations of February 20, 1913 (41 L. D. 528), underlies the lands in question, the present classification of said lands will remain undisturbed.

In its appeal the applicant company declares its consent to take a patent to the lands classified as coal, subject to the reservations and conditions of the act of June 22, 1910 (36 Stat. 583), in the event that no change should be made in the classification thereof. That act, however, by its express terms relates only to entries made under the homestead and desert-land laws and selections under the Carey Act in so far as it involves lands withdrawn or classified as coal at the dates of the initiation of the claims, and can not, therefore, be invoked in favor of a claimant to such lands under the mining laws; and no similar provision is by law made applicable to claims asserted under the mining laws. Nor, as was held by the Department in *Joseph E. McClory et al* (50 L. D. 623), does the fact that an applicant for patent to public land consents to the insertion of a reservation in a patent authorize the Land Department, in the absence of a statute prescribing it, to incorporate such a reservation therein. See also 50 L. D. 650.

In its decision in *Arthur K. Lee et al*, *supra*, the Department held that land classified as coal and valuable therefor is not subject to location, entry and patent under the general mining laws of the United States, no valid location thereof having antedated the classification. Unless, therefore, the propriety of the classification of Sec. 2, the SE. ¼ NE. ¼ and E.½ SE. ¼, Sec. 4, Secs. 10, 12, 14, and 22, and the E. ½, E. ½ SW. ¼, SW. ¼ NW. ¼ and SW. ¼, Sec. 28, as valuable for coal shall be successfully challenged, no locations thereof under the mining laws, sought to be initiated after the date of the classification, can be recognized by the Department as the lawful bases for the entry and patent thereof, and no showing sufficient to warrant the overturning of such classification having been made, the action of the Commissioner in rejecting the application to the extent of said lands must be, and is, affirmed. This determination renders it unnecessary to pass upon the question as to the effect of the withdrawal for water-reserve purposes of the tracts in question, for the reason that all of those tracts are also classified as coal.

The holding of the Commissioner that the three areas not classified as coal and not withdrawn, one embracing the N. ½ NE. ¼, SW. ¼ NE. ¼, W. ½ SE. ¼ and W. ½, Sec. 4, and covered by the Kanda Nos. 10, 11, 12, and 13 claims; another embracing the NE. ¼, Sec. 8, covered by the Kanda No. 7 claim, and a third embracing the NW. ¼ NW. ¼, Sec. 28, being noncontiguous, are not entitled to be included in one patent application, as well as his holding that tracts that merely corner, as does the SW. ¼, Sec. 4 with the NE. ¼, Sec. 8, are not contiguous, and that for those reasons the application must in any event be rejected as to two of said areas, are in harmony with the well settled construction of the mining laws, and those holdings are also affirmed.

The Department, however, does not concur in what appears to be the Commissioner's view that the showing made as to any of the six claims last named will warrant its acceptance as establishing the existence of an adequate oil-shale discovery thereon. In its unreported decision of July 29, 1925, in the case of *J. D. Freeman* v. *George L. Summers* the Department said:

> In determining whether an oil shale deposit shown to have been physically exposed within the limits of an asserted oil shale placer mining location on any particular date is sufficient to constitute an adequate discovery of mineral to render the location valid as of that date, the department will apply to the deposit that may be shown to have been so exposed at that time, and relied upon as a discovery, and to that deposit only, the rule adopted by the United States Geological Survey in its regulations of April 3, 1916, for the classification of lands with respect to their oil shale character. To warrant the classification of areas of oil-shale land those regulations provide: (1) Where the oil-shale beds are too deep to be mined by open-cut methods, such lands must contain shale capable of yielding 1,500 barrels of oil per acre, in beds not less than one foot thick yielding not less than 15 gallons per ton and within a reasonable depth below the surface; (2) where the oil-shale beds are at or sufficiently near the surface to be mined by open-cut methods, such lands must contain shale sufficient to yield 750 barrels of oil per acre in beds not less than six inches thick and yielding not less than 15 gallons per ton. In computing the acre value of the oil shale it is considered that a yield of one gallon of oil per ton of rock is equivalent to yield of 50 barrels (42 gallons each) of crude oil per acre-foot of rock. Accompanying the regulations is a table giving the number of barrels per acre for each foot thickness up to six feet for different shales yielding from 15 to 60 gallons per ton.

In the certificate of location relating each to the Kanda Nos. 7, 10, 11, 12, and 13 claims, it was recited that "this claim is located upon a valuable bed or deposit of hydrocarbons in solid form"; while in that relating to the Empire No. 52 claim it was recited that "this claim is located upon a valuable bed or deposit of petroleum and other hydrocarbons in solid, liquid, and gaseous form." The application for patent contains a recital comprehending all of the claims included therein, that long prior to February 25, 1920, the

applicant had "made discovery of oil in paying and commercial quantities contained in the oil-shale deposits of these said claims and on said date was diligently engaged in the development and exploration of said oil-shale deposits," and in a corroborating affidavit filed in connection with the application it is alleged that "the oil shale deposits found on the above-described oil placer mining claims are what is known as commercial oil shale deposits and that petroleum oil can be produced therefrom in paying commercial quantities." This is all the record shows as to discoveries of oil shale upon any of the six claims last mentioned and falls far short of fulfilling the requirements prescribed in the decision of *Freeman* v. *Summers*, *supra*. Before any of said claims are passed to patents, therefore, a showing made in conformity with said requirements must be submitted.

The decision appealed from as herein modified is affirmed.

HUME, ASSIGNEE OF GRAY, PEDERSEN, TRANSFEREE

Decided January 30, 1926

SOLDIERS' ADDITIONAL HOMESTEAD—INDIAN LANDS—OCCUPANCY—ALASKA.

Lands within the limits of an area upon which a village had been established by the natives of Alaska and under their actual control are not subject to soldiers' additional entry.

FINNEY, *First Assistant Secretary:*

On July 31, 1919, John S. Hume, as the assignee of Rishworth A. Gray, filed an application in the local land office at Juneau, Alaska, to enter 10 acres of unsurveyed land under section 2306, Revised Statutes. This application is now known as Anchorage 04010.

Thereafter this land was surveyed, and on May 4, 1920, the field notes of the survey, which is designated as United States Survey No. 1270, were approved by the surveyor general. Notice of Hume's claim was then published, the date of last publication being February 14, 1921.

On March 5, 1921, in a letter addressed to the register of the local office, William L. Paul, of Wrangell, Alaska, protested Hume's application upon the ground that the land in question was included in an area "cleared, claimed, and possessed by the natives residing at Saxman," and requested that the matter be referred to the General Land Office for its consideration "in order that the facts might be known and the rights of these Indians protected."

As a result of this protest various affidavits were filed on behalf of the opposing parties in interest, and on November 22, 1922, the Commissioner ordered a field investigation. On June 11, 1923, the

clerk who had been detailed to conduct the investigation reported that he found no evidence to substantiate the claim of the Indians, and recommended that the application of Hume pass to patent. This report was transmitted to the General Land Office with a letter from the chief of field division in which he gave a summary of the case and stated conclusions unfavorable to the Indians.

By decision dated July 9, 1924, the Commissioner reviewed the facts of the case as they had been presented to him in the various affidavits, reports, and other papers in the file, and stated that the circulars of March 31, 1884 (3 L. D. 371), and October 24, 1887 (6 L. D. 341), were applicable to Indians who were natives of Alaska, citing in this connection the opinion of the Solicitor *in re* Leasing of Lands within Reservations Created for the Benefit of the Natives of Alaska (49 L. D. 592). The Commissioner accordingly held survey 1270 for cancellation, and held Hume's application for the land for rejection because the greater portion of the land it covered was included in the native village of Saxman.

As it appeared from a further investigation of the case that Hume had transferred his rights by a quitclaim deed to S. Pedersen, the Commissioner, under date of April 13, 1925, rendered a supplementary decision in which he again reviewed the facts of the case, and again decided the same in favor of the Indians. An appeal from this decision was thereupon filed by S. Pedersen.

As the facts of the case as disclosed by the papers in the record have been accurately and fully stated in the two decisions of the Commissioner it is only necessary in disposing of the appeal to give a brief summary of the features of the case which have led the Department to the same conclusions as those reached by the Commissioner.

It has been shown to the satisfaction of the Department that in 1893, at the instance of the Rev. Sheldon Jackson, who at that time represented the United States Bureau of Education in Alaska, certain Indian natives who had resided at Cape Fox and Tongass village, decided to establish a new settlement at the place now known as Saxman village, and that during 1894 a survey was made of the land upon which that village is located. This survey covered land extending one mile along Tongass Narrows, starting at a point on the beach a short distance from the north line of survey 1270, as subsequently made, and within the limits of the land sought to be entered by Hume, and running thence in a southeasterly direction. The population of the village established on this site has fluctuated; at one time it included about 300 persons, but since then it has decreased to about one-third of that number. Photographs of the town show it to be a compact village having what appear to be substantial houses.

While the village has never attained a size sufficient to cover the entire area included in the original survey, the Indians appear to have always claimed a right to all of the land so included. In 1900 during a smallpox epidemic they established a pesthouse near the northeast corner of the original survey, and devoted it to the use of natives who were afflicted with that disease. Since then this house has been allowed to fall into decay and at the time the protest was filed only its foundations remained.

Although the growth of the village of Saxman has not been such as to make an active occupancy of the portion of the land which is embraced in survey 1270 necessary, it appears that the Indians have exercised acts of ownership over the same whenever the necessities of the case have required. When Hume posted notice upon survey 1270 stating that he intended to enter the same the Indian residents of Saxman proceeded to clear and slash a considerable area within the limits of that survey, and to fell the tree upon which his notice was posted, thus asserting their claim to the land in an unmistakable manner. Since then the western shore corner of the original survey has been marked with a cement post.

In view of the facts stated the Department is of the opinion that at the time Hume filed his application 04010 the land in question was claimed by the Indian inhabitants of the village of Saxman and was under their actual control, and that it accordingly was not subject to adverse entry.

The Department also is of the opinion that the Indians of Alaska are entitled to the same rights regarding lands occupied and improved by them as those enjoyed under similar conditions by Indians residing within the limits of the States.

The assignments of error and argument filed by Pedersen have been duly considered, but they have failed to convince the Department in his favor.

The decision appealed from is affirmed.

UNITED STATES v. STATE OF UTAH

Decided March 31, 1926

SCHOOL LAND—MINERAL LANDS—MINING CLAIM—RESERVATION—UTAH—EVIDENCE.

Where a school grant excepts lands known to be mineral in character at the date of the admission of the State, and it is established that the lands contain mineral deposits, evidence as to the existence of mining locations prior to the State's admission tends strongly to support the conclusion that the land was regarded as mineral in the community at that time.

SCHOOL LAND—MINERAL LANDS—RESERVATION—EVIDENCE—UTAH.

In determining whether land claimed by a State under a public-land grant was known to be mineral at or before the date that its rights would have otherwise attached, evidence that no mineral was mined or shipped and that there was no market therefor at that time is not conclusive as establishing that the land was not then valuable for its minerals.

SURVEY—SURVEYOR GENERAL—MINERAL LANDS—DEPOSITION—EVIDENCE.

The official return of a surveyor general is entitled to have accorded to it the force of a deposition.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *United States.* v. *Low* (16 Pet. 166), *Kirby* v. *Lewis* (39 Fed. 66), *Mahoganey No. 2 Lode Claim* (33 L. D. 37), and *State of Utah* v. *Allen et al.* (27 L. D. 53), cited and applied.

FINNEY, *First Assistant Secretary:*

The State of Utah has appealed from a decision of the Commissioner of the General Land Office, affirming the local officers and denying its claim to Sec. 36, T. 36 S., R. 14 W., S. L. M., under the grant in section 6 of the enabling act of July 16, 1894 (28 Stat. 107), on the ground that the land was known to contain valuable deposits of iron ore on January 4, 1896, the date of the admission of the State to the Union.

The decision appealed from was rendered upon consideration of certain official reports and records judicially noticed by the Commissioner and also testimony adduced at a hearing on adverse proceedings brought by the Government against the State. The State submitted no evidence, but contends that the charge that the land was known to be mineral in character prior to the date the rights of the State would have attached was not established by competent evidence, particular objection being made to the consideration of the contents of certain bulletins of the Geological Survey as substantive evidence in support of the charge.

The records of the General Land Office show that the official plat of survey under the section in question was approved April 17, 1874, and that the land was returned as mineral by the surveyor general. Said records also show that a number of iron-lode mining claims included in or impinging upon this section have been patented during or subsequent to 1902.

The departmental inspector testified that he examined the land in June, 1923; that the section lies on the south and west slopes of Iron Mountain, a large laccolith; that there is a large iron blowout on the southwest portion of the section, and large deposits of iron ore in the form of hematite and magnetite occur thereon in fissures and fractures in andesite; that such ore occurs either in

place or in the form of float on every 40-acre tract; that it is especially prominent on the patented tracts and can be seen for a great distance and is readily discernible because of the black character of the iron; the entire section contains valuable deposits of iron; that, evidenced by stakes and notices on the ground, the land unpatented in the section is all embraced in mining locations; that the land is in the Pinto mining district, organized in 1868, and its records disclose that mining locations on this land were made and recorded among the first in the district. The inspector also referred to certain photographs in, and read without objection excerpts from, Bulletin 338 issued in 1908, and Professional Paper 111 issued in 1920 by the Geological Survey. These excerpts describe the iron ores of the district and furnish particulars as to their distribution and character. The excerpt from Bulletin 111 embodied a quotation from an article in Volume 13, 10th Census of the United States, issued in 1885, entitled "Precious Metals," relating to the establishment and operation of an iron furnace and foundry during the period from 1868 to 1875 at Iron City, some three or four miles from the land where various iron castings were made and sold. The inspector also invited attention to the field notes of the deputy surveyor who made the official survey of the section in 1873, wherein notes are made of the occurrence of considerable iron ore on the line between Secs. 25 and 36.

The Government also adduced testimony from three other witnesses who had experience in mining and prospecting for iron, and who were interested in mining claims on the land. These witnesses testified by deposition in June, 1924, to the effect that the earlier and greater part of their lives had been spent in the locality of the land; that they had performed assessment and development work in connection with mining claims on the section in question in 1901, and later. Their testimony corroborates that of the inspector as to the magnitude of the iron deposits, the prominence of the outcrops in places, and the prevalence of the iron either in the form of rock in place or float over the entire section, and as being in both forms valuable for smelting.

Respecting the time when the land was known to contain iron deposits, witness Perry testified that he was 43 years of age and first saw the land when he was about 12 or 14 years old; that he then knew that the locality was an iron country and had heard general talk at that time that there was iron on this section; that he recalled seeing stakes and monuments marking mining claims on this section when a boy.

Witness Murie, who gave his age as 44, testified that five or six years before 1901 he took prospecting trips and located two lode claims on this section, but was not old enough to hold them; that

he knew the land was iron and heard his father talk about it and knew of the iron blow-out upon it.

Witness Eddards testified that he was 58 years old; knew the section since he was 13 years of age; went on it as a boy to get water at the Crystal Spring, and worked on what was known as the blow-out mine on this Sec. 36; that he saw the outcrops and stringers of iron thereon; that he had mining locations on the section in 1881, notices of which were filed with the district recorder, but permitted them to run out, and afterwards relocated them later than 1896. He also testified to the operation of the iron furnace and foundry at Iron City, and states the ore was obtained from the Duncan No. 1 claim, which is shown to be about 1½ miles west of the land in question, and that fire-tongs, stove pieces, grates, and pigs were made at the foundry until it was shut down in about 1879.

The State brought out that no ore was mined or shipped from this section prior to 1906; that there was no market for the ore prior to that time; and that it is because of recently installed facilities in the locality that the ore has now become marketable. Eddards also stated that he abandoned his claims because there was no market for them and it did not pay to hold them at that time, but that they were relocated by others.

The evidence submitted sufficiently establishes that land within this section was held and worked under the mining laws for its deposits of iron, long prior to the admission of the State into the Union, and at that time the presence of large bodies of iron ore was disclosed in the prominent and other outcrops and float upon it.

Although any mineral location made prior to the admission of the State is not sufficient of itself to establish the mineral character of the land so located, so as to defeat the grant or overcome the presumption that the land passed to the State (*Mahoganey No. 2 Lode Claim*, 33 L. D. 37, 38), yet, if the mineral character of the land is otherwise established, such prior locations tend strongly to engender the belief that the existence of the mineral was known and that the land was regarded and reputed to be mineral in the community at that time. Lands held and worked under the mining laws for their mineral deposits, long prior to the admission of Utah as a State, are excepted from the grant for school purposes and their mineral character established. (*Utah* v. *Allen*, 27 L. D. 53, 54.) The testimony further shows that the same class of deposits was mined and shipped from near-by lands and manufactured at Iron City into various articles of commerce, before the rights of the State could attach to the land, and that the existence of the deposit on the section in question, its minable quality, and vast extent were known in the community before such time.

Furthermore, the field notes of the deputy surveyor, which are part of the records of the Land Department, judicial notice of which was invited and which will be taken, disclose that iron was encountered on the section in 1873. Revised Statutes, section 2395, paragraph 7, requires the surveyor to note in his field book * * * the quality of the land." The official return of the surveyor general has accorded to it the force of a deposition. (*United States* v. *Low*, 16 Pet. 160, 166; *Kirby* v. *Lewis*, 39 Fed. 66. 75.)

The finding that the land was known to be mineral in character prior to the date the State's rights would have attached, being warranted independent of any consideration of the historical data in the publications objected to, it is unnecessary to determine whether the Commissioner could with propriety consider their contents in arriving at his conclusion.

The State contends that as the testimony of the three local residents mentioned is to the effect that no iron ore was ever mined or shipped from the land, and there was no local market for the ore in 1896, nor any inducement to hold the claims or develop the mine, for these reasons the land was not valuable for mineral on the vital date, January 4, 1896. The acceptance of these circumstances as *criteria* for determining the mineral character of lands would be to make the determination of the character of the land dependent upon local economic and industrial conditions, and subject to change in character with the ephemeral shifts in economic supply and demand for the particular deposit—a view of the reservation of mineral land in grants to the States for which no authority has been found.

The Department is of the opinion that the charges have been fully sustained, and for the reasons assigned the Commissioner's decision is affirmed.

JOHN McFAYDEN ET AL.

Decided April 12, 1926

COAL LANDS—MINERAL LANDS—MINING CLAIM—OIL AND GAS LANDS—PATENT—EVIDENCE—WITHDRAWAL.

A classification of land as coal, unless the land be valuable therefor, is not sufficient to bar its location under the mining laws on account of a metallic mineral, and before an application for mineral patent on the basis of such a location is rejected because of the classification, the applicant should be afforded an opportunity to show, if he can, that the classification was erroneous.

COAL LANDS—OIL AND GAS LANDS—WITHDRAWAL.

The inclusion of land within a petroleum reserve after its classification as coal does not abrogate, annul, or in any manner impeach the prior coal classification.

COAL LANDS—OIL AND GAS LANDS—MINING CLAIM—PATENT—STATUTES.

The act of February 11, 1897, which declared that lands containing petroleum and other mineral oils, and chiefly valuable therefor, may be entered under the placer mining laws, did not contemplate that the comparative value of a tract for petroleum and for coal should be considered in determining the patentability of the land on account of petroleum.

COAL LANDS—OIL AND GAS LANDS—EVIDENCE—MINING CLAIM.

Proof that a tract of land, classified as coal and valuable therefor, possesses a greater value for petroleum than for coal, does not subject the land to location, entry, and patent under the placer mining laws on account of its oil and gas contents.

COAL LANDS—OIL AND GAS LANDS—MINING CLAIM—PATENT—RESERVATIONS.

The placer mining laws do not authorize the patenting of land with a reservation to the United States of the coal deposits therein.

FINNEY, *First Assistant Secretary:*

This is an appeal by John McFayden and seven associates from the decision of the Commissioner of the General Land Office of May 19, 1925, rejecting their application 014535 for patent to the Mack No. 1 oil placer mining claim covering the SE. ¼, Sec. 25, T. 58 N., R. 100 W., 6th P. M., Lander land district, Wyoming.

Pursuant to instructions by the President, the land here in question was, by departmental order of July 28, 1906, as later modified, withdrawn from coal entry for examination and classification with respect to coal values, and on March 12, 1910, the four forties comprising said quarter section were classified as coal land and appraised at the following prices per acre: NE. ¼ SE. ¼, $30; NW. ¼ SE. ¼, $40; the SE. ¼ SE. ¼ and SW. ¼ SE. ¼, $35. By Executive order of December 6, 1915, the area in question, together with other lands, was, under and pursuant to the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), and subject to the provisions of the act of July 17, 1914 (38 Stat. 509), "withdrawn from settlement, sale, or entry, and reserved for classification and in aid of legislation," and placed in Petroleum Reserve No. 41.

October 5, 1916, one William Malliot filed application 08350 to purchase under the coal land laws the said NW. ¼ SE. ¼, Sec. 25, at the appraised price of $40 per acre, and on January 5, 1917, the applicant, having paid the appraised price, final certificate of entry issued on the application, the final certificate containing the notation: "Patent to contain provisions, reservations, conditions, and limitations of the act of July 17, 1914 (38 Stat. 509), as to petroleum and gas." That entry was held for cancellation by the Commissioner, and in affirming that action the Department, in its decision of February 27, 1919, after reciting the facts as to the withdrawal of the land for coal classification, its classification as coal land, and its inclusion in the petroleum withdrawal of December 6, 1915, said:

The act of July 17, 1914, *supra*, authorizes agricultural entries only upon withdrawn oil land. The act of June 25, 1910 (36 Stat. 847), as amended August 24, 1912 (37 Stat. 497), permits the purchase under the mineral laws only of those lands containing metalliferous minerals.

The coal entry was improperly and erroneously allowed. It can not stand and must be canceled.

The patent application here under consideration was filed December 17, 1923, and recites that the said Mack No. 1 claim was located by the applicants, eight in number, October 15, 1915; that the locators entered into possession of the claim on the date given as that of the location, and " were in the active, diligent, and continuous prosecution of work in and about all the necessary preparation for and drilling of a well on said claim in good faith to ascertain the oil and gas content thereof from the 22d of October, 1915, to and including the 25th day of July, 1916, on which date oil was discovered in commercial quantities in said well " drilled on the claim; that on December 6, 1915, the date upon which the land was included in the petroleum withdrawal—

the locators themselves, their servants, agents, and lessees were in actual possession and occupancy of said Mack No. 1 oil placer mining claim and diligently prosecuted the work which led to the discovery of oil, and although this work was interfered with and rapid drilling of the first well prevented by severe winter weather, insufficient water supply, constant freezing of water pipes, condition of roads, and delays in freighting necessary materials into a new field, they remained in physical possession and continued in diligent prosecution of work on said well from said sixth day of December, 1915, to and including the 25th day of July, 1916, on which date oil in commercial quantities was discovered in said well at a depth of 1,720 feet, and which well was completed on the 27th day of July, 1916, at a depth of 1,932 feet and produced 56 barrels of oil the first twenty-four hours after completion. That, owing to the foregoing described climatic and other obstacles, it was impossible for said locators, their servants, agents, and lessees to complete the drilling of said well to said depth prior to the date above set forth.

It is further alleged that, after the completion of the discovery well on the claim, an additional well was drilled thereon at a cost of $11,112.85. It also appears from the showing made in support of the application that expenditures in excess of $500 were made on the claim by the locators prior to the date of the petroleum withdrawal.

The basis of the Commissioner's action in rejecting the application was that land classified as coal and valuable therefor is not subject to location, entry, and patent under the general mining laws of the United States, citing *Arthur K. Lee et al.* (51 L. D. 119).

The appeal assigns the following errors in the Commissioner's decision complained of:

(1) In rejecting the application on the authority of *Arthur K. Lee et al.*

(2) In rejecting the application on the ground that the land in question was classified as coal land, "for the reason that classifying coal lands is merely a departmental order and the operation of the mineral-land laws of the United States is not thereby suspended."

(3) In rejecting the application without an investigation or a hearing to determine the character of the land sought to be patented.

(4) In not holding that the filing of an application for patent to an oil placer-mining claim raised the question of the mineral character of the lands theretofore classified as coal land, and in not ordering a hearing on the question so presented.

(5) In not notifying the applicants prior to the rejection of their application that the lands applied for had been classified as coal lands and offering them the privilege of being heard upon the question as to the character of the lands, either by filing an application for reclassification or any other appropriate action that the applicants might conceive would establish their contention that the land is more valuable for its oil and gas content than for its coal.

(6) In not ascertaining, prior to the rejection of the application what is asserted to be the facts, that the land does not contain deposits of workable coal, and that the application, if made, for entry of the land as coal land would of necessity, for that reason, be rejected.

(7) In rejecting the application for patent because of the coal classification without investigation of the value of the coal deposits and the oil and gas deposits, respectively, with a view to a determination of the question as to which of said minerals the land was chiefly valuable for.

(8) In not holding that the inclusion of the land in a petroleum reservation, "and in the area designated as the Elk Basin oil and gas field, a producing oil structure, superseded and annulled the prior coal classification, and that such later recognition of the value of the petroleum content was equivalent to holding that the lands were chiefly valuable for their oil and gas, and that such action of the Department amounted to a reclassification of the land."

While the Department in its unreported decision of June 12, 1918, in American Potash Company, cited in *Arthur K. Lee et al., supra*, declared in effect that lands classified and appraised as valuable coal lands are not subject to location, application, and patent under the general mining laws on account of nonmetallic minerals, that ruling was modified or construed by the decision in *Arthur K. Lee et al.* so as to require that such lands, in addition to being classified as coal, should also possess value for coal. In view of such modification or construction of the decision referred to, a mineral claimant, seeking patent to a tract on the basis of an asserted location on account of a nonmetallic mineral, made thereof after its classification and appraisal as valuable for coal, all else being regular, would clearly be entitled, before the outright rejection of his application, to an opportunity to show, if he could, that such classification was, in fact, erroneous.

But, contrary to the contentions of appellants, the correctness of a coal classification of a tract can not be successfully assailed on the

ground that subsequently to such classification the tract had been placed in a petroleum reserve, or that it had been designated as within the geological structure of a producing oil and gas field, as neither of such proceedings would tend to abrogate, annul, or in any manner impeach the coal classification.

Nor is the Department impressed with the soundness of appellants' contention that proof that a tract classified as coal land possesses a greater value for petroleum than for coal, would render the tract subject to location, entry, and patent under the placer mining laws on account of its petroleum content. It is true that by the act of February 11, 1897 (29 Stat. 526), Congress declared that lands containing petroleum and other mineral oils, "and chiefly valuable therefor," might be entered and patented under the provisions of the law relating to placer mining claims, but, considered in the light of matters occurring prior to the approval of the act last cited, and the report and debate in Congress on the bill that became said act, the Department is not persuaded that Congress intended that the comparative value of a tract for petroleum and for coal, or any other mineral deposits, should be taken into consideration in determining the patentability of the tract on account of petroleum. In *Union Oil Company, on review* (25 L. D. 351), the Department, after reciting the various departmental decisions and rulings as to the patentability under the placer mining laws of lands valuable on account of oil deposits, which, prior to the decision of August 27, 1896, there under review, had been uniformly to the effect that said lands were so locatable and patentable, and, after reciting the provisions of said act of 1897, said:

> The language of the act clearly indicates, and the debates of Congress, as well as the report of the Public Lands Committee of the House on the bill, unmistakably show, that it was passed for the purpose of restoring the practice which had prevailed in the Land Department prior to the decision under review. In the House Committee's report reference was made to that decision in connection with some of the earlier rulings on the subject, as hereinbefore set out, and *inter alia*, it was said:
>
> Public lands containing petroleum and other mineral oils have been held and patented under the placer mining acts of the United States for many years past * * * The bill simply provides by legislation for procedure in the entry and patenting of those lands along the lines that have been pursued in the past under the decisions of the General Land Office; so that there is no departure whatever from the procedure in the past for the development and acquirement of such properties.
>
> This legislative action, so promptly taken after the departure from the earlier rulings and the long-established practice thereunder, is significant, and can hardly be considered as less than a disapproval by Congress of the changed ruling.

In *Webb* v. *American Asphaltum Mining Company* (157 Fed. 203, 207), the Circuit Court of Appeals, Eighth Circuit, speaking through Judge Sanborn said:

> Prior to August 27, 1896, the officers of the land department had held that lands valuable for petroleum might be entered and patented by means of placer claims (In re Rogers, 4 Land Dec. Dep. Int. 284; In re Piru Oil Company, 16 Land Dec. 117; *Gird* v. *California Oil Company* (C. C.), 60 Fed. 531), but on that day the Secretary of the Interior decided that they could not be thus located. Union Oil Company, 23 Land Dec. Dep. Int. 222. The nature of the act of 1897 and the fact that it was passed at the next session of Congress after this decision strongly indicate that it was not the intention of that body to change thereby the prescribed method for the entry of veins of asphaltum in rock in place, but that its only purpose and the only effect of the act were to restore the rule and practice regarding petroleum and other mineral oils which were not found in veins or lodes which had prevailed before the decision in the Union Oil Company Case, so as to authorize the entry of lands which contain them by placer claims.

And Lindley, in section 422 of his work on Mines, expressed the view that the said act of 1897 "was not a legislative recognition of the law as it previously existed," meaning previously to the departmental decision of August 27, 1896, in the *Union Oil Company case*.

It appears that for a period of more than 20 years next prior to the date of the departmental decision of August 27, 1896, in the *Union Oil Company case*, holding that petroleum did not fall within the contemplation of the mining laws, it had been uniformly held that lands containing valuable deposits of petroleum were patentable under the mining laws in accordance with the same rules as were applicable to other placer deposits. Instructions of the Commissioner of the General Land Office of January 30, 1875 (Sickels' Mining Laws, 491); *Maxwell* v. *Brierly* (10 C. L. O. 50), decided by the Department April 16, 1883; *Union Oil Company, on review* (25 L. D. 351); *Gird* v. *California Oil Company* (60 Fed. 531), decided February 26, 1894. And in determining the validity of locations made of lands on account of petroleum deposits, and the patentability under the mining laws of lands containing the same, the Land Department applied the same rules that it did with respect to claims located on account of auriferous gravel and other ordinary placer deposits. It required no showing in support of applications for patent to petroleum claims as to the relative or comparative value of the land for any purpose save, respectively, mining and agricultural, which was also the case in regard to locations and patent applications relating to lands involving placer minerals other than petroleum. This being true, and the purpose of the act being, as stated in the authorities above cited, merely to restore the rule and practice regarding petroleum and other mineral oils that prevailed before the departmental decision of August 27, 1896, in the *Union*

Oil Company case, the Department is clearly of opinion that the word "chiefly," which immediately preceded the word "valuable" in the act of 1897, added nothing to the intended meaning of the language used in the act. Indeed, the terms "lands valuable for their minerals" and "lands chiefly valuable for minerals" were held by the Department in *Pacific Coast Marble Company* v. *Northern Pacific Railroad Company* (25 L. D. 233), decided September 9, 1897, to mean the same thing as lands "more valuable on that account (for mining) than for agricultural purposes." And in *Webb* v. *American Asphaltum Mining Company*, *supra*, the court said:

> * * * The "mineral deposits" treated in this legislation (Secs. 2318–20 and 2329, Revised Statutes) include metalliferous deposits, alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, and building stone, as well as deposits bearing gold, silver, and other metals, and the term "lands valuable for minerals" in law means all lands chiefly valuable for any of these minerals rather than for agricultural purposes. *Northern Pacific Railway Company* v. *Soderberg* (188 U. S. 526, 534, 537); *Pacific Coast Marble Company* v. *Northern Pacific Railroad Company* (25 Land Dec. Dep. Int. 233, 240).

For the reasons stated it must be held that the relative value of the land here in question for coal and for petroleum affords no adequate basis for a determination of the right of the applicant to a patent thereto.

It was only in accordance with the provisions of sections 2347–2352, Revised Statutes, and the regulations of April 12, 1907 (35 L. D. 665), issued thereunder, that, during the period between the date of the classification of the tract in question as coal land and that of its inclusion in the petroleum withdrawal, the land, together with the workable coal deposits therein, could have been acquired, or any valid claim thereto initiated. *Albert M. Crafts* (36 L. D. 138, 139). At the beginning of that period the acquisition of "coal lands of the United States" had long been the subject of special statutory restrictions prescribed by said sections 2347–2352, as to the persons entitled to purchase coal lands, the quantity that might be purchased, and the price to be paid therefor. *United States* v. *Diamond Coal and Coke Company* (191 Fed. 786). It is sufficient to say, without enumerating those restrictions, that, save the one respecting citizenship, none is found in the provisions of the placer mining laws. A change in the status of the land, so far as the workable coal deposits therein were concerned, was effected by the petroleum withdrawal order of December 6, 1915. The act of August 24, 1912 (37 Stat. 497), pursuant to the provisions of which the withdrawal was made, permits the land to be explored, occupied, and purchased, under the mining laws of the United States (and the mining laws of the United States have been held to embrace sections 2347–2352 of the Revised

Statutes: *T. P. Crowder*, 30 L. D. 92), only so far as the same applied to metalliferous minerals. In view of such change of status the Department held, and properly so, that the land was not subject to disposition under the application of Malliot to purchase the tract as coal land, presented after the date of the petroleum withdrawal, which application is made a subject of comment by appellants.

Pending determination of the case the Department submitted a showing as to the character of the land, made by the applicants in connection with their appeal, to the Director of the Geological Survey for consideration in the light of the data disclosed by the records and files of the bureau, with a view to a possible reclassification of the land, or a portion thereof, on the bases of units of 2½ acres, should such action be deemed expedient and appear to be warranted by the circumstances of the case. The Director reported under date of January 9, 1926, submitting in connection with his report a plat whereon is represented an area of 7½ acres, comprising three continuous 2½-acre units, which may be described as the N. ½ NE. ¼ NE. ¼ SE. ¼ and the SE. ¼ NE. ¼ NE. ¼ SE. ¼, Sec. 25, the surface of which lies below the coal-bearing horizon of the region, and it is within that 7½-acre area that the two wells referred to in the application and relied upon as grounds therefor have been drilled. The Director reports that the remainder of the area included in the claim appears from said data to be properly classified as coal land under the coal-land classification regulations.

By departmental order of November 15, 1912 (41 L. D. 399), the regulations governing the classification and valuation of coal lands, approved April 10, 1909 (37 L. D. 653), were amended by adding to paragraph 11 thereof the following:

> Where for good reason it is advisable, classification of coal lands may be made by two and one-half or 10-acre tracts, or multiples thereof, described as minor subdivisions of quarter-quarter sections or rectangular lotted tracts.

On the recommendation of the Commissioner, however, the Department, in its instructions of February 16, 1915 (43 L. D. 520), again considered the matter and said:

> While coal lands are held by the Department and the courts to be mineral lands, it is nevertheless true that Congress has provided a special method for the disposition of public lands containing deposits of coal, and it is clear therefrom that it provides for the disposition of such deposits only in accordance wth the legal subdivisions of the public-land surveys. The special provisions of section 2331, Revised Statutes, and of certain other special acts authorizing the entry and disposition of lands in smaller areas than the 40-acre unit or lot fixed by the general laws, are not applicable to coal lands. From the standpoint of administration, as you suggest, the practice is confusing and objectionable. Furthermore, as Congress has now provided for the separate disposition of the land and of the coal deposits therein, acts of March 3, 1909 (35 Stat. 844), and June 22, 1910 (36 Stat. 583), the matter

of classification in smaller areas than the ordinary legal subdivision is less important. In other words, under said acts the agricultural entryman or patentee takes the land exclusive of the coal deposits, and the latter deposits are held subject to disposition separate and apart from the land.

In the actual work of classification and valuation, if the coal within a given legal subdivision is so limited in quantity and value as to not warrant the classification of the subdivision as coal land, it is not believed that the land in question should be classified as coal. If, on the other hand, it contains a coal deposit of substantial value, its classification as coal land will not prevent the disposition of the land itself under the agricultural laws, subject to the coal reservation. Accordingly, and after full consideration of the matter involved, the said instructions of November 15, 1912, are hereby revoked and vacated and the amendment added to paragraph 11 of classification and valuation instructions canceled.

The case at bar, however, does not come within any of the reasons given in the instructions last mentioned for the abrogation of the amendment to section 11 of the coal classification regulations of 1909. It does not involve an application of one seeking title under the coal-land law but to an asserted location and an application for patent under the placer mining laws, which, unlike the coal-land law, recognize areas in units of less than the smallest normal legal subdivision as disposable thereunder. Moreover, unlike the laws relating to the disposition of agricultural lands, the placer mining laws contain no provision authorizing the patenting of land with a reservation to the United States of coal deposits therein, where valuable on account of coal. The situation here presented is one which, the Department believes, will warrant the classification, for the purposes of this case only, according to 2½-acre units or multiples thereof, of the said area shown by the data on file in the Geological Survey to be noncoal, but included in a normal legal subdivision which, as a whole, has been classified as coal in character, the noncoal portion of which, but for the classification, would have been unquestionably locatable under the placer mining laws prior to the date of the petroleum withdrawal covering the same.

Should all else be found regular, the Commissioner will afford the applicants 30 days from notice within which to elect to take a patent to said N. ½ NE. ¼ NE. ¼ SE. ¼ and SE. ¼ NE. ¼ NE. ¼ SE. ¼, Sec. 25, upon which their wells have been drilled and the discovery made. Upon the filing of such election, that area will be reclassified as noncoal and the application will be passed to entry and patent to the extent thereof and stand rejected as to the remainder of the land embraced in the claim. As an alternative, the applicants will be afforded the same period within which to apply for a hearing to enable them to show, if they can, the noncoal character of each 40-acre subdivision embraced in the claim, or of a single area within the claim, comprising units of not less than 2½ acres, in

square form, each capable of being described as a quarter-quarter-quarter-quarter section, such area to be contiguous to the area reported by the Director to be barren of workable coal. Should a hearing for the purpose indicated be applied for and had, action in harmony herewith will be taken in the matter. In the event of default by the applicants in both particulars stated, the application will stand rejected in its entirety.

The decision appealed from is therefore modified to accord with the views herein expressed.

PRACTICE—CONTEST—RULE 14 AMENDED

ORDER

[Circular No. 1061]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 17, 1926.

To eliminate the necessity of notifying the parties by registered mail of the forwarding to the General Land Office of the records in *ex parte* contest cases, Rule of Practice 14 is hereby amended to read as follows:

Upon the failure to serve and file answer as herein provided, the allegations of the contest will be taken as confessed, and the register will forthwith forward the case, with recommendation thereon, to the General Land Office, and notify the parties by ordinary mail of the action taken.

E. C. FINNEY,
First Assistant Secretary.

HEIRS OF T. A. CONNER, TRANSFEREES OF MICHAEL MISER

Decided April 20, 1926

PATENT—PURCHASER—SWAMP LAND—STATUTES.

The act of March 2, 1855, is mandatory and does not leave any discretion in an administrative officer to deny a patent to a purchaser or locator of public lands, claimed by a State as swamp, who had made entry therefor prior to the issuance of a patent to the State, notwithstanding the issuance of a patent under the swamp land grant.

FINNEY, *First Assistant Secretary:*

You [Commissioner of the General Land Office] have informally submitted for instructions the cash entry (G. L. O. 0618) made by Michael Miser at Springfield, Missouri, on April 3, 1856, for E. ½ of lot 2 of NE. ¼, Sec. 3, T. 33 N., R. 16 W., 5th P. M. (39.28 acres).

The widow of T. A. Connor alleges that he had occupied the tract since March 16, 1914, under mesne conveyances from said Miser, and that the widow and children of said Conner have had possession of the tract since the latter date. The recorder of deeds of Laclede County, Missouri, has certified that the heirs of Conner, according to the county records, are the owners of the land. A request has been made for the issuance of a patent under the Miser entry.

The register of the Springfield office issued final cash certificate No. 19642 to said Miser on April 3, 1856, upon payment of $98.20.

It appears that on January 17, 1857, the Secretary of the Interior approved a list (No. 2) of swamp and overflowed lands inuring to the State of Missouri under the swamp-land act of September 28, 1850 (9 Stat. 519), in which list the tract purchased by Miser was included. Patent for the tract issued to the State of Missouri on March 26, 1857.

The act of March 2, 1855 (10 Stat. 634), provides—

> That the President of the United States cause patents to be issued, as soon as practicable, to the purchaser or purchasers, locator or locators, who have made entries of the public lands, claimed as swamp lands, either with cash, or with land warrant, or with scrip, prior to the issue of patents to the State or States, as provided for by the second section of the act approved September twenty-eight, eighteen hundred and fifty, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," any decision of the Secretary of the Interior, or other officer of the Government of the United States, to the contrary notwithstanding: *Provided*, That in all cases where any State, through its constituted authorities, may have sold or disposed of any tract or tracts of said land to any individual or individuals prior to the entry, sale, or location of the same, under the preemption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land, until such State through its constituted authorities, shall release its claim thereto, in such form as shall be prescribed by the Secretary of the Interior: *And provided further*, That if such State shall not, within ninety days from the passage of this act, through its constituted authoirities, return to the General Land Office of the United States, a list of all the lands sold as aforesaid, together with the dates of such sale, and the names of the purchasers, the patents shall be issued immediately thereafter, as directed in the foregoing section.
>
> Sec. 2. *And be it further enacted*, That upon due proof, by the authorized agent of the State or States, before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid, the purchase-money shall be paid over to the said State or States; and where the lands have been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry, at one dollar and a quarter per acre, or less, and patents shall issue therefor, upon the terms and conditions enumerated in the act aforesaid: *Provided, however*, That the said decisions of the Commissioner of the General Land Office shall be approved by the Secretary of the Interior.

The foregoing was extended by the act of March 3, 1857 (11 Stat. 251), which provides as follows:

That the selection of swamp and overflowed lands granted to the several States by the act of Congress, approved September twenty-eight, eighteen hundred and fifty, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and the act of the second of March, eighteen hundred and forty-nine, entitled "An act to aid the State of Louisiana in draining the swamp lands therein," heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage.

The Department is not unmindful of the rule announced by the Supreme Court of the United States in *Wright* v. *Roseberry* (121 U. S. 488), *Tubbs* v. *Wilhoit* (138 U. S. 134), and *Cook County* v. *Calumet and Chicago Canal and Dock Company* (ibid. 635). It has a ministerial duty to perform, not a judicial one, and, the act of 1855 as extended being mandatory, patent must issue under Miser's entry, notwithstanding the issuance of a patent to the State.

FORREST CRUTCHFIELD AND CLAUDE C. FANSLER

Decided April 22, 1926

RECLAMATION HOMESTEAD—OIL AND GAS LANDS—MINERAL LANDS—SURFACE RIGHTS—HEARING.

Section 2 of the act of July 17, 1914, accords an agricultural entryman the right to a hearing where the lands within his unrestricted entry were subsequently classified as mineral and his application for reclassification is denied.

RECLAMATION HOMESTEAD—OIL AND GAS LANDS—PROSPECTING PERMIT—HEARING—EVIDENCE.

Where an agricultural entryman whose application for reclassification of the lands within his unrestricted entry, subsequently classified as mineral, has been denied, demands a hearing, an application for an oil and gas prospecting permit filed by him for the purpose of protecting his rights as against other applicants can not be taken as an admission that the land has prospective oil and gas value.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Jacob Terrell* (49 L. D. 671), cited and applied.

FINNEY, *First Assistant Secretary:*

On July 21, 1905, Anna V. Birum made a reclamation homestead entry of lot 13, Sec. 12, T. 32 N., R. 33 E., S. ½ SE. ¼, lots 4 and

5, Sec. 7, lot 1, Sec. 18, T. 32 N., R. 34 E., M. M. She submitted final proof in accordance with the general provisions of the homestead law on September 13, 1910, which proof was accepted by the General Land Office as to residence, cultivation, and improvements. Assignment of the entry, by mesne conveyances, to Forrest Crutchfield, was accepted on March 15, 1924, the conveyance to Crutchfield having been made on April 27, 1916.

On January 13, 1908, said Forrest Crutchfield made a reclamation homestead entry of the SE. ¼ NW. ¼, NE. ¼ SW. ¼, lots 1 and 3, Sec. 17, lot 7, Sec. 18, T. 32 N., R. 34 E. He submitted final proof in accordance with the general provisions of the homestead law on August 16, 1913, which proof was accepted by the General Land Office as to residence, cultivation, and improvements.

All the land embraced in the two entries was on January 9, 1917, included in Petroleum Reserve No. 53. Said land was on October 18, 1919, restored from the reclamation withdrawal. This region is now part of the Great Falls, Montana, land district, and the entries in question are numbered Great Falls 053839 and 053721, respectively.

On March 10, 1923, Claude C. Fansler filed an application, Great Falls 058342, for a permit to prospect for oil and gas upon the tracts in these two homestead entries and other lands. On April 20, 1923, Crutchfield filed a prospecting permit application, Great Falls 058397, for the land embraced in the two entries, stating—

> This application is made to protect my rights as against a prior application now pending for a permit to prospect upon said land and make this application subject to my rights for an unrestricted patent for which I have made application.

He has not furnished any bond in connection with the application. On March 23, 1923, he paid the final commissions on his own entry but it is not shown that the final commissions on the assigned entry have been paid up to the present time.

By decision of March 17, 1924, the Commissioner of the General Land Office, after Crutchfield had in response to earlier requirements filed an application for reclassification of all the lands involved as nonmineral but had failed to pay the final commissions on the Birum entry, directed that he, Crutchfield, be notified that he would be allowed 30 days from notice either to pay the final commissions on the Birum entry and file his consent to take a limited patent, or to pay the final commissions on said entry and request that his application for reclassification of the lands as nonmineral be considered. It was also stated—

> In the event that the final commissions are paid in 03894 (the Birum entry), and a request is made that his application for reclassification of the lands as

nonmineral be considered and the reclassification is denied, a hearing will then be held if desired, at which the burden of proof will be on the claimant to show that all the land in each of the two entries was not known to be valuable for petroleum or gas at the time of the payment of the final commissions on each entry respectively.

Crutchfield applied for reclassification but by report dated December 1, 1925, the Director of the Geological Survey denied the application, classifying the lands in the two entries as mineral lands as of March 23, 1923. In his decision of December 14, 1925, the Commissioner quoted the Survey's report and said—

> In view of the above Crutchfield's application for classification of said lands as nonmineral is hereby denied and you will allow him 15 days from notice within which to file in your office his consent to a reservation to the Government of the oil and gas content of the land, and to furnish a corporate surety bond for $1,000 on or following the inclosed form, failing in which or to appeal, his application hereby held for rejection will be finally rejected, and said homestead entries hereby held for cancellation will be cancelled without further notice.

Crutchfield has appealed, contending that the Commissioner erred in not holding that, although nonmineral classification of the land was denied, he was entitled to a hearing in the matter to determine the mineral character of the land. He also contends that his permit application should remain suspended, without the requirement of any bond, awaiting final decision in the matter.

The application for reclassification has been denied and the claimant has in effect asked for a hearing. He has a right thereto under Section 2 of the act of July 17, 1914 (38 Stat. 509). In the case of Jacob Terrell (49 L. D. 671), the Department held (syllabus):

> 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.

The case is remanded for hearing in accordance with the foregoing. Crutchfield must pay the final commissions on the Birum entry or suffer cancellation thereof. In view of the conditions under which he filed his application for a prospecting permit, his filing of such application can not be considered an admission that the land has prospective oil and gas value. Pending a hearing and decision his permit application will remain suspended and during that time a bond is not necessary.

EXTENSIONS OF TIME FOR DRILLING UNDER OIL AND GAS PERMITS—ACT OF APRIL 5, 1926—CIRCULARS NOS. 946 AND 1041, SUPPLEMENTED

INSTRUCTIONS

[Circular No. 1063]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 27, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

By act of Congress approved April 5, 1926 (Public No. 93), the Secretary of the Interior was authorized to grant extensions of time for an additional period of two years on oil and gas prospecting permits issued under the act of February 25, 1920 (41 Stat. 437). This act applies also to the Territory of Alaska, and reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any oil or gas prospecting permit issued under the act entitled "An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," approved February 25, 1920, or extended under the Act entitled "An Act To authorize the Secretary of the Interior to grant extensions of time under oil and gas permits, and for other purposes," approved January 11, 1922, may be extended by the Secretary of the Interior for an additional period of two years, if he shall find that the permittee has been unable, with the exercise of reasonable diligence, to begin drilling operations or to drill wells of the depth and within the time required by existing law or has drilled wells of the depth and within the time required by existing law, and has failed to discover oil or gas, and desires to prosecute further exploration.

Sec. 2. Upon application to the Secretary of the Interior, and subject to valid intervening rights and to the provisions of section 1 of this Act, any permit which has already expired because of lack of authority under existing law to make further extensions, may be extended for a period of two years from the date of the passage of this Act.

Under this act extensions of time may be granted for a period of not exceeding two years in addition to the time heretofore authorized except those cases falling specifically within section 2 of this act which are limited to extensions of two years from the date of the act.

Applications for extensions hereunder should follow in form and substance the applicable provisions of Circulars Nos. 946 (50 L. D. 567) and 1041 (51 L. D. 278).

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.

STOKELY ET AL. v. LUND

Decided April 28, 1926

PUBLIC LANDS—ADVERSE CLAIM—COLOR OF TITLE—OCCUPANCY—IMPROVEMENTS—TAX TITLE.

Payment of taxes upon vacant and unoccupied public land, unaccompanied by *bona fide* occupation and improvement, will not defeat the allowance of a valid application filed under the public land laws.

FINNEY, *First Assistant Secretary:*

By decision of August 4, 1925, the Department approved the application of Christian Lund, filed November 2, 1924, under the act of January 27, 1922 (42 Stat. 359), to change the unpatented portion (NW. ¼ NE. ¼ and SE. ¼ NE. ¼, Sec. 33, T. 3 S., R. 40 E., W. M.) of his homestead entry to lot 4, Sec. 13, T. 5 S., R. 29 E., T. M., lot 1, Sec. 30, and lot 2, Sec. 7, T. 44 S., R. 21 E., T. M., Florida (75.52 acres).

During the publication and posting of the notice required by paragraph 6 of the regulations of March 22, 1922, Circular No. 817 (48 L. D. 595), a protest against the issuance of a patent to Lund for lot 4, Sec. 13, T. 5 S., R. 29 E., T. M., was filed by W. R. Stokely, executor of the estate of Hattie N. Stokely, deceased, and attorney in fact for Elizabeth Way, alleging that for and in behalf of said estate and Elizabeth Way he had paid the taxes assessed against said lot for many years. Further, that the lot adjoins other properties of protestant, and is subject to preemption or purchase from the Government. The protest concludes with a request for permission to purchase the lot for Elizabeth Way.

The records of the General Land Office show that said lot 4 was selected by the State of Florida as swamp land on January 13, 1885, but the selection was rejected on September 9, 1891.

With the protest is filed a statement of the transfers of said lot 4 as shown by the county records. The first is a "deed" (not described) by the State of Florida on August 17, 1908, to Haymans & Little. The lot was thereafter transferred to the Morgan Lumber Company on January 22, 1910; to Lewis Shepherd, jr., on August 30, 1913; to W. R. Stokely on September 5, 1913; to Hattie N. Stokely on October 3, 1922, and (by warranty deed) to Elizabeth Way on November 29, 1924.

While it is well settled that public land actually occupied by a person under color of title or claim of right is not subject to entry by another, it has never been held that color of title or claim of right, not accompanied by *bona fide* occupation or improvement, will defeat a valid application under the public land laws. The payment of taxes upon vacant and unoccupied public land, standing alone,

will confer no legal or equitable status which can be recognized by the Department.

The protest is therefore dismissed, and the provisions of paragraph 6 of the regulations of March 22, 1922, *supra*, having been complied with, final certificate and patent will issue on Lund's application, in the absence of objection not now appearing.

HANSON ET AL. v. PFEILER

Decided May 12, 1926

STOCK-RAISING HOMESTEAD — PREFERENCE RIGHT — WITHDRAWAL — RESTORATIONS—MILITARY SERVICE—WORDS AND PHRASES—STATUTES.

The preference right granted by section 8 of the stock-raising homestead act of December 29, 1916, is one of the "preference rights conferred by existing laws" expressly excepted from the operation of the joint resolution of February 14, 1920, as amended by the joint resolution of January 21, 1922, which granted preference right of entry to ex-service men of the war with Germany.

STOCK-RAISING HOMESTEAD—FINAL PROOF—FINAL CERTIFICATE—PATENT—WORDS AND PHRASES—STATUTES.

The term "final proof" as used in sections 4 and 5 of the stock-raising homestead act contemplates a final proof which is complete and entitles the entryman to a final certificate and patent.

FINNEY, *First Assistant Secretary*:

Separate appeals have been filed by Joseph W. Spilker and Clarence O. Hanson from a decision of the Commissioner of the General Land Office dated October 5, 1925, holding that Jacob A. Pfeiler had the superior right to make entry for the W. ½, Sec. 15, T. 7 N., R. 7 E., B. H. M., South Dakota.

The track described was restored from a reclamation withdrawal on May 16, 1925, effective July 1, 1925. On July 7, 1925, Pfeiler applied to make entry under the stock-raising homestead act for NW. ¼, Sec. 9, and W. ½, Sec. 15, said township, as additional to his homestead entry embracing NE. ¼ SE. ¼, Sec. 9, N. ½ SW. ¼ and SE. ¼ SW. ¼, Sec. 10, said township. The register rejected the application because the land applied for was not subject to entry by the general public. Pfeiler appealed.

On June 25, 1925, applications under the enlarged homestead act were filed by ex-service men of the war with Germany, as follows: Joseph W. Spilker (024633) for SW. ¼, N. ½ SE. ¼, and SW. ¼ SE. ¼, Sec. 15, said township; Clarence O. Hanson (0244634) for N. ½, Sec. 15, said township; and Lloyd J. Hogarth (024635) for N. ½ SE. ¼, NE. ¼ SW. ¼, Sec. 3, SE. ¼ SW. ¼ and lot 1, Sec. 4, and NW. ¼, Sec. 9, said township.

The Commissioner rejected Pfeiler's application as to NW. ¼, Sec. 9, because, not being contiguous to his original entry, he could not assert a preferential right thereto under section 8 of the stock-raising homestead act. Pfeiler has acquiesced in such rejection.

Spilker and Hanson contend that the preference right granted ex-service men of the war with Germany by the joint resolution approved February 14, 1920 (41 Stat. 434), as amended by the joint resolution approved January 21, 1922 (42 Stat. 358), is superior to the preference right provided for by section 8 of the stock-raising homestead act, and that Pfeiler had forfeited his rights under said section by failing to continue to reside on his original entry.

The joint resolution referred to grants preference rights to ex-service men of the war with Germany—

> 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.

As the stock-raising homestead act was approved December 29, 1916 (39 Stat. 862), the preference right provided for by section 8 thereof was a preference right "conferred by existing laws" at the date of the joint resolution under which Spilker and Hanson claim the subdivisions in conflict with Pfeiler's application. Hence, the only question to be determined from the record is whether Pfeiler is entitled to a preference right as to the W. ½, said Sec. 15, which is contiguous to his original entry.

The original entry of Pfeiler was made February 11, 1908, subject to the provisions of the reclamation act of June 17, 1902 (32 Stat. 388). Final proof as to compliance with the requirements of the homestead law as to residence, cultivation, and improvements was submitted October 2, 1912, and was accepted by the Commissioner of the General Land Office on March 13, 1913.

In the decision appealed from the Commissioner directed the issuance of final certificate on the original entry, the land embraced therein having been released from the reclamation withdrawal in the same order that released the land in costroversy. However, final certificate does not appear to have been issued.

As Pfeiler concedes that he has not resided on his original entry, although he still owns it, the question arises whether he had, prior to the date of the application in question, submitted final proof on his original entry within the meaning of sections 4 and 5 of the stock-raising homestead act. Section 4 allows a homestead entryman of lands subject to designation under the act "who has not submitted final proof upon his existing entry" to make an additional entry for land within a radius of twenty miles from the existing entry. Section 5 confers the same right to "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." The preference right provided for by section 8 of the act is limited to "lands subject to entry under the provisions of this act and contiguous to those entered or owned and occupied by him."

After Pfeiler had submitted final proof of compliance with the ordinary requirements of the homestead law, further residence on the original entry was not required; but entryman was aware that to obtain patent he must establish by further proof that at least one-half of the irrigable area in the entry as finally adjusted had been reclaimed and pay all the charges, fees, and commissions due on account thereof, and all water-right charges. Upon the land being released from the reclamation withdrawal on July 1, 1925, entryman was relieved of making further proof, but the final proof submitted on October 2, 1912, could not then be made the basis for the issuance of final certificate and patent, for the reason that the required final commissions had not been paid, and, so far as the records of the General Land Office now show, have not been paid. Hence, it must be held that the final proof submitted on October 2, 1912, was not of the nature contemplated by "final proof" as used in sections 4 and 5 of the stock-raising homestead act, which clearly means a final proof which is complete and entitles the entryman to final certificate and patent. Pfeiler's final proof was so far from complete that it is subject to rejection if the final commissions are not paid.

The land involved will be listed in the next order of designation under the stock-raising homestead act affecting lands in South Dakota, and upon the designation of the land becoming effective the register will take appropriate action on Pfeiler's application, the applications of Hanson and Spilker being rejected to the extent they conflict with Pfeiler's.

The decision appealed from is affirmed.

EDWARD F. SMITH ET AL.

Decided May 14, 1926

VALENTINE SCRIP—VESTED RIGHTS—RECLAMATION WITHDRAWAL—ADJUSTMENT TO SURVEY—CONDEMNATION.

The location of Valentine scrip upon unsurveyed public land in conformity with the law and departmental regulations is such an appropriation of the land as can not be defeated by a subsequent reclamation withdrawal, notwithstanding that the selection had not been adjusted to an official survey, and the selector can not thereafter be deprived of his rights thus acquired except in the manner prescribed by the reclamation act.

COURT DECISION CITED AND APPLIED — DEPARTMENTAL DECISIONS OVERRULED SO FAR AS IN CONFLICT.

Case of *Payne* v. *Central Pacific Railway Company* (255 U. S. 228), cited and applied; cases of *Frank Burns* (10 L. D. 365), and *Henry A. Bruns* (15 L. D. 170), overruled so far as in conflict.

FINNEY, *First Assistant Secretary:*

On June 25, 1891, Edward F. Smith made Valetine scrip location for 40 acres of unsurveyed land in the Helena, Montana, land district, described by metes and bounds, which upon survey it was said would probably be the SE. ¼ SE. ¼, Sec. 25, T. 22 N., R. 10 W. In 1923 Smith submitted an affidavit stating that the land would probably be the NE. ¼ SE. ¼ said section, when surveyed, instead of the SE. ¼ SE. ¼, as first described. It appears from some of the papers that the tract may be located in Sec. 26.

The land was subsequently embraced in a withdrawal under the first form in connection with a reclamation project, and for that reason the Commissioner of the General Land Office, by decision of April 10, 1912, held the location for cancellation. On appeal from that action the Department, by decision of May 29, 1914, concurred in the view of the Commissioner that the locator had not obtained a vested right prior to the withdrawal, as the tract was still unsurveyed, but it was held that the location should be allowed to remain intact until it was determined definitely that the land was needed by the Government in the development of the reclamation project. Thereafter the Reclamation Service reported that the tract was so needed and the location was accordingly canceled January 6, 1915.

This case was again considered by the Department on petition for reinstatement and by decision of September 28, 1921, it was held that no vested right had attached under the location and that the inchoate right of the locator was defeated by the withdrawal for reclamation purposes in view of the fact that the land was unsurveyed, citing the case of *Henry A. Bruns* (15 L. D. 170).

Counsel representing the interests of the original locator now seeks to revive the claim and relies upon the doctrine applied by the Department in its decision of March 13, 1925, in the case of F. A. Hyde & Company (unreported), involving a forest lieu selection for unsurveyed land, which, after the date of selection and before any survey thereof, was withdrawn as a public water reserve under the act of June 25, 1910 (36 Stat. 847).

In that decision the Department held that the principle applied in the cases of *Frank Burns* (10 L. D. 365) and *Henry A. Bruns*, *supra*, was inconsistent with more recent rulings by the Supreme Court, notably in the case of *Payne* v. *Central Pacific Railway Company* (255 U. S. 228), wherein it was held that the authority conferred by

the act of June 25, 1910, to withdraw lands from appropriation applies only to "public lands" and does not grant power to destroy private rights by withdrawal of tracts covered by prior selection concerning which the selector had met all conditions imposed by law for its completion. In applying this ruling to the Hyde case in the decision of March 13, 1925, involving unsurveyed land, it was said—

> The selector had complied with all the requirements of the regulations under the act of June 4, 1897, *supra*, prior to the withdrawal of the land. It is true that the selected tracts must be adjusted to the plat of survey, but it is not essential that the adjustment be made by the selector or his transferee, the regulations (38 L. D., 287) providing that if the claimant fails to act, the adjustment will be made by the register and receiver of the local office.

The instant case is in all essential respects comparable to the conditions which existed in the Hyde case. The act of April 5, 1872 (17 Stat. 649), under which the Valentine location was made, allows selection of unsurveyed land subject to conformation to the survey when made. Also, while the reclamation act of June 17, 1902 (32 Stat. 388) authorizes withdrawal of lands for purposes of the act, it does not contemplate the destruction of either vested or inchoate prior rights without due compensation. Section 7 of the reclamation act expressly provides for acquiring "any rights or property" by purchase or condemnation, and to pay for same from the reclamation fund where it becomes necessary in carrying out the purposes of the act. In an opinion rendered October 12, 1905 (34 L. D. 155), by Assistant Attorney General Campbell, it was held in part as follows (syllabus):

> The power conferred upon the Secretary of the Interior by the act of June 17, 1902, to make the necessary withdrawals to carry into effect the provisions of the act, and to acquire rights and property for the purpose contemplated, implies the right to appropriate for irrigation purposes public lands to which the United States has the full legal and equitable title, but the inchoate rights acquired by a *bona fide* settlement made in pursuance of and in strict compliance with the public land laws should not be arbitrarily taken without compensation.

See also page 260, Reclamation Manual (Edition 1917).

A recent report from the Bureau of Reclamation discloses that the development of the project has not yet reached the point where it is necessary to acquire the land in question, and that it has not yet been definitely decided that future development will require the use of this tract. It will be flooded only in case it be decided to build what is known as the Warm Springs dam site. If the development be confined to certain other alternative plans, this tract will not be affected.

In view of the above conditions, the former action is recalled and vacated, and the said location is hereby reinstated with direc-

tions that it be considered on its merits, unaffected by the reclamation withdrawal, except that any valid rights thereunder may be acquired in the manner provided by the reclamation act. The decisions in the cases of *Frank Burns* and *Henry A. Bruns*, *supra*, are hereby overruled in so far as they conflict herewith.

SELECTIONS, FILINGS, OR ENTRIES OF LANDS CONTAINING SPRINGS OR WATER HOLES—ALL PRIOR INSTRUCTIONS AMENDED

INSTRUCTIONS

[Circular No. 1066]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 25, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

By Executive order of April 17, 1926, the following order of withdrawal was issued:

> Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat. 847), entitled "An Act To authorize the President of the United States to make withdrawals of public lands in certain cases," as amended by act of Congress approved August 24, 1912 (37 Stat. 497), it is hereby ordered that every smallest legal subdivision of the public-land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of section 10 of the act of December 29, 1916 (39 Stat. 862), and in aid of pending legislation.

The above order was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.

In furtherance of said order, all General Land Office circulars and regulations pertaining to the selection, filing, or entry of public lands under any of the public land laws of the United States, are hereby amended so that in every instance it must be shown by a duly corroborated affidavit in connection with every selection, filing, or entry made upon or subsequent to the date of said Executive order, or

theretofore filed but not allowed, that no spring or water hole exists, if it be a fact, upon any legal subdivision of the land sought to be appropriated, if surveyed, and if unsurveyed, within one quarter of a mile from the exterior boundaries of said land. If there be any spring or water hole the affidavit should state the exact location and size thereof, together with an estimate of the quantity of water in gallons, which it is capable of producing daily, and any other information necessary to determine whether or not it is valuable or necessary as a public water reserve.

In case the attempted appropriation of the land is one the allowance of which is within the discretion of the Secretary of the Interior or the Commissioner of the General Land Office, the showing hereinbefore referred to must be furnished, irrespective of the date of filing of the application, entry, or selection, before favorable action is taken thereon.

This circular shall not apply, however, to selections or filings made in pursuance of grants which have been determined to be "Grants *in praesenti*," and to have attached and become effective prior to April 17, 1926, or to valid settlement claims initiated prior to said date and thereafter maintained in accordance with the law applicable thereto.

You will make proper notations on your records of this withdrawal in order that it may be considered in connection with any applications filed.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

R. S. COLLETT

Decided May 29, 1926

MINING CLAIM—EXPENDITURES—IMPROVEMENTS—CONTEST—PAYMENT.

A mining claimant who has satisfied the requirements of section 2325, Revised Statutes, except to make payment, is not required to make the annual expenditures during the pendency of adverse proceedings against his claim if he takes the necessary steps to complete his title at the first opportunity afforded him under the law and departmental practice after dismissal of the contest.

DEPARTMENTAL DECISIONS AND REGULATIONS CITED AND APPLIED.

Cases of *The Marburg Lode Mining Claim* (30 L. D. 202), and *Lucky Find Placer Claim* (32 L. D. 200), and Mining Regulations of April 11, 1922 (49 L. D. 15, 73), cited and applied.

FINNEY, *First Assistant Secretary:*

You [Hon. Don B. Colton, M. C.] have submitted, for my consideration, the letter of R. S. Collett, Hotel Savoy, Kansas City, Missouri, dated May 24, 1926, and addressed to yourself.

The facts upon which Mr. Collett desires advice are thus stated by him:

> During 1925, I completed the assessment work of $500 a claim on thirty-two of the Keeler group of oil shale claims and submitted proof on the thirty-two claims to the Vernal land office. I paid the Government price of $2.50 an acre on twenty-four of the thirty-two claims and obtained Register's Final Certificate for these. Then, when the Government contested the claims, I did not pay in the money on the other eight.

The gist of his inquiry is this: Under the circumstances, is it necessary that he make the required annual expenditures, as to the eight claims, pending proceedings by the Government?

The answer is, "No."

In the event that the contest is decided in his favor, payment will be effective to preserve Mr. Collett's rights, if made promptly upon notice of the closing of the case. *The Marburg Lode Mining Claim* (30 L. D. 202, 212); *Lucky Find Placer Claim* (32 L. D. 200, 202); Mining Regulations (Sec. 57, 49 L. D. 15, at p. 73).

Should the proceedings by the Government result in a decision that the claims, whether the twenty-four upon which payment has been made or the eight referred to, are invalid, all asserted possessory or other rights to the land would be terminated, under the provisions of section 37 of the act of February 25, 1920 (41 Stat. 437).

PACIFIC PORTLAND CEMENT COMPANY

Decided May 29, 1926

MILL SITE—REDUCTION WORKS—WORDS AND PHRASES—STATUTES.

A rock crusher or pulverizer, not shown to be connected with, or forming an essential part of the instrumentalities used in any process of reduction is not a "reduction works" within the meaning of the last clause of section 2337, Revised Statutes.

FINNEY, *First Assistant Secretary:*

The Pacific Portland Cement Company has appealed from the decisions of the Commissioner of the General Land Office of December 15, 1925, and March 6, 1926, holding for cancellation its mineral entry, Carson City series, 014935, made August 13, 1925, for the Empire Mill Site, situated in the SW. ¼, Sec. 31, unsurveyed, T. 31 N., R. 24 E., M. D. M.

The facts in the case appear to be as follows: The appellant company is owner of near-by patented placer locations containing valuable deposits of gypsum and has erected and in use an engine house, blacksmith shop, rock-crusher house, conveyer, tram or loading house, and a compressor house on the mill site alleged to have cost in all $100,000.

The appellant company is a manufacturer of Portland cement, and it is alleged that these improvements were installed on the mill site to properly develop, reduce, and prepare the said mineral deposits for practical utilization, and that the "reduction works" upon the mill site consist of a plant to grind, crush, or reduce a lump or mass of gypsum to a smaller size. The gypsum is then conveyed by an aerial tramway six miles to what the appellant characterizes as its main reduction plant. The nature of the reduction is not shown, nor what is reduced, nor what is the article or production that results from the process, nor what use, if any, the gypsum subserves in such process of reduction.

The law providing for the acquirement of title to a mill site is contained in section 2337, Revised Statutes, which provides that—

> 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 under this act 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.

The appellant company not being a proprietor of a vein or lode within the meaning of that statute, it must be determined whether the facts stated bring it within the last clause of the statute, or in other words whether the company has thereon a "quartz mill or reduction works."

That a quartz mill or reduction works is the only kind of improvement contemplated by the last clause of said section is clearly manifested by these improvements being distinctly named, and there being no mention of any other kinds of improvements whatever in said clause. *Le Neve Mill Site* (9 L. D. 460). It is obvious that none of the improvements named is a quartz mill. The appellant company, however, contends that the crusher which reduces the gypsum to a smaller size is a "reduction works." The words "reduc-

tion works" have a reasonably definite and well understood meaning in the mining and milling industry and it is believed that the Congress employed them in the mineral laws in the sense commonly understood in that connection among mining men. These words have been defined as "works for reducing metals from their ores, as a smelting works, cyanide plant, etc.," and the word "reduction" as (1) the act of removing oxygen, and (2) the process of separating metals from their ores. Glossary of Mining and Mineral Industry, Geological Survey Bulletin 95.

Assuming but not deciding that cases may arise in the progress and advancement of the mining and milling industry where structures and appliances used on land claimed as a mill site for the treatment of nonmetalliferous mineral rock and performing functions analogous to reduction works that separate metals from their ores, may be classed in some instances as "reduction works" under the last clause of the statute, nevertheless, the Department is convinced that in this case a rock crusher or rock pulverizer, not shown to be connected with, or forming an essential part of the instrumentalities used in any process of reduction is not a "reduction works" within the meaning of the statute. The Commissioner's decision is therefore affirmed.

It is, however, recognized that the appellant has made large and valuable improvements on the land in good faith and has occupied and used it in good faith for mining and milling purposes under a misconception as to the scope of the statute under which the claim is made. The Department will recognize a preferred right to initiate and perfect title by one who in good faith under color of title has taken possession, occupied, and improved public land under a misunderstanding of his legal rights. *A. R. Bowdrie* (50 L. D. 486.). The appellant has suggested that in the event the claim under the mill site is denied, permission be given to file applicable scrip to cover the land. The protection of appellant's equities appear to justify the Department in the exercise of its supervisory power to accord it reasonable time to procure scrip locatable on unsurveyed land and locate the same in accordance with applicable laws and regulations so as to cover and include the mill-site claim, provided all rights are relinquished thereunder and it is shown by a certificate of a proper custodian of the county land records that his record discloses no incumbrances upon the land, and it is otherwise free from adverse claims.

JAMES H. BARLOW

Decided June 2, 1926

WITHDRAWAL—HOMESTEAD ENTRY—WORDS AND PHRASES—COASTAL WATERS.

The term "coastal waters" as used in the Executive orders of December 8, 1924, and July 3, 1925, which withdrew certan lands and islands in the States of Alabama, Florida, and Mississippi, embraces not merely the waters that face the open sea, but the bays, the passages, the inlets, and the sounds formed by the islands that skirt the coast.

WORDS AND PHRASES—COASTAL WATERS.

The fact that the tide ebbs and flows in a river is not sufficient of itself to warrant the classifying of the river as "coastal waters."

FINNEY, *First Assistant Secretary:*

The Department has considered your [Commissioner of the General Land Office] letter ("C"-JTK) of May 19, 1926, requesting instructions as to the Executive orders of December 8, 1924, and July 3, 1925. With your letter you forwarded the homestead entry (Gainesville 020592) of James H. Barlow, made December 21, 1925, for SW. ¼ SW. ¼, Sec. 25, T. 2 N., R. 28 W., T. M., Florida.

The Executive order of December 8, 1924, withdrew "all islands belonging to the United States in Florida situated in the waters off the coast or in the coastal waters of the State," and the order of July 3, 1925, withdrew "all lands on the mainland within three miles of the coast in the States of Alabama, Florida, and Mississippi," except two described tracts, and "all islands in the States of Alabama and Mississippi situated in the waters off the coast or in the coastal waters of the said States."

Following the rulings of the various courts which have been called upon to adjudicate the meaning of "coast waters" as used in the act of March 3, 1885 (23 Stat. 438), adopting the revised international rules and regulations for preventing collisions at sea, "coastal waters" as used in the Executive orders referred to may be defined as embracing not merely the waters that face the open sea but the bays, the passages, the inlets, and the sounds formed by the islands that skirt the coast.

The entry of Barlow is located on Blackwater River, which empties into Blackwater Bay, which is connected with the Gulf of Mexico by St. Mary de Galves Bay, East Bay, and Pensacola Bay. The shore of Blackwater Bay is a part of the coast of Florida, and the bay at the point nearest the land in Barlow's entry is three miles distant. Hence the entry was properly allowed.

The fact that the tide ebbs and flows in a river is not sufficient of itself to warrant the classifying of the river as "coastal waters."

CHANGE OF ENTRY—ACT OF JANUARY 27, 1922, REPEALED—ACT OF MAY 21, 1926

INSTRUCTIONS

[Circular No. 1070]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 8, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

The act of May 21, 1926 (Public, No. 262), entitled "An Act To repeal the Act approved January 27, 1922, providing for change of entry, and for other purposes," reads as follows:

> That the Act of Congress approved January 27, 1922, entitled "An Act To amend section 2372 of the Revised Statutes," be and the same is hereby repealed: *Providing,* That any applications heretofore filed under the provisions of this Act, or any claim of which notice is filed within sixty days from the approval of this Act, upon which applications are presented within one year from the date of approval of this Act, may be perfected and patents issued therefor the same as if this Act had not been passed: *Provided further,* That when the selection in exchange fails for no fault on the part of the selector another selection in exchange may be made if filed within one year from notice to the selector of the rejection of the selection.

The present law repeals the act of January 27, 1922 (42 Stat. 359), authorizing changes of entry, except as to pending applications, and claims in which notice is filed within 60 days from the approval of the act, followed by selection within one year from the date of approval of the act, and claims where the selection fails for no fault of the selector, in which case a new selection may be made if the same is filed within one year from notice to the selector of the rejection of his selection.

The regulations governing applications under said act of January 27, 1922, are those of March 22, 1922, Circular No. 817 (48 L. D. 595), and your particular attention is called to paragraph 5 thereof which reads as follows:

> Applications should be suspended and transmitted to the General Land Office with the current monthly returns, and the applicants should be notified of such suspension. After consideration of the application, it will be submitted to the Secretary of the Interior with appropriate recommendations.

Said regulations have been added to by the administrative ruling of the Secretary of the Interior of December 2, 1924. See circular No. 967 of December 3, 1924 (50 L. D., 684).

All notices under the act of May 21, 1926, must identify the lands covered by the base entries from which changes of entries are contemplated by describing the lands by subdivision, section, township,

and range or by giving the number, date, and kind of entry and the land office where each entry was made. They may be filed direct in the General Land Office. Unless accompanied by applications for changes of entry to particular tracts of land, you should not assign serial numbers to the notices, but should stamp the date received thereon and promptly forward them to this office.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

UNITED STATES BORAX COMPANY

Decided June 8, 1926

MINING CLAIM—APEX—EVIDENCE—LAND DEPARTMENT—JURISDICTION.

Where the invalidity of a mining location is alleged and the ownership of the apex is a controlling fact in determining its validity the Land Department has jurisdiction to inquire as to whether the apex of the discovered vein is within the claim attacked.

MINING CLAIM—PATENT—APEX—DISCOVERY—ADVERSE CLAIM—EVIDENCE.

An applicant for a mineral patent can not be required to show affirmatively that the discovery he alleges is situated upon the apex of his vein in the absence of a positive allegation by an adverse claimant that the discovery alleged is on the dip of a vein that has been theretofore validly appropriated and has become the property of another.

MINING CLAIM—APEX—ADVERSE CLAIM—EVIDENCE—PRESUMPTION OF OWNERSHIP.

The presumption of ownership in the locator of all within his location lines throughout the entire depth will prevail until it is shown that the veins or lodes within the planes of his lines extended downward vertically have their apices in the surface of another's valid location thereby giving the latter a right to pursue them.

MINING CLAIM—PATENT—APEX—DISCOVERY—EVIDENCE—BURDEN OF PROOF.

For administrative purposes in determining the validity of an application for a mineral patent, it may be assumed, in the absence of a positive allegation and proof to the contrary, that the discovery upon which the applicant relies is upon a vein that has its apex within the claim, and if this assumption be challenged, the burden of proof will be upon the party raising the issue.

FINNEY, *First Assistant Secretary:*

On January 17, 1922, the United States Borax Company made mineral entry, Los Angeles series 034467, for the Slusser, Slusser

No. 2, Slusser No. 3, and Slusser No. 4, lode mining claims situate in Sec. 22, T. 11 N., R. 8 W., S. B. M., California. It is alleged in the application that the claims contain valuable deposits of borate of lime in veins of rock in place within well defined walls. Upon a report as to the character of the formation made by a mineral inspector, the Commissioner of the General Land Office, by decision of June 11, 1925, concluded that the lands should have been located as placer claims and required the claimant to show cause why the entry should not be canceled. The claimant company responded with a further showing which was referred to the local field division, resulting in a further examination and report by field examiners adhering to their former conclusion that the mineral deposit was in placer formation. The examiners, as a further objection to consideration of the claims as lodes, specified "that the work on the claims does not show where the apices of the veins lie—granting for the moment that the deposits may be considered as veins."

The Commissioner upon consideration of the conflicting views as to whether the deposit existed in veins or lodes or in other formation, on February 25, 1926, declined to vacate his previous order, but afforded the claimant opportunity to apply for a hearing to establish its contention that the claims were in a lode formation, stating in that connection, "and should it succeed at such hearing in proving its case, it will be necessary to also prove that the veins apex within the limits of the claims."

The claimant made due application for a hearing to determine the character of the formation within the claims, but has appealed from the requirement that at such hearing it establish that the veins apex within the limits of the claim. The errors specified are as follows:

1. In holding that at the hearing to be held to determine whether the claims are in lode or placer formation, "it will be necessary to also prove that the veins apex within the limits of the claims," such question forming no part of the charges of the inspector.

2. In attempting to usurp the functions of a court, in the determination of a question entirely outside the jurisdiction of the Land Department.

3. In attempting to determine a question which could not possibly arise unless and until a lode claimant seeks to follow his discovery vein on the dip, beyond the side lines of his claim, within the planes of his end lines, and into the land of some otheer mineral claimant, and then could arise only if the adjoining claimant feels agrieved, and seeks his remedy in a suit to enjoin the following of the vein on the dip into foreign ground, coupled with an allegation that the vein followed on the dip does not in fact have its apex in his opponent's claim, but does in fact apex in the invaded ground.

4. In not holding that the only requirement of the Federal law for a valid mineral location as predicate for patent proceedings, is "the discovery of the vein or lode within the limits of the claim located."

The first assignment of error is evidently based on mistaken information as to the charges preferred by the inspectors. It will therefore be passed without further consideration.

The action of the Commissioner in ordering a hearing is an interlocutory proceeding and as a general rule is not subject to appeal, but where it appears that the order involves matters not subject to inquiry by the Land Department, or is for any reason contrary to law or settled rulings of the Department, or is otherwise palpably erroneous, the same may be considered and corrected or wholly vacated when brought to the Department's attention. *P. Wolenberg* (29 L. D. 302).

The question presented is whether under the conditions shown in this case the mineral entryman should be required to establish as a condition prerequisite to the grant of a patent that veins or lodes discovered on the claims have their apex thereon. Evidently if this requirement is the imposition of a useless and unwarranted burden, as contended, the order should be rectified. From what is shown by both parties as to the character of the formation, the possibility may be anticipated that the evidence adduced at the hearing ordered may establish that the deposit is properly subject to location as a lode and yet not contained in veins having any dip or downward course; that is, that the deposit is in blanket formation sometimes termed broad lodes. It is the view of the Government's examiners that the deposit is horizontal and confined to a definable zone and consisting of either ulexite or colemanite in the form of nodules or lenses intermingled with clays regularly called shale, yet not in veins within defined walls. The entryman's contention is that the deposit exists in veins in rock in place with definite hanging and foot walls. The solution of these questions must await the development of facts at the hearing and should they compel the conclusion that the deposit is a lode in blanket formation, covering the entire limits of the claim, the existence of an actual apex would not be a material matter or, indeed, susceptible of proof, assuming such proof is necessary under any conditions disclosed. In the case of blanket lodes, the Department has held that the apex is coextensive with the side lines. *Homestake Mining Company* (29 L. D. 689, 690); *Jack Pot Lode Mining Claim* (34 L. D. 470); *Belligerent and Other Lode Mining Claims* (35 L. D. 22).

But assuming that the entryman proves that the deposit is a lode and occurs in veins within the several claims, must he then show that they apex there before the claims can be held valid and passed to patent?

It must be borne in mind that in this case it is not alleged that the apex of a discovered vein on the claim exists within the lode

claim of another, nor that the apex exists elsewhere than on the claim; on the contrary, doubt is expressed whether the mineral-bearing rock is a vein and has an apex.

The second assignment of error raises the question of jurisdiction of the Land Department to inquire whether the apex of the vein discovered is within the boundaries of the location. That question was presented in *Bunker Hill, etc., Co.* v. *Shoshone Mining Company* (33 L. D. 142). There the Bunker Hill Company filed a protest against the application for patent by the Shoshone Company to the Shoshone and Summit locations, alleging, among other grounds, that no discovery of a lode or vein had been made on either claim having its apex within the surface lines, and further, that the discoveries on these claims were made many feet below the surface on the dip or downward course of a vein the top or apex of which lies inside the Stemwinder claim, a valid location of the protestant. The Commissioner on charges presenting this issue ordered a hearing. The Bunker Hill Company contended that the Department had no jurisdiction to inquire whether a mining location is based upon a discovery on the dip or apex of the vein or lode. As to this contention the Department said (p. 148):

> If it be true that the Shoshone and Summit locations are based upon discoveries on the dip or downward course of a vein or lode whose top or apex lies inside the vertical lines of the prior Stemwinder claim, owned and possessed by the Bunker Hill Company, as alleged in the protest, there can be no serious question, in view of the provisions of the statute referred to and of the principles enounced in the authorities cited, that said locations were made without authority of law, are wholly illegal and void, and confer no rights upon the Shoshone company, claimant thereunder.

In that case *Biek et al* v. *Nickerson* (29 L. D. 662), cited by the appellant here in his brief, was distinguished. In the last case cited, Beik et al. protested against Nickerson's application for patent to the Rattlesnake claim, alleging they were owners of the Levant lode claim located in close proximity to the Rattlesnake and that the ledge contained in the Rattlesnake is the same as that running through the Levant, and the allowance of entry for the Rattlesnake would unjustly affect the extralateral rights of the protestants as owners of the Levant. It was held that the issuance of patents for the Rattlesnake would not be an adjudication as to any extralateral rights of the Levant claimants and the question was one purely for the courts. In the *Bunker Hill case*, *supra*, the Department pointed out that there was no allegation in Beik's protest that discovery had been made on the dip instead of the apex of the vein claimed under the Rattlesnake, or that it was void for want of a legal discovery, in that respect differing from the charges against the Summit and Shoshone claims.

The apex lode proprietor with a regular valid location is granted under section 2322, Revised Statutes, the right to pursue his vein on its downward course into and underneath the land adjoining. *Iron Silver Mining Company* v. *Cheesman* (116 U. S. 529); *Iron Silver Mining Company* v. *Elgin Mining Company* (118 U. S. 196); *Stewart Mining Company* v. *Ontario Mining Company* (237 U. S. 350, 359); Lindley on Mines, section 611. And that section withdraws from the grant made by the patent only such veins as others own and have a right to pursue. *St. Louis Mining etc. Co.* v. *Montana etc. Co.* (194 U. S. 235, 238). Plainly then Beik's protest was based upon a mistaken view of the law and alleged nothing affecting the validity of the application assailed. On the other hand, in the *Bunker Hill case*, *supra*, there was a definite allegation that the discovery was upon the dip of the vein that had been lawfully appropriated and was then property of another. The reason for the rule in the latter case was that the extra-lateral portion of the vein had been withdrawn from the public domain to the same extent as that portion of the vein within the surface boundaries. *Golden Link Mining, Leasing and Bonding Co.* (29 L. D. 384); Lindley on Mines, section 337, page 780. Where the invalidity of the location is alleged and the ownership of the apex is a controlling fact in determining the same, the Department under the ruling in the *Bunker Hill case* undoubtedly has jurisdiction to inquire as to whether the apex of the discovered vein is within the claim attacked. But the *Bunker Hill case* is not authority for a rule that an applicant for patent can be required to affirmatively show that the discovery he alleges is situated upon the apex of his vein in the absence of an adverse claim to such apex, or in the absence of a positive allegation that the apex is elsewhere than inside the claim boundaries. The presumption of ownership in the locator of all within his location lines throughout the entire depth prevails until it is shown that the veins or lodes within the planes of his lines extended downward vertically having their tops or apices in the surface of some other valid location, in such a way as to give the owner of the latter location the right to pursue them on their downward course. See section 4618, United States Compiled Statutes, note 35 and cases there cited; Costigan on Mining Law, section 113. In the case of *St. Louis Min. etc. Co.* v. *Montana etc. Co.*, *supra*, the court quoted with approval the expression of Judge Hawley in *Consolidated Wyoming G. M. Co.* v. *Champion Min. Co.* (63 Fed. 540) "Hands off of anything and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim."

In *Doe* v. *Waterloo Min. Co.* (54 Fed. 935), it was held that the mere possessor of a mining claim under license from the Govern-

ment would be entitled to this presumption. Of course it must yield to a showing that such mineral is part of the vein apexing in the claim belonging to another, *but this is always a matter of defense* (*Lawson* v. *United States Mining Co.*, 207 U. S. 1), and it has been held that this presumption is not overturned by speculative conjecture or intelligent guess made by mining experts. *Heinze* v. *B. & M. Consol. C. & S. Co.* (30 Montana 484; 77 Pac. 421); *Collins* v. *Bailey* (22 Colo. App. 149; 125 Pac. 543).

There is nothing in the requirements of the mining regulations (49 L. D. 15) discordant with the rule above stated. Regulation 8 prescribes that "no lode claim shall be located until after the discovery of a vein or lode within the limits of the claim." Regulation 9 declares that if the vein can not be traced upon the surface, the claimant must sink a shaft or run a tunnel or drift to sufficient depth to discovery or development of a mineral-bearing vein, lode or crevice and should determine if possible its general course. Regulation 38 relating to the surface and platting of the claim requires particulars shall be shown as to the direction of the vein, number of feet claimed on the vein in each direction from the point of discovery. Regulation 41 requires—

> * * * 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.

Not in these or in any other mining regulation is the applicant required to affirmatively show that his discovery is upon the apex of his vein. Furthermore, it has never been the practice of the Department to attack a discovery by adverse proceedings upon the ground that the discovery was not upon the apex of the vein disclosed, or to require such proof as an essential element in establishing the validity of the discovery. Many of the cases in the courts illustrate the difficulty and embarrassments that attend the proof that a vein has its apex within a certain location. It is the conclusion of the Department that for administrative purposes in determining the validity of a patent application, it may be assumed that the discovery upon which the applicant relies is upon a vein that has its apex within the claim for which patent is sought in the absence of a positive allegation and offer of proof to the contrary; and if such

allegation is forthcoming, the burden of proof in cases where inquiry is pertinent will be upon the party questioning the applicant's right to a patent.

The theory that a prior locator on the dip of a vein without any part of the apex being within his boundary may nevertheless be entitled to a patent to the claim and defend it against everyone except the owner of a location including the apex, which theory is predicated in the third assignment of error, finds some support in a number of adjudicated cases. The Supreme Courts of Nevada and Utah have held that there is a difference between a lode sufficient to validate a location and apex giving extralateral rights. *Golden* v. *Murphy* (31 Nev. 395; 103 Pac. 394); *Mammoth Min. Co.* v. *Grand Central Min. Co.* (29 Utah 490; 83 Pac. 648). On appeal, however, of the last cited case to the Supreme Court of the United States, that court did not find it necessary and expressly declined in upholding the decision to agree or disagree with this view. (213 U. S. 72, 77.) Leading text-writers on the mineral law have suggested instances and situations that may arise where the existence of the apex inside the lines of the claim would not be essential to the validity thereof at least as to intralimital rights. See Lindley on Mines, sections 312–a, 337, 364, 594; Costigan on Mining Law, sections 113, 114. And the Department in a case where a patented placer claim overlapped the assumed line of the apex of a subsequently located lode so as to divide the lode into two noncontiguous tracts, and where the vein of the lode claim having a part of its apex within the placer dipped under the lode outside of the placer boundaries, held that for the purpose of *discovery* and *purchase* under the mining laws, the legal apex of the lode "is that portion of the vein within the public lands which would constitute its actual apex, if the vein had no actual existence in the ground disposed of." *Woods* v. *Holden* (26 L. D. 198); on review (27 L. D. 375). This conclusion, however, flowed from the circumstance that the placer patentee had no right to pursue the vein outside his boundary into the lode, and from the view that the segment of the vein in the location was unappropriated mineral land of the United States and free and open to exploration and purchase under section 2319, Revised Statutes.

But whether the existence of the apex of the vein to some extent at least should be found within the limits of the claim as defined upon the surface is a condition precedent to the validity of the claim as well as to the enjoyment of the extralateral right, the Department does not feel called upon to determine in this case in view of the facts disclosed. It is clear there is no burden upon the applicant to make such showing and no specific charge that the apex is elsewhere than on the claim has been made. He is not therefore called

to meet such a charge. The decision therefore requiring the applicant to establish that the veins apex within the limits of the claim, is reversed and that requirement of the order vacated.

WALTER ALLISON VERNON

Decided June 8, 1926

PUBLIC LAND—HOMESTEAD ENTRY—WATER EXPLORATION PERMIT—SELECTION—FINAL PROOF—RECORDS—RESTORATIONS.

Land included in a water exploration permit under the act of October 22, 1919, but not selected for patent by the permittee, becomes subject to entry under section 2289, Revised Statutes, on the date that the acceptance of the final proof is noted on the records of the local office.

WATER EXPLORATION PERMIT—SEGREGATION—ENTRY.

Land embraced within a water exploration permit under the act of October 22, 1919, is segregated as effectually as though it were included in a valid entry.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Martin Judge* (49 L. D. 171), cited and applied.

FINNEY, *First Assistant Secretary.*

This is an appeal by Walter Allison Vernon from a decision of the Commissioner of the General Land Office, dated January 12, 1926, rejecting his application to make homestead entry for SE. ¼ SE. ¼, Sec. 25, N. ½ NE. ¼, Sec. 36, T. 21 S., R. 61 E., M. D. M., and NW. ¼ NW. ¼, Sec. 31, T. 21 S., R. 62 E., M. D. M., Nevada.

The application was filed December 29, 1925, and was rejected because of conflict with the permit granted to John E. Miller on August 30, 1921, under the act of October 22, 1919 (41 Stat. 293).

It appears that Miller submitted final proof on August 20, 1923, selecting for patent the SE. ¼, W. ½ NE. ¼, and E. ½ SW. ¼, Sec. 36, T. 21 S., R. 61 E., M. D. M. The final proof was rejected and the permit held for cancellation by the Commissioner of the General Land Office on April 11, 1924. Thereafter the Commissioner granted to Miller an extension of time to August 30, 1925. New final proof was submitted on October 21, 1925, selecting for patent the SE. ¼, E. ½ SW. ¼, and SW. ¼ NE. ¼, said Sec. 36. Under date of April 9, 1926, the Commissioner of the General Land Office accepted the final proof and directed that final certificate be issued for the 280 acres last described. The register was also directed to note the cancellation of the permit as to the area not embraced in the final certificate, which issued April 15, 1926.

If acceptable final proof is not submitted within the time fixed by the act of 1919 or within the extension of time granted pursuant to

the act of September 22, 1922 (42 Stat. 1012), the permit is canceled, and the land becomes subject to entry under any applicable public-land law, but if the final proof is acceptable, the area not selected for patent by the permittee becomes subject to entry only under section 2289, Revised Statutes. The regulations under the act, revised October 25, 1922 (49 L. D. 328), are silent as to the time when the area not selected for patent shall become subject to entry under section 2289, Revised Statutes, but the correct date is when a notation is made on the records of the local office that the final proof submitted by the permittee has been accepted.

Although the permittee, Miller, had submitted final proof, it had not been accepted when Vernon filed the application in question on December 29, 1925. It must therefore be held that the application was properly rejected.

It is contended on behalf of Vernon that the permit of Miller was fraudulent, in that it embraced a 40-acre subdivision surrounding a flowing well, which was flowing when the permit was applied for.

Land embraced in a permit such as Miller's is segregated as effectually as though included in a valid entry, and nothing is better settled than that an application to enter land covered by an entry will not be entertained. The rule has been extended to permits to prospect for oil and gas under the act of February 25, 1920 (41 Stat. 437). See *Martin Judge* (49 L. D. 171).

By telegram of June 2, 1926, the Department directed the register of the local office to refile the application. It is assumed that such direction was complied with.

No rights were acquired by Vernon through the filing of the application on December 29, 1925, but if no valid adverse claim intervened prior to the receipt of the telegram of June 2, 1926, the application may be allowed, in the absence of objection not now appearing.

The case is remanded for the action indicated.

VAL AHERN [1]

Decided April 27, 1926

DESERT LAND—ASSIGNMENT—CULTIVATION—RESIDENCE—JUDGMENT CREDITOR—EXECUTION.

The obligations of a desert-land entryman who obtains permission to perfect his entry pursuant to the act of March 4, 1915, are, with respect to residence and cultivation, personal and nonassignable, and it is beyond the power of a judgment creditor to substitute himself for the entryman through the levy of an execution upon the entry.

[1] See decision on rehearing, page 474.

FINNEY, *First Assistant Secretary:*

On December 10, 1912, Alphonso Murphy made desert-land entry, 017105, for the S. ½ SE. ¼, Sec. 21, and NE. ¼, N. ½ SE. ¼, Sec. 28, T. 6 N., R. 8 W., S. B. M., Los Angeles, California, land district.

After several extensions of time for making final proof the entryman made application for relief under the last two paragraphs of section 5 of the act of March 4, 1915 (38 Stat. 1138, 1161). This application was granted on November 12, 1923, notice to that effect was served upon the entryman on February 14, 1924, and on April 4, 1924, he announced his election to perfect the entry in the manner required of a homestead entryman.

On October 7, 1925, the constable of Los Angeles township attempted to levy an execution, issued under a judgment of the Justice's Court of that township, upon entry 017105, by serving the same upon the register of the local land office. Thereafter, the constable, in pursuance of his levy, attempted to sell at public auction all of Murphy's right, title, and interest in this entry to Val Ahern.

On October 21, 1925, Ahern filed in the local land office what purported to be an assignment to him of entry 017105, in which he stated that he claimed as an assignee by virtue of the constable's certificate of sale.

By decision dated November 17, 1925, the Commissioner declined to recognize Ahern as the assignee of Murphy. The Commissioner quoted paragraph 41 of desert-land circular No. 474 (50 L. D. 443) to the effect that after a desert-land entry has been authorized to be perfected in the manner of a homestead entry under the provisions of the act of March 4, 1915, *supra*, no assignment of the entry will be allowed.

Ahern has appealed to the Department. He contends that the Commissioner erred in holding that a desert-land entry can not be assigned after relief has been granted pursuant to section 5 of the said act of March 4, 1915. In the event that the Commissioner's construction of the act is held to be correct, the appellant contends that the relief granted under the act did not destroy the nature of the entry, which still remained a desert-land entry, but that the act merely conferred new and additional rights upon the entryman. From these premises he argues that the entry, still being a desert-land entry, was subject to execution and sale under a judgment against the entryman, and that he, as purchaser at the execution sale, is entitled to the status of assignee of Murphy's rights.

The Department does not concur in the appellant's views. Paragraph 41 of Circular No. 474 is conclusive against him in so far as he claims as the assignee of a desert-land entryman who has been authorized to perfect his entry in the manner prescribed by the homestead law.

When a desert-land entryman obtains permission under the act of March 4, 1915, *supra*, to perfect his entry in the manner required of a homestead entryman he assumes the same obligations with respect to residence and cultivation which would have been his had the entry been made under the homestead law. The discharge of these obligations is a personal duty of the entryman which can not be assigned to another person, either voluntarily or by operation of law, and it is beyond the power of a judgment creditor to substitute himself for the entryman in his relation to the Government, through the levy of an execution upon his entry.

The point raised by the appellant, that the entry still remains a desert-land entry even though it is to be perfected in the manner prescribed by the homestead law, is without force, as in any event the obligations assumed by the entryman involve a personal relation between the Government and himself which a judgment creditor can not terminate or disturb.

In addition to the above it is to be remembered that the entry here in question had not been perfected so as to become subject to execution.

The decision appealed from is affirmed.

VAL AHERN (ON REHEARING)

Decided June 16, 1926

DESERT LAND—JUDGMENT LIEN.

Lands in an unperfected desert-land entry are not subject to levy and sale under an execution to satisfy a judgment against the entryman.

DESERT LAND—ASSIGNMENT—STATUTES.

The benefits of the second and third paragraphs of section 5 of the act of March 4, 1915, as amended by the act of March 21, 1918, are not extended to assignees under assignments made after the latter date.

FINNEY, *First Assistant Secretary:*

By decision dated April 27, 1926 (51 L. D. 472), the Department affirmed the action of the Commissioner of the General Land Office refusing to recognize Val Ahern as assignee, by virtue of an execution sale of the desert-land entry of Alphonso Murphy.

Motion for rehearing has been filed, but upon due consideration thereof no reason is seen for disturbing the action heretofore taken. The Department has uniformly held that lands in unperfected desert entries are not subject to levy and sale under execution to satisfy judgments against the entryman. *Young* v. *Trumble et al.* (35 L. D. 515); paragraph 15, Regulations of May 20, 1924 (50 L. D. 443, 454).

Moreover, as pointed out in the prior decision, the benefits of the second and third paragraphs of section 5 of the act of March 4, 1915 (38 Stat. 1138, 1161), as amended by the act of March 21, 1918 (40 Stat. 458), are not extended to assignees under assignments made after the date of the amended act. To enforce this limitation no assignment of an entry which prior to the date of such assignment has been authorized to be perfected under either of said sections will be allowed.

The motion is denied.

SECTION 27 OF THE LEASING ACT OF FEBRUARY 25, 1920, AMENDED—ACT OF APRIL 30, 1926—ALL PRIOR INSTRUCTIONS IN CONFLICT MODIFIED

INSTRUCTIONS

[Circular No. 1073]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 18, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

By the act of April 30, 1926 (Public No. 157), section 27 of the leasing act of February 25, 1920 (41 Stat. 437), was amended so as to read as follows:

That no person, association, or corporation, except as herein provided, shall take or hold coal, phosphate, or sodium leases or permits during the life of such leases or permits in any one State exceeding in aggregate acreage 2,560 acres for each of said minerals; no person, association, or corporation shall take or hold at one time oil or gas leases or permits exceeding in the aggregate 7,680 acres granted hereunder in any one State, and not more than 2,560 acres within the geologic structure of the same producing oil or gas field; and no person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of mineral leases hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. Any interests held in violation of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property, or some part thereof, is located, except that any ownership or interest forbidden in this Act which may be acquired by descent, will,

judgment, or decree may be held for two years and not longer after its acquisition: *Provided*, That nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided further*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same: *And provided further*, That if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusted, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of, or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings.

In accordance with the provisions of said act, every applicant for coal or sodium permit, or coal, phosphate, or sodium lease must show that, with the area applied for, his or its interest or interests in such permits, leases, and other applications therefor, directly or indirectly, will not exceed in the aggregate 2,560 acres for each of said minerals in any one State.

Every applicant for oil or gas permit, lease, or for approval of assignment of any interest in such permit or lease must show that, with the area applied for, his or its interest or interests in such permits, leases, and other applications therefor, directly and indirectly, will not exceed in the aggregate 7,680 acres in any one State and not more than 2,560 acres within the geologic structure of the same producing oil or gas field, together with a full disclosure, nature, and extent of his or its other holdings with identification of the records where such interests may be found.

The act of April 30, 1926, applies to the Territory of Alaska in so far as it allows an applicant to hold direct and indirect interests not exceeding in the aggregate 2,560 acres on the same geologic structure, but such applicant may not take or hold more than five permits and leases within the geologic structure of the same producing oil or gas field, nor more than five in said Territory.

Within the limitations herein stated, assignments of any interest in permits or leases should be submitted for approval, accompanied by the necessary papers and showing of the qualifications of the assignee.

Drilling contracts and operating agreements entered into by holders of prospecting permits should not be submitted for approval unless and until discovery is made and application for lease filed, at which time all such contracts must be disclosed. If the contract carries with it a right or interest in the proceeds or in the permit or lease to be issued thereunder, the contractor must then show his qualifications to take the interest so acquired.

Prior to discovery on oil and gas permits, drilling contracts and operating agreements or copies thereof, filed in connection with applications for extensions of time, will usually be considered only for the purpose of determining whether the permittees have exercised diligence and are entitled to the extensions of time applied for.

In computing the area held by any person, association, or corporation, only those interests which are represented in applications for permits, for leases, and for approval of assignments of any interest in permits or leases, and those interests held or recognized in permits or leases granted or assignments approved, will be considered.

All instructions and regulations in conflict herewith are hereby modified so as to conform hereto.

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.

NEAL v. NEWTON ET AL.

Decided June 18, 1926

HOMESTEAD ENTRY—PATENT—RESERVATION—MINERAL LANDS—OIL AND GAS LANDS—PROSPECTING PERMIT—STATUTES.

The issuance of a patent for lands entered as agricultural pursuant to the act of July 17, 1914, containing a reservation of mineral other than that on account of which the lands were withdrawn or classified or reported as valuable, is without authority of law and ineffective to reserve deposits of such mineral, if there be any, in the lands patented.

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—RESERVATION—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY—GEOLOGICAL SURVEY.

Under the discretionary authority conferred upon the Secretary of the Interior by the act of February 25, 1920, in granting prospecting permits under section 13 of that act, a permit to prospect lands embraced within an agricultural entry made without reservation of oil and gas contents will be denied when it appears, on report from the Geological Survey, that the lands are without prospective value for these minerals.

FINNEY, *First Assistant Secretary:*

On March 22, 1924, Charles J. Neal filed application 09600 for a permit under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon certain lands in T. 3 S., R. 21 E., S. L. M., Vernal, Utah, land district, including the E. ½ NW. ¼, SW. ¼ NW. ¼, SW. ¼, Sec. 20, and NE. ¼ SW. ¼, Sec. 27.

By decision of May 11, 1925, the Commissioner of the General Land Office held the application for rejection as to the NE. ¼ SW. ¼, Sec. 27, on the ground that the Geological Survey had reported that the land had no prospective value for oil or gas. The Commissioner said in that decision—

The NE. ¼ SW. ¼, Sec. 27, is embraced in homestead entry 08191 filed May 23, 1919, by S. Isaac Newton. It appears that the lands were included in Phosphate Reserve No. 24, Executive order of May 11, 1915, and the entryman was required to amend his application subject to the provisions of the act of July 17, 1914 (38 Stat. 509), which he did.

In response to said decision Neal filed a showing, including the report of a geologist. The record was forwarded to the Geological Survey for consideration and further report. On October 28, 1925, the Director of that bureau made a report as follows:

Available data including the showing filed on behalf of the oil and gas permit applicant and the results of a field examination of the involved land by the Geological Survey on August 15 and 16, 1925, disclose no geological basis for modification or reversal of the classification of this land reported to your office under date of April 14, 1925.

According to the observations of the Survey geologist the subdivision is situated on the rise of a structural terrace developed on the south flank of the Uinta Mountain uplift, and its surface is occupied by the Nugget sandstone of Jurassic age, dipping southeastward at an angle of about 15 degrees. Underlying the Nugget, which is about 900 feet thick, are some 1,100 feet of Triassic Red Beds succeeded downward by 450 feet of calcareous shale, cherty limestone, and phosphate beds of Permian age resting on many hundred feet of quartzite of Pennsylvanian age. These formations crop out successively to the north of this land on the Uinta front dipping southward at angles of 8 to 25 degrees and disclose no evidence of dip reversal or of repetition by faulting between their outcrops and the subdivision in question. The structural conditions involved are, therefore, regarded as wholly unfavorable to oil or gas accumulation in paying quantities. Furthermore the nature of the sediments between the Nugget sandstone and the Pennsylvanian quartzite is such as to preclude their consideration as likely places in which oil or gas might have originated.

In my opinion the geological conditions affecting the land listed provide no basis for that reasonable hope of success which is regarded as prerequisite to the prudent expenditure of time and capital in *bona fide* drilling for oil and gas within the area.

By decision dated November 9, 1925, the Commissioner again held Neal's application for rejection as to the NE. ¼ SW. ¼, Sec. 27, and from that action Neal has appealed, alleging errors as follows:

First: In basing said decision upon a report of the Geological Survey, to the effect that the tract of land involved possesses no probable value for oil or gas, there being on file a carefully prepared report by a competent geologist to the effect that the land in question does possess a prospective value for oil or gas.

Second: In basing such action upon the fact of the existence of the homestead entry, this entry being made under the provisions of the act of July 17, 1914 (38 Stat. 509).

Third: In denying the right to permit upon an examination by the Geological Survey, and giving report on such examination the effect of an absolute fact.

Counsel for Neal also requested that a permit be issued for the other tracts, with the understanding that a supplemental permit should issue for the tract here involved if the matter should eventually be decided in his favor.

In a letter dated January 8, 1926, the Commissioner directed that Neal be called upon to furnish a $2,000 bond. He said—

The E. ½ NW. ¼, SW. ¼ NW. ¼, SW. ¼, Sec. 20, is embraced in homestead entry 08184, filed May 10, 1919, by David L. Hall and patented November 17, 1925, subject to the provisions of the act of July 17, 1914 (38 Stat. 509).

Neal furnished a bond in the sum of $2,000, as required, but the matter requires further consideration.

It is found upon investigation that on May 16, 1922, David L. Hall was allowed to make enlarged homestead entry 08184 for the SE. ¼ SW. ¼, Sec. 17, E. ½ NW. ¼, SW. ¼ NW. ¼, SW. ¼, Sec. 20, said township (as amended), subject to the provisions and reservations of the act of July 17, 1914, *supra*. Final proof was submitted and final certificate was issued on July 22, 1925.

On March 24, 1924, William M. Anderson filed application 09602 for an oil and gas prospecting permit for the S. ½, Sec. 17, said township, and other lands. By decision of April 25, 1925, the Commissioner held the application for rejection as to the SE. ¼ SW. ¼, Sec. 17, on the ground that on the 14th of that month the Director of the Geological Survey reported that available evidence indicated that the land in Hall's entry had no prospective value for oil or gas. A permit was issued to Anderson after elimination of the conflicting tract.

On Hill's final certificate there is a notation as follows:

Patent to contain provisions, reservations, conditions, and limitations of the act of July 17, 1914 (38 Stat. 509), as to phosphate as to all and oil and gas as to E. ½ SW. ¼, E. ½ NW. ¼, SW. ¼ NW. ¼, W. ½ SW. ¼, Sec. 20.

It is further shown that patent was issued on November 17, 1925, with phosphate and oil and gas reservations as noted on the final certificate.

It seems to have been erroneously assumed in the General Land Office that the Geological Survey had reported that prospecting for oil and gas should not be denied on Hall's homestead. The report in connection with Anderson's application was evidently wholly overlooked. The only withdrawal upon which a reservation of mineral under the act of July 17, 1914, was based was one for phosphate. Hall was never called upon to consent to any waiver of rights to oil and gas, and the issuance of patent with such reservation was wholly without authority of law. Upon request by the Department the Director of the Geological Survey has on June 5, 1926, reported on the NE. ¼ NW. ¼, S. ½ NW. ¼, SW. ¼, said Sec. 20, as follows:

On the basis of geological data resulting from a special field examination of the so-called "Neal Dome" on August 15 and 16, 1925, the Geological Survey adheres to its report of April 14, 1925 (Vernal 09602), classifying the land listed as without prospective oil or gas value within the intent of paragraph 12 (*c*) of the oil and gas regulations.

With regard to stratigraphic conditions involved and to the conclusion expressed, my report of October 28, 1925 (Vernal 09600), relative to the NE. ¼ of SW. ¼, Sec. 27, of this township, applies equally to the land now under consideration. The structural situation of the subdivisions in Sec. 20 is, however, slightly different in consequence of faulting along northwest-southeast lines which has broken the strata into narrow blocks and tilted them in diverse directions without providing conditions favorable to the accumulation and retention of oil or gas. As previously reported the formations underlying the Nugget sandstone in this area are without geological promise as sources of oil or gas.

The act of July 17, 1914, provides for the appropriation, location, selection, entry, or purchase under the nonmineral land laws of lands with a reservation to the United States *of the deposits on account of which the lands were withdrawn or classified or reported as valuable.* Said act also provides that patents for such lands 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.

Here there was a withdrawal for phosphate, but none on account of oil or gas. The Geological Survey has clearly shown there is no ground for believing the land to have any prospective value for oil or gas.

Under the act of February 25, 1920, *supra*, the granting of a prospecting permit for oil or gas is discretionary with the Secretary of the Interior (47 L. D. 437, 438). If the Department finds, on report from the Geological Survey, that land embraced in an entry *without a reservation* of the oil and gas content to the Government is without prospective value for oil or gas, any application for prospecting permit for such land will be rejected (47 L. D. 437, 444, 445).

Neal's application is rejected as to the NE. ¼ SW. ¼, Sec. 27, in affirmance of the decision appealed from. Said application is also finally rejected as to the E. ½ NW. ¼, SW. ¼ NW. ¼, and SW. ¼, Sec. 20, and the case is closed as to Neal and Newton.

It is directed that the patent to Hall be recalled and canceled and that another patent be issued without reservation of oil or gas, but reserving the phosphate.

The records are herewith returned to the General Land Office.

H. A. SCOTFORD

Opinion, June 21, 1926

SURVEY—COMMISSIONER OF THE GENERAL LAND OFFICE—WISCONSIN—STATUTES.

Within the contemplation of the act of August 22, 1912, granting to the State of Wisconsin certain islands therein, lands are unsurveyed until the survey thereof shall have been approved by the Commissioner of the General Land Office.

WORDS AND PHRASES—ISLAND—ADVERSE CLAIM—STATUTES.

In the sense of physical detachment the term island is complete in itself without the additional word "unattached"; Query: Does the word "unattached" as used in the act of August 22, 1912, have reference to lands free from adverse claims?

FINNEY, *First Assistant Secretary:*

Reference is made to your [Commissioner of the General Land Office] letter "C" of June 12, 1926, asking whether in view of present information the ruling by the Department under date of November 19, 1912, in respect to the title to certain islands in the State of Wisconsin should be adhered to.

The question presented involves the construction of the act of August 22, 1912 (37 Stat. 324), which provides—

> That the unsurveyed and unattached islands in inland lakes north of the township line between townships thirty-three and thirty-four north, in the State of Wisconsin, be, and the same are hereby, granted to the State of Wisconsin as additions to that State's forest reserves. The islands hereby granted shall be used as additions to the forest reserves only, and should the State of Wisconsin abandon the use of said islands for such purpose the same shall revert to the United States.

In the former ruling the Department addressed itself merely to the question whether the islands there considered were to be regarded as surveyed, it being shown that they had been surveyed in the field prior to the date of the grant to the State but the survey had not been approved. It was held that they had the status of unsurveyed lands, citing 37 L. D. 390 and 40 L. D. 284, to the effect that lands are not regarded as surveyed until the survey has been approved in due form, and for that reason it was held that the said islands passed to the State under the grant.

The record now submitted shows that H. A. Scotford made application for the survey of an island in Clam Lake in Sec. 31, T. 43 N., R. 4 W., 4th P. M., Wisconsin, which application was approved by the Department May 3, 1907. The survey was completed in the field on August 11, 1911, and the plat was approved January 3, 1913. By letter of January 13, 1913, the Commissioner of the General Land Office advised Scotford of the said ruling by the Department dated November 19, 1912, and that no entry of the island would be allowed. The commissioner of public lands of the State of Wisconsin was similarly advised on the same date.

It is further stated that Scotford settled on said island about the year 1905, and has occupied the same since that time as a home and has placed valuable improvements thereon. The correspondence from the office of the commissioner of public lands of the State indicates that Scotford took some steps to adjust his claim through the legislature of the State but dropped that effort when he was persuaded by the State forester to do so with the understanding that he could have a lease giving him the use of the land during his lifetime, and that he has since then so occupied the premises. This arrangement, however, was interfered with by the act of the legislature approved June 25, 1925, providing that thereafter no lease should be issued, nor any existing lease extended or renewed in respect to any island granted to the State by the said act of August 22, 1912.

In view of this complication the commissioner of public lands of the State has asked for information as to the record evidence of Mr. Scotford's claim with the view to a decision as to the ownership of the island. There is a statement by Scotford in the record that he had never used his homestead right and it is indicated that he may have had a good settlement claim to the land at the time of the grant to the State. Assuming that he had such a settlement and that he was qualified in all respects to make entry, the question arises whether the grant nevertheless attached.

The former ruling in respect to the uncompleted condition of the survey at the time of the grant is in harmony with well-settled depart-

mental practice and court decisions. Accordingly the Department adheres to the view that the land was unsurveyed at the time of the grant. The further qualifying term employed in the grant is the word "unattached." Only unsurveyed and *unattached* islands passed to the State. In the sense of physical detachment, the term "island" is complete in itself without the additional word "unattached." In fact if attached or adjoined to the mainland the tract would not be an island.

Another well-understood meaning of the word "unattached" as applied in legislation and procedure appertaining to public lands has reference to the status of lands in respect to adverse claims therefor or interests therein. Conceding that Scotford's claim had not ripened into a vested right, there is still room for reasonable contention that it was not intended to destroy such a claim by the grant in question. It would appear fairly permissible to construe the term "unattached islands" as meaning such of them as were free from valid adverse claim. It must be understood, however, that the Department is not committed to that view, and the question must be left open for decision in case the point should be made an issue between the State and an adverse claimant.

If Scotford should file application to make entry it should be entertained for the purpose of adjudication. A copy of this letter should be furnished to him and also to the commissioner of public lands of the State. In case Scotford should make such application the State will then be accorded opportunity to show cause, if any, why the entry should not be allowed, and if issue be joined the case will be adjudicated in the regular course of procedure. And if the State shall fail to show cause to the contrary the entry will be allowed in the absence of other sufficient objection.

ADMINISTRATION OF OATHS BY ACTING REGISTERS

INSTRUCTIONS

[Circular No. 1074]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 24, 1926.

REGISTERS AND ACTING REGISTERS, UNITED STATES LAND OFFICES

By act of May 17, 1926 (44 Stat. 558), provision has been made for acting registers of district land offices to administer oaths at any time in public land matters. The act reads as follows:

That a qualified employee of the Department of the Interior who has been designated to act as register of any United States land office pursuant to the provisions of the act of October 28, 1921, "An Act for the consolidation of the

offices of register and receiver in certain cases and for other purposes" (Forty-second Statutes at Large, page 208), may at all times administer any oath required by law or the instructions of the General Land Office in connection with the entry or purchase of any tract of public land, but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

The intent and purpose of the act is to avoid delay and inconvenience to public land claimants by having some one in the land office at all times who is authorized to administer oaths in public land cases. Under the provisions of the act the acting register may administer oaths at any time, whether the register is present or absent, and no report is required to be made to this office when he performs such service, but nothing contained therein shall be construed to permit the acting register to perform any other duties required to be performed solely by the register when the latter official is on duty, nor to relieve the acting register from the duty of reporting to this office the same as heretofore the exact date and hour of the beginning and termination of his service as acting register at such times as the register may be absent from the office for a day or longer.

The act does not in any way relieve the register of his responsibility for the proper performance of the duties imposed upon him by law, and it is not expected that he will permit private interests to interfere with his active attention to official business, and he is expected to remain on duty at all times except when absent on leave previously granted by this office.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

FEES OF WITNESSES IN PUBLIC-LAND HEARINGS

INSTRUCTIONS

[Circular No. 1075]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 29, 1926.

DIVISION INSPECTORS, INSPECTORS AND REGISTERS:

Section 2 of the act of January 31, 1903 (32 Stat. 790), provides as to witnesses in land hearings that—

* * * The fees and mileage of witnesses shall be the same as that provided by law in the district courts of the United States in the district in which such land offices are situated.

Heretofore certain distinction has been made between allowances to witnesses in western States and in eastern States, but such differ-

ence is eliminated by the act of April 26, 1926 (44 Stat. 323), section 3 of which provides—

Witnesses attending in such courts, or before such commissioners, shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same $2, and 5 cents per mile for going from his or her place of residence to the place of trial or hearing and 5 cents per mile for returning: *And provided further*, That witnesses (other than witnesses who are salaried employees of the Government and detained witnesses) * * * who attend * * * at points so far removed from their respective residences as to prohibit return thereto from day to day, shall, when this fact is certified to in the order of the court or the commissioner for payment, be entitled, in addition to the compensation provided by existing law, as modified by this Act, to a per diem of $3 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to attend court and return home.

The Comptroller General in a decision dated June 21, 1926 (5 Comp. Gen. 1003), holds—

* * * that witnesses in land hearing cases may be paid the per diem for expenses of subsistence under the same circumstances and conditions as are prescribed in the statute with respect to witnesses attending United States courts or commissioners, the certification as to the existence of such circumstances and conditions to be by the officer in charge of the hearing.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

RIGHTS OF WAY OVER PUBLIC LANDS AND RESERVATIONS—CIRCULAR OF JUNE 6, 1908 (36 L. D. 567), AMENDED

INSTRUCTIONS

[Circular No. 1076]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 8, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

Your attention is called to an act of Congress which reads as follows:

(Public No. 302—69th Congress—44 Stat. 668)

An Act To amend section 18 of the Irrigation Act of March 3, 1891, as amended by the Act of March 4, 1917.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 18 of what is generally known as the Irrigation Act of March 3, 1891, as amended by act of March 4, 1917, be, and is hereby, amended so as to read as follows:

"SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, or, if not a private corporation, a copy of the law under which the same is formed and due proof of its organization under the same, to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation of the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." Approved, May 28, 1926.

Apart and aside from extending the scope of the granting act so to include irrigation and drainage districts as beneficiaries, it will be noted that this act authorizes right of way, if needs be, additional to the 50 feet granted by the act of March 3, 1891 (26 Stat. 1095). To obtain such additional right of way, explanatory showing must accompany the application. This should consist of an affidavit by the applicant's engineer or surveyor setting forth succinctly the extent of the additional right of way required and the necessity therefor. The additional right of way should also be shown graphically by lateral limit lines on the map filed in connection with the application. If additional right of way is wanted only for portions or sections of the reservoirs, canals, ditches, or laterals, the termini thereof should be fixed by engineer's survey stations in addition to the lateral limit lines.

This circular should be assembled on page 2 of the circular of June 6, 1908 (36 L. D. 567), as an addendum to paragraph 2 of said circular.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

RIGHT OF LAND-GRANT RAILROAD COMPANIES TO LIST LESS THAN A LEGAL SUBDIVISION

INSTRUCTIONS

[Circular No. 1077]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 9, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

By a decision of the Court of Appeals of the District of Columbia in the case of *Work* v. *Central Pacific Railway Company* (12 Fed., 2nd series, 834), involving primary list, Elko 02291, it was held that under the acts making a grant of lands to the company, title to all the nonmineral lands in the odd-numbered sections within the primary limits of the grant vested in the company, no other objection appearing, irrespective of the fact that such nonmineral land constitutes only a part of a quarter quarter of a section, or of a lot. This reverses the previous rulings of the Department, in so far as they relate to primary lands, that, as a legal subdivision could not be divided, if any part thereof was mineral all the subdivision was impressed with a mineral character and excepted from the grant.

You will, therefore, hereafter accept a listing of primary lands by a land-grant railroad company for less than a legal subdivision, provided it is for all the nonmineral land in such subdivision, the company makes an affirmative showing as to the mineral character of the remaining land in the subdivision, and no other objection appears.

If the listing can be by aliquot parts of a subdivision, such as the NE. ¼ of NE. ¼ of NE. ¼ (10 acres), or S. ½ of NE. ¼ of NE. ¼ (20 acres), a survey to seggregate the nonmineral from the mineral land would be avoided. If a survey is necessary, the company will be required to pay for the execution thereof.

The court further held that as to indemnity lands the rulings of the Department that such lands must be selected in accordance with the legal subdivisions shown by the plats of survey officially filed was reasonable and proper and must be complied with.

A legal subdivision of indemnity lands, therefore, can not be subdivided but must be selected, and its character and status determined as a whole, except as provided for in 49 L. D. 250 and 303, and 50 L. D. 577, which still remain applicable to indemnity lands.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

PURCHASE OF PUBLIC LAND IN NEW MEXICO HELD UNDER CLAIM OR COLOR OF TITLE—ACT OF JUNE 8, 1926

INSTRUCTIONS

[Circular No. 1079] [1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 13, 1926.

REGISTERS, UNITED STATES LAND OFFICES,
SANTA FE AND LAS CRUCES, NEW MEXICO:

Your attention is called to the act of Congress approved June 8, 1926 (44 Stat. 709), entitled "An Act To authorize the Secretary of the Interior to issue patents for lands held under color of title," which provides—

> That whenever it shall be shown to the satisfaction of the Secretary of the Interior that a tract or tracts of public land, not known to be mineral, in the State of New Mexico, not exceeding in the aggregate one hundred and sixty acres, has or have been held in good faith and in peaceful, adverse possession by a citizen of the United States, his ancestors or grantors, for more than twenty years under claim or color of title, and that valuable improvements have been placed on such land, or some part thereof has been reduced to cultivation, the Secretary may, in his discretion, upon the payment of $1.25 per acre, cause a patent or patents to issue for such land to any such citizen: *Provided*, That where the area or areas so held by any such citizen is in excess of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres in the aggregate, to any such citizen may be patented hereunder: *Provided further*, That the term "citizen" as used herein shall be held to include a corporation organized under the laws of the United States or any State or Territory thereof.

This act authorizes the Secretary of the Interior in his discretion to issue patents for not more than 160 acres of land in New Mexico to citizens of the United States who have or whose ancestors or grantors have held the land peaceably and adversely for more than 20 years under claim or color of title upon payment for the land at the rate of $1.25 per acre.

Only claims for surveyed land will be recognized under the provisions of this act. If a tract is shown on the plat of survey as included in a private land or small holding claim, the designation thereof must be shown as public land on an official plat of survey before an entry under this act can be allowed. If unsurveyed land is claimed, the filing of such claim should be deferred until the land has been surveyed.

Persons applying for patent under the provisions of this act must file a nonmineral affidavit. They must show by affidavit that their

[1] Modified by Circular No. 1097, September 29, 1926, page 598.

possession, or the possession of their ancestors or grantors, for the 20 years next preceding the filing of the claim has been peaceful and adverse by setting forth the facts of the possession and not merely the conclusions. If improvements have been placed upon the land, the nature and value thereof should be set forth, together with the time of their construction, and cost, and by whom constructed. If any of the land has been reduced to cultivation, the amount of land claimed so reduced, when it was so reduced, and the nature of the cultivation should be set forth.

In making proof the claimant will be required to make affidavits setting forth the names of all the mesne possessors of the land, periods held by each, giving the exact dates and how each possessor acquired possession of the land; the date the claimant took possession of the land, how he acquired possession thereof, and the manner in which each of the possessors has maintained possession of the land. If documentary evidence of title of the claimant is in existence, such documents or duly authenticated copies thereof must be produced and filed with the proof.

If the claimant is a natural person, the affidavit should set forth whether the claimant is a male or a female, and whether the claimant is a native-born or a naturalized citizen of the United States. If claimant is a female, the affidavit should set forth whether she is married or single, and, if married, the date of her marriage and the facts concerning her husband's citizenship. If the claimant is a naturalized citizen of the United States, a certified copy of the certificate of naturalization should be filed. In case the land is claimed by a corporation, a certified copy of the articles of incorporation should be filed.

The said act does not contemplate the recognition of any claim for more than 160 acres (or approximately that area under the rule of approximation), and no person claiming more than approximately 160 acres will be permitted by transfer of portions of the land claimed to secure recognition of his claim, through himself and his grantees, for more land in the aggregate than he could purchase in his own name. It must be shown in each case that the land claimed is not part of a claim which embraced more than approximately 160 acres on June 8, 1926, or if the land claimed is part of such a larger claim the full facts relative thereto must be shown.

The claimant must in each case show whether or not he has filed any other claim under the said act, and if he has filed another claim he must identify it.

Every material fact stated in the claimant's affidavit or proof 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 knowledge of the facts.

The register will require any claimant, under the provisions of this act, to publish notice of intention to submit proof on his application to purchase under the same terms and restrictions as govern publications in homestead cases, following the same form with such necessary alterations as will indicate the claim and kind of the proof submitted. In all cases in which the claims are situated in sections that have been granted to the State for school purposes, the claimant will 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 service at the time of making proof.

When such proof has been made the register will examine the same in each case, and if satisfied that the provisions of the act have been complied with will issue final certificate thereon in duplicate on the usual form with such codifications as will 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 considering the said proof, the register should be of the opinion that it does not meet the requirements of the act, he will reject it, allowing an appeal to this office.

The proof required by these instructions must be made before the register or one of the officers authorized to take proof in homestead cases.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

EXTENSION OF TIME FOR PAYMENTS ON CROW INDIAN LANDS

INSTRUCTIONS

[Circular No. 1080]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 14, 1926.

REGISTER, BILLINGS, MONTANA:

The President's proclamation issued June 5, 1926, providing for a further extension of time for payment by purchasers and entrymen under the President's proclamations of September 28, 1914 (38 Stat. 2029) and April 6, 1917 (39 Stat. 1653), of lands in the ceded portion of the Crow Indian Reservation, Montana, directs—

That any purchaser or entryman of lands within said former reservation who is unable to pay the purchase money due under his purchase or entry

made under the said proclamation of September 28, 1914, or the said proclamation of April 6, 1917, and who has complied with the provisions of the proclamation of June 9, 1924, upon filing in the local land office an affidavit corroborated by two persons setting out his inability to make the required payment of principal and satisfactory reasons therefor shall be granted an extension of time until the 1927 anniversary of the date of his entry or purchase, upon the payment to the Register of the district land office of interest at the rate of five per cent per annum on the amounts extended from the maturities thereof to the expiration of the period of extension. The district land office will promptly notify all purchasers and entrymen entitled to the extension of the manner in which it may be obtained. If the affidavit is not filed and the interest paid within 30 days from receipt of notice, or if, within such time, the amounts in arrears are not paid in full, 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 said proclamation the following regulations are prescribed:

1. The said proclamation of September 28, 1914, provided that one-third of the price of the land must be paid when the entry or purchase is made. In case of a purchase, the balance of the price must be paid in two equal payments, one year and two years thereafter, and in case of an entry in two equal payments, three years and four years thereafter, unless paid sooner. The said proclamation of April 6, 1917, provided 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. By President's proclamations of May 5, 1920 (41 Stat. 1793), August 11, 1921 (42 Stat. 2246), July 10, 1922 (42 Stat. 2281), December 18, 1923 (43 Stat. 1931), and June 9, 1924 (43 Stat. 1955), extensions of time were allowed until the 1925 anniversaries of the dates of the purchases and entries made under the said proclamations of September 28, 1914, and April 6, 1917. Under the present proclamation, an extension of time to the 1927 anniversaries of said purchases and entries may be secured under the conditions specified therein only by those purchasers and entrymen who have complied with the provisions of the proclamation of June 9, 1924.

2. Within 30 days from receipt of notice to be given by you immediately, any purchaser or entryman whose payments both of principal and interest are in default at the time of such receipt must pay in full the amounts due; any purchaser or entryman whose payments of principal only are in default at the time of such receipt either must pay in full the amounts due or he may file in your office a corroborated affidavit setting out his inability to do so, and the reasons therefor, accompanied by interest at the rate of 5 per cent per annum on the amounts for which an extension is sought.

3. The time for any payment can not be extended to a date beyond the 1927 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 extension will be allowed unless the affidavit and interest as herein required are transmitted to your office within the time allowed.

You will forward a copy of these instructions to each purchaser or entryman who is affected thereby advising him that in order to secure the benefits of said proclamation he must comply with its requirements as herein explained, and that in the event of his failure to take such action within the time allowed, the purchase or entry will be reported for cancellation and forfeiture of payments without further notice to him.

In those cases where an extension of time may be obtained, should a satisfactory affidavit be filed and the required interest paid, you will stamp the affidavit "Allowed" and transmit with your regular returns. You will in due time report the cases in which no action has been taken, transmitting evidence of service of notice.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

FISHER v. WINTER

Decided July 15, 1926

STOCK-RAISING HOMESTEAD—CONTEST—IMPROVEMENTS—LAND DEPARTMENT—STATUTES.

The provision in section 3 of the stock-raising homestead act that one-half of the required improvements be placed upon the land within three years from the date of the entry is merely directory, not mandatory, and failure strictly to comply therewith does not preclude the Land Department from refusing to cancel the entry upon contest proceedings where the entryman has been in good faith in his endeavor to comply with the law.

PRIOR DEPARTMENTAL DECISION CITED AND CONSTRUED.

Case of *Albert T. Hall* (50 L. D. 613), cited and construed.

FINNEY, *First Assistant Secretary:*

This is an appeal by George H. Winter from decision of the Commissioner of the General Land Office dated February 16, 1926, holding his stock-raising homestead entry for cancellation on the contest of Homer Fisher.

The entry was made August 27, 1921, and embraces all of Sec. 18, T. 2 N., R. 2 E., S. L. M., containing 594.40 acres, Salt Lake City land district, Utah. Fisher filed contest affidavit July 27, 1925, charging—

> That said entryman has failed to spend or cause to be spent on the lands in question 62½ cents per acre, tending to improve same for grazing purposes during the first three years since date of entry, or at all, and has made no improvements on said land whatsoever, with the exception of the log cabin, and covered one spring with aspen poles and cut the brush from a small trail. The covering of said spring and the cutting of brush would not exceed a value of $20, including material and labor, and no other improvements have been made on said land by said entryman, and said failure to make the following improvements was not due to any military, naval, marine, or other service of the United States.

Notice of contest was served August 22, 1925. Winter denied the charges and hearing was held before the register September 24, 1925. After considerable testimony had been introduced by both parties, their attorneys made a stipulation respecting the improvements placed upon the land, which reads as follows:

> It is mutually agreed that there was placed on the land in controversy permanent improvements in the nature of improving a spring, cutting of trails, to the value of not to exceed $200, and that there was a habitable house of the value of $250 on the land in question in the year 1922; and that there were no other improvements made on the land in question by contestee until August 24, 1925, and that between August 24, 1925, and September 12, 1925, there were permanent improvements in the nature of fencing placed upon the land of the value of $260.

The register held that the question for decision was purely one of law; that while entryman had proceeded in the utmost good faith he had not complied with the conditions found in the last proviso to section 3 of the stock-raising homestead law, which reads as follows:

> * * * That instead of cultivation as required by the homestead laws, the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes, of the value of not less than $1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof.

To meet these conditions the register held that improvements to the value of $371.50 should have been placed upon the land within three years from the date of the entry or before the initiation of contest, and since this had not been done cancellation of the entry was recommended. The Commissioner affirmed the finding of the register and further appeal brings the case before the Department.

The record has been carefully examined and on the facts presented the Department can not acquiesce in the disposition made of the case by the Commissioner. Winter's good faith is manifest. He

established residence on the land in 1922, in a tent. That year he erected a cabin 12 by 16 feet inside, built a crib over a spring, cleared brush and cut trails, and lived on the place seven months. In 1923 and 1924 he was sick and under the care of a physician, suffering from what he supposed was a form of stomach trouble, and at one time was confined 12 days in St. Mark's Hospital. He was unable to do much work during these two years. In each of these years, however, he lived on the land seven months. He returned to the land in May, 1925, after a five months' absence during the winter and apparently was living there at the date of the hearing. The land was rented for grazing purposes in 1923, 1924, and 1925. Entryman testified that it was his intention to stock the place with blooded sheep.

The question presented is one of law. The material point to be determined is whether the provision in the statute that one-half of the required improvements shall be placed upon the land within three years from the date of entry is mandatory or merely directory in character. The question is not free from difficulty, but in practical application the requisition referred to has uniformly been regarded as directory only. In adjudicating final proofs on stock-raising entries it is not customary to make minute inquiry regarding claimant's compliance with that provision and in no case known to the Department has a departure from the requirement been held to invalidate an entry or impair its integrity. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. *French* v. *Edwards* (13 Wall. 506).

In the case of *Albert T. Hall* (50 L. D. 613), the Department in effect interpreted said provision as being directory only. It was there held that the failure of the claimant to place one-half of the improvements on the land within three years from date of entry is not such a default, in and of itself, as to necessitate cancellation of an entry. In the text of that decision, which it may be observed is not as broad as indicated in the first paragraph of the headnote, it is stated that an allegation of failure to comply with the law as to the time of making one-half of the improvements *might* constitute a sufficient ground of contest. But it was not the intention of the Department to announce or formulate a ruling that nonobservance of that requirement necessarily called for cancellation of an entry on contest proceedings. Good faith is an essential element and when it is found that a claimant is proceeding honestly, diligently, and endeavoring to the best of his ability under the circumstances, to comply with the homestead law and perform the neces-

sary work upon the land, the right of a contestant in such case does not preclude a determination upon principles of equity and justice.

For the reasons stated the decision appealed from is reversed.

NORTHERN PACIFIC RAILWAY COMPANY

Decided July 15, 1926

REPAYMENT—RAILROAD LAND—SELECTION—INDEMNITY.

The limitation in the act of December 11, 1919, fixing the time within which applications for repayment shall be filed, begins to run, in cases involving a railroad indemnity selection list, from the date of the rejection of each item thereof in so far as that particular tract is concerned, without regard to the time of the final disposal of the list as a whole.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Northern Pacific Railway Company et al.* (43 L. D. 534) and *Southern Pacific Railway Company* (46 L. D. 279) cited and applied.

FINNEY, *First Assistant Secretary:*

The Northern Pacific Railway Company has appealed from the decision of the Commissioner of the General Land Office dated April 19, 1926, denying its application filed March 11, 1926, for repayment of the selection fee amounting to the sum of $4, paid in connection with the company's indemnity list No. 531–A, Helena 021101, now Great Falls 061944.

It appears that the indemnity selection list in question included lots 1, 2, 3, 4, and the S. ½ N. ½, Sec. 5, T. 18 N., R. 7 W., M. P. M., containing 304.92 acres, canceled by the Commissioner's letter of October 25, 1922, because of conflict with homestead entry 020392 made October 18, 1919, Helena land district, Montana.

The application for repayment was denied by the Commissioner upon the ground that it was barred under the act of December 11, 1919 (41 Stat. 366), the application not having been filed within two years from the date of the rejection of said selection.

It is urged upon appeal that the limitation of two years contained in the act of December 11, 1919, *supra*, within which an application for repayment shall be filed, is not a bar in the instant case, because its operation does not properly begin until the company's list in its entirety has been acted upon and disposed of; that the indemnity selection list in question is the application to which the statute in terms refers, which list is not yet entirely adjudicated; that as to a considerable number of tracts presented in the list there has been no final action, and until each and every part of the list is passed upon and rejected or approved, it is still pending, and the

application is yet *in fieri;* that the fact that there has been a partial adjudication of the list does not and can not alter the situation.

Upon due consideration the Department is of opinion that the contention urged is without merit. The tracts applied for through what is termed the indemnity selection list, as a general rule, are acted upon separately, the records being examined as to each tract in the list to ascertain if there is any adverse claim, and whether or not it comes within the purview of the grant to the railway company. It is well settled that each item of a railroad indemnity selection list shall be considered and disposed of as an independent selection, unaffected by facts shown in other items. See *Southern Pacific Railway Company* (46 L. D. 279). As to those tracts not in controversy a clear list is made. When any particular tract has been rejected and action of the Land Department becomes final, it is a determination of the matter as to that tract without reference to the other tracts, and is plainly the rejection of an application within the meaning of said act of December 11, 1919. There might be many tracts applied for in an indemnity selection list, and yet the claim of the company to each tract must be adjudicated on its own merits and on the questions involved with respect to each tract. Again the list presented by the company may in time be adjudicated in favor of the company as to all the tracts applied for except one tract, while the adjudications in favor of the company could be many years in the course of determination, and if the repayment of the selection fee in connection with the tract here in question shall await the adjudication of the entire list, the very situation would arise which the two-year bar contained in the act of December 11, 1919, sought to regulate. See *Northern Pacific Railway Company et al.* (43 L. D. 534), where the General Land Office treated each of the selected tracts as a different and distinct selection, which action was affirmed by the Department, and a motion for rehearing denied.

It is urged that the repayment act is remedial and that the proviso to the act of December 11, 1919, *supra*, fixing a limitation of two years within which claims for repayment shall be filed was primarily for the purpose of preventing the presentation of claims where payments were made many years ago, citing the letter of the then Secretary of the Interior addressed to the committees of Congress having the legislation in charge. While this may be true, nevertheless the Department can not discriminate in favor of some person or corporation when the record discloses failure to file the application for repayment within the time specified. A limitation of two years was fixed by the statute, and whatever may have been the controlling reasons for the enactment thereof the Department is in duty bound to apply the law as the facts appear to warrant.

The two-year limitation within which claims for repayment must be filed clearly bars the application here in question, and the decision appealed from is accordingly hereby affirmed.

USE OF NATIONAL MONUMENT LANDS FOR FISH-HATCHERY PURPOSES

Opinion, July 20, 1926

NATIONAL MONUMENT—RESERVATION—FISH HATCHERY—SECRETARY OF THE INTERIOR.

The establishment of a fish hatchery on lands reserved for a national monument, on which there are no lakes or streams or other natural habitats of fish, would not be conducive to the conservation or development intended by such reservation, nor is it one of the privileges specified in the act of August 25, 1916, for which the Secretary of the Interior is authorized to issue a permit.

PATTERSON, *Solicitor:*

The Acting Director of the National Park Service submitted for my opinion the question whether there is legal authority for granting the request of the State of Arizona for permission to construct and operate a fish hatchery in the Papago Saguaro National Monument for the purpose of restocking streams and lakes located within the State.

The act of August 25, 1916 (39 Stat. 535), establishing the National Park Service authorizes the Secretary of the Interior to make rules and regulations for the use and management of national parks, monuments, and reservations in harmony with the fundamental purpose of such reservations, "which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

The Secretary may grant certain privileges as expressly defined in section 3 of the act as follows:

* * * He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations herein provided for, but for periods not exceeding twenty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public: *Provided, however*, That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze livestock within any national park, monument, or reservation herein referred to when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park.

As the application in question is not for a purpose specified in the act with reference to authorized privileges, the Secretary is without authority to grant the same. It appears that there are no lakes or streams or other natural habitats of fish within the reserved area, and, therefore, it could not be contended that the primary purpose of the hatchery so located would be to subserve, maintain, or develop the reservation in harmony with the purpose for which it was established, or that it would afford accommodation to visitors.

My attention has been called to the fact that the department recently entered into a cooperative arrangement with the State of California whereby the State is permitted to install a fish hatchery in the Yosemite National Park in consideration of the benefits accruing to the park thereby. That was the culmination of several years of effort on the part of the park authorities, it being considered as necessary for maintenance of the supply of fish in the waters of the park and other incidental park interests. The Federal Government desired to construct such a hatchery, but no funds were available and the arrangement was accordingly made with the State. It is a direct benefit to the park and is in line with the purposes of the reservation. The justification for that agreement was stated by the National Park Service in part as follows:

> The installation of this hatchery in the park at this time, in addition to its function in supplying fish for restocking the streams and lakes of the park, is also highly important in connection with the educational and nature work being carried on in the park, and since the Federal Government is not in a position to undertake its installation it is believed the Service is extremely fortunate in being able to secure the cooperation of the State authorities for its early installation and operation.

I do not regard that contract as a precedent for allowance of the application under consideration.

Approved:

E. C. FINNEY,
Acting Secretary.

EXTENSION OF TIME FOR PAYMENTS ON FORT PECK LANDS

INSTRUCTIONS

[Circular No. 1081]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 20, 1926.

REGISTER, GREAT FALLS, MONTANA:

The act of June 15, 1926 (44 Stat. 746), provides—

> That any entryman on the former Fort Peck Indian Reservation, or his successors or transferees, who is unable to make payment as required by the

Act of March 4, 1925 (Forty-third Statutes, page 1267), may obtain an extension of time for the payment of the total amount of principal and interest required by that Act for one year from the date when such sum became or shall become due under the provisions of said Act, upon the payment of interest on the total amount involved at the rate of 5 per centum per annum: *Provided*, That the claimant shows to the satisfaction of the Commissioner of the General Land Office by affidavit corroborated by the affidavits of at least two persons, the fact of and the reason for his inability to make the payment: *Provided further*, That such claimant for the same reason and upon making payment of like interest and furnishing a like affidavit may obtain an additional extension of one year, but no more, for the payment of any amount so extended.

SEC. 2. Upon failure of any person to make complete payment of the required amount within the period of any extension granted in accordance with the provisions of this Act, the homestead entry of such person shall be canceled and the lands shall revert to the status of other tribal lands of the Fort Peck Indian Reservation.

1. Under the provisions of this act any entryman on the Fort Peck Reservation, or his successors or transferees, who has not paid the amount due and required to be paid on November 1, 1925, by the act of March 4, 1925 (43 Stat. 1267), may obtain an extension of time for one year for payment of the total amount due both of principal and interest on filing in your office on or before November 1, 1926, an affidavit, corroborated by the affidavits of two persons, satisfactorily showing that he is unable to make the required payment and accompanied by the payment of interest at the rate of 5 per cent per annum on the amount sought to be extended.

2. At the expiration of the first extension granted by the act an additional extension of one year may be allowed on a like showing of inability to pay the amount due if accompanied by the required interest.

3. In the case of the half payment allowed to be made November 1, 1925, under section 1 of the act of March 4, 1925, the entryman, if such payment has not been made, will be allowed an extension until November 1, 1926, within which to pay the amount due on the payment of interest in advance on or before November 1, 1926, at the rate of 5 per cent per annum on the total amount due November 1, 1925, provided a corroborated affidavit as described above is filed and found satisfactory. If at the expiration of the extension period entryman is still unable to pay the amount required, he may obtain a further extension until November 1, 1927, upon filing a similar affidavit and paying a like amount of interest.

4. In the case of the half payment allowed to be made November 1, 1926, under section 1 of the act of March 4, 1925, the entryman, if unable to make such payment, will be allowed an extension until November 1, 1927, within which to pay the amount due on the payment in advance on or before November 1, 1926, of interest at the rate of 5 per cent per annum on the total amount due November 1, 1926,

provided a corroborated affidavit, as described above, is filed and found satisfactory. If at the expiration of the extension period entryman is still unable to pay the amount required he may obtain a further extension until November 1, 1928, upon filing a similar affidavit and paying a like amount of interest.

5. Where relief is sought by persons falling under section 2 of the act of March 4, 1925, who were required to pay on November 1, 1925, the entire amount of principal and interest due, an extension will be granted to November 1, 1926, on the payment of interest in advance on or before November 1, 1926, at the rate of 5 per cent per annum on the total amount due and the filing of an affidavit, as described above, with the privilege of a further extension of one year to November 1, 1927, on the payment of the same amount of interest and the filing of a like affidavit.

6. A copy of each affidavit asking for the extension allowed by this act to those unable to pay the amounts due under the act of March 4, 1925, must be sent by the applicant by registered letter to the superintendent of the Fort Peck Indian Reservation, Poplar, Montana, and the registry receipt must be filed in your office, together with an affidavit that such a notice was mailed. The Indian superintendent should promptly mail to this office any objection, and the reason therefor, entertained by him against the allowance of any extension requested.

7. The provision in section 2 of the act that the failure of any person to make complete payment of the required amount for the period of any extension granted in accordance with the provisions of the act shall result in the cancellation of his entry and the reversion of the land to the status of other tribal lands of the Fort Peck Indian Reservation will be strictly observed. Entries for which payments are not made as required will be canceled without further notice to the parties in interest other than the notice advising them of the amounts due.

8. On each entry on which payment has not been made as required by the act of March 4, 1925, a notice showing the total amount due on November 1, 1925, under the said act and the amount of interest required to extend the time for payment until November 1, 1926, will be prepared in this office and sent to your office for service by registered mail. A copy of the notice, together with a copy of this letter, should first be sent to the entryman at his record address, and if service is not obtained at that address a further notice should be directed to the entryman at the post office nearest the land.

9. When the required interest is paid and the affidavit filed, you will transmit the affidavit to this office with a statement of the interest received, which you will hold in your unearned account until advised of the acceptance of the affidavit.

10. Where full payment has been made and satisfactory proof as to residence, cultivation, and improvements has been submitted, you will issue final certificate in the absence of objections shown by your record without special instructions from this office.

11. The act is supplemental to the acts of March 2, 1917 (39 Stat. 994), December 11, 1919 (41 Stat. 365), and March 4, 1925 (43 Stat. 1267). See Circulars Nos. 544 (46 L. D. 75), 667 (47 L. D. 335), and 986 (51 L. D. 76). Payments maturing after March 4, 1925, must be paid as indicated in Circular No. 544.

12. Any entryman may, if he so desires, file a relinquishment of a portion of his entry and apply to have the money heretofore paid applied on the part retained (46 L. D. 282).

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

SURVEY AND DISPOSITION OF INDIAN POSSESSIONS IN TRUSTEE TOWN SITES, ALASKA

INSTRUCTIONS

[Circular No. 1082]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 20, 1926.

REGISTER AND DIVISION INSPECTOR, ANCHORAGE, ALASKA; REGISTERS AND RECEIVERS, FAIRBANKS AND NOME, ALASKA:

The act of May 25, 1926 (44 Stat. 629), provides—

That where, upon the survey of a town site pursuant to section 11 of the Act of March 3, 1891 (Twenty-sixth Statutes, page 1095), and the regulations of the Department of the Interior under said Act, a tract claimed and occupied by an Indian or Eskimo of full or mixed blood, native of Alaska, has been or may be set apart to such Indian or Eskimo, the town site trustee is authorized to issue to him a deed therefor which shall provide that the title conveyed is inalienable except upon approval of the Secretary of the Interior: *Provided*, That nothing herein contained shall subject such tract to taxation, to levy and sale in satisfaction of the debts, contracts, or liabilities of the patentee, or to any claims of adverse occupancy or law of prescription: *Provided further*, That the approval by the Secretary of the Interior of the sale by an Indian or Eskimo of a tract deeded to him under this Act shall vest in the purchaser a complete and unrestricted title from the date of such approval.

SEC. 2. That whenever the Secretary of the Interior shall determine that it would be to the interest of the Indian or Eskimo occupant of land described

in the preceding paragraph, he is authorized to extend the established streets and alleys of the town site upon and across the tract, and the deed issued to such occupant under this Act shall reserve to the town site the area covered by such streets and alleys as extended.

SEC. 3. That whenever he shall find nonmineral public lands in Alaska to be claimed and occupied by Indians or Eskimos of full or mixed blood, natives of Alaska, as a town or village, the Secretary of the Interior is authorized to have such lands surveyed into lots, blocks, streets, and alleys, and to issue a patent therefor to a trustee who shall convey to the individual Indian or Eskimo the land so claimed and occupied, exclusive of that embraced in streets or alleys: *Provided*, That any patent or deed to be issued under this section shall be subject to all the provisions, limitations, and restrictions of section 1 of this Act with respect to Indian and Eskimo claims to land occupied by them within the limits of town sites established or to be established under said Act of March 3, 1891.

SEC. 4. That the Secretary of the Interior is authorized to prescribe appropriate regulations for the administration of this Act.

Sections 1 and 2 of the act relates, in express terms, to tracts claimed and occupied by native Alaskan Indians and Eskimos, of full or mixed blood, which have been or may be set apart to them, upon the survey of a town site pursuant to section 11 of the act of March 3, 1891, *supra*, and the regulations thereunder. Under said act and the regulations thereunder (50 L. D. 27, 46) tracts are set apart, upon town-site surveys, only to Indian or native Alaskan occupants who have not secured certificates of citizenship under the territorial laws.

Section 3 relates to lands in Alaska occupied by native Indians and Eskimos as a town or village.

The purpose of the act is, therefore, to provide for the town site survey and disposition of public lands set apart or reserved for the benefit of a certain class, namely, Indian or Eskimo occupants who have not secured certificates of citizenship under the laws of Alaska; so considered, it is in *pari materia* with the act of March 3, 1891, *supra*, and the regulations thereunder, which provide for the survey and disposition of lands in the occupancy of those who have secured such certificates.

In accordance with authority conferred by section 4 of the act, the following regulations are prescribed:

(1) As to trustee town sites in Alaska, established under authority of section 11 of the act of March 3, 1891 (26 Stat. 1095), and for which the town-site trustee has heretofore closed his accounts, and been discharged as trustee, the division inspector for Alaska, whose address is now Anchorage, Alaska, is hereby appointed town-site trustee, and authorized to perform all necessary acts and to administer the necessary trusts in connection with the act of May 25, 1926.

(2) As to other trustee town sites in Alaska the division inspector for Alaska is now the duly appointed and acting town-site trustee,

and for such towns he will perform all necessary acts and administer the necessary trusts in connection with the act of May 25, 1926, in addition to his other duties as trustee.

(3) Where the matter of surveying and disposing of Indian or Eskimo possessions in trustee town sites is hereafter taken up for consideration, the town-site trustee will submit a report to the Commissioner of the General Land Office showing whether or not it would be of interest to the Indian or Eskimo occupants of the land to extend the established streets and alleys of the town site upon and across the tract, and whether or not subdivisional surveys should be made. The report will be examined and considered by the Commissioner of the General Land Office, and he will transmit it to the Secretary of the Interior with such recommendation as he may deem appropriate.

(4) Before directing the survey and disposal of such Indian or Eskimo possessions under authority of the act of May 25, 1926, the Secretary of the Interior will determine whether or not the patent which issued for the town-site tract includes the tract designated as "Indian possessions." If it does not, a supplemental patent will be issued, to accompany the departmental order for survey and disposal.

(5) If the parties to a proposed sale involving land for which a restricted deed has been issued under authority of the act of May 25, 1926, wish to have the sale approved by the Secretary of the Interior, the facts should first be submitted to the division inspector. Upon receiving information regarding any proposed sale, the division inspector, in his capacity as trustee, will make such investigation as he deems proper, and he will submit a report to the Commissioner of the General Land Office as to the advisability of approving the proposed sale. The report will be examined by the Commissioner, and he will transmit it to the Secretary of the Interior with appropriate recommendation.

(6) The division inspector for Alaska is also hereby designated as trustee for any and all native towns in Alaska which may be established and surveyed under authority of section 3 of the said act of May 25, 1926, and as such trustee he will take such action as may be necessary to accomplish the objects sought to be accomplished by that section. In any case in which he thinks it would be of advantake to the Indian or Eskimo occupants to have the lands occupied and claimed by them surveyed as town or village, he should bring the matter to the attention of the Commissioner of the General Land Office with appropriate recommendation.

(7) The town-site trustee will note a proper reference to the act of May 25, 1926, on each deed which is issued under authority of that act, and each such deed should provide that the title conveyed

is inalienable except upon approval of the Secretary of the Interior, and that the issuance of the restricted deed does not subject the tract to taxation, to levy and sale in satisfaction of the debts, contracts, or liabilities of the transferee, or to any claims of adverse occupancy or law of prescription; also, if the established streets and alleys of the town site have been extended upon and across the tract, that there is reserved to the town site the area covered by such streets and alleys as extended. The deed should further provide that the approval by the Secretary of the Interior of a sale by the Indian or Eskimo transferee shall vest in the purchaser a complete and unrestricted title from the date of such approval.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

DRAWINGS UPON CANCELLATION OF OIL AND GAS PERMITS—CIRCULAR NO. 929, AMENDED

INSTRUCTIONS

[Circular No. 1084]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 23, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

On June 3, 1926, in considering a protest filed as the result of a drawing held in accordance with Circular No. 929 (50 L. D. 387), upon the cancellation of an oil and gas prospecting permit the Department directed that—

> Hereafter parties desiring to file applications for participation in drawings of this kind be required to allege that they are filing in their own interest and not in the interest of any other person or persons, association, or corporation; or to show clearly in whose interest if not in their own exclusive interest.

It must be stated in each application that the applicant files the same in good faith for his or its own benefit, and not directly or indirectly in whole or in part in behalf of any other person or persons, association, or corporation, or if made in the interest of any other person or persons, association, or corporation, a full disclosure thereof must be made, accompanied by a showing of the qualifications of all the interested parties. Any such application filed that does not meet the above requirements will not be allowed to participate in the drawings when held.

Any applicant who fails to disclose any and all interests other than his own which shall tend to give an advantage in the drawing, will forfeit any claim to a return or repayment of moneys tendered with his application and subject the permit, in the event that one is awarded to him, to cancellation for fraud.

Circular No. 929 is hereby amended so as to conform hereto.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

ACQUISITION OR USE OF PUBLIC LANDS BY STATES, COUNTIES, OR MUNICIPALITIES FOR RECREATIONAL PURPOSES

INSTRUCTIONS

[Circular No. 1085]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 23, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

The act of June 14, 1926 (44 Stat. 741), entitled, "An Act To authorize acquisition or use of public lands by States, counties, or municipalities for recreational purposes," reads as follows:

That the Secretary of the Interior be, and hereby is, authorized, in his discretion, to withhold from all forms of appropriation unreserved nonmineral public lands, which have been classified by him as chiefly valuable for recreational purposes and are not desired for Federal administration, but only after a petition requesting such withdrawal has been signed and filed by the duly constituted authorities of the States or of the county or counties within which the lands are located, and to accept title on behalf of the United States from any States in and to lands granted by Congress to such State, and in exchange therefor to patent to such State an equal quantity or value of surveyed land so withheld and classified, any patent so issued to contain a reservation to the United States of all mineral deposits in the land conveyed and of the right to mine and remove same, under regulations to be established by the Secretary, and a provision for reversion of title to the United States upon a finding by the Secretary of the Interior that for a period of five consecutive years such land has not been used by the State for park or recreational purposes, or that such land or any part thereof is being devoted to other use: *Provided,* That lands so withheld and classified may, in the discretion of the Secretary of the Interior, be also held subject to purchase and may be purchased by the State or county in which the lands are situated, or by an adjacent municipality in the same State, at a price to be fixed by the Secretary of the Interior, through appraisal or otherwise, subject to the same reservation of mineral deposits and the same provision for reversion of title as are

prescribed for conveyances to the States in consummation of exchanges hereby authorized, or be held subject to lease and may be leased to such States, counties, or municipalities for recreational use at a reasonable annual rental for a period of twenty years, with privilege of renewal for a like period. And the Secretary of the Interior is hereby authorized to make all necessary rules and regulations for the purpose of carrying the provisions of this Act into effect: *Provided further*, That the Secretary of the Interior shall for each year make a report to Congress giving in detail a list of lands exchanged under the provisions of this Act.

Lands Subject to Withdrawal.—Unreserved nonmineral public lands not desired for Federal administration, surveyed or unsurveyed, exclusive of those situated in the Territory of Alaska, may be withheld from appropriation in aid of the classification and disposition or use authorized by the act upon a proper petition therefor. Any withdrawal for such purpose will, however, be subject to valid existing appropriations under the public-land laws legally maintained. The land must be surveyed before title may be acquired. The duration of these withdrawals will depend upon the good faith shown by the petitioners in prosecuting the necessary preliminary work in connection with the recreational project involved.

Petitions.—Petitions for such withdrawal should be addressed to the Secretary of the Interior and filed in duplicate in the proper district land office, should describe the land desired withdrawn by legal subdivisions, if surveyed, or by metes and bounds in conformity with the regulations approved November 3, 1909 (38 L. D. 287), if unsurveyed, and contain a statement that the area is unoccupied and nonmineral and chiefly valuable for recreational purposes. Such petitions should set forth the plan of recreational development proposed, giving details as to any contemplated improvements, state whether acquisition is sought through exchange or purchase, or whether a lease is desired, and should contain proof or a citation of the authority of the official or officials signing the petition to act for the State or county or counties when a State or county recreational project is involved, or of the authority of either State or county officials to submit the petition in behalf of a municipality when a municipal project is concerned. In event that acquisition is sought through exchange, the petition of the State seeking the exchange should contain a description of the State land proffered as a basis therefor. The registers of the district land offices will not assign serial numbers to these petitions and will upon receipt forward them by special letter to the Commissioner of the General Land Office for action.

Action by Division Inspectors.—In event of favorable action upon such a petition, the proper division inspector will, if necessary, be instructed to cause an examination to be made to determine whether

the withdrawn land is nonmineral and chiefly valuable for recreational purposes and will thereafter submit report to the Commissioner of the General Land Office. The report submitted will also contain information as to the comparative values of the public and State lands involved when an exchange is proposed. In order that the Department may determine a proper charge in case purchase or lease is desired the division inspector will ascertain and report what is a fair and reasonable price per acre or annual rental for the area, taking into consideration the purpose for which it is to be used. The Commissioner of the General Land Office will forward such reports to the Secretary of the Interior with recommendation.

Applications.—The Commissioner of the General Land Office will notify the register of the district land office in which the land is situated of the findings of the Department and the register will then advise the State, county, or municipality which has requested the withdrawal thereof. Thereafter, in event the land has been found subject to use or acquisition under the law, such State, county, or municipality may file formal application for the land in the district land office, and all such applications will be given current serial numbers, noted upon the records and transmitted with the returns from that office. No fixed forms of applications have been prepared, but these instructions should be followed as nearly as possible.

The application of a State for an exchange should follow in so far as applicable the form used by the State in making application for indemnity for losses in its school grant where the land tendered as a basis has been granted to the State by the United States for school or other purposes and has thereafter remained the property of the State. A deed of relinquishment of the base land must be executed by the proper State officer or officers and duly recorded. Such deed must be accompanied by a certificate of the officer, or officers, of the State charged with the care and disposal of the land reconveyed, showing that same has not been alienated or contracted to be alienated in any way by the State; that the said land is not in the possession of, or subject to the claim of any third party under any law or permission of the State; and that except for such conveyance the title of the State is unimpaired, together with a certificate of the recorder of deeds or official custodian of the records of transfers of real estate in the proper county; or a duly authenticated abstract of title, showing that at the time the reconveyance was recorded the title was in the State making the conveyance and that the land was free from encumbrances of any kind.

There should be tendered with the application of a State, county, or municipality to purchase or lease lands withdrawn under this law the amount fixed as the purchase price or as annual rental therefor.

Such application should contain proof or a citation of the authority of the official or officials signing the application to represent the State, county, or municipality in the transaction. In so far as applicable the general regulations of the Department governing the execution of contracts will be followed in the preparation of leases issued. The proceeds from sales or leases will be credited to "Sales of Public Lands," except in those instances in which other provision has been made in the laws authorizing disposition of the land.

Applications presented under these regulations not in substantial conformity with the requirements herein made and not accompanied by the prescribed proof will be rejected subject to appeal or curing the defect where possible.

Reservations and Conditions.—Any patent or lease issued to a State, county, or municipality will contain the mineral reservation and forfeiture provision prescribed by the law. No provision is made at this time for development of the reserved mineral deposits in lands to be conveyed or leased under the terms of this law, and until such regulations shall have issued the reserved deposits will not be subject to disposition.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

LUSK ROYALTY COMPANY ET AL.

Decided July 30, 1926

OIL AND GAS LANDS—APPLICATION—LEASE—RENTALS—PAYMENT—POSSESSION—OCCUPANCY.

Annual rentals accrue under a lease executed pursuant to section 19 of the act of February 25, 1920, from the date of the filing of the lease application, and failure to remain in actual possession of the premises thereafter will not excuse full payment thereof from that time in cases where the applicant could have occupied the land had he desired to do so.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Big-4 Consolidated Oil Company* (49 L. D. 482), cited and applied.

FINNEY, *First Assistant Secretary:*

This is the appeal of the Lusk Royalty Company from a decision of the Commissioner of the General Land Office, dated February 4, 1926, which required said company and its coapplicants to pay $5,000 as accrued annual rentals, under an oil and gas lease, authorized by

the Department to be issued to the parties for 1,000 acres of land in the Cheyenne, Wyoming, land district.

The Lusk Royalty Company filed application on August 25, 1920, pursuant to section 19 of the leasing act of February 25, 1920 (41 Stat. 437), for a prospecting permit or lease for these lands. Adverse claims were filed under the act of February 25, 1920, by certain agricultural entrymen whose entries covered certain of the lands involved, and who claimed preferences, pursuant to section 20 of the act of February 25, 1920. These entrymen denied that the applicant company had expended sufficient sums on certain of the lands to entitle it to relief under section 19 of the leasing act. It also developed that insufficient abstracts of title were filed by the company and that a number of persons owned interests which entitled them as well as the company to receive such lease as issued. Numerous proceedings were had, the adverse claims being disposed of in 1924, upon evidence which showed that three wells had been drilled upon the area, in one of which a great quantity of gas was discovered. It appears that operations ceased in April, 1920, and that the producing gas well has since been closed, save for occasional measurements of the flow of gas.

Many showings were still to be made, however, by the various individual claimants, so that it was not until October 4, 1924, that the Department authorized the issuance of the lease, and forms were soon thereafter sent to the company for execution by it and the coapplicants. In July, 1925, the lease forms were signed and returned to the Department, where they await execution by the Secretary.

The sum of $1,000 was tendered by the prospective lessees as rental payment, and by decision of September 16, 1925, the Commissioner pointed out that the lease will be issued as of August 25, 1920, the date of filing of the permit application, and that as section 2 (c) of the lease requires payment in advance of annual rentals of $1 per acre per annum, there is due on that account the sum of $5,000 instead of the sum tendered. By decision of February 4, 1926, the Commissioner denied the application of the Lusk Royalty Company for a reduction of $4,000 of the rental required, and that company has filed this appeal. It is appellant's contention that since it did not have possession of the land after filing the application for a lease, and did not know that it would secure such a lease until October, 1924, when said lease was sent to it for execution, rental charges should not be made for any period prior to the execution and delivery of the lease.

The Department had the question raised by appellant presented to it in the case of *Big-4 Consolidated Oil Company* (49 L. D. 482), and

in its decision that rentals must be paid by lessees under section 19 of the act of February 25, 1920, from the effective date of the lease, said:

> 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.

While it is true that in the case of the Big–4 Company, the lessee, from the date of filing its application, was in actual possession of the premises; nevertheless, in this case it appears that a discovery of gas had been made, and wells and equipment were maintained on the land, and, so far as appears, the appellant could have occupied the premises and continued work, had it desired to do so, in reliance upon its application for a lease, from which it must be held that the rental must be paid from August 25, 1920. Had gas been produced and sold after that date, the company would have been entitled to the proceeds save and except the royalties prescribed in the lease. That no gas was sold does not change this fact nor justify the Department in making any departure of the well settled and consistent practice established by the regulations and decisions of the Department. See paragraph 1, Circular No. 795 (48 L. D. 340); *Big 4 Consolidated Oil Company*, *supra*, and the case of C. T. Carney (A. 4571—unreported), decided April 2, 1923.

The Commissioner's decision is affirmed, and appellant and coapplicants are required to make full payment of rentals within 30 days from notice hereof, on penalty of revocation of the authorization of lease, and rejection of the application.

HAZEL L. HARTLEY-JOHNSON [1]

Decided June 3, 1926

HOMESTEAD ENTRY—RESIDENCE—OCCUPANCY—STATUTES.

The statutory requirement of the three-year homestead law of actual residence upon the land entered for at least seven months in each year for three years contemplates *bona fide* continuous residence, and presence on the homestead of one or two days each week during those periods will not suffice.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Josephine M. Locher* (44 L. D. 134), cited and applied.

FINNEY, *First Assistant Secretary:*

An appeal has been filed on behalf of Hazel L. Hartley-Johnson from a decision of the Commissioner of the General Land Office dated December 14, 1925, reversing a decision of the register of the Boise, Idaho, land office, and holding for cancellation her entry under the enlarged homestead act and her additional entry under the stock-raising homestead act.

The original entry embraces lots 2, 3, and 4, Sec. 2, lots 1 and 2, SW. ¼ NE. ¼ and SE. ¼ NW. ¼, Sec. 3, T. 2 N., R. 4 E., B. M. (315.27 acres). It was allowed November 11, 1918. The application to make additional entry was filed November 18, 1918, and was allowed April 27, 1920. As amended April 10, 1922, the additional entry embraces SW. ¼ NE. ¼, SE. ¼ NW. ¼, NE. ¼ SW. ¼, Sec. 2, lots 3 and 4, SW. ¼ NW. ¼, Sec. 3, lot 1 and SE. ¼ NE. ¼, Sec. 4, said township (336.27 acres).

Final proof on the combined entries was submitted July 6, 1923, but final certificate was withheld at the request of the chief of field division. In her final-proof testimony, Mrs. Johnson stated that she established residence on the land the first part of May, 1919. The periods during which she actually resided on the land were stated as from the first part of May to the latter part of November, 1919; from about April 10 to December 6, 1921; from April 15 to November 28, 1922, and from April 18 to July 6, 1923.

Entrywoman had been granted a year's leave of absence from May 1, 1920, under section 3 of the act of March 2, 1889 (25 Stat. 854).

[1] See decision on rehearing, page 513.

On September 8, 1924, proceedings against the entries were instituted on charges preferred by a special agent, as follows:

> That the entrywoman did not establish residence on the land as alleged in her final proof, nor was residence thereon maintained in the manner and for the period stated in the said proof, nor was residence maintained thereon for a period of as much as seven months each year for at least three years, as required by the law under which said entry was made.

Entrywoman denied the charges, and a hearing was held before the register of the local office on July 18, 1925. The only witness called on behalf of the Government was the entrywoman. She testified that she was continuously on the land for three or four weeks in 1919, a month in 1921, about the same length of time in 1922, and from April 16 until July 6, 1923. At all other times, except during the year she was absent on leave and during the five months' absence during other years, she went to the land almost every Saturday afternoon and remained until the next afternoon, when she returned to Boise, about 20 miles distant, where she was employed as a stenographer. She was employed as a stenographer when she made the entries, and continued in such employment until her marriage on February 28, 1923. Even during the year (from May 1, 1920) she was on leave of absence, she was continuously employed, except during the vacation period allowed by her employers.

In the appeal counsel contends that the Commissioner erred in his construction of the requirements of the homestead law, and that "actually resided" as used in section 2291, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat. 123), does not mean that entrywoman's actual presence on the land was necessary. Counsel's discussion of the question is interesting, but he has overlooked two facts:

First. That section 2297, Revised Statutes, as amended by the act of June 6, 1912, *supra*, contains the following:

> *Provided*, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land.

Second. That the interpretation given the three-year homestead law by the Secretary of the Interior has never been questioned by the Congress or in any way overruled by the courts.

In paragraph 12 of the first instructions under the three-year homestead law, dated July 15, 1912 (41 L. D. 103, 107), the Secretary of the Interior held—

> In according such extended periods of absence the Congress has dealt liberally with the homestead entryman, and bona fide continuous residence during the remaining portions of the three-year period must be clearly shown.

In the case of *Josephine M. Locher* (44 L. D. 134) the Department held (June 26, 1915) that prior to June 6, 1912, the homestead law

prescribed no exact amount of residence, cultivation, or improvements as a condition to making final proof, merely requiring the entryman to show, within two years after the expiration of five years from the date of his entry, that he has "resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit." Further—

* * * This statutory requirement of actual residence upon the land entered for at least seven months in each year for three years precludes the Department from extending in such cases the privilege of constructive residence during absences in the seven months' period, when actual residence is required by the statute, and one who is on the homestead one or two days each week for a period of seven months in each year can not be said to have actually resided thereupon, no matter what occasioned the absences. This does not mean that an entryman can not go to market or be away for short periods of a few days at a time upon necessary business, but it does not permit the maintenance of *actual* residence in town for five or six days of the week and a visit to the claim on Saturdays or Sundays during seven months of the year. The Department is, therefore, without discretion in this matter and must conform to the express requirements of the statute. In the case of entries made or proof submitted under the so-called three-year homestead law, seven months' *actual* residence for each year for three years must be shown.

Counsel for appellant discourses at length on the definitions of "reside," "residence," and "presence," but he is silent on the meaning of "actual permanent residence."

Entrywoman's testimony established all the charges made by the special agent.

The decision appealed from is affirmed.

HAZEL L. HARTLEY-JOHNSON (ON REHEARING)

Decided July 31, 1926

HOMESTEAD ENTRY—RESIDENCE—OCCUPANCY—WORDS AND PHRASES.

The term "actual residence" as used in the homestead laws means personal presence and physical occupation of the land entered to the exclusion of a home elsewhere.

FINNEY, *First Assistant Secretary:*

By decision dated June 3, 1926 (51 L. D. 511), the Department affirmed the action of the Commissioner of the General Land Office rejecting final proof and holding for cancellation, for insufficient residence, Hazel L. Hartley-Johnson's enlarged and additional stock-raising homestead entries.

Motion for rehearing has been filed, contending, in substance, that the Department's interpretation of the three-year homestead law, as to the requirement of residence, is erroneous; that the expressions "have actually resided" and "actual permanent residence," as used

in sections 2291 and 2297, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat. 123), contemplate nothing more than "residence" as that term had been defined by the Interior Department and the courts prior to the amendment of the law; that the question of residence turns largely on circumstances and intent and good faith evidenced by acts and conduct, and does not necessarily involve continuous personal presence, but is consistent with absence.

"Actual residence" under the homestead laws means personal presence and physical occupation of the premises as a home. It means precisely the same thing as actual inhabitancy. There must be a settled, fixed abode, and that to the exclusion of a home elsewhere. The phrase means the same now that it always has meant, and the Department has never sought to apply it, define it, or construe it in any other way. And while the definition and meaning of the term remain unchanged the homestead law itself has been materially altered, imposing different conditions and limitations upon homestead entrymen who seek to take advantage of its provisions. These changed conditions and limitations were fully pointed out in the prior decision, where it was also pointed out that occasional temporary absences of a few days at a time upon necessary business did not interrupt the continuity of residence.

No reason is seen for disturbing the action heretofore taken and the motion is accordingly denied.

SURVEY OF HOMESTEAD CLAIMS IN ALASKA—CIRCULAR NO. 491 AMENDED

INSTRUCTIONS

[Circular No. 1087]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,
Washington, D. C., July 31, 1926.

The act approved April 13, 1926 (44 Stat. 243), entitled "An Act To authorize a departure from the rectangular system of surveys of homestead claims in Alaska, and for other purposes," provides as follows:

That the provisions of the Act of May 14, 1898 (Thirtieth Statutes at Large, page 409), extending the homestead laws to Alaska, and the Act of March 3, 1903 (Thirty-second Statutes at Large, page 1028), amendatory thereof, in so far as they require that the lands so settled upon, or to be settled upon, if unsurveyed, must be located in rectangular form by north and south lines running according to the true meridian, and marked upon the ground by permanent monuments at each of the four corners; and the provisions of the Act of June 28, 1918 (Fortieth Statutes at Large, page 632), in so far as they require

that surveys executed thereunder, without expense to the claimant, must follow the general system of the public-land surveys, shall not apply where, by reason of the local or topographic conditions, it is not feasible or economical to include in a rectangular form with cardinal boundaries the lands desired; but all such claims must be compact and approximately rectangular in form, and marked upon the ground by permanent monuments at each corner, and the entryman or claimant shall conform his boundaries thereto. In all other respects the claims will be in conformity with the provisions of the aforesaid Acts.

SEC. 2. That if the rectangular system of the public-land surveys has not been extended over the lands included in a soldier's additional homestead entry, authorized by the aforesaid Act of May 14, 1898, as amended by the Act of March 3, 1903, or a trade and manufacturing site authorized by section 10 of the first-named Act, the entryman or claimant may, upon the approval of the register and receiver, make application to the public survey office for an official survey of his claim, accompanied by a deposit of the estimated cost of the field and office work incident to the execution of such survey. Upon receipt of the application and its accompanying deposit the public survey office will immediately issue appropriate instructions for the survey of the lands involved, to be executed by the surveying service of the General Land Office not later than the next surveying season under the direction of the supervisor of surveys, unless by reason of the inaccessibility of the locality or other conditions the supervisor of surveys decides that it will result to the advantage of the Government or claimants to have the survey executed by a United States deputy surveyor, in which event the laws and regulations now governing the execution of the surveys by United States deputy surveyors will be observed.

SEC. 3. The sum so deposited shall be held by the public survey office, and may be expended by it in payment of the cost of such survey, including field and office work; and any excess over the cost of the survey shall be repaid to the depositor or his legal representative. The Secretary of the Interior is authorized to make all necessary rules and regulations to carry this Act into full force and effect.

In locating claims under the homestead acts as applied to Alaska, where, by reason of local or topographic conditions, it is not feasible or economical to include in a rectangular form with cardinal boundaries the lands desired, the act of April 13, 1926, permits settlers to depart from such restrictions in the matter of the form of their claims and the direction of their boundaries. Under the conditions recited in the law as justifying such departure it will be sufficient that the claims shall be compact and approximately rectangular in form, and where a departure from cardinal courses in the direction of boundary lines is necessary, in order to include the lands desired, there will be no restriction as to the amount of such departure. The modifications of former practice in the matter of form and direction of boundaries is not to be construed, however, as authorizing the lines of the claims to be unduly extended in any such manner as will be productive of long, narrow strips of land departing materially from the compactness of the tract as a whole.

The foregoing does not in any manner modify the provisions of existing law and regulations whereby there is reserved an 80-rod space between claims along navigable or other waters.

In this and all other respects the claims must conform to the provisions of the acts of Congress to which this act is amendatory.

Upon receipt of an application for survey under the provisions of section 2 of the act of April 13, 1926, approved by the register and receiver, the public survey office will, if conditions make such procedure practicable, furnish the applicant with an estimate of the cost of field and office work, and upon receipt of the deposit required, appropriate instructions for the survey of the claim will be issued, such survey to be made by the surveying service of the General Land Office, not later than the next surveying season, under the direction of the supervisor of surveys. The sum so deposited by the applicant for survey will be deemed an appropriation thereof and will be held by the public survey office, to be expended in the payment of the cost of the survey, including field and office work, and upon the acceptance of the survey any excess over the cost shall be repaid by the public survey office to the depositor or his legal representative.

In case it is decided by the supervisor of surveys that by reason of the inaccessibility of the locality embraced in an application for the survey of a soldier's additional homestead entry or of a trade and manufacturing site, or by reason of other conditions, it will result to the advantage of the Government or claimants to have the survey executed by a United States deputy surveyor, the laws and regulations now governing the execution of such surveys will continue to be applied.

To the extent above indicated Circular No. 491 (50 L. D. 27) is hereby amended.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

RELIEF OF SETTLERS AND ENTRYMEN ON BACA FLOAT NUMBERED THREE, ARIZONA

INSTRUCTIONS

[Circular No. 1088]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 2, 1926.

REGISTER, PHOENIX, ARIZONA:

The act of Congress approved April 17, 1926 (44 Stat. 299), extended for two years from the date of said act the period for

making selections and entries under the provisions of the act of July 5, 1921 (42 Stat. 107). The act of July 5, 1921, reads as follows:

That where, prior to December 13, 1917, patents or patent certificates have issued under the homestead laws or preemption laws for land within the limits of a tract known as Baca Float Numbered Three, in the State of Arizona, and the patentees, their assigns, and legal representatives have been evicted by the local courts by reason of the prior grant to the legal representative of Luis Maria Baca, the patentee, his assigns, or his legal representative, who under the laws and regulations would have been entitled to the return of the purchase money, fees, and commissions, shall be entitled to select in lieu thereof not exceeding twice the area of the lands lost, of any nonmineral unoccupied surveyed public lands in the State of Arizona subject to homestead entry.

SEC. 2. That where any person had made homestead entry for land within Baca Float Numbered Three, and had fully complied with the homestead laws thereon as to residence and cultivation prior to June 22, 1914, in the bona fide belief that the land was public land, and has been evicted therefrom or prevented from making final entry by reason of the prior grant, said homestead entryman, or, in the case of his or her death, the successor to the right of entry under the homestead laws, shall be permitted to make second homestead entry for other land situated in the State of Arizona and not exceeding twice the area of the original homestead entry lost as herein set forth, subject to the conditions, limitations, and benefits of the homestead laws applicable to such land; and upon submission of proof under his original entry that he had fully complied with the law as to residence and cultivation, shall on approval of such proof and payment at the office of second entry for the final fees and commissions due on a final entry for the land entered, receive a final certificate and patent without further residence and cultivation of the land embraced in the second entry.

SEC. 3. That the right of selection and second entry hereby granted shall not be assignable, directly or through irrevocable power of attorney, and must be exercised within three years after the passage of this Act by the persons entitled to such relief, or, in the case of the death of a homestead entryman who has not submitted final proof and received his final certificate, by the person or persons succeeding to his right of entry under the homestead laws: *Provided*, That no persons acquiring said land by sale or conveyance subsequent to December 13, 1917, shall be recognized, and the applicant shall submit proof that he has not sold, assigned, nor relinquished his homestead nor entered into any contract or agreement to sell, assign, or relinquish the same, nor abandoned the land for a valuable consideration; also that the land sought to be selected is for applicant's own exclusive use and benefit, and that he has not sold or contracted to sell, directly or indirectly, said selected land: *And provided further*, That the entire right of reselection under each entry shall be exercised at the same time, under such rules and regulations as the Secretary of the Interior may prescribe, and on approval of the selection patent shall issue as on other entries.

SELECTIONS UNDER SECTION ONE

Selections under section 1 of the act may be made by persons, their heirs or legal representatives, to whom patents or patent certificates issued under the homestead or preemption laws for lands within the limits of the tract known as Baca Float No. 3 in the State of Ari-

zona. The right is conditional upon the issuance of patents or final certificates, as well as eviction by the local courts by reason of the prior grant to the legal representative of Luis Maria Baca, prior to December 13, 1917.

The selector must surrender the patent or final certificate, or submit proof of its loss. He must show whether or not he has sold or conveyed the land; if conveyance of the land has been made he must show that he has indemnified his assignee, or perfected title in him through other sources, or produce a full reconveyance to himself from the last assignee.

He must furnish evidence that he has been evicted by a local court.

Assignees must furnish abstracts of title, or certificates of title setting forth clearly their interest in the land patented.

Mortgagees are not assignees within the meaning of the repayment laws, but may become such under the act of July 5, 1921, by foreclosure or deed from the mortgagor.

Where a patentee or a person to whom a final certificate issued, or his assignee, died after entry, his executor or devisee, or, if he died intestate, the person or persons succeeding to his interest in the land under the laws of Arizona, may make the selection.

Where the person evicted and entitled to make a lieu selection had died since his eviction, his heirs or legal representatives may make the selection.

SECOND HOMESTEAD ENTRIES UNDER SECTION TWO

Section 2 authorizes second homestead entries by any person who made a homestead entry for land within Baca Float No. 3, and fully complied with the homestead laws as to residence and cultivation prior to June 22, 1914, and has been evicted from the land or prevented from making final entry by reason of the prior grant.

In case of death, the successor to the entryman under the homestead laws succeeds to the right of second entry.

The homestead entryman is required, before patent issues, to submit evidence, corroborated by two witnesses, showing that the homestead laws had been fully complied with prior to June 22, 1914, as to residence and cultivation with respect to the land covered by the original entry. No testimony need be submitted of such compliance with respect to the lieu land selected.

PROVISIONS APPLICABLE TO BOTH SECTIONS

The area covered by a selection of second homestead entry authorized by the act shall not exceed twice the area of the land lost, and shall embrace nonmineral unoccupied surveyed public land in the State of Arizona subject to homestead entry.

The applicant's entire right of selection or second entry must be exercised at the same time.

Each applicant must submit his affidavit that he has not sold, assigned, nor relinquished the land in lieu of which the selection or entry is made, and that he has not entered into any contract or agreement to sell, assign, or relinquish the same, nor abandoned the land for a valuable consideration; also that the land selected or entered in lieu thereof is for the applicant's own exclusive use and benefit, and that he has not sold, nor contracted to sell, directly or indirectly, the selected land.

Applicants must furnish the regular nonsaline and nonmineral affidavit, nonoccupancy affidavit, and an affidavit that no spring or water hole exists on the selected land or on the land covered by the second entry.

The regular proof of publication and posting for thirty days must be furnished. The notice of a selection under section 1 must describe the land selected. In the case of a second enty under section 2, the notice must describe the land covered by the original entry as well as the land selected in lieu thereof.

No fee or commissions are required under section 1 of the act, but persons who make second homestead entry under section 2 of the act will be required to pay the fee and commissions due on a final entry for the land originally entered.

WILLIAM SPRY,
Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

GEORGE DOLLEMORE ET AL., JULIUS HIRSHBERG, MORTGAGEE

Decided August 9, 1926

HOMESTEAD ENTRY—FINAL PROOF—VESTED RIGHTS—MORTGAGE—MORTGAGEE—ABANDONMENT.

A homestead entryman, after submission of acceptable final proof, can not by wrongful abandonment and forfeiture of his rights acquired thereunder, defeat the rights of an encumbrancer who has in good faith furnished the means with which to improve the entry, but the latter will be allowed to show that equitable title has been earned by compliance with the essential requirements of the law.

HOMESTEAD ENTRY — FINAL PROOF — ABANDONMENT — MORTGAGE — RECORDS — NOTICE.

Where a mortgaged homestead entry has been canceled upon default of the entryman after submission of acceptable final proof, a subsequent entryman will be chargeable with notice of what an examination of the county records would have disclosed with respect to the mortgage.

EDWARDS, *Assistant Secretary:*

The record in this case discloses that on November 25, 1912, George Dollemore made homestead entry, Great Falls 029577, for S. ½ S. ½, Sec. 11, T. 22 N., R. 4 W., M. M., containing 160 acres, upon which final proof was submitted November 4, 1919, which showed substantial compliance with the law, but because of failure to file evidence of full naturalization the local officers suspended final proof; that record evidence as to naturalization was duly filed June 20, 1920, and by letter "N" of August 25, 1923, the Commissioner of the General Land Office required entryman to file within 15 days consent to a waiver of the oil and gas content, and in which to exercise his preference right to a prospecting permit; that entryman appealed from this action, and that by decision dated April 12, 1924, the Department affirmed the action below; that the decision of the Department was promulgated April 25, 1924, holding the entry for cancellation upon failure to meet the requirements of said departmental decision within the time allowed; that service of said decision was made July 11, 1924, on William Dollemore, entryman's brother and agent; that thereupon the local officers reported no action taken, when the entry was duly canceled of record July 23, 1924.

The record further discloses that on April 24, 1925, William Dollemore, who had made additional homestead entry, Great Falls 052912, under section 3 of the act of February 19, 1909 (35 Stat. 639), embracing the W. ½ NE. ¼, Sec. 14, T. 22 N., R. 4 W., M. M., filed an application to amend said additional entry to embrace in addition the S. ½ SW. ¼, Sec. 11, said township and range, formerly embraced in said canceled entry of his brother, George Dollemore, Great Falls 029577.

It now appears that on July 9, 1925, Julius Hirshberg filed application for reinstatement of said canceled entry of George Dollemore, 029577, and protest against the allowance of William Dollemore's application 052912, to amend, alleging in substance that he is the successor in interest to the lands embraced in the canceled entry of George Dollemore by reason of a mortgage in the sum of $1,200 executed in favor of the First National Bank of Choteau, Montana, by said Dollemore, which mortgage was duly recorded; that protestant is the cashier of said bank and by assignment of the bank he is the sole owner of said mortgage; that George Dollemore defaulted in the payment of same and interest thereon, when foreclosure proceedings were instituted by protestant; that judgment was rendered in his favor, and upon due notice as required by the laws of Montana, the property was sold by the sheriff at public sale, when protestant became the purchaser thereof for the sum of $1,865.45; that the 12 months granted by the Montana law for

redemption of said property having expired, the sheriff duly executed to protestant his deed for same, dated April 1, 1924.

It is further alleged by protestant that he had every reason to believe that said Dollemore had fully complied with the requirements of the homestead law in so far as such compliance was then possible, before final proof was offered, and alleges as a fact that there was such compliance; that relying upon the integrity of said mortgagor he made no examination of land-office records and remained in ignorance of the status of said entry until about 10 days prior to the filing of the petition herein, when he was informed that said entry 029577 of George Dollemore had been canceled of record and a portion of the lands covered by same refiled upon by his brother, William Dollemore, under serial 052912.

Protestant charges collusion on the part of said George and William Dollemore, and that they wilfully and knowingly allowed the entry in question to be canceled without notice to protestant; that said William Dollemore was fully advised as to said mortgage, and had known for at least two years that protestant was the lawful owner of an interest in said lands under a mortgage duly executed and delivered by his brother, and that said sheriff's deed had in fact been issued to protestant on April 1, 1924. A certified copy of the sheriff's deed is submitted by protestant, accompanied by a waiver of oil and gas rights as required by the Commissioner's letter of April 25, 1924. It is also offered to submit upon demand any additional evidence required in support of the allegations set out, and to comply with any further requirements. It is prayed that said entry of George Dollemore be reinstated, subject to said reservation, and that final proof be accepted in order that patent may issue.

By decision dated February 5, 1926, the Commissioner held that an encumbrancer is always recognized by the courts as entitled to use every right that his debtor had to protect title to property in which he had security, and it was accordingly directed that William Dollemore be notified that 30 days would be allowed him within which to show cause why his application to amend should not be rejected, and the entry of George Dollemore reinstated, or to appeal within the time allowed.

The applicant accordingly appealed to the Department, and with his appeal is submitted a sworn statement in response to the order to show cause, uncorroborated. It is stated therein in substance that the application to amend said additional entry was filed in good faith and without knowledge or information that said Julius Hirshberg or any other person claimed any rights in and to said land; that he was informed by one of the clerks in the local land office that the tract in question was vacant public land subject to entry, and that no

reason appeared of record why he should not file an application to amend his additional homestead entry; that the charge of collusion between his said brother, George Dollemore, and himself, with intent to injure and defraud protestant, is not true; that notice of said mortgage was never placed of record in the local land office; that so far as said records show the land was vacant and unentered, and had remained so for nearly a year; that the said George Dollemore left his homestead entry shortly after the submission of final proof thereon and since that time has not resided on the land or in the vicinity of same; that he has not discussed with his brother his business affairs and had no knowledge or information with respect to same. Nor did he have any knowledge or information concerning foreclosure of said mortgage, and that a sheriff's deed had been executed in favor of Julius Hirshberg covering the land embraced in George Dollemore's homestead entry.

It is prayed that a hearing be ordered; that protestant be required to prove his allegations, and that he be afforded an opportunity of defending himself.

The entire record, in connection with the response of William Dollemore to the order to show cause, has had the careful attention of the Department. It is not denied that the mortgage in question was in fact executed and delivered as claimed by Hirshberg to secure the payment of moneys with which to improve the homestead entry of George Dollemore, covering in part the tract applied for by William Dollemore. Said tract adjoins the homestead of William Dollemore on the north, and as they are brothers, living side by side for a number of years, it must be concluded that William Dollemore had some knowledge of his brother's financial affairs. Certainly he knew, since he was his brother's agent, that the tract in question was a part of George Dollemore's entry. As the mortgage was recorded in the county records, a court decree entered, and the land ordered sold in satisfaction of the debt and interest of Hirshberg, he is chargeable with notice of what an examination of the county records would have disclosed. (*Krueger* v. *United States*, 246 U. S. 69, 78.)

It is observed that George Dollemore had not only complied with the homestead law by submitting acceptable final proof, but he encumbered his entry with a mortgage with which to make his improvements, giving rise to very great equities in favor of those from whom the money was obtained, and it is well settled that an encumbrancer, in the case of a defaulting debtor, may submit evidence probative of the fact that the requirements of the homestead law have been personally met. In a number of adjudicated cases, involving mortgaged homestead lands for moneys borrowed with

which to improve same, where the entryman filed relinquishment in favor of a subsequent applicant, the Department has ruled that the mortgage should be satisfied or the subsequent entryman suffer the cancellation of his entry. Nor should an entryman who has earned the right to a patent be permitted to wrongfully abandon and forfeit the rights so acquired, thus defeating his creditors by refusal to comply with a lawful requirement. He can not, of course, be prevented from so doing, and specific performance can not be enforced, but the Department will not deny the right of an encumbrancer who has furnished the homesteader in good faith means with which to improve his entry to show that equitable title has been earned by compliance with the essential requirements of the law. See 48 L. D. 582 and the cases there cited; also *Lacher* v. *Mort* (50 L. D. 431).

In the opinion of the Department, the response of appellant to the order to show cause does not meet the material issues involved and fails to traverse the legal title claimed by Hirshberg. The request for a hearing is denied and it is directed that the application to amend of William Dollemore, Great Falls 052912, be rejected, and the homestead entry of George Dollemore, Great Falls 029577, be reinstated.

The decision appealed from is affirmed.

HATTIE B. MALTBY, ABRAHAM F. TOAVS, TRANSFEREE

Decided August 11, 1926

ENLARGED HOMESTEAD—TRANSFEREE—FORT PECK LANDS—PAYMENT—STATUTES.

The transferee of an entryman of Fort Peck Indian lands is entitled under the act of June 15, 1926, to the same benefits as to extension of time within which to complete payments as that act and the prior act of March 4, 1925, accord to the entryman himself.

EDWARDS, *Assistant Secretary:*

Abraham F. Toavs, transferee of Hattie B. Maltby, has appealed from a decision of the Commissioner of the General Land Office dated January 5, 1926, holding that unless $603.62 were paid within thirty days from notice the latter's entry under the enlarged homestead act, embracing lots 9, 10, 11, 12, 13, and 14, Sec. 6, T. 29 N., R. 47 E., M. M., Montana, would be canceled.

The balance of principal and interest due on said entry on March 4, 1925, with interest to November 1, 1925, was $1,207.24. One-half of said sum, or $603.62, was paid on October 28, 1925, and the transferee claimed that he was entitled to an extension of time under sec-

tion 1 of the act of March 4, 1925 (43 Stat. 1267), within which to pay the balance.

The transferee is holding an entry for land adjoining the entry in question, on which he was residing on March 4, 1925. He had farmed the land involved during 1925.

Under the provisions of section 2 of the act of March 4, 1925, *supra*, entrymen who had abandoned both residence on *and* cultivation of the land were required to pay all sums on or before November 1, 1925. The act made no provision for the relief of transferees of entrymen, but the act of June 15, 1926 (44 Stat. 746), extends the benefits of the act of 1925 to " successors or transferees " of entrymen.

Therefore, as Maltby's transferee had not abandoned the cultivation of the land, he was not in default, and was entitled to an extension of time to November 1, 1926, to pay the balance due.

The decision appealed from is reversed.

JOHN W. WARD

Decided August 11, 1926

ENLARGED HOMESTEAD—LIMITATION AS TO ACREAGE—STATUTES.

The limitation in section 7 of the enlarged homestead act, which relates to the quantity of lands that a settler or entryman may acquire thereunder, has no application to lands embraced in entries made prior to the act of August 30, 1890, or to settlements made prior thereto and subsequently carried to entry.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Courtier* v. *Hogan* (38 L. D. 499) cited and applied.

EDWARDS, *Assistant Secretary:*

By decision dated March 19, 1926, the Commissioner of the General Land Office held that John W. Ward was not qualified to make a further entry under the homestead law and accordingly rejected his application to make entry under section 7 of the enlarged homestead act for S. ½ SE. ¼, Sec. 32, T. 24 N., R. 7 W., M. M., Montana. An appeal to the Department has been filed.

It appears that on August 15, 1885, Ward made homestead entry for SW. ¼ SW. ¼, Sec. 29, SE. ¼ SE. ¼, Sec. 30, NE. ¼ NE. ¼, Sec. 31, and NW. ¼ NW. ¼, Sec. 32, said township, under which final certificate issued August 13, 1892, followed by patent.

On April 25, 1890, Ward made timber-culture entry for SW. ¼ NW. ¼, N. ½ SW. ¼, and NW. ¼ SE. ¼, Sec. 32, said township. Final certificate issued February 26, 1903, followed by patent.

On December 8, 1899, Ward made a desert-land entry for 320 acres in said township, which he perfected, patent issuing on February 23, 1907.

The Commissioner held that as Ward had acquired title to more than 480 acres he was not qualified to make the entry applied for, the holding being based on paragraph 3 of the regulations of July 8, 1916 (45 L. D. 208), under the act of July 3, 1916 (39 Stat. 344), adding a seventh section to the enlarged homestead act, which paragraph reads as follows:

> The only qualifications required of an applicant under this act are that he has not already made an additional entry thereunder, and that the tract applied for will not, with other lands which he has entered and acquired title to under any of the nonmineral public-land laws, or which he is then claiming thereunder, make an aggregate of more than 480 acres.

The foregoing must be read in connection with prior well-settled rulings of the Department, it not being practicable or necessary to embody in the regulations all the exceptions applicable.

In *Courtier* v. *Hogan* (38 L. D. 499) the Department held that lands embraced in entries made prior to the act of August 30, 1890 (26 Stat. 391), or in settlements made prior thereto and subsequently carried to entry, are not considered in determining the quantity of lands a settler or entryman may acquire under the limitation of that act that not more than 320 acres in the aggregate may be acquired by any one person under the public-land laws.

Hence, the area of the original homestead entry and of the timber-culture entry, both made prior to August 30, 1890, should be disregarded.

The land in the original entry will be listed in the next order of designation affecting land in Montana.

The decision appealed from is reversed.

ADJUSTMENT OF WATER-RIGHT CHARGES ON FEDERAL IRRIGATION PROJECTS—ACT OF MAY 25, 1926 (44 STAT. 636)—INTERPRETATIONS AND REGULATIONS GOVERNING THE ADMINISTRATION OF SECTIONS 41–45 [1]

August 20, 1926

SEC. 41. All lands found by the classification to be permanently unproductive shall be excluded from the project, and no water shall be delivered to them after the date of such exclusion unless and until they are restored to the project. Except as herein otherwise provided, the water right formerly appurtenant to such permanently unproductive lands shall be disposed of by the United States under the reclamation law: *Provided*, That the water users on the projects shall have a preference right to the use of the water: *And provided further*, That any surplus water temporarily available may be fur-

[1] Transmitted to all field offices of the Reclamation Service, August 20, 1926, and to registers of all United States land offices, September 4, 1926.

nished upon a rental basis for use on lands excluded from the project under this section on terms and conditions to be approved by the Secretary of the Interior.

It was not the intention of Congress to exclude permanently unproductive land from the project in any case where the United States is under contract to furnish a water right to the land now determined to be permanently unproductive and the contractor is unwilling so to amend the contract as to consent to the elimination of such land. If the landowner in such case elects to continue payment of charges on land now found to be permanently unproductive, he may do so, and would be entitled to continuation of water service.

Under section 45 of the act before any contract referred to in the preceding paragraph may be amended so as to release any water user under contract with the United States to pay construction and operation and maintenance charges on land now found to be permanently unproductive from such obligation it is required that the Secretary secure the execution of a contract by a water users' association or irrigation district whereby such association or district shall assume what is commonly referred to as "joint liability"; that is, shall be obligated to pay to the United States, without regard to default in the payment of charges against any individual farm unit or tract of irrigable land, the entire charges against all productive lands remaining in the project after the permanently unproductive lands shall have been eliminated and the charges against temporarily unproductive lands shall have been suspended in the manner and to the extent authorized by the act. Where the United States is under contract to furnish water for land now found, in accordance with the act, to be permanently unproductive, not only the owner of the land but also any interested mortgagees or other lienors are entitled to a notice and an opportunity to consent or object to the severance of the water right. This is especially of importance where the mortgagee or other lienor acquired his lien with a view to the enhanced value of the land due to the presence of the water right. Notice must be given accordingly.

The provision regarding disposition of water formerly appurtenant to permanently unproductive land applies to all projects except the Uncompahgre and Umatilla, where special provision is made otherwise. The water thus severed from unproductive land should be disposed of only where there is a sufficient supply to irrigate all of the remaining productive land. Where a shortage exists the water so severed should be utilized to supplement the insufficient supply available for the productive lands of the project.

The first proviso is interpreted to mean that the water right severed from the unproductive land shall be disposed of by the United States giving preference to landowners within the project

proper rather than to Warren Act contractors or other landowners outside of the boundaries of the project or on some other project than that from which severed.

Surplus water temporarily available under the second proviso should not be furnished for use on permanently unproductive land excluded from the project until after express authority has been secured and terms and conditions covering such service approved by the Secretary of the Interior. The superintendent should submit report in each case where the use of water is so desired. The report should be accompanied by recommendation of the irrigation district or water users' association.

SEC. 42. The construction charges heretofore paid on permanently unproductive lands excluded from the project shall be applied as a credit on charges due or to become due on any remaining irrigable land covered by the same water-right contract or land taken in exchange as provided in Section 44 of this Act. If the charges so paid exceed the amount of all water-right charges due and unpaid, plus the construction charges not yet due, the balance shall be paid in cash to the holder of the water-right contract covering the land so excluded or to the irrigation district affected; which in turn shall be charged with the responsibility of making suitable adjustment with the landowners involved. Should all the irrigable lands of a water-right applicant be excluded from the project as permanently unproductive, and no exchange be made as provided in section 44 hereof, the total construction charges heretofore paid, less any accrued charges on account of operation and maintenance, shall be refunded in cash, the water-right contract shall be canceled, and all liens on account of water-right charges shall be released.

Before credits may be properly applied under the foregoing section and the accounts handled as outlined, it will be necessary to ascertain from each water-right applicant affected whether an exchange is to be made under section 44. Suitable blanks will be provided for submitting request for application of credits and for refund of charges. Vouchers providing for refund of charges in cash should be prepared and forwarded to the Commissioner's office [Bureau of Reclamation] for appropriate action. There must accompany the voucher a showing regarding whether or not there are any outstanding mortgages or liens, the amount covered by such mortgages or liens, and the names and addresses of the mortgagees or other lien holders. This is necessary because of the proviso in section 44 which requires the Secretary to take into consideration the rights and interests of lien holders.

Where contracts are in force with irrigation districts which collect water charges, adjustments should be made through the medium of or in cooperation with such districts as the foregoing section provides.

Where all the irrigable lands of a water-right applicant are excluded no exchange is made and the construction charges paid are

refunded in cash, the water-right contract will be canceled by order of the Secretary, by whom also liens on account of charges will be released where individual water-right applications are in force. Where liens have attached by means of tax levies and assessments made through irrigation districts the necessary procedure will be worked out in such way as may be required by the State laws applicable. In all cases where action is to be taken under the last sentence of section 42 report should be made by the superintendent through the office of the district counsel, who will submit recommendation regarding the procedure necessary to secure release of liens. All other adjustments under this section, except as otherwise specified, may be made by the project superintendent, subject to appeal to be taken within 30 days to the Commissioner [Bureau of Reclamation] and Secretary by any applicant aggrieved by the action taken or decision made.

SEC. 43. The payment of all construction charges against said areas temporarily unproductive shall remain suspended until the Secretary of the Interior shall declare them to be possessed of sufficient productive power properly to be placed in a paying class, whereupon payment of construction charges against such areas shall be resumed or shall begin, as the case may be. While said lands are so classified as temporarily unproductive and the construction charges against them are suspended, water for irrigation purposes may be furnished upon payment of the usual operation and maintenance charges, or such other charges as may be fixed by the Secretary of the Interior, the advance payment of which may be required, in the discretion of the said Secretary. Should said lands temporarily classed as unproductive, or any of them, in the future be found by the Secretary of the Interior to be permanently unproductive, the charges against them shall be charged off as a permanent loss to the reclamation fund and they shall thereupon be treated in the same manner as other permanently unproductive lands as provided in this Act.

No affirmative action by the landowner is necessary to secure the suspension provided for in this section. The methods of handling suspended charges heretofore in vogue no doubt will be found sufficient in general to meet the requirements under this section. Where any doubt is entertained regarding the proper procedure special instructions should be requested of the Commissioner's office [Bureau of Reclamation].

Recommendations should be submitted by the project superintendent through the chief engineer's office regarding the charges to be made for water service to lands upon which payment of construction charges is temporarily suspended, specifying whether advance payment should be required. In the absence of special reasons to the contrary advance payment should be required. The report should be accompanied by the views and recommendations of the irrigation district or water users' association.

SEC. 44. Settlers who have unpatented entries under any of the public land laws embracing lands which have been eliminated from the project, or whose entries under water rights have been so reduced that the remaining area is insufficient to support a family, shall be entitled to exchange their entries for other public lands within the same project or any other existing Federal reclamation project, with credit under the homestead laws for residence, improvement, and cultivation made or performed by them upon their original entries and with credit upon the new entry for any construction charges paid upon or in connection with the original entry: *Provided*, That when satisfactory final proof has been made on the original entry it shall not be necessary to submit final proof upon the lieu entry. Any entryman whose entry or farm unit is reduced by the elimination of permanently unproductive land shall be entitled to enter an equal amount of available public land on the same project contiguous to or in the vicinity of the farm unit reduced by elimination, with all credits in this section hereinbefore specified in lieu of the lands eliminated. Owners of private lands so eliminated from the project may, subject to the approval of the Secretary of the Interior, and free from all encumbrances, relinquish and convey to the United States lands so owned and held by them, not exceeding an area of one hundred and sixty acres, and select an equal area of vacant public land within the irrigable area of the same or any other Federal reclamation project, with credit upon the construction costs of the lands selected to the extent and in the amount paid upon or in connection with their relinquished lands, and the Secretary of the Interior is hereby authorized to revise and consolidate farm units, so far as this may be made necessary or advisable, with a view to carrying out the provisions of this section: *Provided further*, That the rights extended under this section shall not be assignable: *And provided further*, That in administering the provisions of this section and section 42, the Secretary of the Interior shall take into consideration the rights and interests of lien holders, as to him may seem just and equitable: *Provided further*, That where two entrymen apply for the same farm unit under the exchange provisions of this section, only one [of] whom is an ex-service man, as defined by the joint resolution of January 21, 1922 (Forty-second Statutes, page 358), the ex-service man shall have a preference in making such exchange.

Before an exchange of an unpatented entry may be made under the first sentence of this section, except where the total area is eliminated, a finding must be made that the entry has been reduced to such an extent that the remaining area is insufficient to support a family. The decision of the superintendent on this feature, concurred in by the Director of Reclamation Economics, will be final, subject to the usual right of appeal within 30 days to the Commissioner, Bureau of Reclamation, and the Secretary. When appeals are forwarded a report should be made in each case showing:

(*a*) Area eliminated;

(*b*) Area remaining;

(*c*) Classification of the land remaining;

(*d*) The character and value of the improvements upon the remaining area; and

(*e*) Any and all other facts not enumerated which would have a bearing upon the matter to be determined.

If the superintendent and Director of Reclamation Economics make an affirmative finding that the area of the entry has been so reduced that the remaining land is insufficient to support a family or if the total area is eliminated, the entryman will be eligible for application to enter any available land for which application is made. The lands embraced in the original entry or farm unit must be relinquished to the United States free of all encumbrances, and the relinquishment with satisfactory showing that the land so relinquished is free of all encumbrance, together with the application to make new entry must be presented to the proper local land office with the approval of the superintendent and Director of Reclamation Economics.

The section further provides that an entryman whose entry or farm unit is reduced by the elimination of permanently unproductive land shall be entitled to enter an equal amount of available public land on the same project contiguous to or in the vicinity of the farm unit reduced by such elimination. This right is not dependent upon a finding that the area remaining is insufficient to support a family, but no entry for additional lands under this section will be permitted unless at least five acres have been eliminated from the original entry. Another condition is, of course, that there be available public land which may be entered. Preferably land to be entered should be contiguous to the farm unit reduced. However, the prospective entryman under the law has the election to enter either contiguous land if available or land on the same project in the vicinity. The term "in the vicinity" within the purview of this section is interpreted to mean land so located that it may be consolidated with the remaining area of the farm unit reduced so that the two areas may be handled as one farm. This will vary depending upon the accessibility of the tracts involved. It will also be influenced to a considerable extent by the presence or absence of canals, drainage ditches, and other physical barriers which obstruct communication, by the character and location of roads between the areas involved, and other physical features which go to render it feasible for the entryman to handle the two areas as a whole. Applications to enter noncontiguous land under section 44 must be accompanied by the certificate of the project superintendent of the Bureau of Reclamation that if the proposed entry is allowed the old and new land held by the entryman may, in his opinion, feasibly be worked as one farm unit.

As a prerequisite to the owners of private lands which have been eliminated from the project selecting or entering land of an area

equal to that eliminated, there must be presented to the superintendent and forwarded by him with appropriate endorsement to the proper local land office the following papers:

(*a*) An application describing the land desired by way of exchange.

(*b*) Warranty deed from the landowner conveying to the United States the lands eliminated.

(*c*) Satisfactory showing of ownership by the person executing the warranty deed.

(*d*) A satisfactory showing that the land so conveyed is free of all incumbrance.

(*e*) Certificate of project superintendent, required by last sentence of preceding paragraph, if applicable.

All papers when so filed will be forwarded by the local land office, through the Commissioner of the General Land Office, to the Secretary of the Interior for his approval.

To summarize:

Section 44 covers three situations under which an exchange of entries may be permitted: (1) Settlers on unpatented entries entirely eliminated from the project or whose entries have been so reduced that the remaining area is insufficient to support a family; (2) where there is some elimination in an unpatented entry but not enough to destroy the ability of the unit to support a family; and (3) owners of private lands "so eliminated from a project."

From the above it will be noted that as to settlers on unpatented land, the right to make lieu entry is specifically conferred both where the original is insufficient to support a family and where the elimination as made does not result in this condition, but the latter is subject to the limitation that the new area selected must consist of land contiguous to or in the vicinity of the original unit.

The owner of a tract of private land having a project water right, and permitted by the act to be eliminated in whole or in part from the project, may, subject to the approval of the Secretary of the Interior, select an equal area of vacant public land. If the whole of such privately owned tract is so eliminated, the owner thereof may select an equal irrigable area of vacant public land within the limits of any other Federal reclamation project. If only a portion of such privately owned tract is so eliminated, the owner thereof may select an equal irrigable area of vacant public land within the limits of the same project, but such equal irrigable area so selected must be in the vicinity of the retained land of such owner, so that in the opinion of the Secretary the new and retained areas may be worked advantageously as one farm. This regulation is intended to equalize the conditions applicable to private land owners and to entrymen when

claiming the benefits of section 44. For the same reason no exchange of private for public land will be permitted when the acreage eliminated is less than five acres. Private landowners making such exchange are entitled to credit upon the construction costs of the selected lands to the extent and in the amount of the construction charges paid upon or in connection with the relinquished land. The construction charge upon any land taken in exchange will be that fixed for such land by the applicable public notice, district contract, or association contract, as the case may be.

Section 45 being of some length will be quoted and commented upon by paragraphs of which there are four.

Section 45 (par. 1):

> The Secretary of the Interior is hereby authorized, in his discretion, to amend any existing water-right contract to the extent necessary to carry out the provisions of this Act, upon request of the holder of such contract. The Secretary of the Interior, as a condition precedent to the amendment of any existing water-right contract, shall require the execution of a contract by a water users' association or irrigation district whereby such association or irrigation district shall be required to pay to the United States, without regard to default in the payment of charges against any individual farm unit or tract of irrigable land, the entire charges against all productive lands remaining in the project after the permanently unproductive lands shall have been eliminated and the charges against temporarily unproductive areas shall have been suspended in the manner and to the extent authorized and directed by this Act.

The foregoing provision is referred to under section 41 of the act, but is of sufficient importance to warrant further comment and emphasis. In the first forty sections of this act, the details of the charge-offs and suspensions on each individual project are recited, and in the administrative provisions of the act in sections 41 to 50, inclusive, are set forth the terms and conditions under which the adjustments made in the earlier sections of the act may be carried out.

Paragraph 1 of section 45 gives the Secretary authority in his discretion and upon the request of the holder of such contract, to amend any existing water-right contract to the extent necessary to carry out the adjustments. No adjustment involving the amendment of an existing contract may be made except with the consent of the contractor and in addition to the consent of the contractor the Secretary must require as a condition precedent to the amendment the execution of a contract by a water users' association or district whereby such association or district assumes joint liability for payment of the construction charges. The individuals on a given project must organize (if the required organization does not already exist), either as a water users' association or an irrigation district before it will be possible for the individuals to secure any relief under this act, except the suspension of construction charges on temporarily unproductive land. In other words, Congress has provided that cer-

tain charges and costs may be eliminated, but has also provided that to secure this write-off the owners of the productive lands must agree to be jointly liable for the remaining cost. Where a district or an association is already in existence and has entered into a repayment contract providing for complete joint liability, the requirement named in the first paragraph of this section is satisfied and no further contract will be required as a condition precedent to granting relief to individuals.

Section 45 (par. 2):

> The Secretary is authorized, in his discretion, upon request of individual water users or districts, and upon performance of the condition precedent above set forth, to amend any existing water-right contract to provide for increase in the time for payment of construction charges, which have not then accrued, to the extent that may be necessary under the conditions in each case, subject to the limitation that there shall be allowed for repayment not more than forty years from the date the first payment matured under the original contract, and also to extend the time for payment of operation and maintenance of water-rental charges due and unpaid for such period as in his judgment may be necessary, not exceeding five years, the charges so extended to bear interest payable annually at the rate of 6 per centum per annum until paid, and to contract for the payment of the construction charges then due and unpaid within such term of years as the Secretary may find to be necessary, with interest payable annually at the rate of 6 per centum per annum until paid.

Under the second paragraph, and provided the condition precedent named in the first paragraph is satisfied, the Secretary is authorized to increase the time for payment of construction charges to not more than 40 years from the date the first payment matured under the original water-right contract. The period of 40 years could not begin to run from the date of a proposed contract with a district or an association.

The time of payment for due and unpaid operation and maintenance charges may be extended for not exceeding five years, the charges so extended to bear interest payable annually at the rate of six per cent per annum until paid. The time of payment for due and unpaid construction charges may be extended for such terms of years as the Secretary may find necessary, with interest payable at the rate of six per cent per annum until paid. This provision does not permit the deferment or a period of suspension in the due dates of construction charge installments that are not due at the date the contract becomes effective. The act does not require that the 40 annual payments be equal, and when the conditions warrant the installments may be graduated in such manner as the Secretary may specify. The matter of extending the dates of payment is entirely within the discretion of the Secretary, and a district or association desiring relief should file application therefor with the superintend-

ent setting forth the time of the extension desired and all of the conditions under which the extension is believed warranted.

Section 45 (par. 3):

> The Secretary is further authorized, in his discretion, to grant the relief provided for in section 4, Act of December 5, 1924 (Forty-third Statutes at Large, page 701), to any of the projects mentioned in this Act, without requiring such project to take over the care, operation, and maintenance of the project works.

Subsection G of section 4, act of December 5, 1924, required the taking over of operation of the irrigation works by the water users' organization when the project or division was two-thirds under water-right contract as a prerequisite to the granting of the benefits provided for in said act. Paragraph 3 of section 45 of the present act merely amends the 1924 act by substituting the judgment and discretion of the Secretary for the mandatory requirement named in subsection G.

Section 45 (par. 4):

> The decision of the Secretary as to the necessity for amending any such contract shall be conclusive: *Provided*, That nothing in this Act shall prevent the execution of any contract heretofore negotiated or in connection with which negotiations have been heretofore opened in good faith or which may be hereafter opened in good faith under the Act approved December 5, 1924 (Forty-third Statutes at Large, page 701), and which shall be executed on or before January 1, 1927, unless the water users affected elect to have the contract governed by this section: *Provided further*, That in the execution of any contract provided for in the last proviso, the Secretary of the Interior shall have authority to arrange for payment of construction charges by any project or division for the calendar years 1926, 1927, and 1928 in proportion to the state of development of the project in those years: *Provided further*, That the Secretary of the Interior is authorized to complete and execute the supplemental contract, now being negotiated and which has been approved as to form by the Secretary, between the United States and the Belle Fourche Irrigation District and at the expiration of said supplemental contract to enter into a permanent contract on behalf of the United States with said District in accordance with the terms of said supplemental contract.

The first sentence needs no interpretation, it being clear from the language used that Congress intended that the Secretary should decide all questions as to the necessity for amending existing contracts.

The first proviso permits for the limit of time named, the continuation or inauguration of negotiations with those districts or associations desiring the crop-production plan of repayment. The negotiations must result in an executed contract before January 1, 1927: otherwise the repealing provisions of section 47 of the act under consideration will become effective and prevent the execution of a contract upon the crop-production basis. The important element here is one of time and a clear understanding by the water users that

negotiations alone will not withhold the bar of the statute. Many contracts providing for payment on a crop-production basis have been approved as to form by the Department, but such contracts can not under the present status of the law be made effective unless actually executed by all parties before January 1, 1927.

The last proviso save one to paragraph 4 authorizes the arrangement, at the discretion of the Secretary, of a graduation in construction installments during the years 1926, 1927, and 1928 in contracts executed under the act of December 5, 1924. This is a matter which would be handled by negotiation and no definite instructions appear necessary since the decision in each case would depend upon the development of the particular project in the years named.

GENERAL DISCUSSION

From the publicity which has been given on all projects to the work of the Board of Survey and Adjustments, the classification of lands and subsequent reviews, as well as the action subsequently taken by Congress, it may be assumed that water users are fairly familiar with the general significance of the act. However, in order to forestall any possible neglect, the substance of the law and these regulations should be discussed by the project superintendent and the district counsel with the governing board of the water users at the first convenient regular meeting.

At such meeting many doubtful points may be clarified and interpreted by the district counsel and the project superintendent, and if necessary any doubtful questions as to the interpretation of the law may be submitted to the Commissioner [Bureau of Reclamation] for decision.

Full publicity should be given to the availability of the benefits of this act in the local press in such manner as may be decided on by the district or water users' board. This is more distinctly a local problem because most projects present dissimilar conditions with respect to the applications of the act which must be appropriately treated both from the standpoint of conveying the information to the water users who are interested as well as in the application of the most effective remedy.

Lists and plats should be made available in the district or water users' association office as well as in the project office (in case these are located in different places) so that each water user may become acquainted with the results of the classification as it affects his individual holding, particularly in reference to the number of acres and the general location of the land in his tract upon which the payment of charges are authorized to be suspended or as to which elimination from the irrigable area is permitted. Each settler seeking relief under the act should state his intention as to the future operation of

his holding at the earliest possible date, because in most cases the opportunities for suitable exchanges are necessarily limited. Appropriate blanks will be prepared and distributed for this purpose at an early date. If all or practically all of a farm unit not patented is land upon which a temporary suspension of charges is authorized by the act, the owner may apply for an exchange, which is grantable under subsection M of section 4 of the act of December 5, 1924 (43 Stat. 672, 703), if the Secretary finds that the unit is insufficient to support a family. Or such unit holder may continue the water service with payment of only operation and maintenance charges upon the land as to which the payment of the construction charges is authorized to be suspended. If all or practically all is land permanently unproductive, he may exchange or accept the refund or he may maintain his existing status by continuing his payments. He may also accept the refund, permit the cancellation of his water right, and rent surplus water if any is available. Should a small percentage only of the holding be permanently unproductive lands, credit for charges paid on the excluded area may be applied to the remaining irrigable land. Even in cases where the remaining area is insufficient to support a family the owner may in consideration of his improvements, etc., prefer to remain, taking advantage of the credits. In making an exchange of units it would not be equitable, nor in fact workable, for the Government to accept lands with outstanding liens and the fact that the entry or tract in private ownership must be relinquished or deeded to the United States free of all encumbrances should be stressed in the notice to those affected, in view of the large number of mortgages known to exist on some projects.

Cases involving the elimination of a small percentage only, where the remaining area is sufficient to support a family and where a lieu entry for the eliminated portion is desired rather than the application of credit to the remaining area, must of necessity be considered and decided upon the individual merits of each and not by the application of a hard and fast rule. The important element here is the availability of an equivalent or suitable amount of land contiguous to or in the vicinity of the remaining land. The primary duty imposed by the Adjustment Act is believed to be directed toward those cases where classification has established that the unit as a whole is unsuitable and insufficient to support a family, and these cases should be given the earliest consideration.

ELWOOD MEAD,
Commissioner, Bureau of Reclamation.

WILLIAM SPRY,
Commissioner, General Land Office.

Approved:

E. C. FINNEY,
First Assistant Secretary.

EXPORTATION OF TIMBER FROM PUBLIC LANDS IN ALASKA

REGULATIONS

[Circular No. 1092]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 27, 1926.

The act of April 12, 1926 (44 Stat. 242), provides—

> That timber lawfully cut on any national forest, or on the public lands in Alaska, may be exported from the State or Territory where grown if, in the judgment of the Secretary of the department administering the national forests, or the public lands in Alaska, the supply of timber for local use will not be endangered thereby, and the respective Secretaries concerned are hereby authorized to issue rules and regulations to carry out the purposes of this Act.

Pursuant to the above act, the rules and regulations governing the sale and use of timber upon the vacant, unreserved public lands in Alaska as set forth in Circular No. 491, approved September 8, 1923 (50 L. D. 27, 58–66), are hereby modified as follows:

(1) Sales of timber to be cut for export may be made pursuant to the procedure and under the conditions set forth in the existing rules and regulations (Circular No. 491) where quantities are such as will be disposed of from year to year, and the purchases are made by those who do not contemplate large-scale production and an expenditure of large sums of money for developing enterprises for the exportation of such timber.

(2) Sales of timber suitable for manufacturing purposes are hereby authorized in quantities, if found available, sufficient to supply a mill or proposed mill for a period of as much as ten years, when it is satisfactorily shown that the purchaser in good faith intends to develop an enterprise for the cutting of this class of timber for export from Alaska and the sale does not endanger the supply of such timber for local use. The amount of timber that any one purchaser will be permitted to purchase under this provision and the period of the contract will be governed by the capacity of the mill and the estimated quantity that it will be capable of producing during the period covered by the contract of sale. When a ten years' supply is sold the period within which the same must be cut (ten years) will begin to run from the time that the contract of sale is executed, if the manufacturing plant has been built, or from the time that the mill has been constructed and ready to begin operations if it is to be built, but in no case will more than two years be allowed for construction, and each contract shall contain a provision that all rights acquired thereunder shall be forfeited if operations have

not been commenced within three years from the date of execution of the contract, unless, upon satisfactory showing the Secretary of the Interior, shall, in his discretion, excuse the delay. Commencement of operations in this sense will be construed as a bona fide commencement of actual cutting of timber in quantity sufficient to show that it is the purpose of the purchaser to fulfill the conditions of the contract and that it was not entered into merely for speculative purposes.

(3) Applications to purchase timber for export from Alaska pursuant to the foregoing act of Congress must be filed in duplicate in the United States land office for the district wherein the lands to be cut over are situated and should show: (*a*) Name, post-office address, residence and business location of applicant; (*b*) amount or approximate amount of board feet of timber that the applicant desires to purchase; (*c*) a description by legal subdivision or subdivisions, if surveyed, or by metes and bounds with reference to some permanent natural land mark, if unsurveyed, and the area or approximate area of the land from which the timber is to be cut, and if the lands are within the area (Alaskan Timber Reserves) withdrawn pursuant to the act of March 12, 1914 (38 Stat. 305), in aid of the construction of the Alaskan Government-owned railroads it should be so stated and evidence of consent previously obtained from The Alaska Railroad should be filed with the application; (*d*) whether or not the applicant is prepared to commence cutting immediately, and if not, approximately how long before timber-cutting operations will be commenced; (*e*) the estimated annual capacity of the mill or proposed mill, and the amount of money invested or to be invested in the establishment of the enterprise, accompanied by evidence as to the financial standing of the applicant and a statement showing the general plan of operation and the purpose for which the timber is to be used. The sum of $200 must be deposited with each application as an evidence of good faith and for the purpose of helping to defray the cost of appraisal. If the sale is consummated the amount of the deposit will be credited on the purchase price without deduction for the cost of appraisal. All remittances must be in cash or by certified check or postal money order. No other form of remittance can be accepted.

(4) Immediately upon the filing of an application to purchase timber under section 2 of these rules and regulations a notice shall be published at the expense of the applicant in a newspaper designated by the register, published in the vicinity of the land from which the timber is to be cut and most likely to give notice to the general public, once a week for a period of five consecutive weeks, if in a weekly paper, or if a daily paper for a period of 30 days. The description of the land in the notice must be identical with the de-

scription in the application. The register and receiver will post a copy of said notice in a conspicuous place in their office during the period of publication. Upon the execution of a contract the purchaser shall, if the lands from which the timber is to be cut are unsurveyed, cause the boundaries to be blazed or otherwise marked in order that they may be identified. This requirement has been adopted in order that others who may subsequently desire to purchase timber or to settle upon or enter the land may have notice that the timber has been applied for.

(5) The district officers will make appropriate notations upon the records of their office and transmit the application to the Commissioner of the General Land Office, and at the same time transmit the duplicate to the division inspector at Anchorage, Alaska, or to an inspector located in the particular land district who shall have been designated by the division inspector to make appraisals. Upon receipt of the same the latter will without delay cause the timber applied for to be examined and appraised. The appraisal rates will be based upon a fair stumpage rate taking into consideration the quality of the timber and its accessibility to market. In no event will any timber suitable for manufacturing purposes be appraised at less than $1 per thousand feet, board measure. After an examination and appraisal has been made the division inspector will at once submit his report and recommendation to the Commissioner of the General Land Office, together with a statement of facts showing whether such sale would endanger the supply of timber for local use. The Government reserves the right to reappraise the remaining standing timber at the expiration of five years from the date of commencement of the timber-cutting period as set forth in paragraph 2 thereof, but in no instance shall the appraisal be at more than double the rate of the original appraisal.

(6) Upon receipt of a report that such sale appears warranted the Commissioner of the General Land Office will notify the applicant of the result of the appraisal and advise him that he will be allowed 30 days from receipt of such notice within which to enter into a contract with the Government through the Commissioner of the General Land Office as its agent, subject to the approval of the Secretary of the Interior, to purchase the timber applied for pursuant to the rules and regulations of the Department pertaining thereto, and shall execute and file therewith a bond in a sum equal to 50 per cent of the stumpage value of the estimated amount of timber to be cut during each year of the contract. The said bond to have as surety a bonding company shown on an approved list issued by the Treasury Department, and shall be conditioned on the payment for the timber in accordance with the terms of the contract and to the faithful performance of the contract in other respects

and to observance of the rules and regulations pursuant to which the sale is made. Forms of contract and bond to be used hereunder are appended to these rules and regulations [forms omitted]. All contracts and bonds executed hereunder must be approved by the Secretary of the Interior.

(7) All contracts shall contain provisions against waste and precaution against forest fires. The Government may reserve the right to insert in a contract a provision authorizing the disposition for local use of timber that is not suitable for manufacturing purposes upon the area described in the contract, to another or others pursuant to the provisions of Circular No. 491 (50 L. D. 58, 59, Secs. 1 and 2). Contracts entered into under these rules and regulations will also be subject to the right of qualified persons to settle upon or enter the lands under the provisions of the homestead laws, but such settlers or homesteaders shall not have any title to or interest in the timber purchased under the contract or be permitted to interfere with the purchaser's operations incident to the cutting and removal of the timber.

(8) At the expiration of a contract a new contract may be entered into for a period of five years, upon the approval of the Secretary of the Interior, where there is sufficient timber available to warrant it. Prior good faith of the purchaser and substantial compliance with the conditions of the expired contract will be given consideration with reference to awarding a new contract. A new appraisal shall be made at that time for the purpose of fixing the stumpage price. Further renewals for five-year periods may be made to the same purchaser upon approval of the Secretary of the Interior.

(9) These rules and regulations are not applicable to timber on National Forests, Indian or Eskimo claims, or lands otherwise appropriated, reserved, or withdrawn for any purpose, except where the terms of the reservation or withdrawal order permit. For information relative to areas in Alaska from which timber can not be sold, see Circular No. 491 (50 L. D. 61, Sec. 8).

WILLIAM SPRY,
Commissioner.

Approved:

HUBERT WORK,
Secretary.

LOOSE v. WALKER RIVER IRRIGATION DISTRICT

Decided August 31, 1926

RIGHT OF WAY—RESERVOIR SITE—STATE IRRIGATION DISTRICT.

A State irrigation district, created by State law, although having some of the attributes of a private corporation, is a public corporation for municipal purposes and quasi municipal in character.

RIGHT OF WAY—RESERVOIR SITE—STATE IRRIGATION DISTRICT.

The corporate existence of a State irrigation district and its right to function can not be collaterally attacked or impeached.

RIGHT OF WAY—RESERVOIR SITE—STATE IRRIGATION DISTRICT.

The right of a State irrigation district to function and operate in a State other than that in which it was created is a matter of comity and consent, express or implied, and can be questioned only by the State itself.

FINNEY, *First Assistant Secretary:*

This is an appeal by C. E. Loose from decision of the Commissioner of the General Land Office dated January 13, 1925, dismissing his protest against the application of the Walker River Irrigation District, a quasi municipal corporation of the State of Nevada, for a reservoir site and irrigation easements on the East Walker River, involving lands in Ts. 5 and 6 N., R. 25 E., M. D. M., California, pursuant to the provisions of the act of March 3, 1891 (26 Stat. 1095), and section 2 of the act of May 11, 1898 (30 Stat. 404).

The Walker River Irrigation District filed application March 3, 1921, for the so-called Bridgeport Dam and Reservoir Site. That application was rejected by the Commissioner of the General Land Office June 16, 1921, his decision being affirmed by the Department August 26, 1921 (48 L. D. 197), on the ground that part of the lands involved were reserved under the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), and for the further reason that Loose owned the land upon which the proposed dam site was located, and had applied for license for a power project under said act, which was pending before the Federal Power Commission. December 28, 1922, the Commission denied the application of Loose on the grounds—

> that the construction and operation of his proposed project would seriously interfere with the utilization of the waters of East Walker River for irrigation upon lands of the Walker River Irrigation District; that there is public demand for the use of the waters of East Walker River for irrigation and no demand for additional electric power in the territory adjacent to the proposed project; and that under the circumstances existing a comprehensive development of East Walker River for purposes of water-power development or other beneficial public use requires that irrigation be the primary use and power development secondary thereto.

As a result of this action by the Commission, the Walker River Irrigation District filed a new map of location of the reservoir site covering substantially the same ground as the former application, the only difference being that the dam site is upon Government land and not upon land owned by Loose. Protest was filed by Loose against the new application on the ground that it covered lands still embraced in a power-site withdrawal, and while so reserved the application was ineffective and could not be entertained. Pro-

testant also asserted that he owned in fee simple most of the lands which would be inundated by the reservoir and likewise is the owner of practically all of the lands below said proposed reservoir, upon, over, and across which the proposed flume of the Walker River Irrigation District—along its course—must necessarily pass; that by reason of his ownership of said lands the proposed storage reservoir of said district is not feasible, and without acquisition of title to the lands held by him the Walker River District's undertaking could not be executed successfully, at least as now planned. It was contended, furthermore, that inasmuch as said district is a mere instrumentality or agency of the State of Nevada for the performance of certain quasi municipal functions, it can not act beyond the territorial limits of the State by which it is created; that it is not a corporation in the sense in which that word is used in the constitution and laws of California and elsewhere; that it can legally be granted no rights or privileges in the State of California; that it can not appropriate, acquire, divert, impound, or lawfully use the waters of that State, and that the Secretary of the Interior is without authority, under the circumstances, to grant the District's application for irrigation easements under the act of 1891.

Following the usual practice, the Commissioner of the General Land Office referred the new map of the reservoir site to the Federal Power Commission for consideration and report, and under date of December 26, 1923, the Executive Secretary of the commission advised the General Land Office as follows:

The Walker River Irrigation District, Yerington, Nevada, having filed in the United States Land Office at Independence, California, an application for right of way for a reservoir under the act of March 3, 1891 (26 Stat. 1095), as amended by the act of May 11, 1898 (30 Stat. 404), the lands included in said right of way being in part included in Power Site Reserves Nos. 58, 150, and 555, withdrawn under the act of June 25, 1910 (36 Stat. 847), and in a reserve created under the act of June 10, 1920 (41 Stat. 1063), in pursuance of Project No. 139 in Ts. 5 and 6 N., R. 25 E., M. D. M., California, and the Commission having considered the circumstances with reference thereto, as presented by the Executive Secretary, voted to approve said right of way applied for by said District and the proposed use of said lands for a reservoir for irrigation purposes as being in accordance with the plan best adapted to a comprehensive scheme of utilization of the water resources involved for power development and other beneficial public uses, subject to such stipulation to be executed by the applicant as will permit of the future development of water power under conditions which will not materially interfere with the use of the reservoir for irrigation. It was further voted that the Executive Secretary be authorized to prepare such stipulations and to execute the same on behalf of the Commission.

I am submitting herewith a draft of stipulation in triplicate which should be forwarded to the applicant for execution prior to approval of the right of way. Thereafter one copy may be retained by the applicant, one copy by your office, and one copy returned to this Commission for its permanent record.

Thereupon the Commissioner of the General Land Office dismissed the protest. As stated in the decision from which this appeal is prosecuted, the record affirmatively shows:

(1) That the Walker River Irrigation District was duly and regularly organized pursuant to the Nevada Irrigation District Act approved March 19, 1919 (Nev. Stat. 1919, Chap. 64), all the proceedings of organization having been confirmed by the district court in and for the county of Lyon and sustained by the supreme court of Nevada. *Hendrich* v. *Walker River Irrigation District* (195 Pac. 327).

(2) That the district had a *prima facie* valid right to appropriate water for diversion and use through the right of way sought to be secured from the United States.

(3) That it had complied with the terms and conditions upon which foreign corporations may transact business in the State of California, by filing the prescribed documents in the office of the Secretary of State of California, consisting of a certified copy of the legislative act under which it was created, and a certified copy of the decree of the Eighth Judicial District Court of the State of Nevada in and for the county of Lyon, confirming the organization of said district. In this connection it appears that the Nevada law recognized the possibility that an irrigation district or corporation might find it necessary to operate or function by appropriating water or acquiring property in another State, and made due provision therefor. Section 10 of the irrigation district law of 1919 provides—

* * * Said board shall also have the right to acquire, either by purchase, condemnation, or other legal means, all lands, rights, and other property necessary for the construction, use and supply, operation, maintenance, repair, and improvement of the works of the district, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of waters, and all other works and appurtenances, either within or without the State of Nevada.

Furthermore, there is a comity existing between the States of California and Nevada regarding the appropriation and use of water and the statutes leave no doubt as to the right to appropriate water in California or Nevada for use in the other State. The act approved May 17, 1917 (Cal. Stat. 1917, Chap. 195), provides—

Sec. 15a. The state water commission shall allow the appropriation of water in this state for beneficial use in another state only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in the State

of California. Upon any stream flowing across the state boundary a right of appropriation having the point of diversion and the place of use in another state and recognized by the laws of that state shall have the same force and effect as if the point of diversion and the place of use were in this state: *Provided*, That the laws of that state give like force and effect to similar rights acquired in this state: *Provided*, That nothing in this act be so construed as to apply to interstate lakes or streams flowing in or out of such lakes.

The reciprocal provision is found in Chapter 174, Nevada Statutes of 1913, reading as follows:

That no permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit or any portion of the works in such application described and to be constructed for the purpose of storing, conserving, diverting, or distributing such water, or because the place of intended use, or the lands to be irrigated by such water, or any part thereof, may be situated in any other state, when such state authorizes the diversion of water from such state for use in Nevada, but in all such cases where either the point of diversion or any of such works or the place of intended use or the lands or part of the lands to be irrigated by means of such water are situated within the State of Nevada the permit shall issue as in other cases.

In disposing of the case the Commissioner held that the district had fully complied with the governing regulations (36 L. D. 567, 570) under the act of 1891 and had *prima facie* established its right to apply for and receive a right of way thereunder; that it had previously been recognized as a proper beneficiary under said act, having obtained a grant May 3, 1922, for the Topaz or Alkali Lake Reservoir, lying partly within the State of California and partly within the State of Nevada, and consequently that all questions as to said company's right to apply for and receive such right of way were *res judicata*. It was also held that any question respecting the right of the district as a corporation to operate and function in the State of California and to appropriate, divert, and use the waters of that State were matters for the courts of California and not for the Land Department to determine.

Exhaustive briefs have been filed and the case has received careful consideration. It appears that the Bridgeport Reservoir is one of the principal projects planned by the Walker River Irrigation District for the reclamation enterprise it has undertaken, and that in 1923, following the rejection by the Federal Power Commission of the application of C. E. Loose for license for a power project, the district proceeded to construct the said dam and reservoir; that the work has now been completed at a cost of approximately $300,000 and is being utilized for the storage of water for the Walker River Irrigation District. Pending the appeal a hearing was held June 22, 1925, before the division of water rights, State Department of Public

Works (California) involving application No. 1389 of the Walker River Irrigation District to impound water for irrigation purposes at the site of the said reservoir, protest having been filed by Loose on the ground that the district was not qualified to do business in the State of California or acquire water rights therein. The Department has now been advised by the Department of Public Works that the protest in question was dismissed and that the application of the Walker River Irrigation District to appropriate water from the East Walker River for storage in Bridgeport Reservoir was appoved June 18, 1926. Manifestly, therefore, appellant's contention that the easement sought can not be utilized for lack of water is without force.

The Department is not disposed to question the right of the Walker River Irrigation District to function and operate in the State of California. Any uncertainty in that regard may properly be left to the courts to determine. In that connection, however, it is observed that the courts have not always been harmonious in their views as to the precise definition to apply to irrigation districts, but there has been uniformity in the decisions to the effect that these corporations are public and quasi municipal in character. They apparently have some elements of private corporations. In *Indian Cove Irrigation District* v. *Prideaux* (136 Pac. 618, 621) the court held—

> It is settled law that irrigation districts are public corporations although not strictly municipal in the sense of exercising governmental functions other than those connected with raising revenue to defray the expense of constructing and operating irrigation systems and the conduct of the business of the district.

In the case of *Randolph* v. *Stanislaus County* (186 Pac. 625, 627), quoting from *In re Wener* (62 Pac. 99), the court defined an irrigation district as follows:

> A sanitary district, no more than an irrigation district, or a reclamation district, or a drainage district, possesses police powers properly belonging to cities and municipal bodies exercising local governmental functions. Such districts are created for the purpose generally of some special local improvement and should exercise only such powers as may be conferred upon them by the Legislature in the line of the object of their creation. Although in the nature of public corporations, they are not municipal corporations in the proper sense of that term. All municipal corporations are public corporations, but the converse does not follow that all public corporations are municipal. Railroad corporations are deemed quasi public corporations, but they are not deemed quasi municipal corporations. In some of the cases expressions may doubtless be found which would seem to indicate that public corporations and municipal corporations are synonymous, but it is nevertheless inaccurate to designate a drainage district or a sanitary district, although public corporations, as municipalities.

In the case of *Turlock Irrigation District* v. *White* (198 Pac. 1060), the court held (syllabus)—

An irrigation district organized under the laws of California is not a "municipal corporation," within the amendment of 1914 to Const. art. 13, section 1, excepting from the exemption from taxation of property belonging to municipal corporations, "such lands and the improvements thereon located outside the municipal corporation owning the same as were subject to taxation at the time of their acquisition by the county, city and county, or municipal corporation."

In the body of that decision it was stated (page 1062)—

* * * The nature of an irrigation district has been a matter of judicial investigation and interpretation, and it has been held that such a corporation is not a municipal corporation but a "public corporation for municipal purposes." Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. As to swamp land, drainage, levee, and reclamation districts, similar to irrigation districts, it has been held that they were not municipal corporations. People *v.* Levee Dist. No. 6, 131 Cal. 30, 63, Pac. 676; People *v.* Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207; Swampland Dist. No. 150 *v.* Silver, 98 Cal. 51, 32 Pac. 866, and Reclamation District No. 70 *v.* Sherman, 11 Cal. App. 399, 105 Pac. 277. See, also, People *v.* Selma Irrigation Dist., 98 Cal. 206, 208, 32 Pac. 1047, and cases there cited.

Ordinarily these districts can exercise no functions and engage in no activities outside the boundaries of the State by which they are created. But it appears that the Walker River Irrigation District was expressly authorized and endowed by its charter with the right to do business, store water, and acquire property in an adjoining State. Obviously it can exercise none of the functions and privileges conferred by its charter in any other State or country except by the comity and consent, express or implied, of such State or country. In this connection it is shown that its right to function and operate in California has been recognized and acquiesced in by the public officials of that State. None but the State can question its right to so operate and the State itself may justly be precluded on principles of estoppel from raising such objection. Its corporate existence and right to function can not be collaterally attacked or impeached. *Western Union Telegraph Company* v. *Superior Court of Sacramento County* (115 Pac. 1091); *Miller* v. *Perris Irrigation District* (85 Fed. 693); *Quinton* v. *Equitable Investment Company* (196 Fed. 314); *Tulare Irrigation District* v. *Shepard* (185 U. S. 1).

Under these circumstances the Department holds the objections here considered to be untenable and the decision appealed from is accordingly affirmed.

RULES OF PRACTICE

[Approved December 9, 1910; effective February 1, 1911; reprint September 1, 1926, with amendments]

I

PROCEEDINGS BEFORE REGISTERS

INITIATION OF CONTESTS

RULE 1. Contests may be initiated by any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Land Department.

Any protest or application to contest filed by any other person shall be forthwith referred to the Division Inspector, who will promptly investigate the same and recommend appropriate action.

APPLICATION TO CONTEST

RULE 2. Any person desiring to institute a contest must file, in duplicate, with the register, application in that behalf, together with statement under oath containing:

(*a*) Name and residence of each party adversely interested, including the age of each heir of any deceased entryman.

(*b*) Description and character of the land involved.

(*c*) Reference, so far as known to the applicant, to any proceedings pending for the acquisition of title to or the use of such lands.

(*d*) Statement, in ordinary and concise language, of the facts constituting the grounds of contest.

(*e*) Statement of the law under which applicant intends to acquire title and facts showing that he is qualified to do so.

(*f*) That the proceeding is not collusive or speculative, but is instituted and will be diligently pursued in good faith.

(*g*) Application that affiant be allowed to prove said allegations and that the entry, filing, or other claim be canceled.

(*h*) Address to which papers shall be sent for service on such applicant.

RULE 3.[1] The statements in the application must be corroborated by the affidavit of at least one witness having such personal knowl-

[1] Amended Sept. 23, 1915.

edge of the facts in relation to the contested entry as, if proven, would render it subject to cancellation, and these facts must be set forth in his affidavit.

RULE 4. The register may allow any application to contest without reference thereof to the commissioner; but he must immediately forward copy thereof to the Commissioner of the General Land Office, who will promptly cause proper notations to be made upon the records, and no patent or other evidence of title shall issue until and unless the case is closed in favor of the contestee.

CONTEST NOTICE

RULE 5. The register shall act promptly upon all applications to contest, and upon the allowance of any such application shall issue notice, directed to the persons adversely interested, containing:

(*a*) The names of the parties, description of the land involved, and identification, by appropriate reference, of the proceeding against which the contest is directed.

(*b*) Notice that unless the adverse party appears and answers the allegation of said contest within 30 days after service of notice the allegations of the contest will be taken as confessed.

(For contents of notice when publication is ordered, see Rule 9.)

SERVICE OF NOTICE

RULE 6. Notice of contest may be served on the adverse party personally or by publication.

RULE 7. Personal service of notice of contest may be made by any person over the age of 18 years, or by registered mail; when served by registered mail, proof thereof must be accompanied by post-office registry return receipt, showing personal delivery to the party to whom the same is directed; when service is made personally, proof thereof shall be by written acknowledgment of the person served, or by affidavit of the person serving the same, showing personal delivery to the party served; except when service is made by publication, copy of the affidavit of contest must be served with such notice.

When the contest is against the heirs of a deceased entryman, the notice shall be served on each heir.[2] If the heirs of the entryman are nonresident or unknown, notice may be served upon them by publication as hereinafter provided. If the person to be personally served is an infant under 14 years of age or a person who has been legally adjudged of unsound mind, service of notice shall be made by delivering a copy of the notice to the statutory guardian or committee of such infant or person of unsound mind, if there be one; if there be none, then by delivering a copy of the notice to the person having the infant or person of unsound mind in charge.

[2] Amended July 13, 1921.

RULE 8.[3] Unless notice of contest is personally served within 30 days after issuance of such notice and proof thereof made not later than 30 days after such service, or if service by publication is ordered, unless publication is commenced within 20 days after such order and proof of service of notice by publication is made not later than 20 days after the fourth publication, as specified in Rule 10, the contest shall abate: *Provided*, That if the defendant makes answer without questioning the service or the proof of service of said notice, the contest will proceed without further requirement in those particulars.

SERVING NOTICE BY PUBLICATION

RULE 9. Notice of contest may be given by publication only when it appears, by affidavit by or on behalf of the contestant, filed within 30 days after the allowance of application to contest and within 10 days after its execution, that the adverse party can not be found, after due diligence and inquiry, made for the purpose of obtaining service of notice of contest within 15 days prior to the presentation of such affidavit, of the postmaster at the place of address of such adverse party appearing on the records of the land office and of the postmaster nearest the land in controversy and also of named persons residing in the vicinity of the land.

Such affidavit must state the last address of the adverse party as ascertained by the person executing the same.

The published notice of contest must give the names of the parties thereto, description of the land involved, identification by appropriate reference of the proceeding against which the contest is directed, the substance of the charges contained in the affidavit of contest, and a statement that upon failure to answer within 20 days after the completion of publication of such notice the allegations of said affidavit of contest will be taken as confessed.

The affidavit of contest need not be published.

There shall be published with the notice a statement of the dates of publication.

RULE 10.[4] Service of notice by publication shall be made by publishing notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and if no newspaper be printed in such county, then in a newspaper printed in the county nearest to such land.

Copy of the notice as published, together with copy of the affidavit of contest, shall be sent by the contestant within 10 days after the first publication of such notice by registered mail directed to the party for service upon whom such publication is being made at the last address of such party as shown by the records of the land office

[3] Amended Nov. 15, 1912, and Jan. 6. 1925. [4] Amended Mar. 7, 1911.

and also at the address named in the affidavit for publication, and also at the post office nearest the land.

Copy of the notice as published shall be posted in the office of the register and also in a conspicuous place upon the land involved, such posting to be made within 10 days after the first publication of notice as hereinabove provided.

RULE 11.[5] Proof of publication of notice shall be by copy of the notice as published attached to and made a part of the affidavit of the publisher or foreman of the newspaper publishing the same, showing the publication thereof in accordance with these rules.

Proof of posting shall be by affidavit of the person who posted notice on the land, and the certificate of the register as to posting in the district land office.

Proof of the mailing of notice shall be by affidavit of the person who mailed the notice, attached to the postmaster's receipt for the letter or (if delivered) the registry return receipt.

DEFECTIVE SERVICE OF NOTICE

RULE 12. No contest proceeding shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served; but in such case the time to answer may be extended in the discretion of the register.

ANSWER BY CONTESTEE

RULE 13. Within 30 days after personal service of notice and affidavit of contest as above provided, or, if service is made by publication, within 20 days after the fourth publication, as prescribed by these rules, the party served must file with the register answer, under oath, specifically meeting and responding to the allegations of the contest, together with proof of service of a copy thereof upon the contestant by delivery of such copy at the address designated in the application to contest, or personally in the manner provided for the personal service of notice of contest.

Such answer shall contain or be accompanied by the address at which all notices or other papers shall be sent for service upon the party answering.

FAILURE TO ANSWER

RULE 14.[6] Upon failure to serve and file answer as herein provided, the allegations of the contest will be taken as confessed, and the register will forthwith forward the case, with recommendation thereon, to the General Land Office, and notify the parties by ordinary mail of the action taken.

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[5] Amended Jan. 6, 1925.

[6] Amended Apr. 17, 1926.

DATE AND NOTICE OF TRIAL

RULE 15. Upon the filing of answer and proof of service thereof the register will forthwith fix a time and place for taking testimony, and notify all parties thereof by registered-letter mail not less than 20 days in advance of the date fixed.

PLACE OF SERVICE OF PAPERS

RULE 16. Proof of delivery of papers required to be served upon the contestant at the place designated under clause "*h*" of Rule 2 in the application to contest, and upon any adverse party at the place designated in the answer, or at such other place as may be designated in writing by the person to be served, shall be sufficient for all purposes; and where notice of contest has been given by registered mail, and the registry-return receipt shows the same to have been received by the adverse party, proof of delivery at the address at which such notice was so received shall, in the absence of other direction by such adverse party, be sufficient.

Where a party has appeared and is represented by counsel, service of papers upon such counsel shall be sufficient.

CONTINUANCE

RULE 17. Hearing may be postponed because of absence of a material witness when the party applying for continuance makes affidavit, and it appears to the satisfaction of the officer presiding at such hearing, that—

(*a*) The matter to which such witness would testify, if present, is material.

(*b*) That proper diligence has been exercised to procure his attendance, and that his absence is without procurement or consent of the party on whose behalf continuance is sought.

(*c*) That affiant believes the attendance of said witness can be had at the time to which continuance is sought.

(*d*) That the continuance is not sought for mere purposes of delay.

RULE 18. One continuance only shall be allowed to either party on account of absence of witnesses, unless the party applying for further continuance shall, at the same time, apply for order to take the testimony of the alleged absent witnesses by deposition.

RULE 19. No continuance shall be granted if the opposite party shall admit that the witness on account of whose absence continuance is desired would, if present, testify as stated in the application for continuance.

Continuances will be granted on behalf of the United States when the public interest requires the same, without affidavit on the part of the Government.

DEPOSITIONS AND INTERROGATORIES

RULE 20. Testimony may be taken by deposition when it appears by affidavit that—

(*a*) The witness resides more than 50 miles, by the usual traveled route, from the place of trial.

(*b*) The witness resides without, or is about to leave, the State or Territory, or is absent therefrom.

(*c*) From any cause it is apprehended that the witness may be unable to, or will refuse to, attend the hearing, in which case the deposition will be used only in the event personal attendance of the witness can not be obtained.

RULE 21. The party desiring to take deposition must serve upon the adverse party and file with the register affidavit setting forth the name and address of the witness and one or more of the above-named grounds for taking such deposition, and that the testimony sought is material; which affidavit must be accompanied by proposed interrogatories to be propounded to the witness.

RULE 22. The adverse party will, within 10 days after service of affidavit and interrogatories, as provided in the preceding rule, serve and file cross-interrogatories.

RULE 23. After the expiration of 10 days from the service of affidavit for the taking of deposition and direct interrogatories, commission to take the deposition shall be issued by the register directed to any officer authorized to administer oaths within the county where such deposition is to be taken, which commission shall be accompanied by a copy of all interrogatories filed.

Ten day's notice of the time and place of taking such deposition shall be given, by the party in whose behalf such deposition is to be taken, to the adverse party.

RULE 24. The officer before whom such deposition is taken shall cause each interrogatory to be written out, and the answer thereto inserted immediately thereafter, and said deposition, when completed, shall be read over to the witness and by him subscribed and sworn to in the usual manner before the witness is discharged, and said officer will thereupon attach his certificate to said deposition, stating that the same was subscribed and sworn to at the time and place therein mentioned.

RULE 25. The deposition, when completed and certified as aforesaid, together with the commission and interrogatories, must be inclosed in a sealed package, indorsed with the title of the proceeding in which the same is taken, and returned by mail or express to the register, who will indorse thereon the date of reception thereof, and the time of opening said deposition.

RULE 26. If the officer designated to take the deposition has no official seal, certificate of his official character under seal must accompany the return of the deposition.

RULE 27. Deposition may, by stipulation filed with the register be taken before any officer authorized to administer oaths, and either by oral examination or upon written interrogatories.

RULE 28. Testimony may, by order of the register and after such notice as he may direct, be taken by deposition before a United States commissioner, or other officer authorized to administer oaths near the land in controversy, at a time and place to be designated in a notice of such taking of testimony. The officer before whom such testimony is taken will, at the completion of the taking thereof, cause the same to be certified to, sealed, and transmitted to the register in the like manner as is provided with reference to depositions.

RULE 29. No charge will be made by the register for examining testimony taken by deposition.

RULE 30. Officers designated to take testimony will be allowed to charge such fees as are chargeable for similar services in the local courts, the same to be taxed in the same manner as costs are taxed by registers.

RULE 31. When the officer designated to take deposition can not act at the time fixed for taking the same, such deposition may be taken at the same time and place before any other qualified officer designated for that purpose by the officer named in the commission or by agreement of the parties.

RULE 32. No order for the taking of testimony shall be issued until after the expiration of time allowed for the filing of answer.

TRIALS

RULE 33. The register and other officers taking testimony may exclude from the trial all witnesses except the one testifying and the parties to the proceeding.

RULE 34. The register will be careful to reach, if possible, the exact condition and status of the land involved in any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest; to this end said officer should, whenever necessary, personally interrogate and direct the examination of a witness.

RULE 35. In preemption cases the register will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming; the steps taken to mark and secure the claim; and the exact status of the land at that date as shown upon the records of his office.

RULE 36. In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the

subsequent acts of the respective claimants, must be fully and specifically examined.

RULE 37. Due opportunity will be allowed opposing claimants to cross-examine witnesses.

RULE 38. Objections to evidence will be duly noted, but not ruled upon, by the register, and such objections will be considered by the commissioner. Officers before whom testimony is taken will summarily stop examination which is obviously irrelevant.

RULE. 39. At the time set for hearing, or at any time to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing.

When testimony is taken in shorthand the stenographic notes must be transcribed, and the transcription subscribed by the witness and attested by the officer before whom the testimony was taken: *Provided, however*, That when the parties shall, by stipulation, filed with the record, so agree, or when the defendant has failed to appear, or fails to participate in the trial, and the contestant shall in writing so request, such subscription may be dispensed with.

The transcript of testimony shall, in all cases, be accompanied by certificate of the officer or officers before whom the same was taken, showing that each witness was duly sworn before testifying, and, by affidavit of the stenographer who took the testimony, that the transcription thereof is correct.

RULE 40. If a defendant demurs to the sufficiency of the evidence, the register will forthwith rule thereon. If such demurrer is overruled, and the defendant elects to introduce no evidence, no further opportunity will be afforded him to submit proofs.

When testimony is taken, before an officer other than the register, demurrer to the evidence will be received and noted, but no ruling made thereon, and the taking of evidence on behalf of the defendant will be proceeded with; the register will rule upon such demurrer when the record is submitted for his consideration.

If said demurrer is sustained, the register will not be required to examine the defendant's testimony. If, however, the demurrer be overruled, all the evidence will be considered and decision rendered thereon.

Upon the completion of the evidence in a contest proceeding, the register will render a report and opinion thereon making full and specific reference to the posting and annotations upon the records.

RULE 41. The register will, in writing, notify the parties to any proceeding of the conclusion therein, and that 15 days will be allowed from the receipt of such notice to move for new trial upon the ground of newly discovered evidence, and that if no motion for new trial is made, 30 days will be allowed from the receipt of such notice within which to appeal to the commissioner.

NEW TRIAL

RULE 42. The decision of the register will be vacated and new trial granted only upon the ground of newly discovered evidence, in accordance with the practice applicable to new trials in courts of justice: *Provided, however,* That no such application shall be granted except upon showing that the substantial rights of the applicant have been injuriously affected.

No appeal will be allowed from an order granting new trial, but the register will proceed at the earliest practicable time to retry the case, and will, so far as possible, use the testimony theretofore taken without reexamination of same witnesses, confining the taking of testimony to the newly discovered evidence.

RULE 43. Notice of motion for new trial, setting forth the grounds thereof, and accompanied by copies of all papers not already on file to be used in support of such motion, shall be served upon the adverse party, and, together with proof of service, filed with the register not more than 15 days after notice of decision; the adverse party shall, within 10 days after such notice, serve and file affidavits or other papers to be used by him in opposition to such motion.

RULE 44. Motions for new trial will not be considered or decided in the first instance by the commissioner or the Secretary of the Interior, or otherwise than on review of the decision thereof by the register.

RULE 45. If motion for new trial is not made, or if made and not allowed, the register will, at the expiration of the time for appeal, promptly forward the same, with the testimony and all papers in the case, to the commissioner, with letter of transmittal, describing the case by its title, nature of the contest, and the land involved.

The register will not, after forwarding of decision, as above provided, take further action in the case unless so instructed by the commissioner.

FINAL PROOF PENDING CONTEST

RULE 46.[7] The pendency of a contest will excuse the submission of final proof on the entry involved until a reasonable time after the disposition of the proceedings, but final or commutation proof may be submitted at any stage thereof. The payment of the final commissions or purchase money, as the case may be, should be deferred until the case is closed, when, if the contest is dismissed and the proof is found satisfactory, claimant will be allowed 30 days from notice within which to pay all sums due and furnish a nonalienation affidavit, upon receipt of which the proper form of final certificate will issue.

[7] Amended May 16, 1916.

In such cases the fee for reducing the proof testimony to writing must be paid at the time the proof is submitted.

The final proof should be retained in the district land office until the record in the contest case is forwarded to the General Land Office, but will not be considered in determining the merits of the contest, though it may be used for the purpose of cross-examination during the trial.

In such cases the party making the proof will at the time of submitting same be required to pay the fees for reducing the testimony to writing.

APPEALS TO COMMISSIONER

RULE 47. No appeal from the action or decision of the register will be considered unless notice thereof is served and filed in the district land office in the manner and within the time specified in these rules.

RULE 48. Notice of appeal from the decision of the register shall be served and filed with such register within 30 days after receipt of notice of decision: *Provided, however*, That when motion for new trial is presented and denied, notice of such appeal shall be served within 15 days after receipt of notice of the denial of said motion.

RULE 49. No person who has failed to answer the contest affidavit, or, having answered, has failed to appear at the hearing, shall be allowed an appeal from the final action or decision of the register.

RULE 50. Such notice of appeal must be in writing, and set forth in clear, concise language the grounds of the appeal, in the form of specifications of error, which shall be separately stated and numbered; where error is based upon insufficiency of the evidence to justify the decision, in the assignment thereof the particulars wherein it is deemed insufficient must be specifically set forth in the notice. All grounds of error not assigned or noticed and argued in the brief will be considered as waived.

Upon failure to serve and file notice of appeal as herein provided the case will be closed.

RULE 51. When any party fails to move for a new trial or to appeal from the decision of the register within the time specified, such decision shall, as to such party, be final and will not be disturbed except in case of fraud or gross irregularity.

No case will be remanded for any defect which does not materially affect the aggrieved party.

RULE 52. All documents received by the register must be kept on file and the date of filing noted thereon; no papers will, under any circumstances, be removed from the files or from the custody of the register, but access to the same, under proper regulations, and so as not to interfere with transaction of public business, will be permitted to the parties or their attorneys.

COSTS AND APPORTIONMENT THEREOF

RULE 53. A contestant claiming preference right of entry under the second section of the act of May 14, 1880 (21 Stat. 140), must pay the costs of contest. In other cases each party must pay the cost of taking the direct examination of his own witnesses and the cross-examination on his behalf of other witnesses; the cost of noting motions, objections, and exceptions must be paid by the party on whose behalf the same are made.

RULE 54. Accumulation of excessive costs will not be permitted. When the officer before whom testimony is being taken shall rule that a course of examination is irrelevant, the same will not proceed except at the sole cost of the party insisting thereon and upon his depositing the amount reasonably sufficient to pay therefor.

RULE 55. Where a party contesting a claim shall by virtue of actual settlement and improvement establish his right of entry of the land in contest under the preemption, homestead, or desert-land laws by virtue of settlement and improvement without reference to the act of May 14, 1880, the costs of contest will be imposed as prescribed in the second clause of Rule 53.

RULE 56. The only cost of contest chargeable by registers are the legal fees for reducing testimony to writing. No other contest fees or costs will be allowed to or charged by those officers, directly or indirectly.

RULE 57. Registers may at any time require either party to give security for costs, including expense of taking and transcribing testimony.

RULE 58. Upon the filing of the transcript of the testimony in the local office, any excess in the sum deposited as security for costs of transcribing testimony will be returned to the parties depositing the same.

RULE 59. When hearings are ordered on behalf of the Government, all costs incurred on its behalf will be paid from the proper appropriation, and when, upon the discovery of reason for suspension in the usual course of examination of entries and contest, hearings are ordered between contending parties, the costs will be paid as required by Rule 53.

RULE 60. The costs provided for by the preceding rules will be collected by the register when the parties are brought before him in obedience to the order for hearing.

Rule 61 was abolished by Circular No. 962, approved October 10, 1924 (50 L. D. 656).

PREPARATION OF NOTICES

RULE 62. All notices and other papers not required to be served by the register must be prepared and served by the respective parties.

RULE 63. The register will require proper provision to be made for such notices not specifically provided for in these rules as may become necessary in the usual progress of the case to final decision.

APPEAL FROM DECISION REJECTING APPLICATION TO ENTER PUBLIC LANDS

RULE 64. To facilitate appeals from his action relative to applications to file, enter, or locate upon the public lands, the register will—

(*a*) Indorse upon every rejected application the date of presentation and reasons for rejection.

(*b*) Promptly advise the party in interest of the action and of his right of appeal.

(*c*) Note upon his records a memorandum of the transaction.

RULE 65. The party aggrieved will be allowed 30 days from receipt of notice in which to file notice of appeal in the district land office. The notice of appeal, when filed, will be forwarded to the General Land Office with full report upon the case, which should recite all the facts and proceedings had and must embrace the following particulars:

(*a*) The original application, with reasons for the rejection thereof.

(*b*) Description of the tract involved and statement of its status, as shown by the records of the district office.

(*c*) Reference to all entries, filings, annotations, memorandum, and correspondence shown by the record relating to said tract and to the proceedings had.

II

PROCEEDINGS BEFORE THE DISTRICT CADASTRAL ENGINEER

RULE 66. The proceedings in hearings and contests before the district cadastral engineer shall, as to notices, depositions, and other matters, be governed as nearly as may be by the rules prescribed for proceedings before registers, unless otherwise provided by law.

III

PROCEEDINGS BEFORE THE COMMISSIONER OF THE GENERAL LAND OFFICE AND SECRETARY OF THE INTERIOR

EXAMINATION AND ARGUMENT

RULE 67. The commissioner will cause notice to be given to each party in interest whose address is known of any order or decision affecting the merits of the case or the regular order of proceedings therein.

RULE 68. No additional evidence will be admitted or considered by the commissioner unless offered under stipulation of the parties or in support of a mineral application or protest: *Provided, however,*

That the commissioner may order further investigation made or evidence submitted upon particular matters to be by him specifically designated.

Affidavits or other ex parte statements filed in the office of the commissioner will not be considered in finally determining any controversy upon the merits.

RULE 69. After receipt of the record by the commissioner 30 days will be allowed to expire before any action is taken thereon, unless, in the judgment of the commissioner, public policy or private necessity shall require summary action, in which event he will proceed at his discretion, first notifying the attorneys of record of his intention so to do: *Provided*, That where no appeal has been filed the case may be immediately considered and disposed of.

RULE 70. If brief is not filed before a case is reached in its order for examination, the argument will be considered closed, and no further argument or motion of any kind will be entertained, except upon application and upon good cause appearing to the commissioner therefor.

RULE 71. In the discretion of the commissioner, oral argument may be presented, at a time to be fixed by him and upon notice to opposing counsel, which notice shall specify the time for such argument and the specific matter to be discussed. Except as herein provided, oral hearings or suggestions will not be allowed.

REHEARINGS

RULE 72. No motion for rehearing of any decision rendered by the Commissioner of the General Land Office will be allowed.

MOTIONS

RULE 73. No motion shall be entertained or considered in any case after the record has been transmitted to a reviewing officer.

In ex parte cases, where the entryman has been allowed by the commissioner to furnish additional evidence or to show cause, or, in the alternative, to appeal, both the evidence or showing and the appeal are filed, the commissioner shall pass upon the evidence or showing submitted, and, if found sufficient, note the appeal as closed. If such evidence or showing be found insufficient, the appeal will be forwarded to the Secretary as in other cases.

APPEAL FROM THE COMMISSIONER TO THE SECRETARY

RULE 74. Except as herein otherwise provided, an appeal may be taken to the Secretary of the Interior from the final decision of the commissioner in any proceeding relating to the disposal of the public lands and private claims.

RULE 75. No appeal shall be had from the action of the commissioner affirming the decision of the register in any case where the party adversely affected shall have failed to appeal from the decision of said register.

RULE 76. Notice of appeal from the commissioner's decision must be served upon the adverse party and filed in the office of the register or in the General Land Office within 30 days from the date of service of notice of such decision.

RULE 77. When the commissioner considers an appeal defective he will notify the party thereof; and if the defect be not cured within 15 days from the date of receipt of such notice, the appeal may be dismissed and the case closed.

RULE 78. In proceedings before the commissioner in which he shall decide that a party has no right to appeal to the Secretary, such party may apply to the Secretary for an order directing the commissioner to certify said proceedings to the Secretary and suspend action until the Secretary shall pass upon the same; such application shall be in writing, under oath, and fully and specifically set forth the grounds upon which the same is made.

RULE 79. When the commissioner shall decide against the right of appeal he will suspend action on the case for 20 days from service of notice of such decision to enable the party against whom the decision is rendered to apply to the Secretary for an order certifying the record as hereinabove provided.

RULE 80. The appellant will be allowed 20 days after service of notice of appeal within which to serve and file brief and specification of error, as provided by Rule 50, the adverse party 20 days after service of such within which to serve and file reply thereto; appellant will be allowed 10 days after service of such reply within which to serve and file response: *Provided, however,* That if either party is not represented by counsel having offices in the city of Washington, 10 days in addition to each period above specified will be allowed within which to serve and file the respective briefs.

No arguments otherwise than above provided shall be made or filed without permission of the Secretary or commissioner granted upon notice to the adverse party.

RULE 81. (Abolished.)

ORAL ARGUMENT BEFORE THE SECRETARY

RULE 82.[8] Oral argument in any case pending before the Secretary of the Interior will be allowed, on motion, in the discretion of the Secretary, at a time to be fixed by him, after notice to the parties. The counsel for each party will be allowed only one-half an hour, unless an extension of time is ordered before the argument begins.

[8] Amended Nov. 6, 1911.

REHEARING OF SECRETARY'S DECISION

RULE 83.[9] Motions for rehearing before the Secretary must be filed within 30 days after receipt of notice of the decision complained of and will act as a supersedeas of the decision until otherwise directed by the Secretary. Such motions, briefs, and arguments must not be served on the opposite party and must be filed directly with the Secretary of Interior, Washington, D. C.

Any such motion must state concisely and specifically the grounds upon which the motion for rehearing is based and be accompanied by brief and argument in support thereof.

If proper grounds are not shown the rehearing will be denied and sent to the files of the General Land Office, whereupon the commissioner will proceed to execute the decision before rendered. If upon examination grounds sufficient for rehearing are shown, a rehearing will be granted and the moving party will be notified that he will be allowed 15 days from receipt of notice within which to serve a copy of his motion, together with all argument in support thereof, on the opposite party, who will be allowed 30 days thereafter in which to file and serve answer, brief, and argument. Thereafter the cause or matter will be again considered and appropriate action taken, which may consist either in adhering to the former decision or modifying or vacating the same, or the making of any further or other order deemed warranted.

As applied to the Territory of Alaska, the periods of time granted by this rule shall be doubled.

MOTIONS FOR REVIEW AND REREVIEW

RULE 84. Motions for review and rereview are hereby abolished.

SUPERVISORY POWER OF SECRETARY

RULE 85. Motion for the exercise of supervisory power will be considered only when accompanied by positive showing of extraordinary emergency or exigency demanding the exercise of such authority.

In proceedings before the Secretary of the Interior the same rules shall govern, in so far as applicable, as are provided for proceedings before the Commissioner of the General Land Office.

RULE 86. No rule here prescribed shall be construed to deprive the Secretary of the Interior of any direct or supervisory power conferred upon him by law.

ATTORNEYS

RULE 87.[10] Every attorney, before practicing before the Department of the Interior and its bureaus, must comply with the require-

[9] Amended Oct. 25, 1915.

[10] Amended Apr. 9, 1915.

ments of the regulations prescribed by the Secretary of the Interior pursuant to section 5 of the act of July 4, 1884 (23 Stat. 101).

RULE 88. In all cases where any party is represented by attorney, such attorney will be recognized as fully controlling the same on behalf of his client, and service of any notice or other paper relating to such proceedings upon such attorney will be deemed notice to the party in interest.

Where a party is represented by more than one attorney service of notice or other papers upon one of said attorneys shall be sufficient.

RULE 89. No person hereafter appearing as a party or attorney in any case shall be entitled to notice of any proceeding therein who does not, at the time of appearance, file in the office in which the case is pending a statement showing his name and post-office address and the name and post-office address of the party whom he represents.

RULE 90. Any attorney in good standing employed, and whose appearance is regularly entered in any case pending before the department, will be allowed full opportunity to consult the records therein, together with abstracts, field notes, tract books, and correspondence which is not deemed privileged and confidential.

RULE 91. Verbal or other inquiries by parties or counsel directed to any employee of the department, except the commissioner, assistant commissioner, or chief of division of the General Land Office, or the Secretary and Assistant Secretaries, the Solicitor, members of the Board of Appeals, or the Supervising Attorney, or with the consent of one or more of said officers, is expressly forbidden.

RULE 92. Abuse of the privilege of examining records of the department or violation of the foregoing rule by any attorney will be treated as sufficient cause for institution of disbarment proceedings.

SERVICE OF NOTICES

RULE 94.[11] Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notice or other papers by mail from the General Land Office, except in case of notice to resident attorneys, in which case one day will be allowed.

In computing time for service of papers under these rules of practice the first day shall be excluded and the last day included: *Provided*, That where the last day is a Sunday, a legal holiday, or half holiday such time shall include the next full business day.

RULE 95.[12] Notice of all motions and proceedings before the commissioner or Secretary, except as specified below, shall be served upon parties or counsel personally or by registered mail, and no motion will be entertained except on proof of service of notice thereof. As to motions for rehearing, petitions for certiorari and petitions

[11] Amended Apr. 30, 1917. [12] Amended Sept. 28, 1917.

for the exercise of supervisory authority before the Secretary, service of notice shall be made only after such proceeding has been entertained and service directed, as provided by Rule 83.

RULE 96. Ex parte proceedings and proceedings in which the adverse party does not appear will, as to notice of decision, time for appeal, and filing of exceptions and arguments, be governed by the rules prescribed in other cases, so far as the same are applicable. In such cases the commissioner or Secretary may, pursuant to application and upon good cause being shown therefor, permit additional evidence to be presented for the purpose of curing defects in the proofs of record.

INTERVENTION

RULE 97. No person shall be allowed to intervene in any case except upon application therefor, under oath, showing his interest therein.

HOW TRANSFEREES AND INCUMBRANCERS MAY ENTITLE THEMSELVES TO NOTICE OF CONTEST OR OTHER PROCEEDINGS

RULE 98.[13] Transferees and incumbrancers of land the title to which is claimed or is in process of acquisition under any public-land law shall, upon filing notice of the transfer or incumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original entryman or claimant. Every such notice of a transfer or incumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the General Land Office, where like notation thereof will be made. Thereafter such transferee or incumbrancer, as well as the entryman, must be made a party defendant to any proceeding against the entry.

ACKNOWLEDGMENT OF THE FILING OF APPLICATIONS AND OTHER PAPERS

RULE 99.[14] The Secretary and the Commissioner of the General Land Office will not acknowledge the receipt of papers forwarded by mail, but if a prepared receipt is forwarded to a district land office with any paper the register will sign and return the receipt to the party who forwarded the same, after inserting the date and the serial number.

NOTICE OF PREFERENCE RIGHT

RULE 100. Where preference right of entry is awarded under section 2 of the act of May 14, 1880 (21 Stat. 140), the register will,

[13] Adopted Sept. 23, 1915. [14] Adopted Nov. 10, 1915.

after service of notice of such right upon contestant and the expiration of the 30 days allowed for exercise thereof, transmit to the Commissioner of the General Land Office by special letter the evidence of service for filing with the canceled entry record. A fee of $1 for giving such notice must be tendered to the register of the district land office before any application for the land will be approved.

WILLIAM SPRY,
Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

HOWARD v. GREEN

Decided September 3, 1926

DESERT LAND—IMPROVEMENTS—EXPENDITURES—PRACTICE.

The instructions of April 26, 1924, Circular No. 933, declaring that the cost of clearing by the process of "railing" shall not be an acceptable expenditure for the reclamation of desert lands, will not be applied retroactively, where the work of clearing was performed in good faith and proof thereof submitted at a time when it was the practice to allow credit for such work.

FINNEY, *First Assistant Secretary:*

This is an appeal by James K. Green from decision of the Commissioner of the General Land Office dated February 3, 1926, holding his desert-land entry for cancellation on the contest of Abigail Howard.

The entry was made June 16, 1919, and embraces the W. ½ NW. ¼, Sec. 21, T. 6 S., R. 7 E., G. & S. R. M., containing 80 acres, Phoenix land district, Arizona. Three annual proofs were filed, the first showing an expenditure of $103 for erecting a fence; the second proof evidences an expenditure of $80 for clearing 20 acres on the north side of the land; and the third proof shows the same expenditure for clearing an additional 20 acres. A plat which accompanied the third yearly proof shows one-fourth of a mile of fence on the north side of the entry, and the north 40 acres of the tract cleared.

June 8, 1923, the entryman filed an application for an extension of time to submit final proof stating that he had expended more than $3 per acre in clearing the land and in erecting a substantial wire fence with cedar posts around three of its sides—the fourth side being already fenced—but that he had been unable to sink a well

for irrigation purposes. The application was referred to the division inspector for investigation, and prior to any action thereon Abigail Howard, on December 4, 1923, filed contest affidavit, charging—

> that said entryman has not expended the sum of One Dollar per acre on or for the benefit of said land during each of the three years following the date of said entry and that he has not at any time made any expenditures or improvements on or for the benefit of said land except to erect about one-fourth mile of wire fence of the value of sixty-five Dollars and do some railing of no value.

Answer was filed denying the charges and hearing held before a notary public at Casa Grande, Arizona, March 22, 1924, both parties appearing in person and by counsel. Three witnesses testified for the contestant. The entryman testified in his own behalf and produced six witnesses. Upon consideration of the testimony thus adduced, the local officers held that the charge had not been proved, and recommended the dismissal of the contest. On appeal by the contestant the Commissioner in his decision of February 3, 1926, reversed the action of the local officers and held the entry for cancellation. Appeal by the contestee brings the case before the Department.

In reaching the conclusion that the required amount of expenditures had not been made upon the land, the Commissioner held that credit could not be allowed for the cost of clearing; that the only acceptable expenditure was that relating to the fence on the north line of the entry, variously estimated to be worth from $70 to $100. As to the clearing the Commissioner applied retroactively the ruling with reference to "railing" announced in Circular No. 933, dated April 26, 1924 (50 L. D. 398), and while it was satisfactorily shown that between 40 and 50 acres of the land had once been cleared or "railed," and that the entryman had actually paid $160 for the work performed—the current market price at the time being between $3 and $4 per acre—it was held that no value could be attached to this work, because the brush had not been properly removed or destroyed. In other words, the work done does not conform to existing requirements.

Appellant challenges this ruling and contends that the provisions of the circular above referred to should not be applied retroactively to his prejudice.

The Department has carefully considered the matter and believes that the regulations should not be given a retroactive effect. Work of the character done in this case was formerly accepted as a basis of annual proof, and clearing was counted an improvement within the meaning of the desert-land law without strict regard to the fact whether it was done by rolling or crushing the vegetation, or dragging or railing the land, that being the common practice in many

localities. Green's expenditures were apparently made in good faith, and proof thereof submitted at a time when it was the practice to allow credit for such work. Furthermore, it appears from endorsements on the entry papers that his three annual proofs were examined and accepted by the General Land Office as satisfactorily conforming to regulations then in force. Under the circumstances, and since it is shown that he has expended $3 per acre, of the whole tract, the decision appealed from is reversed.

SEWELL A. KNAPP (ON PETITION)

Decided September 3, 1926

JURISDICTION — LAND DEPARTMENT — SELECTION — CERTIFICATION — NEVADA — STATUTES.

Section 2449, Revised Statutes, declaring in terms all selection lists "perfectly null and void" if the lands certified are not of the character granted by the act upon which the selection is based, is inoperative to restore jurisdiction in the Land Department lost by the approval of a certification of a tract of land selected by the State of Nevada under the grant of June 16, 1880, where the certifying officers acted within the scope of their authority and upon a presentation of evidence showing the land to be of the character contemplated by the grant.

PRIOR DEPARTMENTAL DECISION REAFFIRMED.

Case of *Sewell A. Knapp* (47 L. D. 152 and 156), reaffirmed.

FINNEY, *First Assistant Secretary:*

This is a petition for the exercise of the supervisory authority of the Department, filed by Frank R. Porter, on behalf of himself and as attorney in fact for Sewell A. Knapp in the matter of the application 010030 filed by Knapp for patent to the Belleville placer mining claim embracing together with other tracts not here in controversy, the NW. ¼ NE. ¼ NE. ¼, NW. ¼ NE. ¼, NW. ¼ SE. ¼ NE. ¼, and N. ½ SW. ¼ NE. ¼, Sec. 10, T. 4 N., R. 34 E., M. D. M., Carson City, Nevada, land district, wherein the Department by decision of June 1, 1918 (47 L. D. 152), adhered to, on motion for rehearing, February 7, 1919, and on petition, June 24, 1919 (47 L. D. 156), October 12, 1923, and July 2, 1925, affirmed the action of the Commissioner of the General Land Office, which, in turn, affirmed that of the local officers, in rejecting said application as to the described tracts in the NE. ¼, Sec. 10, for the reason that said quarter section had been 16 years before the filing of the application certified to the State of Nevada in part satisfaction of its two million acre grant by the act of June 16, 1880 (21 Stat. 287), and had therefore passed beyond the jurisdiction of the Land Department.

The petition alleges error in the decisions of the Department herein on the following grounds:

That the Department misinterpreted the United States mining laws and statutes pertaining to our case.

That the decisions of the Department of June 1st and June 24th, 1919, were erroneous because the Department disregarded and overlooked facts and evidence submitted by your petitioners.

That the failure of the Department to order a hearing, either of its own volition or in response to the earnest solicitation of your petitioners, was a clear violation of the laws and rules of the Department.

That the decisions of June 1st and 24, 1919, promulgated by Asst. Secretary A. T. Vogelsang clearly violated the statutes of the United States and the State of Nevada, and was and is a direct attempt to override the will of Congress and convey away lands in defiance of such laws and statutes and of the rights of your petitioners herein.

The said act of June 16, 1880, provides that—

The lands herein granted shall be selected by the State authorities of said State from any unappropriated, nonmineral, public land in said State, in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this Act the same shall be duly certified to said State by the Commissioner of the General Land Office and *approved by the Secretary of the Interior*. [Italics supplied.]

It is urged by the petitioners that they have shown that the tracts in question were not subject to selection by the State because known long prior to the selection thereof to have been mineral in character. In that connection they cite the provisions of section 2449, Revised Statutes, to the effect that where lands have been granted to any State by a law of Congress and where such law does not convey the fee simple title or require payment, the list, which is certified by the Commissioner of the General Land Office, shall be regarded as conveying the fee simple of the lands that are of the character contemplated by the act and intended to be granted, but that—

where lands embraced in such lists are not of the character embraced by such Acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

On their showing, and in view of the provisions of said section 2449, the petitioners insist that the certification of said described tracts to the State should be disregarded as being null and void, and that patent to said tracts should be issued on the application of Knapp, which was filed April 9, 1917, and based upon the asserted Belleville placer mining location alleged to have been made August 11, 1904.

The original selection list (No. 122), which embraced the said NE. ¼, Sec. 10, was filed September 30, 1890, and was accom-

panied by an affidavit by J. F. Longabaugh, at whose instance the selection of said tract was made, to the effect that the affiant was well acquainted with the tract, having frequently passed over the same, and that his knowledge was such as to enable him to testify understandingly with regard thereto;

> that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land * * *.

The said original list bears a certificate by the register and receiver that "no valid conflicting right is known to exist."

The NE. ¼, Sec. 10, was, together with other tracts, incorporated in Carson City list No. 33, whereon, in March, 1901, it is certified by examiners of the General Land Office, and over the signatures of the proper chiefs of divisions, that "the tract books of lands described in this list have been carefully examined and compared with the township plats and tract books of this office and have been found to be free from conflict and to inure to the State for the purpose above stated." Also that—

> by the records of this office none of the tracts selected herein are in conflict with mining claims of record in this office, that some of the tracts selected subsequent to the circular of July 9, 1894, have been published under the mining regulations without protest or objection; and that the others are not in townships containing mining claims of record; that of the tracts selected prior to said circular, those in townships containing mining claims of record are covered by nonmineral affidavits for each and every legal subdivision, and that all tracts returned as mineral have been finally adjudged nonmineral.

The list further bears the certificate, dated April 8, 1901, by the Commissioner, that the tracts described therein "are unreserved, unappropriated, surveyed public lands of the United States within the limits of the said State, free from adverse claims of record, and not mineral in character." It was accordingly recommended by the Commissioner that the clear list be approved, "subject to any valid interfering rights existing at date of selection." The list was so approved by the Secretary April 12, 1901, and as approved it was certified by the Commissioner to the State April 23, 1901.

The primary question involved in the case is as to the jurisdiction of the Department, in view of the certification of the tracts in controversy to the State, to entertain either the patent application or the charges as to the known mineral character of the lands as of the date of the selection.

It is settled law that the approval by the Secretary, and certification by the Commissioner, of State selection lists, where such officers are acting within the scope of their authority, passes the title to the lands embraced in such lists to the State as completely as though transferred by a patent of the United States. *Frasher* v. *O'Connor* (115 U. S. 102); *Gerrard* v. *Silver Peak Mines* (94 Fed. 983) and cases there cited.

The effect of a patent is clearly stated in *Moore* v. *Robbins* (96 U. S. 530). That case involved a tract which was sold at public sale to Moore, but his right was contested before the local officers by one Bunn, who set up a prior preemption right to the land. The local officers decided in favor of Bunn, but on appeal their action was reversed by the Commissioner, whereupon the land was patented to Moore. Some time after the delivery of the patent to Moore, Bunn appealed to the Department, which reversed the decision of the Commissioner and directed that the patent be recalled and that one be issued to Bunn. Moore, however, refused to return the patent, and the matter there rested so far as the Land Department was concerned. It was, however, taken into the courts, and the Supreme Court of Illinois, wherein the land is situated, deeming itself bound by the decision of the Department in favor of Bunn, felt compelled to give effect thereto, and decided in favor of Bunn. The Supreme Court, however, in passing upon the case, at page 532, said—

> Without now inquiring into the nature and extent of the doctrine referred to by the Illinois court, it is very clear to us that it has no application to Moore's case. While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the Executive Department of the Government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public lands; and it is a part of their daily business to decide when a party has by purchase, by preemption, or by any other recognized mode, established a right to receive from the Government a title to any part of the public domain. This decision is subject to an appeal to the Secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the Government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any

private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the Government is the party injured, this is the proper course.

"A patent," says the court in *United States* v. *Stone* (2 Wall. 525), "is the highest evidence of title, and is conclusive as against the Government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias;* but a bill in chancery is found a more convenient remedy." See also *Hughes* v. *United States*, 4 Wall. 232; s. c. 11 How. 552.

* * * * * * *

But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority.

To the same effect, save as to the necessity for the delivery of a recorded patent, is the decision in *United States* v. *Schurz* (102 U. S. 378). In that case the Department had sought to withhold from delivery a homestead patent which, through inadvertence, had been executed and recorded, and which the Department had determined to be void. The proceeding was one for mandamus to compel the delivery of the patent. The court, at page 400, said—

It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States because it was not subject to homestead entry and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that District generally had been opened to preemption, homestead entry, and sale. The question whether any particular tract, belonging to the Government, was open to sale, preemption, or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hear-

ings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the Government never had any, it would be absolutely void. If it should issue for land once owned by the Government but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable but not absolutely void.

The mode of avoiding it, if voidable, is not by arbitrarily withholding it but by judicial proceedings to set it aside, or correct it if only partly wrong. It was within the province of those officers to sell the land and to decide to whom and for what price it should be sold; and when, in accordance with their decision, it was sold, the money paid for it, and the grant carried into effect by a duly executed patent, that instrument carried with it the title of the United States to the land.

See also *Steel* v. *Smelting Company* (106 U. S. 447); *Iron Silver Mining Company* v. *Campbell* (135 U. S. 286); and *Michigan Land and Lumber Company* v. *Rust* (168 U. S. 589).

The issuance of a patent having been thus repeatedly held by the Supreme Court to deprive the Land Department of all jurisdiction over the patented premises, and a State selection list certified by the Commissioner to the State after its approval by the Secretary, both officers acting within the scope of their authority, having, as has been shown, the same effect as a patent, there can be no question that the Department lost all jurisdiction to determine any questions affecting the lands here in controversy after the approval and certification of the clear list embracing the same. It is true that in *Charles H. Moore* (27 L. D. 481) the Department held in substance that a patent which was void on its face has no operative effect requiring resort to a court of equity for its avoidance, and therefore that its issuance does not deprive the Land Department of jurisdiction over the land so purported to have been conveyed. But it can not be seriously contended that the certification of the land here involved is void on its face. On the contrary, the recitals in the certificates annexed to and comprising a part of the certified list constitute, together with the approval and certification of the list, an adjudication in favor of the State of all the facts essential to bring the land described, including that here involved, within the category of those subject to selection by and certification to the State, and those matters

could be controverted only on the basis of fact *dehors* the instrument of conveyance, and, indeed, existing wholly outside the record before the Land Department at the time of the approval and certification of the list. Under the decisions above cited those were matters solely for the jurisdiction of the courts. And in that connection it is to be noted, although it does not affect the merits of the case, that the State's original selection list embracing the land in quetsion was filed more than 27 years, and the land had been duly certified to the State more than 16 years, before any of the matters now relied upon as grounds for defeating the selection and certification were presented to the Department.

The decisions heretofore rendered, to the effect that the Department had lost all jurisdiction for any purpose over the land involved when it was certified to the State, are again adhered to and the petition is accordingly denied.

EXECUTION OF PROOFS, AFFIDAVITS, AND OATHS

INSTRUCTIONS

[Circular No. 884] [1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 3, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

Section 2294, Revised Statutes, as amended by the act of March 11, 1902 (32 Stat. 63), the act of March 4, 1904 (33 Stat. 59), and the act of February 23, 1923 (42 Stat. 1281), provides—

That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone Acts, may in addition to those now authorized to take such affidavits, proofs, and oaths be made before any United States commissioner 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

[1] Revision of Circular No. 884, approved March 23, 1923 (49 L. D. 497).

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.

The act of May 17, 1926 (44 Stat. 558), provides—

That a qualified employee of the Department of the Interior who has been designated to act as register of any United States land office pursuant to the provisions of the Act of October 28, 1921, "An Act for the consolidation of the offices of register and receiver in certain cases and for other purposes" (Forty-second Statutes at Large, page 208), may at all times administer any oath required by law or the instructions of the General Land Office in connection with the entry or purchase of any tract of public land, but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

The act of July 3, 1926 (44 Stat. 830), provides—

That in all cases in which, under the laws of the United States, oaths are authorized or required to be administered, they may be administered by notaries public duly appointed in any State, District, or Territory of the United States, by clerks and prothonotaries of courts of record of any such State, District, or Territory, by the deputies of such clerks and prothonotaries, and by all magistrates authorized by the laws of or pertaining to any such State, District, or Territory to administer oaths.

As a result of the enactment of the said acts of May 17, 1926, and July 3, 1926, oaths in public-land cases may now be executed before the register or the acting register of the United States land office (and in Alaska, before the receiver, where there is a receiver), or before a United States commisisoner, or a notary public, or before a judge or clerk, or prothonotary of a court of record, or the deputy of such clerk or prothonotary, or before a magistrate authorized by the laws of the State, District, or Territory of the United States to administer oaths, in the county, parish, or land district in which the land lies, or before any officer of the classes mentioned who resides nearer or more accessible to the land, although he may reside outside of the county and land district in which the land is situated.

Where an oath is administered before an officer outside of the county, parish, or land district in which the land applied for is situated, an affidavit must be furnished satisfactory to the Commissioner of the General Land Office, that because of topographic or geographic conditions the officer was nearer or more accessible to the land; but in those States in which there is no United States land office, an affidavit may be executed before any qualified officer in the State without any showing as to his nearness or accessibility with reference to any particular county.

Except as to the register or the acting register, the official character of any officer not using a seal of office must be certified to under seal by the clerk of court having the record of his appointment and qualifications.

WILLIAM SPRY,
Commisisoner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

SALE OF DEAD OR DOWN AND FIRE KILLED OR DAMAGED TIMBER—ACT OF JULY 3, 1926—CIRCULAR NO. 258 (42 L. D. 300), SUPERSEDED

REGULATIONS

[Circular No. 1093]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 11, 1926.

DIVISION INSPECTORS:

The act of July 3, 1926 (44 Stat. 890), amended the act of March 4, 1913 (37 Stat. 1015), to read as follows:

That the Secretary of the Interior is hereby authorized, under such rules as he may prescribe, to sell and dispose of to the highest bidder, at public auction or through sealed bids, dead or down timber, or timber which has been seriously or permanently damaged by forest fires, on any lands of the United States, outside the boundaries of national forests, including those embraced in unperfected claims under any of the public land laws, also upon the ceded Indian lands, the proceeds of all such sales to be covered into the Treasury of the United States: *Provided*, That such dead, down, or damaged timber upon any lands embraced in an existing claim shall be disposed of only upon the application or with the written consent of such claimant, and the money received from the sale of such timber on any such lands shall be kept in a special fund to await the final determination of the claim.

SEC. 2. That upon the certification of the Secretary of the Interior that any such claim has been finally approved and patented, the Secretary of the Treasury is hereby authorized and directed to pay to such claimant, his heirs,

or legal representatives, the money received from the sale of such timber upon his land, after deducting therefrom the expenses of the sale; and upon the certification of the Secretary of the Interior that any such claim has been finally rejected and canceled, the Secretary of the Treasury is hereby authorized and directed to transfer the money derived from the sale of such timber upon the lands embraced in such claim to the general fund in the Treasury derived from the sale of public lands, unless by legislation the lands from which the timber had been removed had been theretofore appropriated to the benefit of an Indian tribe or otherwise, in which event the net proceeds derived from the sale of the timber shall be transferred to the fund of such tribe or otherwise credited or distributed as by law provided.

This act permits the sale of all dead or down timber and timber seriously or permanently damaged by forest fires on vacant public lands outside of national forests, including ceded Indian lands and including lands in the Territory of Alaska and also lands embraced within unperfected or unapproved claims, grants, or selections over which the Department of the Interior has jurisdiction.

Pursuant to the authority granted by the above act the following rules and regulations are hereby prescribed:

1. Where such dead or down or fire-killed or damaged timber is found, or upon receipt of an application to purchase any of such described timber upon vacant, unreserved Government lands, including ceded Indian lands, the division inspector of the division within which the timber is situated will cause a reconnaissance cruise to be made in order to obtain an approximate scale of the timber to be offered for sale, and will cause to be blazed or otherwise marked the outside boundaries of the areas from which the timber is to be sold so that they may be readily distinguishable on the ground. Reports on such cruises, with appropriate recommendations, should be promptly submitted to this office and should contain the following information:

(*a*) Description of the land upon which the timber is situated by township and range and legal subdivisions thereof, if surveyed, or by natural objects sufficient to identify the land if unsurveyed.

(*b*) Approximate percentage of the timber on the described area that is dead, down, or damaged by fire;

(*c*) The approximate scale in thousand feet board measure of timber subject to sale;

(*d*) The approximate market value thereof per thousand feet board measure and the prospects of a sale in its present condition and location and fixing a minimum stumpage price per thousand feet board measure for the timber to be cut; and

(*e*) The method and approximate expense of disposing of the brush, tops, lops, and other forest débris which will result from the felling and removing of the timber.

2. Upon consideration of the report the Commissioner of the General Land Office will, if the amount or the value of the timber warrants it, instruct the division inspector to offer the same for sale under sealed bids by advertisement covering a period of not less than thirty (30) days, if in a daily paper, to be published at least twice a week, and if in a weekly paper, at least four consecutive weeks, next preceding the time set for the opening of the bids, in 2 representative newspapers of general circulation in each field division wherein the timber to be sold is situated, and if the proposed sale be for twenty million feet board measure or more of timber available by location to a single logging operation, the division inspector will also cause an advertisement of the proposed sale to be inserted once in two lumber trade journals of general circulation. The division inspector will also during the period of the advertising post copies of the advertisement where they will attract the notice of the general public.

3. The notice of sale must announce the time and place of filing bids; contain a careful description of the land on which the timber is situated, giving the township and range and legal subdivision, or approximate legal subdivision, whether surveyed or unsurveyed, and shall also designate the location with reference to water courses, mountain tops, or other well-known natural objects; the approximate amount in board feet and minimum stumpage value of the timber to be sold; the sum required to be deposited with the bid; the conditions by which the purchaser will be bound; and the name and address of the division inspector from whom full information can be obtained. It shall also be stated that bidders offering a sum based on a rate less than the minimum stumpage price of the timber mentioned therein will not be considered and that the right to reject any or all bids is reserved.

4. Each bid submitted must be sealed and transmitted to the division inspector having jurisdiction of the timber sale for which the bid is submitted.

Each bid must state whether it is for the whole of the timber offered for sale in the advertisement or for only a part thereof, and, if the latter, it should designate how much, and describe the land from which the timber is to be taken. No bid will be accepted for less than all the timber offered on a legal subdivision. Each bid must state the amount per thousand feet which the bidder will pay for the timber.

Each bid shall be accompanied by a certified check for at least 20 per cent of the amount bid, said certified check to be made payable to the Commissioner of the General Land Office, and to be retained by the division inspector and disposed of as provided in Rules 7 and 8.

5. The division inspector will number the bids consecutively in the order in which they are received, and endorse thereon the date and hour of receipt and will on the day and at the hour set therefor open said bids and award said timber, either in one lot or in separate lots, located upon definitely described areas of land, in such manner as shall afford the greatest amount of revenue therefrom, to the highest bidder or bidders. Should two or more bids in the same amount be received for the same timber, the award will be made to the bidder whose bid was first received. In such case the award may be made with due regard to other timber purchased by the same persons, and also with a view to preventing a monopoly. The division inspector will, immediately upon the acceptance of said bid or bids, notify the bidder or bidders thereof, and shall also promptly forward a report thereon to the Commissioner of the General Land Office.

6. Upon notice from a division inspector to a bidder that his bid has been accepted, he must, within 30 days from the receipt of such notice, enter into a contract with the Government through the Commissioner of the General Land Office acting as its agent, subject to the approval of the Secretary of the Interior, and shall execute and file therewith a bond with proper sureties thereupon, the penalty of the bond to be of an amount which shall be 50 per cent of the stumpage value of the timber estimated in accordance with the provisions contained in subdivision (c), section 1, of these regulations. Blank forms to be used in executing contracts and bonds under the act governing the sale of timber herein have been approved by the Secretary of the Interior and copies of the same will be furnished by the division inspector. The bond shall be conditioned for the payment for said timber, and for the faithful performance of the above-referred-to contract, and for the observance of the regulations hereinafter set forth. Bonds should be prepared and executed in accordance with the regulations of the Department governing the same.

In the event that the bidder whose bid has been accepted shall fail to submit the required bond within the specified time, the division inspector shall cause his action in accepting said bid to be revoked by written notice to the bidder (see Rule 7 as to the check), and he shall then accept the bid received by him next in order of time should the bids be equal, otherwise the next highest bid. If the bid accepted was the only bid received, the timber will be readvertised for sale.

7. Immediately upon the execution of the contract and bond the division inspector shall transmit the same, together with the certified check originally deposited, to the Commissioner of the General Land Office.

Upon receipt of such certified checks in the General Land Office, they shall be immediately deposited for collection and the moneys derived therefrom placed in his special account in the United States Treasury to remain there subject to final disposition as provided in the act of Congress, and the receiving clerk of the General Land Office shall issue his receipt to the purchaser for the amount deposited in each case.

The Commissioner of the General Land Office will execute the contract and transmit it with the bond to the Secretary of the Interior for his approval or rejection. The division inspector will be notified of the action taken thereon, and will, in turn, notify the bidder. Upon approval of the contract and bond by the Secretary of the Interior, the amount paid shall be credited as part payment of the purchase price.

8. Should a bidder or bidders whose bid or bids have been accepted by a division inspector fail to submit a bond or bonds, as herein provided, the division inspector will at once transmit said certified check or checks to the Commissioner of the General Land Office, and the amount or amounts called for therein will be collected and retained by the United States as a forfeit.

Upon the acceptance of a bid or bids by a division inspector, the certified checks of the bidders whose bids were rejected shall be returned to them.

9. Immediately upon notification of the approval of a sale by the Secretary of the Interior, the division inspector will cause an inspector to go over the area from which the timber is to be removed with the purchaser or his representative, and designate the timber subject to be taken under the act, and shall also point out the boundaries of the land as blazed or otherwise marked by the inspector who made the appraisal. Cutting and removal of the timber may then be commenced.

10. All settlements for timber cut pursuant to this act shall be based upon an actual scale made after the timber has been cut. The timber shall be scaled by an inspector designated by the division inspector, on the banking ground, landing, or skidway, and before it is placed on cars or put into the water. When the timber shall be ready for removal the purchaser shall submit a written notice thereof to the division inspector. The scale must be made within 30 days after receipt of such notice. It will not be necessary, however, to wait until all of the timber covered by the contract has been cut before a scale may be made. The scale shall be made in accordance with Scribner's rules, and each log or stick scaled shall be stamped "U. S." on at least one end. The inspector shall keep a record in

board feet of all timber scaled and file the same with the division inspector.

11. No timber shall be removed until it has been paid for. Although permission may be granted for the removal of installments of timber, yet the sale is not to be considered a sale by installments, and failure on the part of the purchaser to cut and remove all of the timber covered by the terms of the sale will be considered a violation of the terms of the contract and render the obligors in the bond liable for whatever damage shall be incurred by the Government. The amount originally deposited shall be credited as an advance payment and installments of timber up to that amount may be removed without requiring a further deposit. When the stumpage value of an installment of timber, together with the installments previously cut, exceeds the sum originally deposited, a further deposit in a sum sufficient to equal the difference will be required before permission to remove that installment can be granted. All deposits must be made by certified check, payable to the Commissioner of the General Land Office, and all checks thus deposited shall be transmitted to him at once by the division inspector.

12. The purchaser shall keep a record of the amount in board feet of timber cut and shall submit a monthly report to the division inspector.

13. All brush, tops, lops, and other forest débris, made in felling and removing the timber, shall be disposed of in such manner as shall be set forth in an agreement entered into between the purchaser and the division inspector. If the purchaser fails to comply with the requirements contained in said agreement, then the division inspector shall cause said débris to be disposed of and charge the expense thereof to the purchaser, provided however, that written notice shall first be given by the division inspector that such action will be taken if said instructions are not complied with within 30 days from the service of such notice. The aforesaid bond shall be conditioned to this requirement.

14. The division inspector shall see that, so far as practicable, all branches of the logging operations keep pace with each other, and the piling or burning of the brush and other débris shall not be allowed to fall behind the cutting and removing of the logs.

15. The division inspector shall determine the period within which all of the timber embraced within a sale shall be cut and removed, and completion of the cutting and removing within such period as shall be thus fixed shall be made a condition in the contract and in the bond. The action of the division inspector shall be governed by the quantity of timber involved, the topography of the land,

the accessibility of the timber, and any other circumstances that may have an influence on the cutting and removing. Owing to the nature of the timber subject to disposal under these rules and regulations, the cutting should be done as rapidly as possible and the final time limits should be restricted as far as practicable logging conditions will permit. Any extension of the period fixed in the contract will be granted only upon a showing that the completion of the cutting was unavoidably delayed by causes over which the purchaser had no control and that the interests of the Government will not be prejudiced thereby, and must be approved by the Secretary of the Interior.

16. Timber of the character described in the above act, located upon existing unperfected claims and upon unapproved selections and grants, may be disposed of in the same manner and under the same conditions as set forth in the preceding paragraphs; provided, however, that an application shall first be filed with the proper division inspector by such claimant, selector, or grantee, or by a prospective purchaser, with the written consent of such claimant, selector, or grantee requesting that the timber on said claim, selection, or grant be offered for sale. Nothing herein shall prohibit such claimant, selector, or grantee from bidding for the timber thus offered.

17. Nothing in the aforesaid act or these regulations shall be construed to abrogate or in any way modify the rights of settlers or homestead entrymen to cut and dispose of timber on their homestead claims, as explained in Circular No. 306, approved March 7, 1914, or the rights of miners to the enjoyment of the surface embraced within the area of their mining claims, as provided by section 2322, United States Revised Statutes.

18. If it shall be shown that there are settlers or residents within the vicinity of the vacant lands involved who are in urgent need of timber for domestic purposes, and it shall be necessary to procure the same from said lands, permits may be granted under applications filed in accordance with the provisions contained in the acts of June 3, 1878 (20 Stat. 88), or March 3, 1891 (26 Stat. 1093), as extended by the acts of February 13, 1893 (27 Stat. 444), July 1, 1898 (30 Stat. 618), and March 3, 1901 (31 Stat. 1436 and 1439); provided, however, that said applications shall be filed prior to the advertising of the timber for sale as hereinbefore set forth. The amounts of timber thus applied for shall be deducted from the amount offered for sale, and the advertisement shall state that the sale shall be subject to the rights of such applicants to procure the amounts of timber applied for.

19. The above act specifies the manner of disposition of the proceeds from the sale of the timber authorized thereby. Where the

timber is on ceded Indian lands, disposed of in trust for the Indians, or the timber is on unperfected claims or unapproved selections and grants, the division inspectors shall render to the Commissioner of the General Land Office expense accounts showing in each case all costs incident to the administration of the law with reference to such sales in order that the net proceeds therefrom may be ascertained and deposited in the appropriate fund.

20. Division inspectors shall cause investigations to be made from time to time and submit a final report at the expiration of the period allowed for the cutting and removing, showing whether or not the law and rules and regulations have been complied with and setting forth any infraction of the same.

21. The cutting or removing of the timber referred to herein in any other manner than that authorized by these regulations will be considered a trespass.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

RICHARD O. LUNKE

Decided September 16, 1926

ENLARGED HOMESTEAD—ADDITIONAL ENTRY—FINAL PROOF.

The fact that one had made an additional entry under section 3 of the enlarged homestead act will not preclude him from making a further additional entry under that section, regardless of the manner in which the prior entries were perfected, if the combined areas of the original and additional entries do not exceed 320 acres.

RULE IN PRIOR DEPARTMENTAL DECISION MODIFIED.

Rule in case of *Silas A. Fry* (45 L. D. 20), modified.

FINNEY, *First Assistant Secretary:*

This is an appeal by Richard O. Lunke from a decision of the Commissioner of the General Land Office dated May 25, 1926, rejecting his application to make entry under section 3 of the enlarged homestead act for SW. ¼ SE. ¼, Sec. 24, T. 27 N., R. 58 E., M. M., Montana.

The application was filed November 9, 1925, and was rejected by the register of the local office on the ground that applicant had already perfected an entry under said section 3.

It appears that on May 7, 1910, after perfecting an entry under section 2289, Revised Statutes, for NW. ¼ SE. ¼, SE. ¼ NW. ¼,

SW. ¼ NE. ¼, and NE. ¼ SW. ¼, said Sec. 24, Lunke made entry under section 3 of the enlarged homestead act for E ½ SE ¼ and SE ¼ NE. ¼, said Sec. 24, under which patent issued April 24, 1914.

Section 3 of the enlarged homestead act as amended by the act of March 3, 1915 (38 Stat. 956), provides—

> That any person who has made, or shall make, homestead entry of lands of the character herein described, and who has not submitted final proof thereon, or who having submitted final proof still owns and occupies the land thus entered, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his first entry, which shall not, together with the original entry, exceed 320 acres: *Provided*, That the land originally entered and that covered by the additional entry shall have first been designated as subject to this act, as provided by section 1 hereof.

In the case of *Silas A. Fry* (45 L. D. 20), the Department held (syllabus)—

> Where entry for eighty acres was made under the enlarged homestead act as additional to an original homestead entry for 160 acres, and final proof was submitted and patent issued upon the original and additional entries as one entry, the entryman may be permitted to make a further entry for eighty acres under section 3 of the enlarged homestead act as amended by the act of March 3, 1915, as additional to his combined entry, where the land so taken was not subject to entry at the date he made his first additional entry.

The tract now applied for by Lunke was not subject to entry when he made an additional entry on May 7, 1910. Hence, the facts in the case under consideration are similar to those in the case of *Silas A Fry*, except that Lunke submitted separate final proofs on his original and additional entries.

Construing provisions of the stock-raising homestead act similar to section 3 of the enlarged homestead act, the Department has held (48 L. D. 38, 39) that—

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

Upon mature consideration, the Department has concluded that the manner in which the prior entries were perfected is not controlling, the only limitation of section 3 of the enlarged homestead act being as to the area which may be acquired thereunder. Accordingly, the restriction mentioned in the case of *Silas A. Fry*—that final proof was submitted and patent issued upon the original and additional entries as one entry—will no longer be followed.

The tract applied for will be listed in the next order or designation under the enlarged homestead act affecting lands in Montana.

The decision appealed from is reversed.

RULES AS TO PAYMENT OF ROYALTY FOR OIL OR GAS USED FOR PRODUCTION PURPOSES UNDER PERMITS AND LEASES

Instructions, September 16, 1926

OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT—ROYALTY.

An oil and gas prospecting permit, after its issuance, remains a unit, and where parts of the area included therein have been assigned, with departmental approval, an assignee of one of those parts is not chargeable with royalty on oil or gas produced on his portion and sold to the holder of another portion of the permit area for use for production purposes thereon.

OIL AND GAS LANDS—LEASE—ASSIGNMENT—ROYALTY.

Where a portion of an oil and gas lease has been assigned, the assignee in effect acquires a separate lease, and oil or gas produced upon one portion can not be sold to the holder of another portion without payment of royalty.

DEPARTMENTAL DECISION AND INSTRUCTIONS CITED AND APPLIED.

Case of *Denver Exploration and Development Company* (50 L. D. 652), and instructions of November 19, 1925 (51 L. D. 283), cited and applied.

FINNEY, *First Assistant Secretary*:

I have your [Director of the Geological Survey] memorandum of September 11, 1926, in which you make inquiry as follows:

In case assignment has been made of all right, title, and interest in and to one or more specified portions of the area included in an oil and gas permit, thus dividing the permit area, with departmental approval, into, say, three portions, one held by the original permittee and the others held by separate assignees, should royalty be charged on oil or gas produced on one such portion of the permit area and sold to the holder of another such portion of the permit area for use for production purposes thereon?

The answer to your question is, no. In the case of *Denver Exploration and Development Company* (50 L. D. 652) cited by you, the Department held that upon partial assignment of a prospecting permit such permit would still be regarded as a unit and the permittee and assignee as associates; that drilling to discovery by either permittee or assignee would entitle both to leases; but that the one-fourth area to be claimed at five per cent as a reward for discovery must be computed upon the entire area of the permit in conformity with an election made before approval of assignment. In its ruling of November 19, 1925 (51 L. D. 283), also cited by you, the Department held that section 15 of the leasing act does not require payment of royalty on oil or gas used for production purposes on lands covered by a permit.

These decisions were reached after mature consideration by the Department.

The principle of integrity of a prospecting permit even after partial assignment is essential to preserve for the Government the right to a higher royalty than five per cent from any producing permit area or lease based on permit. And a permit area can not be considered whole and undivided for one purpose without considering the same whole and undivided for other purposes which may not be to the advantage of the Government.

As to leases, the rule is different. "In the case of a lease the assignee, whether acquiring a portion of the area leased or all of it, acquires an obligation to the United States with respect thereto of the same character as though a lease had issued to him in the first instance. The same is true where there is an assignment of a prospecting permit in its entirety." *Denver Exploration and Development Company, supra.*

NICHOLS ET AL. v. STEVENS

Decided September 21, 1926

PUBLIC LAND—TAX DEED—OCCUPANCY—COLOR OF TITLE.

A void tax deed, followed by a warranty deed for a valuable consideration and long occupancy of the land in good faith in the honest belief that no cloud rested upon the title, is a sufficient basis to constitute color of title.

HOMESTEAD ENTRY—OCCUPANCY—PUBLIC LAND—COLOR OF TITLE—RECORDS—NOTICE.

Land that has been occupied for many years in good faith under claim of title is not subject to homestead entry by another, and one seeking to make entry thereof is chargeable with notice of what an examination of the county records would have disclosed.

HOMESTEAD ENTRY—APPLICATION—EVIDENCE.

An application to make homestead entry presupposes good faith on the part of the applicant, and where his good faith is questioned and the facts and circumstances justify the conclusion of bad faith, his application will not be entertained.

FINNEY, *First Assistant Secretary:*

This is an appeal by Lafayette Stevens from the decision of the Commissioner of the General Land Office dated March 30, 1926, holding for cancellation upon the contest of Ada Nichols and Margaret L. Davlin, his homestead entry, Roseburg 015512, made April 11, 1924, under section 2289, Revised Statutes, for lots 1 and 2, Sec. 27, T. 28 S., R. 7 W., W. M., Oregon, containing 48.40 acres.

The affidavit of contest filed November 15, 1924, charged in substance that contestants and their predecessors in interest have been in the exclusive possession and occupancy of the land in question for more than 40 years under claim and color of title; that the land had

been inclosed with a substantial fence for many years, a portion of it cultivated, and the remainder used for grazing purposes; that they have paid the taxes assessed against same since 1892 in good faith and in the honest belief that they were the owners thereof; that the homestead applicant well knew at the time of filing his application to make entry of said lots that contestants were in the exclusive possession of same; that since learning that title to the land is in the United States, it has been their purpose and intention to purchase same under the act of March 28, 1912 (37 Stat. 77), or to perfect title under any other applicable law.

The register rejected the application to contest, which action was reversed by the Commissioner and a hearing ordered. The hearing was held April 9, 1925, both parties appearing with counsel, when testimony and other evidence was submitted. By decision dated October 7, 1925, the register found in favor of contestee and recommended dismissal of the contest. Upon appeal, this action was reversed by the Commissioner, and Stevens has appealed to the Department.

The records of the county clerk and recorder of deeds of Douglas County, Oregon, show that on April 18, 1883, John A. Freeman became the purchaser at a tax sale of the two lots in question; that on March 15, 1892, said John A. Freeman and wife conveyed 153 acres, including said two lots, to James Davlin and John Brown by warranty deed for a consideration of $3,000; that in 1905, contestants, Ada Nichols and Margaret L. Davlin, daughters of James Davlin succeeded to a one-half undivided interest in same by the terms of James Davlin's will, and that by a warranty deed dated April 8, 1907, John Brown conveyed his one-half undivided interest in 160 acres, which included said two lots, to contestants for the sum of $2,200. Since that date contestants have been in the exclusive possession of the land in controversy under and by virtue of said conveyances.

It is well settled that public lands in the actual possession and occupancy of any person under claim of title, are not subject to entry by another. It is contended in substance in behalf of contestee, however, that the rule does not apply in the instant case. Prior decisions of the Land Department and the courts in which the rule in question was considered, are analyzed at length by counsel, and it is insisted that the facts disclosed do not bring the case of contestants within the meaning of the precedents relied upon and cited; that the tax sale to John A. Freeman in 1883, under which contestants claim color of title, was void on its face, and that a void tax deed confers no interest in the land conveyed thereunder and does not constitute color of title; that contestants are chargeable with notice of the fact that their

chain of title is based upon a void tax deed, and that it is presumed that a purchaser has examined every instrument affecting his title.

The contentions urged, in the opinion of the Department, are not in point, and do not meet the issues involved. In many of the States, if not all of them, it is settled law that 20 years' adverse possession of land, however the possession originated, gives absolute title. In the State of Oregon action for the recovery of the possession of real property is limited to ten years and no action shall be maintained for such recovery unless it appear that plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commencement of such action. Oregon Laws 1920, chap. 2, sec. 4, p. 193. Adverse possession for the period mentioned in the statute is a bar to the action by the owner to recover possession. *Shuffleton* v. *Nelson* (2 Sawy. 540); and it is a presumption of law that an uninterrupted adverse possession of real property for 20 years or more is possession pursuant to a written conveyance. Oregon Laws 1920, chap. 8, sec. 799, p. 812.

While no specific time has been fixed by Congress to quiet title in public lands held adversely by persons who have occupied and improved them under claim of title, nevertheless, since the decision in *Atherton* v. *Fowler* (96 U. S. 513), it has been consistently held by the Department without any deviation that public lands improved and occupied in good faith by another under claim of title, are not subject to entry. See 50 L. D. 239; 49 L. D. 624, 653; 34 L. D. 304; 32 L. D. 298; 28 L. D. 235; 228 U. S. 211; 246 U. S. 69, 208. In this case the testimony conclusively shows that contestants have claimed and occupied the two tracts in question for more than 30 years through mesne conveyances, which are warranty deeds, purchasing same in good faith for a valuable consideration; that at all times it has been inclosed by a fence and either cultivated in part or used for grazing purposes; that the taxes assessed annually have been paid each year by contestants or their predecessors in interest since the conveyance to them in 1892 by John A. Freeman, and that they have claimed to be the rightful owners of said tracts in the honest belief that title to same was secure in themselves. Whether or not the tax sale to Freeman in 1883 was void, is immaterial. In the opinion of the Department, sustained by the great weight of authority, a void tax deed is sufficient basis for color of title, when followed by warranty deeds for a valuable consideration and long occupancy of the land in good faith in the honest belief that no cloud rested upon the title.

In the case of *Wright* v. *Mattison* (18 How. 50, 56), the Supreme Court said: "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance

is title, but which in reality is no title"; and in the case of *Hamm* v. *McKenny* (73 Ore. 347; 144 Pac. 435), it was held (syllabus)—

A sheriff's deed, purporting on its face to convey property to the purchaser at a foreclosure sale, constitutes such "color of title" as will form a basis of a title by prescription, though the foreclosure decree was void or voidable for want of jurisdiction over the defendants in the foreclosure suit.

Again, in view of the testimony and the exhibits disclosed by the record to the effect that at the time Stevens made his entry the land in question was occupied by contestants, and had been so occupied for more than 30 years under claim of title in good faith, which was in fact color of title, he is chargeable with notice of what an examination of the county records would have disclosed (*Krueger* v. *United States*, 246 U. S. 69, 78).

Not only this, but an application to make homestead entry presupposes good faith on the part of the applicant, and when it appears that he is seeking to enter land personally known to him to be inclosed, claimed, and occupied by another for many years in good faith under color of title, thereby proposing to deprive him of the fruits of his labor, such applicant is chargeable with bad faith, and the Department has uniformly held that when and if the good faith of an applicant to make homestead entry is questioned and the facts and circumstances justify such conclusion, his application to enter will not be entertained.

In view of the facts disclosed by this record, the entry of appellant held for rejection, is hereby finally rejected, and contestants will be allowed to perfect their title to said lots under any applicable law.

The decision appealed from is affirmed.

NICHOLS ET AL. v. STEVENS

Motion for rehearing of departmental decision of September 21, 1926 (51 L. D. 584), denied by First Assistant Secretary Finney, November 4, 1926.

SOUR v. McMAHON

Decided September 21, 1926

OIL AND GAS LANDS—PROSPECTING PERMIT—ATTORNEYS—AGENT—CORPORATIONS—SEGREGATION.

An oil and gas prospecting permit application executed by an agent is invalid and without segregative effect if he is not an authorized attorney in fact.

FINNEY, *First Assistant Secretary:*

On December 5, 1925, there was filed in the Santa Fe, New Mexico, land office an application (053140) of George W. McMahon, of Los Angeles, California, to prospect for oil and gas upon all of Secs.

8 and 30, N. ½ and SE. ¼, Sec. 4, S. ½, Sec. 6, W. ½ SW. ¼, Sec. 10, E. ½ and SE. ¼ SW. ¼, Sec. 18, T. 7 N., R. 4 W., N. M. P. M. The application was executed and filed by Nora E. Summers, of Santa Fe, New Mexico, who signed her name as attorney in fact for George W. McMahon. On December 14, 1925, there was filed a power of attorney, executed on the 10th of said month, from said McMahon to Nora E. Summers in connection with the permit application. A bond executed by said Summers as attorney in fact for both the principal and the bonding company, was filed January 2, 1926.

On August 16, 1926, there was filed a supplemental application signed by the applicant himself.

On December 10, 1925, Abry Sour filed prospecting permit application 053158 for the land described. He filed a bond on December 21, 1925. The register transmitted the two applications by letters dated February 3, 1926, calling attention to the conflict. By decision dated June 15, 1926, the Commissioner of the General Land Office held Sour's application for rejection for conflict with the prior application of McMahon.

Sour has appealed from the Commissioner's decision, and in connection with his appeal he has filed copies of letters written to the register at Santa Fe, and to F. A. Andrews, of Los Angeles, California, on December 23, 1925. He has also filed photostatic copies of a telegram dated December 4, 1925, from F. A. Andrews to Nora E. Summers and of an affidavit by said Summers as follows:

Before me the undersigned authority personally came and appeared Nora E. Summers who, being first duly sworn according to law, deposes and says: That she of her own knowledge knows that oil and gas application No. 053139 filed by said Nora E. Summers as Attorney-in-Fact for William M. Thomas, carried no Power of Attorney, and that said Nora E. Summers has not at any time up to now received any instrument capable of making her Attorney-in-Fact for the said William M. Thomas or for making any act of hers for him legal:

Also that she of her own knowledge knows that oil and gas application No. 043140 (053140) filed by the said Nora E. Summers as Attorney-in-Fact for Geo. W. McMahon, carried no Power of Attorney, and that said Nora E. Summers has not at any time up to now received any instrument capable of making her Attorney-in-Fact for the said Geo. W. McMahon or for making any act of hers for him legal:

Also, that the instructions she received for filing the above two mentioned applications were received by her in two telegrams signed F. A. Andrews and dated Los Angeles, California, Dec. 4, 1925, the contents as follows:

NORA E. SUMMERS,
Santa Fe, N. Mex.:

File George W. McMahon applications selections Thirty Ten Eighteen Eight Four South Half Six Seven North Four West mailing fees.

F. A. ANDREWS,
1216 P

NORA E. SUMMERS,
Santa Fe, N. Mex.:

File William M. Thomas application Sections Four Ten Twelve Fourteen Six North Four West wire when filed.

F. A. ANDREWS.
1214P

NORA E. SUMMERS.

Subscribed and sworn to before me this 8th day of December, 1925.

A. M. BERGERE,
Register, U. S. Land Office.

In his appeal Sour states under oath—

That immediately after the filing by appellant of his said application 053158, to wit, on the 23d day of December, 1925, he caused to be mailed from St. Louis, Missouri, to A. M. Bergere, register of the land office at Santa Fe, New Mexico, two photostatic copies of the affidavit of the said Nora E. Summers, appellant's Exhibit "1," together with a letter of transmittal in which letter appellant directed the attention of the register of the land office to the fact that application 053140 was made without authority and that the said Nora E. Summers was wholly without right or authority to file in the name of the said George H. McMahon, and that her action in the matter was null and void, and appellant requested the register to forward one of the photostatic copies of said affidavit to the General Land Office, together with the other papers in the application; a copy of which said letter of transmittal is hereto attached and made a part hereof, marked appellant's Exhibit "3."

Appellant further shows that on the said 23d day of December, 1925, appellant caused to be transmitted three photostatic copies of the affidavit of Nora E. Summers to F. A. Andrews, instructing the said F. A. Andrews to deliver a copy of the said affidavit to the said George H. McMahon, a copy of which said letter of transmittal to F. A. Andrews being hereto attached and made a part hereof, marked appellant's Exhibit "4," appellant having been informed and believing that the said George H. McMahon was in the employ of the said F. A. Andrews, and that the application of the said George H. McMahon was filed at the request of the said F. A. Andrews. All of which more fully appears from a certain telegram signed F. A. Andrews, and directed to Nora E. Summers, photostatic copy of which said telegram is hereto attached and made a part hereof, marked appellant's Exhibit "5."

That appellant is informed and believes and alleges the fact to be that Nora E. Summers at the time of the filing of the said application 053140 did not know the said George H. McMahon or F. A. Andrews, and had no information upon which to base a belief as to whether the said George H. McMahon or F. A. Andrews were persons *sui-juris* or were but fictitious names.

Appellant further shows that the said Nora E. Summers had no communication of any kind or nature from the said George H. McMahon, but acted purely upon the request of the said F. A. Andrews, as herein set out in telegram marked appellant's Exhibit "5."

Appellant further shows that he is informed and believes that the letter of transmittal of December 23, 1925, or its contents, were never received by A. M. Bergere, Register of the Land Office at Santa Fe, New Mexico, but that the said papers were surreptitiously abstracted from the United States mails by some person to appellant unknown.

Wherefore, appellant having shown by the facts as herein above set forth that the application for oil prospecting permit 053140, filed by the said George H. McMahon was incomplete at the time of the perfecting of said application by appellant, and appellant having further shown by the said facts that the acts and things done and shown on the records of the Land Office in connection with said application 053140 were wholly void and without effect, appellant prays that the said application of the said George H. McMahon, 053140, be held inferior and subordinate to the application of appellant, 053158.

Counsel for McMahon have filed a brief in answer to the appeal.

In the oil and gas regulations of March 11, 1920 (47 L. D. 437), under the general leasing act, the Department states (page 465)—

In making applications for lease or permit corporations may act by attorneys in fact. Individuals and associations of individuals should execute their own papers.

And again on page 466—

Under the law, the action of an agent in posting notice is the action of his principal, but the application for permit may not be executed by agent, unless applicant is a corporation.

In a telegram sent to J. N. Gillett, of San Francisco, California, on January 8, 1921, First Assistant Secretary Vogelsang said—

Applications prospecting permits signed by authorized attorney in fact acceptable, but the rule is that individuals should make their own affidavits of citizenship and statements as to whether or not they are interested in other lands under the leasing act.

Said telegram has been and is authority for the acceptance of permit applications signed by authorized attorneys in fact.

An attorney in fact is a private attorney authorized by another to act in his place and stead, either for some particular purpose, as to do a particular act, for the transaction of business in general, not of a legal character. This authority is conferred by an instrument in writing called "a letter of attorney," or more commonly, a "power of attorney." Black L. Dict.

Even if Nora E. Summers could be considered McMahon's agent by virtue of the telegram sent by F. A. Andrews, there was nothing which could possibly be considered sufficient to constitute her McMahon's attorney in fact prior to the filing of Sour's application. Under the departmental regulations quoted an agent can not execute a permit application. Summers had no authority whatever to execute and file an application in McMahon's name, signed by herself as attorney in fact, and the application could have no segregative effect as against the properly executed application of another filed prior to the time that any power of attorney and affidavit of qualifications were filed.

The decision appealed from is reversed. Sour's application appears to be allowable and McMahon's application is therefore rejected. The case is closed and the papers are returned to the General Land Office.

It has been found that not infrequently permit applications signed and filed by alleged attorneys in fact have not been accompanied by powers of attorney or affidavits by the applicants themselves as to their qualifications. It appears that it has been the practice in such cases to note the applications regularly upon the records and if the required powers of attorney and affidavits of qualifications have been furnished prior to adjudication the applications have been accepted as regular and satisfactory and permits have been issued upon recommendation therefor by the Commissioner, in the absence of protest. It is clear that this is not a satisfactory state of affairs. Even though there may be no conflicting application filed, it must nevertheless be recognized that the filing and notation upon the tract books and plats, or either, indicates a segregation which more or less effectively prevents or discourages the filing of any other application. In this manner it has been possible for applicants to secure priority of right to permits contrary to law and regulations.

The leasing act and departmental regulations thereunder require that applications for oil and gas prospecting permits shall be under oath. An application not sworn to has no segregative force. *Allen* v. *Pilcher* (51 L. D. 285). Manifestly, an affidavit by an alleged attorney in fact as to the qualifications of an applicant has ordinarily no worth or effect. See telegram of January 8, 1921, *supra*.

From and after November 1, 1926, prospecting permit applications signed by attorneys in fact must be accompanied by powers of attorney and affidavits by the applicants as to their qualifications. Such applications not accompanied by proof of authority and qualifications will be received and rejected, subject to the right to complete or to appeal, but will not be noted on the tract books or plats prior to the filing of powers of attorney and affidavits by the applicants as to their qualifications. The Commissioner will prepare and submit for consideration and approval by the Department instructions in accordance with these views.

JOHN ADAMS ET AL.

Decided September 22, 1926

PRIVATE CLAIM—BOARD OF LAND COMMISSIONERS—PATENT—LAND DEPARTMENT—COURTS—JURISDICTION.

A finding in favor of Mexican grant claimants by the Board of Land Commissioners created by the act of March 3, 1851, to ascertain, adjudicate, and settle private land claims in the State of California, when confirmed by a decree of the district court, is conclusive against the United States and all claiming under them, and the issuance of a patent pursuant thereto deprives the Land Department of further jurisdiction in the matter.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Ben McLendon* (49 L. D. 548) cited and applied.

FINNEY, *First Assistant Secretary:*

John Adams and a large number of others have appealed from a decision of the Commissioner of the General Land Office, dated March 27, 1926, affirming the action of the register at Los Angeles, California, rejecting their respective homestead applications for specified parcels or tracts of land within the patented Rancho de Los Palos Verdes grant, situated not far from the City of Los Angeles. The action of the Commissioner was based upon the ground that—

> The land is within the exterior limits of a confirmed Mexican land grant known as the "Rancho de Los Palos Verdes," surveyed by deputy surveyor Henry Hancock in September, 1859, which survey was approved by the United States surveyor general on September 19, 1859, and a patent was issued in accordance with the survey June 22, 1880.
>
> The issuance of the patent divested the Government of all title to, and removed from this office all jurisdiction over, the land. Accordingly, all applications for any lands embraced in the said patent must necessarily be rejected.

The appeal challenges the genuineness and authenticity of the grant, asserts that it is supported by no legal authority and no archive evidence, and is therefore null and void and has not now and never has had any lawful existence. It is contended, furthermore, that the patent issued in 1880 is inoperative and of no effect; that it does not preclude the further exercise of departmental jurisdiction over the lands, and does not prevent the allowance of entries under the homestead laws. Exhaustive briefs have been filed and counsel have been heard orally in the matter.

None of the contentions above set forth are well grounded. From examination of voluminous papers relating to the grant on file in the General Land Office the history of the case is found to be as follows: The formal grant of the land in question was made by Governor Pio Pico to Jose Loreto Sepulveda and Juan Sepulveda June 3, 1846, same having been based upon a previous provisional grant, or permission to occupy, under which the grantees had been in possession for a period of some 20 years. November 1, 1852, the Sepulvedas duly presented their claim to a special tribunal created by act of Congress, approved March 3, 1851 (9 Stat. 631), to ascertain, adjudicate, and settle private land claims in California. This tribunal was known as the Board of Land Commissioners. On hearing the proofs and allegations the Commissioners adjudged the claim to be valid and it was confirmed December 20, 1853. The case was thereupon certified to the United States District Court for the Southern District of California for review as provided by the act aforesaid, and therein a decree was entered December 10, 1856, as follows:

> This cause coming on to be heard on appeal from the decision of the Board of Land Commissioners to ascertain and settle private land claims in the State

of California under the Act of Congress approved March 3rd, 1851, upon the transcript of proceedings and decision of said Board and the papers and evidence upon which said decision was founded, all of which have been duly filed in this Court and Counsel for the respective parties having been heard.

It is ordered, adjudged, and decreed that the decision of said Board be, and the same is hereby, affirmed and that the title of the said Jose Loreto Sepulveda and Juan Sepulveda, the above-named appellees, is a good and valid one.

The land of which confirmation is hereby made is that known by the name of "Las Palos Verdes," situate in the County of Los Angeles, and is bounded and described as follows.

Subsequent to the final decree survey of the grant was made by United States deputy surveyor Hancock, as stated in the decision of the Commissioner of the General Land Office. Some question thereafter arose as to the correctness of that survey, the district attorney contending that it did not conform to the final decree, and upon hearing the court ordered that certain corrections should be made by a new survey. From that decree the case was taken upon appeal to the Supreme Court of the United States, where it was held that with the surveys following the decrees of the Board of Land Commissioners the district court had nothing to do. *United States* v. *Sepulveda* (68 U. S. 104). In that proceeding the history of the grant is briefly reviewed by Mr. Justice Field, who delivered the opinion of the court.

It seems unnecessary to discuss at length the questions raised in the brief for the appellants. Under section 15 of the act of March 3, 1851, *supra*, as construed by the courts a decree by the Board of Land Commissioners and confirmation by the district court is final and conclusive against the United States and those claiming under them. In the case of *United States* v. *Flint* (4 Sawy. 42) the United States circuit court, district of California, speaking through Mr. Justice Field, said (syllabus)—

Final decrees touching the validity of such claims rendered by these tribunals are conclusive and final between claimants and the United States. Such decrees are not open to review in any court.

In the body of that decision at page 49 the court said—

As thus seen the most ample powers were vested in the commissioners and the District Court to inquire into the merits of every claim; and they were not restricted in their deliberations by any narrow rules of procedure or technical rules of evidence, but could take into consideration the principles of public law and of equity in their broadest sense. When the claim was finally confirmed the act provided for its survey and location and the issue of a patent to the claimant. The decrees and the patents were intended to be final and conclusive of the rights of the parties as between them and the United States. The act in declaring that they should only be conclusive between the United States and the claimants did in fact declare that as between them they should have that character.

Here, then, we have a special tribunal, established for the express purpose of ascertaining and passing upon private claims to land derived from Spanish or Mexican authorities, clothed with ample powers to investigate the subject and determine the validity of every claim and the propriety of its recognition by the Government capable as any court could possibly be made of detecting frauds connected with the claim, and whose first inquiry in every case was necessarily as to the authenticity and genuineness of the documents upon which the claim was founded.

* * * * * * *

On principle such adjudications can not be reviewed or defeated by a court of equity upon any suggestion that the commissioners and court misapprehended the law or were mistaken as to the evidence before them, even if that consisted of fabricated papers supported by perjured testimony.

The Supreme Court of the United States has spoken to the same effect. In the case of *United States* v. *Fossatt* (21 Howard, 445, 447) the court, speaking through Mr. Chief Justice Taney, said—

The effect of the inquiry and decision of these tribunals upon the matter submitted is final and conclusive. If unfavorable to the claimant, the land "shall be deemed, held, and considered as a part of the public domain of the United States"; but if favorable, the decrees rendered by the commissioners or the courts "shall be conclusive between the United States and the claimants."

In the case of *Beard* v. *Federy* (3 Wallace, 478, 491) the court said—

In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners.

In the second place, the patent is a record of the action of the Government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former Government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was of course political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3d, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the Government; authorized appeals from the decisions of the tribunal, first to the District and then to the Supreme Court; and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the Government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the Government upon the title of the claimant. By it the Government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition

and protection by the stipulations of the treaty, and might have been located under the former Government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the Government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the Government by title subsequent. It is in this effect of the patent as a record of the Government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid or was not properly located, and therefore he could not be disturbed by the patentee. No construction which will lead to such results can be given to the fifteenth section.

In the case of *Botiller* v. *Dominguez* (130 U. S. 238, 249) the court said—

* * * The order of the commissioners or the decree of the court established as between the United States and the private citizen the validity or the invalidity of such claims, and enabled the Government of the United States, out of all its vast domain, to say "this is my property," and also enabled the claimant under the Mexican Government who had a just claim, whether legal or equitable, to say "this is mine." This was the purpose of the statute; and it was equally important to the object which the United States had in the passage of it, that claims under perfect grants from the Mexican Government should be established as that imperfect claims should be established or rejected.

In the case of *Thompson* v. *Los Angeles Farming and Milling Company* (180 U. S. 72, 77) the court said, in reference to the act of 1851, *supra*—

* * * The power to consider whatever was necessary to the validity of the claim—propositions of law or propositions of fact—the fact of a grant, or the power to grant, was conferred. If there should be a wrong decision the remedy was not by a collateral attack on the judgment rendered. The statute provided the remedy. It allowed an appeal to the District Court of the United States, and from thence to this court. Legal proceedings could not afford any better safeguards against error. Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted but required all claims to be presented to the board, and barred all from future

assertion which were not presented within two years after the date of the act. Sec. 13. The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the District Court. Sec. 9. Indeed, the proceedings in the District Court were really new, and further evidence could be taken. Sec. 10. Upon the confirmation of the claim by the commissioners or by the District or Supreme Court, a patent was to issue and be conclusive against the United States. Sec. 15.

See also *Barker* v. *Harvey* (181 U. S. 481).

The very questions presented by this appeal were fully considered by the Department in the case of *Ben McLendon*, decided April 30, 1923 (49 L. D. 548), involving a surveyed Mexican grant known as Rancho Lomas de Santiago, patented in 1868, and it was there held (syllabi)—

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.

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.

The facts in that case were later submitted to the Attorney General with the suggestion that he consider the advisability of a suit to reform the patent on the ground that it covered 47,226.61 acres, or nearly 11 square leagues, instead of 4 square leagues, or 17,557.72 acres, covered by the grant and embraced in a survey made by the Mexican Government. By letter dated November 11, 1925, the Attorney General advised this Department that suit should not be instituted. His conclusion, in substance, being that the patent must be held good and not open to attack.

It is clear from the foregoing that this Department has no jurisdiction over the lands sought to be entered by Adams and others and no power to inquire into and determine the validity or invalidity of the patent issued in 1880.

The action of the Commissioner was correct and the decision appealed from is accordingly affirmed.

JOHN ADAMS ET AL.

Motion for rehearing of departmental decision of September 22, 1926 (51 L. D. 591), denied by First Assistant Secretary Finney, December 14, 1926.

DESIGNATION LISTS UNDER THE ENLARGED AND STOCK-RAISING HOMESTEAD ACTS—WATER HOLES—CIRCULAR NO. 1066, MODIFIED

ORDER

[Circular No. 1095]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 22, 1926.

Geological Survey designation lists, both enlarged and stock raising, now contain a paragraph that—

> This area contains no springs or water holes of the type intended to be withdrawn by Executive order of April 17, 1926, creating Public Water Reserve No. 107, and, therefore, is unaffected by it.

Where orders of designation under the enlarged or stock-raising acts contain the above-quoted paragraph, it will not be necessary for an entryman to make the showing required by Circular No. 1066. (51 L. D. 437.)

THOS. C. HAVELL,
Acting Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

OIL AND GAS LEASES—REWARD FOR DISCOVERY—PARAGRAPH 8, CIRCULAR NO. 672 (47 L. D. 437), AMENDED

INSTRUCTIONS

[Circular No. 1094]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 23, 1926.

REGISTERS, UNITED STATES LAND OFFICES:

On August 30, 1926, the Department amended section 8 of the regulations concerning oil and gas permits and leases, Circular No. 672 (47 L. D. 437), to read as follows:

> 8. *Reward for Discovery.*—Upon establishing to the satisfaction of the Secretary of the Interior that compliance has been made with the terms and conditions of the permit and the operating regulations applicable thereto and that valuable deposits of oil or gas have been discovered within the limits of the land embraced in the permit, within the period of the permit or extension

thereof, the permittee is entitled (a) to a lease of one-fourth of the land included in the permit, on a royalty of 5 per cent, or for at least 160 acres if there be that area in the permit; (b) to a preference right to a lease for the remainder of the land covered by his permit at such royalty as may be fixed by the Secretary of the Interior, not less than 12½ per cent in amount or value of the production, nor more than the royalties fixed for leases under section 18 of the act (sec. 19, par. c, of these regulations), except that on that portion of the average production exceeding 200 barrels per day per well for the calendar month, the royalties shall be 33⅓ per cent for oil of 30 degrees Baumé or over and 25 per cent for oil of less than 30 degrees Baumé. Application for lease based on a claim of discovery of oil or gas within the limits of land embraced in a permit should set forth in detail the operations that have been conducted and the amount and value of the discovery claimed to have been made; and must include a certificate by the officer of the department empowered to supervise operations under the permit to the effect that the permittee has conducted his prospecting operations in accordance with approved methods and practice and has made satisfactory compliance with the operating regulations; that each and every well drilled on the permit area is in a satisfactory condition, and that the well or wells relied upon for evidence of discovery have been put in condition for operation and thereafter tested adequately for productive capacity.

THOS. C. HAVELL,
Acting Commissioner.

PURCHASE OF PUBLIC LAND IN NEW MEXICO—ACT OF JUNE 8, 1926—CIRCULAR NO. 1079, MODIFIED

INSTRUCTIONS

[Circular No. 1097]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 29, 1926.

REGISTER, SANTA FE, NEW MEXICO:

I have your letter of August 23, 1926, suggesting modifications of Circular No. 1079, dated July 13, 1926 (51 L. D. 488), relative to the purchase of lands in New Mexico under the act of June 8, 1926 (44 Stat. 709).

1. Small holding claims have from the beginning been classified with private-land claims. See the instructions of September 18, 1895 (21 L. D. 157). Small holding claims have had a distinctive designation on the plats of survey, being given a number of tract and a small holding claim number. Public lands irregular in area have usually been given a lot number or have been designated by a letter of the alphabet. The act of June 8, 1926, authorizes the disposal thereunder of "tract or tracts of public land." There is therefore seen no reason for a modification of said Circular No. 1079, which requires that before allowance of an entry under the act of

June 8, 1926, the land be designated in accordance with the public-land system.

2. Where a small holding claimant submits proof on a claim and same is rejected because of inability of the claimant to qualify under an applicable small holding claim act, he may at once waive his right of appeal and file an application to be allowed to purchase the land under said act of June 8, 1926. Such application should be accompanied by the proof or by copy of the proof submitted under the small holding act. If such proof is clear and unmistakable as to all the tracts applied for, and satisfactorily shows that the applicant is entitled to purchase the land under the act mentioned; if proper publication of notice has been had of the small holding claim and no protest has been filed or other objection shown by your records, this office will, as speedily as practicable after receiving your report, accompanied by the evidence submitted, prepare a supplemental plat, retaining the boundaries of the small holding claim but clearing away the reference thereto as such and substituting a lot number or other legal designation with appropriate area as in rectangular surveys, and will instruct you to issue final certificate, if proper payments have been made, without further proof or publication of notice.

3. In the case of small holding claims as shown by the official plats, the parties entitled to submit proof thereon may waive their rights to acquire title under the small holding acts and file an application to purchase under the act of June 8, 1926. You will submit such application to this office with your report as to what your records show with regard thereto, whereupon the tract will be designated in accordance with the public-land system of designations and you will be informed thereof and the party, if entitled thereto, will be permitted to purchase the land in accordance with Circular No. 1079.

4. All deeds which are in Spanish should be accompanied by a translation thereof. The practice of submitting deeds in a foreign language is objectionable.

5. The forms submitted by you have been examined and no objection is found thereto. The forms already prepared for submitting proof on small holding claims are acceptable, however, and no reason appears for officially adopting new forms. The proof submitted, however, should clearly indicate that the party is entitled to purchase the lands under the act of June 8, 1926.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

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

INSTRUCTIONS

[Circular No. 823] [1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 1, 1926.

REGISTERS,
UNITED STATES LAND OFFICES:

In order to expedite and coordinate the work of the General Land Office and of the Geological Survey 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 will immediately transmit the original to the Commissioner of the General Land Office, by special letter, and the duplicate to the supervisor of the Geological Survey 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. Subdivision 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,

[1] This is a revision of Circular No. 823, approved May 5, 1922 (49 L. D. 104), which amended section 8 of Circular No. 672 (47 L. D. 437).—Ed.

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.

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.

9. A certificate to be furnished by the supervisor in charge of operations to the effect that the permittee has conducted his prospecting operations in accordance with approved methods and practice, and has made satisfactory compliance with the operating regulations, that each and every well operated on the permit area is in a satisfactory condition, and that the well or wells relied upon for discovery have been put in condition for operation and thereafter tested adequately for productive capacity.

Should such a certificate be lacking when an application is filed in your office, you will reject the application and advise the applicant that upon obtaining the certificate a new application for lease may be presented, which application will be given the current date of filing, the purpose of this being to avoid the establishment of a date of application for lease prior to bona fide compliance with the terms and conditions of the permit.

For address list of supervisors of oil and gas operations, see last page of this circular.[1] Applications for certificates may be filed with the supervisor or his local representative.

Relinquishments.—Relinquishments of permits must be accompanied by an affidavit of the permittee giving the facts as to operations under the permit. If no drilling was done, it should be so stated. If drilling has been done, the number of wells drilled, their location and depth, the depth and thickness of oil, gas and water sands, and detailed method of plugging the wells for abandoning them must be stated.

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 supervisor of the Geological Survey or other authorized agent of the Department of the Interior.

Sales contracts.—Triplicate signed copies of sales contracts submitted for the approval of the Secretary of the Interior under paragraph 2 (d) of the lease must be filed with the supervisor of the

[1] List omitted.

Geological Survey having jurisdiction of the district in which the leased land is situated. The supervisor will retain one copy for his files and forward the other copies with his report to the director of the Geological Survey. One copy will then be transmitted for appropriate action to the Commissioner of the General Land Office with recommendation of the Director of the Geological Survey.

If a sales contract is submitted to any official of the Interior Department other than the supervisor without its having been approved by him or other authorized official, the contract should be returned to the person submitting it with instructions to file triplicate signed copies at the office of the local supervisor, who will handle it in the regular manner.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

OIL AND GAS PERMIT APPLICATIONS MADE BY ATTORNEYS IN FACT

INSTRUCTIONS

[Circular No. 1099]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 19, 1926.

REGISTERS,
UNITED STATES LAND OFFICES:

Under date of September 21, 1926 (*Sour* v. *McMahon*, 51 L. D. 587), the department directed, in connection with applications for oil and gas prospecting permits filed under the act of February 25, 1920 (41 Stat. 437), that—

> From and after November 1, 1926, prospecting permit applications signed by attorneys in fact must be accompanied by powers of attorney and affidavits by the applicants as to their qualifications. Such applications not accompanied by proof of authority and qualifications will be received and rejected, subject to the right to complete or appeal, but will not be noted on the tract books or plats prior to the filing of powers of attorney and affidavits by the applicants as to their qualifications.

You will, in acting on cases coming under these instructions, allow 15 days in which to cure the defects or to appeal, and, in default, transmit the papers to this office as a closed case. If the power of attorney is filed and the land has not in the meantime been appro-

priated under a proper oil and gas application, you will note the hour and date the application is so completed and hold same suspended for 30 days after completion, at which time you will take action as prescribed in section 4, Circular No. 672 (47 L. D. 437).

Any application presented by an agent or attorney in fact which appears to have been executed by the applicant in blank and the land description later filled in by the agent or attorney, should be received and noted filed, and promptly transmitted here for instructions, accompanied by your report of all the facts and circumstances known.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

BLANCHARD J. STEWART

Decided October 19, 1926

DESERT LAND—MINERAL LANDS—WITHDRAWAL—LIMITATION AS TO ACREAGE—STATUTES.

The provision in section 1 of the act of July 17, 1914, which limits a desert entry made under that act to 160 acres, has reference only to lands withdrawn, classified, or valuable for one or more of the minerals named therein, and it does not preclude inclusion within such an entry of other lands, nonmineral in character, which, together with the mineral lands, exceed in the aggregate 160 acres.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Roy T. Young* (43 L. D. 289), cited and applied.

FINNEY, *First Assistant Secretary:*

The department has considered the proposed letter addressed to the register of the Blackfoot, Idaho, land office [by the Commissioner of the General Land Office] relative to the desert-land entry (Blackfoot 032366) of Blanchard J. Stewart.

The entry was allowed November 24, 1920, without the reservation of any minerals. It embraces SE. ¼ SE. ¼, Sec. 5, NE. ¼, NE. ¼ SE. ¼, Sec. 8, SW. ¼ NW. ¼, NW. ¼ SW. ¼, Sec. 9, T. 8 S., R. 44 E., B. M. (320 acres). Final proof was submitted October 29, 1924, and, after an inspector had made a favorable report, final certificate issued August 19, 1926.

By Executive order of July 1, 1910, the W. ½ NE. ¼, SE. ¼ NE. ¼, Sec. 8, and NW. ¼ SW. ¼, Sec. 9, said township, were withdrawn and included in phosphate reserve No. 2. Subsequently the 160 acres last described were classified by the Geological Survey as

phosphate land and restored as such by Executive order of January 28, 1925.

The proposed letter requires the claimant to reduce the entry to 160 acres, or apply for a hearing to disprove the classification of the land.

The only question involved is whether a desert-land entry may contain 160 acres of land classified as valuable for phosphate and 160 acres of nonmineral land.

Section 1 of the act of July 17, 1914 (38 Stat. 509), provides that "no desert entry made under the provisions of this act shall contain more than 160 acres"—undoubtedly meaning that no desert entry shall contain more than 160 acres of land withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits. The entry in question does not violate the act referred to, and no good reason appears why it should be disturbed, provided the entryman consents to the amendment thereof to make it, as to the 160 acres of phosphate land, subject to the provisions and reservations of the act of 1914 as to phosphate.

It is noted that at one time your office was of opinion that a homestead entry could not contain subdivisions classified as coal land and subdivisions of nonmineral land. In the case of *Roy T. Young* (43 L. D. 289) the Department held that—

> * * * no sufficient reason is seen for refusing to allow the lands thus differing in character to be embraced in one entry. Of course, it is necessary to take the precaution to note on the application proper references to the laws applicable to the respective tracts, and when patent issues the coal deposits must be reserved to the United States as to the tracts found to be coal lands. An entry embracing coal lands will not be subject to commutation.

What was said in the *Young case*, which involved a construction of the act of June 22, 1910 (36 Stat. 583), "An Act To provide for agricultural entries on coal lands," is applicable to the act of July 17, 1914, *supra*.

You will therefore afford Stewart an opportunity to consent to accept, as to the 160 acres classified as phosphate, a patent containing the provisions and reservations of the act of 1914, or to apply for a hearing in accordance with the provisions of paragraph 10 of the regulations of March 20, 1915, Circular No. 393 (44 L. D. 32, 36).

UNITED STATES v. BULLINGTON (ON REHEARING)

Decided October 21, 1926

RIGHT OF WAY—RAILROAD LAND—MINERAL LANDS—MINING CLAIM—STATUTES.

A railroad right of way granted pursuant to the act of March 3, 1875, conferred upon the grantee a limited fee, subject to an implied condition of reverter should the land cease to be used or retained for the purposes

for which granted, and none of the land therein is subject to location and appropriation under the mining laws while the grant remains in effect.

MINERAL LANDS—MINING CLAIM—EVIDENCE—RIGHT OF WAY—RAILROAD LAND.

Lands, although containing deposits of mineral, will be considered as nonmineral in character, where the cost of extracting is shown to be so large that a prudent man would not be warranted in expending his time and money thereupon in the reasonable expectation of success in developing a paying mine.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Rio Grande Western Railway Company* v. *Stringham* (239 U. S. 44), and *Cataract Gold Mining Company et al.* (43 L. D. 248), cited and applied.

FINNEY, *First Assistant Secretary:*

This is a motion for rehearing filed by Alta and Eva Bullington in the matter of their mineral entry 014570, allowed July 23, 1923, on an application filed April 21, 1923, for patent to the Alta and Eva placer mining claims, survey No. 5627, situate in what, if surveyed, would be T. 25 N., R. 6 E., M. D. M., Sacramento land district, California, and also in the Plumas National Forest, wherein the Department by decision of July 15, 1926, reversing the action of the Commissioner and the register, found and held, as a result of the hearing had on a protest filed against the application by the Forest Service, that the area included in the claims was nonmineral in character, directed the cancellation of the entry, and declared the asserted locations to be null and void.

The facts disclosed by the records in this and other proceedings relating to the land involved, and the testimony adduced in the present case as to mineral disclosures on the claims are fairly and fully stated in the decision complained of and will not, therefore, be here again recited. The decision was in part based upon the theory that the land involved, having been adjudicated to be nonmineral in character in the earlier proceeding in the (unreported) case of Stewart *v.* Bullington, involving placer patent application 010169, the burden was upon the entrywomen to establish its present mineral character. Irrespective of the effect of that adjudication, however, the Department, upon a reexamination of the record in the present proceeding, is of opinion that the same shows that neither of the claims, in so far as they involve public land of the United States, is, from a practical point of view, of any value for mining purposes.

Before again discussing the testimony as to the character of the land, the Department deems it expedient to direct attention to the fact that the claims as located, applied for, and entered, are shown by the plat and field notes of the official survey to conflict along their southern lines with the right of way of the Western Pacific

Railroad which arose under the act of March 3, 1875 (18 Stat. 482), by the construction of the line of road long prior to the attempted initiation of the claims, the Alta conflict being to the extent of 4 acres and that of the Eva to the extent of 1.559 acres with the said right of way. In *Rio Grande Western Railway Company* v. *Stringham* (239 U. S. 44) the Supreme Court declared that the right of way granted by the act of March 3, 1875, *supra*, and similar acts, was neither a mere easement, nor a fee absolute, but a limited fee, made on an implied condition of reverter in the event that the company should cease to use or retain the land for the purposes for which it was granted, and that it carried with it the incidents and remedies usually attending the fee. This being true, it is clear that the land included within the common limits of the claims in question and the right of way was not subject to location and appropriation under the mining laws of the United States, and hence that in any event such areas would have had to be eliminated from the claims.

Referring to the question of the character of the land included in the claims involved lying outside of the right of way conflicts, the testimony in the case, while establishing the existence upon both claims of gravel, bearing gold in substantial quantities, is nevertheless to the effect that such deposits could not be operated by drifting at a cost of less than $2.25 per cubic yard, if the reasonable cost, as testified to by one of the witnesses for the Government, a mining engineer, of the workings placed on the claim by the locators be taken as a basis, or at a cost of less than $4 per cubic yard, if the value of such work, as given in the report of the mineral surveyor, be taken into consideration.

Indeed, it is conceded by the witnesses for the claimants that it would not be feasible to operate the claims by drifting. The only other method by which the gravel deposits on the claim could be worked would be by the use of a hydraulic elevator, as ordinary sluicing by the use of a hydraulic giant could not be employed on account of the restrictions imposed by the California Débris Commission. P. F. Bullington, the father of the mineral claimants, who is not shown to have had any experience in the practical operation of placer mining claims, testifies that it is proposed to construct a dam about 12 feet high across what is known as China Creek or Fern Canyon, at a point about a mile northeasterly from the claims, thus forming a reservoir that would give a head of about 150 feet, construct a retaining wall for the purpose of impounding the tailings, conduct water to the claims by a 10-inch pipe, with 5 or 6-inch reducers at the lower end, and then mine the claims through sluice-

boxes by a Martin elevator, commencing at the lower or western ends of the claim and working back; that he has been advised by an engineer that the dam and pipe line could be constructed at a cost of around $3,500 or $4,000, no estimate of the cost of the retaining wall having been given. On the other hand, E. C. Hard, a witness for the Government, who has had large experience in placer-mining operations, and is familiar with the hydraulic-elevator process of mining, testifies that the friction on the pipe through which, according to Bullington's testimony, it is proposed to conduct water to the land, would amount to at least one-third of the elevation of the head, and that that would reduce the head to such an extent that it would hardly be practicable to lift gravel to an elevation greater than 16 feet; that considering the narrowness of the bar on which the claims are situated and the lack of space on which to pile the bowlders, which comprise 70 per cent of the bar material, and the immense amount of other waste, he does not believe it would be possible to find room for the material; that one retaining wall would not be sufficient, for the reason that it would simply back up the water and drown the supply flume to the elevator; that there would have to be a double wall in order to retain the water and material and prevent it from going either way; and that twice the cost of the pipe line alone would be $5,200, exclusive of the cost of the dam. The Department is clearly of opinion that the gold values in the gravel existing on the claim could not be worked at a cost which would warrant mining operation.

In *Cataract Gold Mining Co. et al.* (43 L. D. 248, 254) it is said that—

> * * * the intent of the general mining laws was to encourage and promote the development of the mining resources of the United States, and with this fact in mind, a careful review of the laws and of the various decisions of this Department and of the courts appears to support the conclusion that if a mineral claimant is able to show that the land contains mineral of such quantity and value as to warrant a prudent man in the expenditure of his time and money thereupon, in the reasonable expectation of success in developing a paying mine, such lands are disposable only under the mineral laws, notwithstanding the fact that they may possess a possible or probable greater value for agriculture or other purposes. In other words, the mineral deposit must be a "valuable" one; such a mineral deposit as can probably be worked profitably; for, otherwise, there would be no inducement or incentive for the mineral claimant to remove the minerals from the ground and place the same in the market, the evident intent and purpose of the mining laws.

Applying the rule above stated the claims in question would not be subject to disposal under the placer mining laws. The decision complained of is accordingly adhered to and the motion denied.

FRANK ZUMPFE

Decided October 21, 1926

RECLAMATION HOMESTEAD—WATER RIGHT—COSTS—PAYMENT—FINAL PROOF—PATENT—IRRIGATION DISTRICT.

The provision of the reclamation law requiring payment by an entryman of all sums due the United States on account of the land or water right at the time of submission of proof as a condition precedent to the issuance of patent, is not satisfied by the assumption by an irrigation district of an obligation to pay the water right charges; nor does an extension of time accorded by the irrigation district for the payment of accrued charges operate as an extension by the Government unless approved by the latter.

FINNEY, *First Assistant Secretary:*

Frank Zumpfe has appealed from a decision by the Commissioner of Reclamation dated April 2, 1926, rejecting his final affidavit in connection with his homestead entry under the reclamation act for Farm Unit D, Sec. 21, T. 41 S., R. 12 E., W. M., Klamath Reclamation Project, Oregon, on the ground that full payment had not been made of all accrued charges as required by section 1 of the act of August 9, 1912 (37 Stat. 265), as amended by the act of February 15, 1917 (39 Stat. 920).

The said law provides that a homestead entryman under the reclamation act may at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation and cultivation, submit proof of such residence, reclamation and cultivation, which proof, if found regular and satisfactory shall entitle the entryman to patent, and a purchaser of a water-right certificate is entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land, subject however to the following conditions:

Provided, That no such patent or final water-right certificate shall issue until after the payment of all sums due the United States on account of such land or water-right at the time of the submission of proof entitling the homestead or desert-land entryman to such patent or the purchaser to such final water-right certificate.

The issue in the case is whether all sums due had been paid. The claimant contends that the law has been satisfied, not by actual payment of the dues, but by virtue of the contract between the Government and the Klamath Irrigation District whereby the district assumed such liabilities, and the further contract between the entryman and the said district whereby the entryman was allowed an extension of time for making the payments.

The contention of claimant is succinctly stated in the last paragraph of the brief, as follows:

Wherefore, it is respectfully submitted to the honorable Secretary of the Interior that the United States, having agreed to look to the Klamath Irrigation District for the payment of the construction, and operation and maintenance charges pending against appellant's lands, it is the duty of the honorable Secretary of the Interior to now issue patent to the appellant, without requiring him to pay to the Klamath Irrigation District the construction and operation and maintenance charges due, and which are embraced in his contract with the district, and which are to be paid in five equal annual instalments.

It was stated by the Commissioner that the district was delinquent in its obligations to the Government in the amount of about $61,000; that if the amount due on account of Zumpfe's land were paid by the district it would satisfy the law and the Government would not be concerned in any extension arrangement between the district and the entryman, but that the amount due on the land must be paid to the Government before patent could issue.

The position thus taken by the Commissioner is so clearly in harmony with the requirements of the law that there would seem to be no room for serious dissent therefrom. The extension of time accorded the entryman by the irrigation district did not operate as an extension by the Government to the district for payment of accrued charges. It is understood that a proposed agreement between the Government and the district is pending whereby the time is to be extended. Should such extension be granted it will inure to the benefit of the entryman so that he may then make final proof. But in the absence of payment of the charges due or extension of time by the Government for such payments, patent may not issue.

The decision appealed from is accordingly affirmed.

MUNSELL v. ARMSTRONG

Decided October 26, 1926

STOCK-RAISING HOMESTEAD—ADDITIONAL—RESIDENCE—TRANSFER.

One who owned and resided upon his original entry when he applied to make an additional entry under the stock-raising homestead act was qualified to make entry under section 5 of that act, and the fact that he transferred his original entry prior to the allowance of the additional does not change the character of the entry to one under the proviso to section 3 of the act.

STOCK-RAISING HOMESTEAD—ADDITIONAL—FINAL PROOF—EVIDENCE—PRACTICE—STATUTES.

Whether an additional entry under the stock-raising homestead act is governed by section 5 or by the provisos to section 3 thereof is dependent upon the nature of the showing to be made in the final proof, and is a question solely for determination between the Government and the entryman.

STOCK-RAISING HOMESTEAD—ADDITIONAL—APPLICATION—RESIDENCE—TRANSFER.

An application to make an additional stock-raising homestead entry by one who was not residing upon the original entry at the time the application was filed may, nevertheless, be allowed under section 5 of the stock-raising homestead act if he thereafter resumed residence thereon prior to its transfer.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Larson* v. *Parrish and Woodring* (49 L. D. 311), cited and applied.

FINNEY, *First Assistant Secretary:*

Floyd L. Munsell has appealed from a decision of the Commissioner of the General Land Office dated May 12, 1926, rejecting his application, filed April 15, 1926, to make entry under section 2289, Revised Statutes, for W. ½ SW. ¼, Sec. 5, T. 16 S., R. 27 W., 6th P. M., Kansas, and dismissing his protest against the allowance of the application of Robert W. Armstrong to make an additional entry under the stock-raising homestead act for said tract.

Armstrong's original entry embraced the NE. ¼ (or lots 1 and 2 and S. ½ NE. ¼), said Sec. 5, and was made December 17, 1906. It was perfected by final five-year proof submitted May 12, 1913.

On July 17, 1916, Armstrong made entry under section 3 of the enlarged homestead act for lot 4, SW. ¼ NW. ¼ and N. ½ SW. ¼, Sec. 4, said township. He submitted final proof on the additional entry on March 31, 1919, prior to which, on March 26, 1917, he applied to make an additional entry under the stock-raising homestead act for S. ½ SW. ¼, Sec. 4, said township, which application was allowed January 2, 1920, and on which he submitted final proof October 15, 1925.

On August 17, 1920 (supplemental application filed September 11, 1920), Armstrong applied to make a further additional entry under the stock-raising homestead act for W. ½ SW. ¼, Sec. 5, said township. The application was allowed May 12, 1926, on the date of the decision appealed from.

Munsell alleges that Armstrong sold and transferred the land in his original entry on May 12, 1924, and was therefore not qualified to make the entry allowed on May 12, 1926. Further, that there is no law under which a person may make two additional entries under the stock-raising homestead act. Appellant also questions the correctness of the Commissioner's holding that the additional entry allowed on May 12, 1926, is governed by section 5 of the stock-raising homestead act.

In the final proof on the additional entry under the enlarged homestead act, Armstrong and his witnesses testified on March 31, 1919, that he had continued to reside on his original entry; and in the final proof on the additional entry under the stock-raising homestead act, submitted October 15, 1925, it was testified that Arm-

strong had continuously resided on the original entry since March, 1907, except for about 15 months during 1913 and 1914, when he went away to secure work.

It thus appears that on August 17, 1920, when Armstrong applied to make a further additional entry under the stock-raising homestead act, he owned and resided on his original entry, hence was qualified to make an entry under section 5 of the act. The fact that he transferred his original entry on May 12, 1924, prior to the allowance of the application filed on August 17, 1920, did not preclude the allowance of the application nor change the character of the entry to one under the provisos to section 3 of the act.

It is well settled that a homestead application filed, for land subject thereto, accompanied by the required showing and payment, has the segregative effect of an entry, and that if an entryman possessed the necessary qualifications at the date of the application it is not invalidated by the doing of any act which, had it been done before the date of the application, would have disqualified him from making the entry. See *Larson* v. *Parrish and Woodring* (49 L. D. 311) and cases there cited.

Even if it were conceded that Armstrong was not residing on his original entry on August 17, 1920, nor at any time subsequent thereto, he was nevertheless qualified to make a further additional entry. See paragraph 1 of the instructions of March 2, 1921 (48 L. D. 28); also Circular No. 740 (48 L. D. 38). But in that event the entry would be governed by the provisos to section 3 of the act—i. e., entryman would be required to reside on the land for at least seven months each year for three years, and make the required improvements. But whether an additional entry under the stock-raising homestead act is governed by section 5 or the provisos to section 3 is one solely between the Government and the entryman, as the only question which could arise is the nature of the showing to be made in the final proof.

Moreover, if Armstrong was not residing on his original entry on August 17, 1920, but resumed residence thereon prior to the transfer of the original entry on May 12, 1924, the additional entry would be governed by section 5 of the act. The Department has on numerous occasions recognized the right of an entryman to change the character of his additional entry in this manner.

Munsell's application was filed long subsequent to the application of Armstrong, and was properly rejected. His protest is without merit.

The decision appealed from is affirmed.

WILLIAM M. ANDERSON

Decided October 28, 1926

RESERVOIR SITE—RIGHT OF WAY—OIL AND GAS LANDS—PROSPECTING PERMIT—MINERAL LANDS—PRESUMPTION.

Land within an oil and gas prospecting permit must be held to be prospectively valuable for oil and gas and not, therefore, subject to disposition for a reservoir site under the act of January 13, 1897, which is limited by its terms to lands "not mineral or otherwise reserved."

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *William R. Brennan* (48 L. D. 108), cited and applied.

FINNEY, *First Assistant Secretary:*

William M. Anderson has appealed from a decision of the Commissioner of the General Land Office dated April 12, 1926, rejecting his application for the reservation of NE. ¼ SE. ¼, Sec. 23, T. 2 N., R. 104 W., 6th P. M., Colorado, under the provisions of the act of January 13, 1897 (29 Stat. 484), "An Act Providing for the location and purchase of public lands for reservoir sites."

The application was filed December 17, 1925, and was rejected because the tract described is embraced in a permit granted to Floyd C. Fulenwider under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas.

The act of January 13, 1897, *supra*, is limited by its terms to lands "not mineral or otherwise reserved." In the case of *William R. Brennan* (48 L. D. 108), the Department held that lands embraced in a prospecting permit must be treated as valuable for oil and gas. It must therefore be held that the prospective value of the land for mineral excludes it from the operations of the act under which the application in question was filed.

However, the water hole which applicant desires to reserve as a watering place for stock was affected by the Executive order of April 17, 1926, withdrawing from settlement, location, sale, or entry, and reserving for public use in accordance with the provisions of section 10 of the stock-raising homestead act, "every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one-quarter of a mile of every spring or water hole located on unsurveyed public land."

It thus appears that the water hole which applicant desires to reserve as a watering place is effectually reserved for that purpose by the Executive order of April 17, 1926.

The decision appealed from is affirmed.

APPLICATIONS UNDER FEDERAL WATER POWER ACT—WITHDRAWAL OF PUBLIC LANDS—PRACTICE

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
Washington, D. C., November 1, 1926.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

The executive secretary of the Federal Power Commission has agreed to adopt and, unless unforeseen obstacles arise, to continue indefinitely the following practice.

When applications under the Federal water power act (41 Stat. 1063), involving public lands, are filed with field representatives of the commission, copies of the application will be forwarded to the executive secretary, who will immediately notify you of the filing, and of the date it was received by him, which will be considered as the date of filing with the Federal Power Commission for purposes of land withdrawal. A copy of the letter to you will be mailed directly by the executive secretary to the register of the district land office of the district in which the public land affected is located.

You will, therefore, instruct all registers that upon receipt of such notices they will note on their records that the public land described therein is withdrawn from entry, location, or other disposal until otherwise directed by the commission or by Congress, as provided by section 24 of the Federal water power act, the effective date of such withdrawal being the date the power project application was filed. Registers should also be instructed to make report as to any application embracing withdrawn land which may be allowed prior to the receipt of the notice and after the effective date of the withdrawal, in order that appropriate action may be taken.

E. C. FINNEY,
First Assistant Secretary.

ASSESSMENT OF CHARGES ON LANDS WITHIN INDIAN IRRIGATION PROJECTS

Opinion, November 6, 1926

INDIAN LANDS—SCHOOL LANDS—RECLAMATION—IRRIGATION—WATER RIGHT—COSTS—PAYMENT.

State school lands within Indian irrigation projects should not be furnished with water in the absence of an agreement with the State to bear its proper part of the costs of the project.

INDIAN LANDS — RECLAMATION — IRRIGATION — COSTS — LIENS — PAYMENT — TRANSFEREE.

On Indian irrigation projects where a specific lien for repayment of the irrigation charges is retained, such charges run as a covenant with the land until paid, even as against subsequent owners.

INDIAN LANDS—RECLAMATION — IRRIGATION — LEASE — LESSEE — TRANSFEREE — COSTS—PAYMENT.

Where a lessee of Indian irrigation project lands obligates himself to pay the annual operation and maintenance charges accruing during the term of the lease, such charges become a part of the consideration for the lease, collectable from the lessee or from his bondsman, and payment can not be demanded from a subsequent lessee or purchaser of the same land.

INDIAN LANDS—RECLAMATION—IRRIGATION—PAID-UP WATER RIGHT—COSTS—PAYMENT—TRANSFEREE.

Where land within an Indian irrigation project is sold under Government supervision as having a "paid-up water right," additional compensation can not be exacted from purchasers even in those cases where the irrigation costs were underestimated in the first instance.

INDIAN LANDS—RECLAMATION—IRRIGATION—ALLOTMENT—PATENT—PURCHASER—COSTS—LIEN—PAYMENT.

Where no lien exists for repayment of irrigation charges, an Indian holding a patent in fee who sells his land to a white purchaser is liable for all charges accruing up to the time of sale and the purchaser for all charges accruing thereafter.

INDIAN LANDS—RECLAMATION—IRRIGATION—COSTS—PAYMENT—DELIVERY OF WATER.

Where a legal liability to repay irrigation charges rests upon a landowner, Indian or white, delivery of water may be refused until payment is had, but where no such liability exists refusal to deliver water would not be justified.

PATTERSON, *Solicitor:*

In connection with irrigation work on Indian reservations you [Secretary of the Interior] have requested my opinion on several questions presented by the Commissioner of Indian Affairs who, after referring to the two main classes into which such projects fall—those on which the irrigation costs constitute a lien against the lands benefited and those on which no such lien exists—submits the following:

1. Can the Secretary of the Interior assess charges against lands within these two projects that are State school lands where such lands are susceptible of receiving water but are not now being cultivated owing to the fact that the title is still in the respective States?

2. Where Indian lands are leased under both projects, the leases providing for the lessees to pay the operation and maintenance assessments accruing during the period of such leases, but the lessees fail to pay such charges, would subsequent purchasers of the land take such land subject to the accrued charges?

3. Where land is purchased under Government sale holding out that a paid-up water right went with the land (see Attorneys General opinions 33, page 25, *supra*); also where a white man purchases direct from a fee patent Indian, is this service required to continue construction work to provide irrigation facilities for the total area of the irrigable allotment when at the date of the sale or the issuance of fee patent only part of the land was then actually under constructed works and could accordingly be irrigated?

4. Referring further to Question No. 3, opinion is also desired as to whether or not in cases where fee patent Indians sell direct to white purchasers and no construction charges are paid and no lien is created by express legislative act to assure their repayment, the Government can refuse delivery of water unless and until the purchaser executes an agreement to pay his share of the construction cost.

From the inception of activities by the Federal Government in connection with irrigation work among the Indians down to the year 1900 or thereabouts practically all appropriations by Congress for such work were purely gratuitous; that is, there was no thought of requiring the Indian to repay. About the year mentioned, however, this policy underwent a decided change, to the extent at least of either drawing on tribal funds belonging to the Indians chiefly concerned, if such funds were at hand, or by making direct appropriations from the Federal Treasury to be reimbursed from tribal funds of the Indians derived fom sales of unallotted lands within their reservation as and when had. For illustrative purposes see section 4 of the act of May 31, 1900 (31 Stat. 221, 247), dealing with the Crow Indians in Montana; article 4 of the agreement with the Indians of the Wind River Reservation, Wyoming, ratified by the act of March 3, 1905 (33 Stat. 1016), and the provisions of the act of June 21, 1906 (34 Stat. 325, 375), dealing with irrigation among the Ute Indians in Utah. Others could be cited, but these are ample for our present purpose. On many of the reservations, however, the entire tribal membership failed to receive irrigable lands in severalty; that is, some held allotments lying within the irrigable areas while others did not. This arose from several causes among which may be mentioned the immediate habitat of individual members of the tribe, preference in selecting lands wanted in allotment, but more largely because on a great many reservations allotments in severalty were made years before the inauguration of any irrigation scheme. At any rate, on most of the reservations where irrigation is in vogue we find some of the Indians holding allotments under the irrigation systems while other members of the same tribe have no land under ditch. Naturally those members who received no irrigable lands in allotment protested against the expenditure or hypothecation of their share of a fund common to the entire tribe for the special benefit of their more fortunate brethren who happened to hold irrigable lands in allotment. Appreciating the lack of equity in situations of this kind Congress set about to rectify it and by an item of general application in the Indian appropriation act of August 1, 1914 (38 Stat. 582), after advancing some $335,000 for irrigation work among the Indians further directed (p. 583):

* * * 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 such 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. [Italicized and parenthetical matter supplied.]

Even prior to the year 1914, in a few instances at least, in dealing with particular projects or reservations Congress had placed the burden of the cost of irrigation work where it more properly belongs, on the shoulders of the individual Indians benefited or, better still, by way of a lien against the land irrigated. Illustrative of this see the act of August 24, 1912 (37 Stat. 518, 522), which reads in part—

* * * That the proportion of the cost of the irrigation project on the Gila River Indian Reservation heretofore and herein authorized to be paid from the public funds shall be repaid into the Treasury of the United States as and when funds may be available therefor: *Provided further*, That in the event any allottee shall receive a patent in fee to an allotment of land irrigated under this project before the United States shall have been wholly reimbursed as herein provided, then the proportionate cost of the project, to be apportioned equitably by the Secretary of the Interior, shall become a first lien on such allotment, and the fact of such lien shall be recited on the face of each patent in fee issued and the amount of the lien set forth therein, which said lien, however, shall not be enforced so long as the original allottee or his heirs shall own the allotment; and the receipt of the Secretary of the Interior, or of the officer, agent, or employee duly authorized by him for that purpose, for the payment of the amount assessed against any allotment as herein provided shall, when duly recorded by the recorder of deeds in the county wherein the land is located, operate as a satisfaction of such lien.

Legislation of similar import with respect to the Colorado River and Yuma Indian Reservations in California and Arizona will be found in the act of March 3, 1911 (36 Stat. 1058, 1063), and in the act of May 18, 1916 (39 Stat. 123, 139, *et seq.*), dealing with the Blackfeet, Flathead, and Fort Peck Reservations in Montana.

Others could be mentioned, if necessary, but it will here be observed that the substantive legislation in the act of August 1, 1914, *supra*, creates no lien for repayment of the irrigation charges, but simply directs the Secretary of the Interior to require reimbursement, if the Indians have adequate funds to repay, under such rules and regulations as the Secretary may prescribe. Administrative officers of the Government being without power to insert conditions or limitations in land patents not contemplated by law (*Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669), it follows that the Secretary of the Interior is unable to impose a lien for repayment of these irrigation charges except where Congress has expressly so directed.

In this connection it is to be remembered that most of our Indian allottees, holding lands within these irrigation projects, received title therefor under our familiar 25-year trust patents which declare that at the expiration of the trust period the fee will then be conveyed, also by patent, "free of all charges or incumbrances of any nature whatsoever." In the face of this obligation on the part of the Government, the right of the Indian to an unincumbered title on expiration of the trust is not lightly to be invaded. At any rate we are thus confronted with the two classes into which these projects fall, those on which Congress has specifically provided for the retention of a lien to guarantee repayment of the irrigation charges and those on which no such lien exists. With these observations in mind we return to the question first presented above.

From an early date in providing for the disposal of lands within Indian reservations Congress has uniformly granted certain areas therein, usually sections 16 and 36 in each township (or an equivalent), to the State or States in which such lands are located in support of the common or public schools of such States. For the grant so made compensation has usually been awarded to the Indians but with that feature of the matter we are not now concerned. In no instance, however, and I speak advisedly, has either Congress or the Indians assumed any obligation, legal or otherwise, to furnish water for irrigation purposes to any lands so granted to a State. The State of course simply takes such lands in place, or indemnity lands elsewhere in case of loss, and the State is entitled only to these lands in their original or native condition, without enhancement in value at the expense either of the Federal Government or of the Indians, by way of irrigation or otherwise. That is to say, if water is desired for such lands, the expenses incident thereto must be borne by the State or by its grantees. As officials of a State, however, in the absence of appropriate authority from the legislative body, are without power to burden or impair lands belonging to the State with liens or obligations of the character with which we are now dealing, water should not be delivered to any State lands through any irrigation system constructed by the Government, in the absence of specific agreements with officers of the State supported by proper statutory authority. Further, in the absence of express legislation by Congress to that effect, lands so granted to any State can not be burdened with such a lien by officers of the Federal Government without the consent of the State. Situations of this kind can best be met by distributing the costs or "irrigation charges" over the remaining area within the project, omitting the State school lands. Thus, if a given project embraces say 40,000 acres, including 2,000 acres belonging to the State, in the absence

of a contract with the State officials, supported by the necessary statutory authority, the lands belonging to the State should be excluded from the area furnished with water and the project costs distributed over the remaining 38,000 acres within the project. Later, should the State school lands come into a position to assume a proper proportionate part of the costs of the system, water can then be delivered to such lands and the project charges redistributed over the entire area within such project. This reduces the matter simply to one of bookkeeping and hence needs no further discussion here.

As a preliminary to the second question it may be said that on those projects where a specific lien for repayment of the irrigation charges is retained, such charges, of course, remain a lien against the land until paid; enforceable as such, or, as indicated in the answer to the fourth question below, where the liability to repay is undoubted, delivery of water may be refused until payment is made. In all such matters, of course, the provisions of special enactments relating to particular projects are not to be disregarded, such as a declaration in the act of August 24, 1912, *supra*, to the effect that the lien is not to be enforced as long as the land is in Indian ownership; and those provisions of the act of May 18, 1916 (39 Stat. 123, 142), relating to the Blackfeet, Flathead, and Fort Peck Reservations in Montana, wherein it is said—

> That in addition to the construction charges every allottee, entryman, purchaser, or owner shall pay to the superintendent of the reservation a maintenance and operation charge based upon the total cost of maintenance and operation of the systems on the several reservations, and the Secretary of the Interior is hereby authorized to fix such maintenance and operation charge upon such basis as shall be equitable to the *owners* of the irrigable land. Such charges when collected shall be available for expenditure in the maintenance and operation of the systems on the reservation where collected: *Provided*, That delivery of water to any tract of land may be refused on account of nonpayment of any charges herein authorized, and the same may, in the discretion of the Secretary of the Interior, be collected by a suit for money owed: * * * [Italics supplied.]

Ordinarily where lessees of Indian lands within an irrigation project obligate themselves to pay the annual operation and maintenance charges accruing during the term of their lease such charges then become part of the consideration for the lease, collectable as such from the lessee, or from his bondsmen in case of failure to pay. Hence, in the absence of an express agreement between the parties to that effect I am unable to see how a subsequent lessee or owner can be held accountable for the delinquencies of a former occupant of the same premises. This is particularly true in those cases where no lien is retained for repayment of the irrigation charges. In the practical operation of projects of this character some losses are

bound to occur as it is usually impossible in every instance to collect down to the last penny. These so-called "project losses," meaning those items it is found impossible to collect, may be accounted for by charging them off to profit and loss or under appropriate circumstances by covering them into the project and redistributing them over the entire area as a part of the construction costs. A procedure analogous in principle at least has been resorted to on our Federal reclamation projects and has been recognized and upheld in the case of *Nampa and Meridian Irrigation District* v. *Bond* (283 Fed. 569, 573).

The third inquiry brings into view two classes of obligees or assumed obligees, (a) purchasers of allotted Indian land sold under governmental supervision and (b) purchasers of such land who buy direct from Indians holding patents in fee simple. For convenience in discussion these will be treated separately, although both subdivisions relate only to those projects on which no lien exists for repayment of the irrigation charges. As indicated in the question submitted, 3 (a) has already been dealt with in part in the Attorney General's opinion of September 2, 1921 (33 Ops. Atty. Gen. 25). Therein it was held that liability for repayment of the costs of irrigation—the construction charge—on the Wind River Reservation, Wyoming, is a personal obligation or liability resting against individual Indian allottees holding lands within the irrigated areas there, and that where such lands are sold under governmental supervision to purchasers who paid the estimated construction charge at the time of sale, such purchasers can not thereafter be held liable for additional payments in this behalf. Further, that this holds true even in those cases where the construction charge had been underestimated in the first instance. In other words, we can not require a purchaser to pay for the same thing twice, and any error in estimating the construction charge is one for which the purchaser is not responsible and can not be held accountable. It will be recalled that sales of this character are had pursuant to that provision in section 1 of the act of June 25, 1910 (36 Stat. 855, 856), which reads in part—

> * * * All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such *terms* as the Secretary of the Interior may prescribe, and he shall require a deposit of ten per centum of the purchase price at the time of the sale. [Italics supplied.]

Regulations prescribed by an administrative officer, if in harmony with the statute, have all the force and effect of law. Hence, where the Secretary of the Interior in prescribing the terms of sale of

allotted Indian lands, holds out to and assures the purchaser that the lands so sold carry a "paid-up water right" we can not thereafter repudiate that obligation by demanding from the purchaser additional compensation. The criterion for determining the purchaser's liability in such cases is not the area under ditch at the time of sale, or the area to which water can be delivered for irrigation purposes at that time, but rather the area so sold as having a paid-up water right. That is, if an allotment is sold as having a paid-up water right for 80 acres and the purchaser buys accordingly, we can not thereafter recover additional compensation on the ground that at the time of sale only 40 acres were then actually under ditch. We must look to "the terms of the sale" for guidance rather than to the area being irrigated at the time of sale.

Purchasers buying direct from Indians to whom patents in fee have issued—class 3(b) above—occupy a somewhat different position in so far as contractual obligations with the Government are concerned. The rights of purchasers under such circumstances have previously been dealt with, in part, in an opinion by the Solicitor for this Department under date of December 15, 1922 (49 L. D. 370), the project there under discussion also being the one at Wind River. In that opinion it was pointed out that where the obligation to repay is a personal one resting against the Indian—there being no lien running as a covenant with the land—such obligation can not be shifted to the shoulders of purchasers from the Indian, in the absence of an express agreement to that effect. Here the area under ditch at the time of issuing the patent in fee simple to the Indian may be used as the criterion for determining the liability of the respective parties in interest. The former Indian owner is liable for the irrigation charges, construction, operation, and maintenance, accruing prior to the time he parts with the title; hence, repayment of those charges, if to be had at all, is to be had from the former Indian owner rather than from his grantee, in the absence of an express agreement otherwise between the parties. In other words, a purchaser can not be held liable for a personal indebtedness resting against the former Indian owner of the land. Being under no obligation, legal or otherwise, to furnish water gratis to such white landowners, such charges, construction, operation, and maintenance, as accrue after the passing of the title are properly chargeable to the then owner of the land; hence, where part of the land only is under ditch at the time of sale, if such subsequent owner of the land desires water for any additional area, in the tracts so purchased, he must assume the obligation of paying therefor. It would be advisable, however, under such circumstances, to require the purchaser to execute an agreement to that effect, and delivery of water

to such additional area may be withheld until the purchaser agrees to pay therefor.

The matter of collecting from the Indians, generally, leads me to reinvite attention to that clause in the act of August 1, 1914, *supra*, requiring reimbursement "where the Indians have adequate funds to repay." Some consideration should be given to the financial status of individual Indians as doubtless Congress never intended that any of its Indian wards would be impoverished as a result of appropriations made by that body in their behalf. Situations of this kind amply illustrate the superiority of having expenditures of this character rest against the lands benefited, by way of a lien, but even as to that class of cases, where vested rights have once been created, some question may well be raised as to the power of Congress to impair or invade such rights: *Choate* v. *Trapp* (224 U. S. 665); *Morrow* v. *United States* (243 Fed. 854); and *United States* v. *Heinrich* (12 Fed., 2d series, 938). The latter case is now on appeal before the Ninth Circuit, and as the constitutional powers of Congress over such matters is one properly belonging to the courts for determination, further discussion of this feature of the matter would be inappropriate here.

The answer to the fourth and last question turns in a large measure on the answer to the third. Where no lien exists for repayment of the irrigation charges and where purchasers buy direct from the Indians without having agreed to assume an indebtedness resting against the former Indian owner such purchasers can not be required to assume the indebtedness by a refusal to deliver water until he agrees to pay. This would savor too largely of arbitrary action without due regard to the rights and equities of the respective parties in the premises. In its final analysis it would simply be equivalent to creating or enforcing a lien where none exists. Delivery of water, of course, may be refused under proper circumstances, if a delinquent water user refuses to pay. *Mower* v. *Bond* (8 Fed., 2d series, 518), and *Holmes* v. *Whitestone Irrigation and Power Company* (244 Pac. 579). In the absence of a valid obligation to pay, however, refusal of water until payment is made or until the landowner agrees to pay would not, in my opinion, be justified.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

BLAKENEY v. WOMACK

Decided November 16, 1926

HOMESTEAD ENTRY—OIL AND GAS LANDS—PROSPECTING PERMIT—EVIDENCE—RESERVATIONS.

An application for an oil and gas prospecting permit for land embraced within an unrestricted homestead entry is not a nullity, but it may be regarded as a report of mineral value sufficient to inquire as to whether conditions warrant the procurement of mineral wavers pursuant to the act of July 17, 1914.

HOMESTEAD ENTRY—OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—STATUTES.

The right of an agricultural entryman to be preferred in the award of an oil and gas prospecting permit granted by section 20 of the leasing act of February 25, 1920, is not applicable to homestead entries initiated after the passage of that act.

HOMESTEAD ENTRY—OIL AND GAS LANDS—PROSPECTING PERMIT—SURFACE RIGHTS—ADVERSE CLAIM—PREFERENCE RIGHT.

The determination of the question as to which of two conflicting claimants, an agricultural entryman or an oil and gas permittee, has the paramount right to the exclusive use of the surface, is dependent upon priority in the initiation of the claims.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—HOMESTEAD ENTRY—CONTEST—CONTESTANT—SURFACE RIGHTS—PREFERENCE RIGHT.

One who files an application for an oil and gas prospecting permit for land embraced within an existing homestead entry during the pendency of a contest, does not acquire surface rights superior to those of the successful contestant who timely exercises his preference right under the agricultural land laws. *Amerman* v. *Mackenzie* (48 L. D. 580), overruled so far as in conflict.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—AMENDMENT—COMPACTNESS.

A defect in an oil and gas prospecting permit application due to violation of the rules as to compactness of the tracts applied for, is curable by amendment of the application within the specified time and, when thus cured, does not affect the rights of the applicant thereunder.

FINNEY, *First Assistant Secretary:*

On April 28, 1924, Zeb P. Womack filed oil and gas prospecting permit application, now Las Cruces 028802, for, among other tracts, the E. ½, Sec. 18, T. 18 S., R. 29 E., N. M. P. M. This tract was then embraced in the enlarged homestead entry, made without mineral reservation, of Theodore N. Flippin, initiated by an application filed October 27, 1921. On January 24, 1924, George Blakeney instituted a contest against the entry of Flippin, charging abandonment. Upon due notice of contest and default by Flippin, his entry was

canceled June 25, 1924. Blakeney thereafter, to wit, on August 6, 1924, filed homestead application, now 028975, for this tract, upon a form appropriate for homestead entry, under section 2289, Revised Statutes, which, on September 11, 1924, in response to the requirement of the local office, he corrected by filing an amended homestead application under the provisions of the act of February 19, 1909 (35 Stat. 639.)

By decision of January 5, 1926, the Commissioner of the General Land Office held that Blakeney's application was subsequent to that of Womack and required the former, as a prerequisite to the allowance of his entry, to file consent to a reservation of the oil and gas content of the land in accordance with the act of July 17, 1914 (38 Stat. 509), and a waiver under the provisions of section 29 of the act of February 25, 1920 (41 Stat. 437), of all right to damages to crops and improvements by reason of the operations conducted under the latter act.

The basis for this requirement is stated to be a report by the Geological Survey that this tract had a prospective value for oil and gas and was subject to classification as oil and gas land. No report, however, to this effect made prior to said decision, is found with the record, but, be that as it may, the department is now in receipt of a report from the Geological Survey, dated May 11, 1926, stating relative to the land in question—

> Available evidence, including the results of a recent field investigation of the Artesia oil and gas field and surrounding area which includes the land listed, shows that the structural features of the producing Artesia oil and gas field in the township to the west affects the land listed and that the bringing in of a commercial oil well in the SW. ¼, Sec. 31, T. 17 S., R. 29 E., undoubtedly impresses this tract with a prospective value for oil and gas within the intent of paragraph 12 (c) of the oil and gas regulations, and to that extent the land described is properly subject to classification as oil and gas land.

Blakeney has appealed from the requirements made by the Commissioner. Stated briefly, his contentions are that Womack's application was premature, the land not then being subject thereto by reason of the unrestricted entry of Flippin; that the land was not known to be valuable for oil and gas and had not been reported as prospectively valuable for oil and gas; consequently, no mineral reservation could have been required of the entryman whose entry he was contesting; that he, by his successful contest of that entry and timely exercise of his preference right to make homestead entry, succeeds to the same rights enjoyed by the previous entryman and is entitled to the same quality and quantity of estate that he had. It is argued, therefore, that Blakeney can not be required to consent to a mineral reservation as a condition to the allowance of his entry; that such rights became fixed at the time his contest was allowed

and continued thereafter so as to debar the attachment of any rights under the subsequent permit application. There is error in appellant's assumptions which vitiates his conclusions. Appellant's premises that Womack's application was a nullity, that Flippin's entry was immune from the operation of the acts of July 17, 1914, and February 25, 1920, that he, by his successful contest and exercise of a preference right under the act of May 14, 1880 (21 Stat. 140), became invested with the right to an unrestricted entry, that by relation attached at the date of the filing of his contest, can not be sustained.

Under paragraph 12 (c) of the oil and gas regulations (47 L. D. 437, 444, 445), issued under the leasing act, the right of a person to file a prospecting permit application for a tract covered by the unrestricted entry of another is expressly recognized, subject, however to the future amendment of the entry to be obtained in the manner provided for in said section (*Otrin* v. *Hawkins*, 48 L. D. 622). Such applications are not nullities but are regarded as a report of mineral value sufficient to inquire whether conditions warrant the procurement of mineral waivers under the act of 1914, *supra*. (See Fred Muller *v.* State of New Mexico, A–8988, decided July 7, 1926, unreported.)

There being in this case a report by the Geological Survey that the land has prospective value for oil and gas under the provisions of paragraph 12(c), conditions exist such as to require either a consent to a reservation of the oil and gas by Blakeney or the submission by him of such a showing to the contrary as would overcome the conclusions of the Survey. If he does neither, his homestead application must be rejected. The same obligation would have rested upon Flippin were his entry now intact.

The applications of both Flippin and Blakeney, having been filed subsequent to the passage of the act of February 25, 1920, entitled neither of them to a preference right to a permit under section 20 of said act, nor does such preference right exist in Blakeney, because he, by contest, has procured the cancellation of a former agricultural entry, inasmuch as the act of May 14, 1880, *supra*, under which the right of contest arises, does not provide for a preference right in such a case (*Amerman* v. *Mackenzie*, 48 L. D. 580). Womack's permit application, all else being regular, is therefore subject to allowance as to this tract.

A further question emerges and is suggested by the appeal as to which applicant should be considered first in time in determining the paramount rights to the surface of the land under paragraph 4 of the instructions of October 6, 1920 (47 L. D. 474), issued pursuant to certain provisions of section 2 of the act of July 17, 1914, and section 29 of the act of February 25, 1920.

With respect to the oil and gas application, upon the grant of the permit, rights thereunder attached as of the date of the filing of the application (*William R. Brennan*, 48 L. D. 108). With respect to the preference right of the successful contestant, it is well settled that the act of 1880, *supra*, does not confer a vested right to enter the land so as to deprive Congress of its power to dispose of it as public land (*Emblen* v. *Lincoln Land Company*, 184 U. S. 660), but merely a preferred right of entry for 30 days as against everyone except the United States (*Jefferson E. Davis*, 19 L. D. 489; *William H. Schmith*, 30 L. D. 6; *Emma H. Pike*, 32 L. D. 395; *David A. Cameron*, 37 L. D. 450); a right to make such entry as the land may be subject to at the time the homestead applicant tenders his application (*Henry Sanders*, 41 L. D. 71).

While it necessarily follows that the land was subject to the operation of said acts of 1914 and 1920, at the time Blakeney filed his homestead application, and he must take the land under the homestead law with such limitations and reservations of right, title, and estate as may have been imposed by those acts, and conferred upon others who have invoked the benefits of the provisions thereof, yet such acts do not confer upon the mineral applicant an unconditional right to the exclusive use of the surface. Such right is dependent upon priority in the initiation of the claims, the determination of which is governed by other rules.

The use and occupation of the surface is the chief and most important right the homestead entryman has in the land. The provision in section 2 of the act (1914) that—

> * * * 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 payment 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.

implies clearly a recognition by the Congress that there is a conflict of interest between the mineral and agricultural claimants; that the latter's rights are likely to be impaired by the operations of the former, for which protection should be afforded. The question is presented then whether an oil and gas applicant, by filing his application for land embraced in an existing homestead entry during the pendency of the contest against it, acquires surface rights which attach prior to those of the contestant who subsequently succeeds in his contest and timely exercises his preference right by applying for the land under the agricultural laws.

The rule is well established and well known that the preference right of a successful contestant who timely exercises his right of

entry can not be defeated by intervening applications and settlement on the land in conflict therewith. Instances of the application of this rule are numerous in the decisions of the Department and require no citation. If the right of entry can not be defeated by intervening conflicting applications, neither can it be abridged or restricted by them in the absence of a statute so providing, and nothing is perceived in the acts here above mentioned or in any other statute which would prevent granting to this homestead applicant protection of the above-stated rule as to rights incident to the homestead entry and not taken away by the said acts.

Blakeney's contest, then, having been filed prior to the application of Womack, should be considered as the senior application; and it follows that he is entitled to the bond against damages to the surface which has been filed by Womack. Certain conclusions in the case of *Amerman* v. *Mackenzie*, *supra*, express a contrary view, but the question does not appear to have been presented there and was not particularly considered, and to the extent that said decision does not accord with the views herein expressed is overruled.

One other feature of the case needs notice. Womack's application originally violated the rule as to compactness by including tracts not within an area six miles square. His withdrawal of his application as to other tracts so as to conform to the rule and enable him to obtain a permit for the land here involved with other land was not filed until January 13, 1926, but within 15 days from the time the Commissioner required him to make an election. The defect is curable and does not affect his rights (*Spindle Top Oil Association* v. *Downing et al.* 48 L. D. 555).

In accordance with these views the decision of the Commissioner requiring a mineral reservation under the act of July 17, 1914, is affirmed; his requirement that Blakeney file a waiver of damages to the surface under the provisions of section 29 of the act of February 25, 1920, is reversed.

POTASH EXPLORATIONS UNDER ACT OF JUNE 25, 1926—COSTS OF OPERATION

Opinion, November 17, 1926

POTASH LANDS—MINERAL LANDS—LEASE—LESSEE—EXPENDITURES—PAYMENT—STOCK-RAISING HOMESTEAD—SURFACE RIGHTS—STATUTES.

The provision in the first proviso to section 2 of the act of June 25, 1926, for the payment of costs of operation in making the potash explorations authorized by the act, applies only to the owners or lessees, or both, of the land *and* minerals or the mineral rights, and has nothing to do with a mere surface entryman or owner who has no interest in the mineral deposits.

PATTERSON, *Solicitor:*

You [Secretary of the Interior] have referred to me for an opinion a query propounded by the Director of the United States Geological Survey, as follows:

Does the repayment agreement required in section 2 of this act (the act of June 25, 1926, Public No. 424, 69th Cong.) apply to stock-raising homesteads and other holdings when the surface has passed from the Government with reservation of the minerals to the United States?

The act in question (44 Stat. 768) reads as follows:

That there is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of $100,000 for the fiscal year ending June 30, 1927, and a similar amount for each succeeding fiscal year for four years, to be expended as may be mutually agreed upon by the Secretary of the Interior and the Secretary of Commerce for the purpose of determining the location, extent, and mode of occurrence of potash deposits in the United States and conducting the necessary laboratory tests incident thereto.

SEC. 2. The Secretary of the Interior and the Secretary of Commerce jointly are hereby authorized, within their discretion, to cooperate under formal agreement with individuals, associations, corporations, States, municipalities, educational institutions, or other bodies, for the purposes of this Act: *Provided*, That before undertaking drilling operations upon any tract or tracts of land the Secretary of the Interior and the Secretary of Commerce jointly, shall enter into a contract or contracts with the owners or lessees, or both, of the mineral rights therein, which contract shall provide, among other things, that not more than the actual cost of the exploration shall constitute a preferred claim in favor of the United States and its cooperators against any minerals developed; and the aforesaid contract or contracts shall provide that the owners or lessees, or both, of said lands and/or mineral rights within the radius hereinafter mentioned, shall pay to the Government and its cooperators an amount equal to the actual costs of said explorations, said payments to be made at such time or times, in such manner, and in such proportions as said Secretaries may, in their discretion, determine to be equitable: *Provided further*, That such contract shall not restrict the Secretary of the Interior and the Secretary of Commerce jointly in the choice of drilling locations within the property or in the conduct of the exploratory operations, so long as such selections or conduct do not interfere unreasonably with the use of the surface of the land or with the improvements thereon, and such contract shall provide that the United States and its cooperators shall not be liable for damages on account of such reasonable use of the surface as may be necessary in the proper conduct of the work: *Provided further*, That before such drilling be commenced the Secretary of the Interior and the Secretary of Commerce jointly shall require the owners of land and/or mineral rights therein lying within a radius of not less than one mile of any proposed well, in consideration of the probable increase in value to such lands and/or mineral rights therein incident to any discovery of potash and in order to prevent profiteering, to enter into an agreement whereby the Secretary of the Interior and the Secretary of Commerce, jointly, are empowered to act as referees in determining the maximum price at which the potash rights in such lands can be sold, which covenant shall run with the lands and/or mineral rights

therein: *And provided further*, That the owners of such potash rights, in consideration of the advantage accruing from an equitable price for such potash rights as effected by said Secretary of the Interior and Secretary of Commerce, may be required to enter into an agreement whereby the potash produced from said lands shall be marketed at a price not in excess of a maximum determined by the Secretary of the Interior and the Secretary of Commerce jointly as equitable.

The first proviso to section 2 of this act specifies the parties with whom the contract or contracts shall be made respecting the payment of the costs of actual drilling operations. These are "the owners or lessees, or both, of the *mineral rights* therein"; the word "therein" evidently referring to the tract or tracts upon which drilling operations are to be undertaken. It is further prescribed in this proviso—

* * * and the aforesaid contract or contracts shall provide that the owners or lessees, or both, of said lands and/or mineral rights within the radius hereinafter mentioned, shall pay to the Government and its cooperators an amount equal to the actual costs of said explorations. * * *

Detached from its context and without consideration of the objects and purpose of the act the phrase "the owners or lessees, or both of said lands and/or mineral rights" might be construed as referring to three categories of persons; that is, the owners or lessees—

(1) Of the land *and* mineral rights,

(2) Of the mineral rights, and

(3) Of the land—in the sense that the surface owner under either the stock-raising act or other homestead acts subject to the act of July 17, 1914 (38 Stat. 509), is owner of the land.

That the persons in class 3 are not within the purview of the proviso, or indeed of the act, seems apparent for the following reasons: (a) The owners of the mineral rights with whom the Secretaries are authorized alone to contract, could not impose any obligation on the surface owner; (b) where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense. (36 Cyc., Statutes, p. 1132, note 79.) The phrase last above quoted occurs in the third proviso dealing with those who must contract as to the price at which the potash rights may be sold; a matter in which the surface entryman has no interest or concern. (c) Under the stock-raising homestead act all rights to the minerals are reserved, together with the right to prospect, mine, and remove the same, and provision is made for indemnification of the surface owner under that act upon entry of the mineral claimant by the payment of an agreed sum as compensation for injuries to the crops and tangible improvements of the entryman or owner thereof, or the exaction of a bond to secure such payment. Similar protective

provisions in favor of the surface owner are prescribed in the act of July 17, 1914. The rights and the estate vested in the stock-raising homestead entryman or patentee or surface owners under the act of 1914 are not therefore in contemplation of law affected or impaired by the operation of the mineral claimant who has met the prerequisite requirements in the exercise of his rights. The cooperation or consent, therefore, of the surface owner is not necessary in the prosecution of operations authorized by the act of June 25, 1926. He obtains directly no benefits from successful operations thereunder and has no inducement to share its burdens. If it be held that the surface owner is an essential party to the preliminary contracts that must be made before drilling operations are commenced, then, under the provisions of the first proviso he is subject to the assessment of a proportionate part of the cost of operations and, in addition, under the second proviso he must join in the waiver of all damages that may arise from reasonable selection and use of the surface in the conduct of operations and thereby forego, without consideration, his right to compensation, in cases where it exists, secured by the acts above referred to; the consideration mentioned in the third proviso, i. e., the "probable increase in value of the land and/or mineral rights therein incident to the discovery of potash" can not in connection with its context, be held applicable to the surface estate.

(d) The first proviso further reads that "not more than the actual cost of exploration shall constitute a preferred claim in favor of the United States and its cooperators against *any minerals developed.*" (Italics supplied.) This provision is a plain declaration that the costs of operations to be apportioned among the owners or lessees, or both, shall constitute and be secured by a lien or charge upon the potash mined and removed; a provision clearly inapplicable to the estate of the surface entryman.

For the reasons stated, I am of the opinion that the provision for the payment of costs of operation in the first proviso to the act in question applies only to the owners or lessees, or both, of the land *and* minerals or the mineral rights. The answer to the query is therefore "No."

Approved:

E. C. FINNEY,
First Assistant Secretary.

SURVEY OF UNSURVEYED LANDS APPLIED FOR UNDER THE LEASING ACT OF FEBRUARY 25, 1920

REGULATIONS

[Circular No. 1102]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 18, 1926.

SUPERVISOR OF SURVEYS AND
REGISTERS, UNITED STATES LAND OFFICES:

Under the provisions of section 10 of the act of February 25, 1920 (41 Stat. 437), relating to the leasing of public lands containing deposits of phosphates, of section 14 of said act relating to the leasing of lands embraced in any prospecting permit therefor upon which valuable deposits of oil or gas have been discovered, of section 21 of said act relating to the leasing of lands containing deposits of oil shale or land adjacent thereto, and of section 24 of said act, relating to the leasing of lands embraced in any prospecting permit therefor upon which valuable deposits of sodium have been discovered, it is provided that in case the lands in question are unsurveyed, they shall be surveyed by the Government at the expense of the applicant for lease, in accordance with rules and regulations prescribed by the Secretary of the Interior.

In order that uniform procedure may be established in case of application for lease of unsurveyed lands under the provisions of any of the above-enumerated sections of said act the following regulations will be observed:

When the application for lease shall have received favorable consideration by the Department, the applicant will be required to file with the district cadastral engineer of the public survey office of the State or district in which the lands are situated an application for an estimate of the cost of surveying the sections in which the claim will probably be located and upon receipt of such estimate, the applicant will be required to deposit with such cadastral engineer the estimated cost of surveying such sections, the deposit to be held as a trust fund. Upon receipt of such deposit the district cadastral engineer shall prepare and submit to the General Land Office for approval special instructions providing for the subdivision of the township in its entirety in which the claim is located, the expense of the field work to be paid from the regular appropriation for surveying the public lands.

When the survey is accepted and the plat filed in the local land office, the claim will be adjusted to the resulting subdivisions as shown upon said plat. The cost of surveying the particular lands

included within the claim thus adjusted will be ascertained by prorating the total cost of surveying the township to the area thereof. The amount thus ascertained will be deducted from the claimant's deposit, and credited to the appropriation for surveying the public lands, and the balance of the deposit, if any, returned to the depositor or his legal representative.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
E. C. FINNEY,
First Assistant Secretary.

RESTORATION TO ENTRY OF LANDS WITHIN THE FORMER OREGON AND CALIFORNIA RAILROAD AND COOS BAY WAGON ROAD GRANTS

REGULATIONS

[Circular No. 892] [1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 10, 1926.

The SUPERINTENDENT OF OPENING AND SALE,
OREGON AND CALIFORNIA RAILROAD AND
COOS BAY WAGON ROAD GRANT LANDS:

The act approved June 9, 1916 (39 Stat. 218), revested in the United States the title to what are known as the Oregon and California Railroad grant lands; required that such lands, after examination in the field, be classified as class 1, power-site lands; class 2, timber lands; 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 under the general provisions of the homestead laws as modified by said act of lands of class 3 and also lands of class 2, after the Secretary of the Interior has determined and announced that the merchantable timber thereon has been removed. 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 dis-

[1] Revision of circular of May 2, 1923 (49 L. D. 566).

posed 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 Company 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 and California Railroad Company and Coos Bay Wagon Road Company, 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.

Section 4 of the act of June 9, 1916, makes provision for the disposal of lands of class 2, in the manner provided for the disposal of lands of class 3, when the Secretary of the Interior has determined and announced that the merchantable timber thereon has been removed. Relinquishments having been filed by the purchasers of the timber on all such lands of class 2, as are described in the attached list,[1] of all rights under patents for such timber, it is hereby determined and announced, for the purposes mentioned in said section 4, that the merchantable timber thereon has been removed and all said lands accordingly now fall in class 3 and become subject to disposal in the manner herein provided for the disposal of lands of that class, with the exception that the payment of $2.50 per acre shall not be required from entrymen upon lands from which the timber has been removed, hereinafter designated cut-over lands.

Pursuant to the authority of said acts, and the announcement made with reference to cut-over lands, it is directed that all such lands of class 3 described in the attached list,[1] including cut-over lands, 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, Oregon, 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 House Joint Resolution 30, approved January 21, 1922 (42 Stat. 358), in the manner hereinafter indicated and not otherwise. If the

[1] List omitted.

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 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 Company, 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 and 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.

"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, or H. J. R. 30, 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.

"OFFICERS, SOLDIERS, SAILORS, AND MARINES."—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.

"CUT-OVER LANDS."—Lands in connection with which it has been determined and announced that the merchantable timber has been removed, formerly class 2 lands, now subject to entry as agricultural lands in class 3. No charge as purchase price is made for lands designated cut-over lands.

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, together with a payment of 50 cents per acre for the area embraced in the application, as first installment of the purchase price of the land; commissions at the rate of 3 per cent on a bases of $1.25 per acre on cut over lands or a flat rate of 3¾ cents per acre, no payment as purchase price being necessary.

(*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, together with a payment of 50 cents per acre for the area included in such statement as

first installment of the purchase price as to lands sold at $2.50 per acre and a similar fee of $3 as to cut over lands, no payment as purchase price being necessary. If an entry, embracing either lands sold at $2.50 per acre or cut over lands, is made pursuant to such statement, the fees and commissions required with other applications must be paid as mentioned in (a) section 2, and the moneys deposited as first installment of the purchase price with the declaratory statement embracing lands sold at $2.50 per acre will be applied.

SEC. 3. EXECUTION AND PRESENTATION OF APPLICATIONS AND DECLARATORY STATEMENTS.—(*a*) Any application must be sworn to by the applicant before the register or acting register of the United States land office for the district in which the land is situated, or before a United States commissioner, a notary public, a judge or clerk or prothonotary of a court of record, or the deputy of such clerk or prothonotary, or before any magistrate, authorized by the laws of or pertaining to the State of Oregon, to administer oaths in the county or land district in which the land lies, 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 acting register 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.

SEC. 4. PREFERENCE RIGHTS UNDER THE PROVISO.—(*a*) *Filing application.*—An application for a preference right of homestead entry under the proviso for either revested Oregon and 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, February 23, and prior to 4.30 p. m., standard time, March 14, 1927, 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 or acting register 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, including cut-over lands 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 March 15, 1927, 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, March 15, 1927, any lands of class 3, including cut-over lands 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, February 23, 1927, 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.

(*d*) *Disposition of applications.*—All applications presented hereunder received by the register or acting register on and after 9 o'clock a. m., standard time, February 23, 1927, and prior to 4.30 p. m., standard time, March 14, 1927, 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 March 15, 1927. 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 March 16, 1927, at the Portland land office, and on March 18, 1927, 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 applications 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 or acting register 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 or acting register 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., March 15, 1927, 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 March 14, 1927, will be deposited by the register or acting register 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 pur-

chase 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 register or acting register. Moneys tendered with applications presented after March 14, 1927, will be deposited by the register or acting register 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 March 15, the first day on which applications thereunder may be allowed, and terminates on June 13, 1927.

SEC. 6. APPLICATIONS UNDER THE GENERAL LAW.—Beginning 9 o'clock a. m., standard time, June 14, 1927, the lands of class 3, including cut-over lands, 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., June 3, 1927, and such applications and declaratory statements together with those filed or presented at 9 o'clock a. m., standard time, June 14, 1927, 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, June 16, 1927. 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 June 14, 1927. 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, June 20, 1927, rights to lands of class 3, including cut-over lands, 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, together with the last installment of the purchase price, to wit, $2 per acre for the area included in the entry, and final commissions at the rate of 3 per cent on a basis of $1.25 per acre as to cut-over lands, no payment as purchase price being necessary.

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 Company 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 and was such 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 affi-

davit, 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 March 14 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 or acting register, 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:
E. C. FINNEY,
First Assistant Secretary.

NORTHERN PACIFIC RAILWAY COMPANY

Decided December 11, 1926

SELECTION—SURVEY—WITHDRAWAL—PREFERENCE RIGHT—ADVERSE CLAIM—STATUTES.

The act of August 18, 1894, did not operate to suspend the public land laws as to lands under survey in accordance with its terms, but appropriation of lands reserved for survey may be made, except to the extent that such appropriation may come in conflict with the State's right of selection within the period of its preference right after the filing of the township plat.

SELECTION—RAILROAD LAND—SURVEY—WITHDRAWAL—FORFEITURE—STATUTES.

A selection made by the Northern Pacific Railway Company in accordance with the act of March 2, 1899, is a lawful filing excepted from the operation of the proclamation of May 23, 1905, which reserved certain lands for the Henrys Lake Forest Reserve.

SELECTION—RAILROAD LAND—SURVEY—WITHDRAWAL—FORFEITURE—STATUTES.

Failure of a railroad company to file a new selection list within three months after the filing of the plat of survey, as required by the act of March 2, 1899, does not work a forfeiture of the selection, or constitute such noncompliance with the law as to remove it from the benefit of the proviso to the proclamation of May 23, 1905, in favor of lawful selections existing at its date.

COURT DECISIONS CITED AND APPLIED.

Cases of *Hall* v. *Payne* (254 U. S. 343), and *Edward Rutledge Timber Company* v. *Farrell* (255 U. S. 268), 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 May 20, 1926, holding for cancellation its selection list No. 2, Blackfoot 040474, embracing the SE. ¼ NE. ¼, Sec. 31, T. 12 N., R. 42 E., B. M., Blackfoot, Idaho, land district.

By direction of the Commissioner of the General Land Office, pursuant to an application for survey by the Governor of the State of Idaho under the act of August 18, 1894 (28 Stat. 372, 394), all of the said T. 12 N., R. 42 E., was on September 8, 1899, withdrawn and reserved from adverse appropriation by settlement or otherwise until the expiration of 60 days from the date of the filing of the township plat of survey in the Blackfoot district land office.

On July 21, 1902, the Northern Pacific Railway Company, acting in accordance with the provisions of the act of March 2, 1899 (30 Stat. 993), filed its selection list No. 2 in the Blackfoot office, making selection of the land described above, which was then unsurveyed, in lieu of other land located in the Mount Rainier National Park, which it released and conveyed to the United States.

By proclamation dated May 23, 1905 (34 Stat. 3052), the President reserved certain lands including the tract in question from entry or settlement and set them apart as a public reservation designated as the Henrys Lake Forest Reserve, afterwards called the Targhee National Forest. The proclamation contained the following exception and proviso (p. 3054):

> Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, That this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing or settlement was made.

The plat of survey was filed in the Blackfoot land office on August 1, 1924. This plat designated the land which had been selected by the railway company by the same description as that given in the company's original selection list, to wit, SE. ¼ NE. ¼, Sec. 31, T. 12 N., R. 42 E. On March 31, 1926, the Northern Pacific Railway Company, in accordance with the provisions of the act of March 2, 1899, *supra*, filed a new list in the local office, in which the description of the land selected was the same as that given in the original list.

Upon consideration of the facts stated above the Commissioner, in his decision of May 20, 1926, held for cancellation the railway company's selection list for the land in controversy. The Commissioner based his decision upon three grounds, as follows: (1) That the land had been withdrawn from adverse appropriation in accordance with the act of August 18, 1894, *supra*, prior to the time when the railway company's selection list was filed; (2) that the land was withdrawn thereafter for a forest reserve by an Executive proclamation; (3) that the railway company failed to file its new selection list within the period of three months after the filing of the plat of survey in the local office at Blackfoot, Idaho, as was required by the said act of March 2, 1899.

In its appeal to the Department the railway company assigns error with respect to each of the Commissioner's findings.

The Department is of the opinion that the Commissioner's action canceling the railway company's selection was unwarranted. The act of August 18, 1894, *supra*, does not withhold lands under survey from appropriation, except to the extent that such appropriation may come in conflict with the State's right of selection, exercised within 60 days after the filing of the township plat of survey in the district land office. There is nothing in the act to indicate an intention on the part of Congress to suspend the operation of the public land laws as to lands under survey in accordance with its terms, and there appears to be no reason why a railway company may not exercise a right of selection conferred upon it by law with respect to such lands, subject to the possibility that its selection may be defeated by the State's selection of the same tract or tracts within the period of its preference right. *Hall* v. *Payne* (254 U. S. 343); *Edward Rutledge Timber Co.* v. *Farrell* (255 U. S. 268).

It may be conceded that as the State of Idaho had made no selection at the time of the President's proclamation, its right to make such selection in the future ceased to exist. It does not follow, however, that the proclamation had the same effect upon the railway company's selection. That selection had been made in accordance with law, and therefore was a lawful filing expressly excepted from the force and effect of the proclamation.

The Department is of the opinion that the railway company's failure to file a new selection list within three months after the plat of survey was filed in the local office, in accordance with the act of March 2, 1899, *supra*, did not work a forfeiture of its selection or constitute such a failure to comply with the law under which it was made as to remove the selection from the benefit of the proviso to the President's proclamation in favor of lawful selections existing at its date. The act of March 2, 1899, was intended to benefit rail-

way companies coming within its scope, and it prescribes no penalty for failure by such a railway company to file a new selection list within three months after unsurveyed land selected by it shall have been surveyed and the plat filed in the local office.

Section 3 of the instructions dated November 3, 1909 (38 L. D. 287), with reference to selections for unsurveyed public lands, makes it the duty of the register and receiver to notify a claimant for such lands, by registered mail, of the filing of the township plat in the district land office and to require adjustment of the selection to the public survey within 30 days. No forfeiture is provided for in case of default by the party notified, but in such case the register and receiver are instructed to adjust the selection themselves.

It is stated on behalf of the railway company that no notice of the filing of the township plat of survey in question was given to it, as required by these instructions. In any event, therefore, it would be improper to penalize the railway company in view of the fact that the register of the local office failed to discharge a duty which he owed to the company and was himself the party first at fault.

The decision appealed from is reversed.

TAYLOR AND McINTOSH v. PRUIT

Decided December 13, 1926

OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT—LAND DEPARTMENT—JURISDICTION.

The Land Department has jurisdiction to inquire into and determine whether or not an assignment of an oil and gas prospecting permit has been completed according to the agreement between the parties, and to refuse ratification of the assignment when it is proven that the assignee has failed fully to comply with the conditions under which the assignment was to be effective.

FINNEY, *First Assistant Secretary:*

This is an appeal by Zachary L. Taylor and Kenneth McIntosh from a decision of the Commissioner of the General Land Office holding in effect that assignment of oil and gas prospecting permit, Las Cruces 029845, to Drew E. Pruit would be submitted for approval and that application for the approval of a subsequent assignment of the same permit to Kenneth McIntosh would be denied unless there was filed an assignment of the same by Pruit to McIntosh.

Since the decision of the Commissioner was rendered, supplemental showings have been filed and oral argument has been had before the Department in behalf of all the parties.

Stripped of unessential matters and minor details the facts now disclosed by the record are as follows:

On March 27, 1926, Taylor executed an instrument of assignment of the permit to Pruit, subject to approval by the Department and left it in the hands of the attorney who drew it for submission on behalf of Pruit. A contemporaneous agreement in writing was signed by Taylor and Pruit reciting the execution of the assignment and containing this stipulation:

> It is therefore agreed that the party of the second part will, and he hereby agrees to place in the First National Bank of Artesia, New Mexico, the sum of Two thousand four hundred seven and 45/100 ($2,407.45) dollars, to be held by said bank until the said aforementioned assignment is approved by the Honorable Secretary of the Interior. When and as soon as the said assignment is so approved the said escrow agent is authorized to pay to the party of the first part the said $2,407.45.

It was also agreed therein that the sum above mentioned should be returned to Pruit by the escrow agent in the event the assignment was not finally approved by the Department. On the same date, Pruit drew a draft on the Joyce Pruit Company, of Roswell, payable to Taylor for the said sum of $2,407.45, which was indorsed by Taylor and deposited by Pruit in the escrow bank. This draft was sent to the First National Bank of Roswell for collection, presented by the latter for payment, but payment was refused. The draft was then protested and at no time since has the sum agreed upon been deposited with the escrow agent. Upon information that the assignment to Pruit had been rejected by the Department, Taylor on July 6, 1926, for a substantial consideration assigned the permit to Kenneth McIntosh. It appears also that Pruit signed a statement on July 3, 1926, reading in part "If Drew Taylor will let McIntosh step into my shoes, I will assign to McIntosh all my right, title, and interest in my assignment of the permit and State lease from said Taylor." It is averred by McIntosh and not denied, that the consideration for this promise was an agreement by McIntosh to pay certain of Pruit's debts, one of $26 having been pursuant thereto paid by McIntosh. Both assignees have presented their respective instruments of assignment for approval.

While it is not part of the province of the Department to inquire whether or not the consideration for an assignment of an oil and gas permit has been paid or secured, if in fact an assignment has been made, yet, it is in all cases pertinent to inquire into the transaction and determine from the showings whether or not in fact the assignment is effective and has been completed according to the agreement between the parties. It is the view of the Department that the execution and delivery of the instrument of assignment, the escrow agreement and the check tendered to the escrow agent are

all parts of one transaction; that no right in the permit was intended to become vested in Pruit until he had deposited the purchase price with the escrow agent agreed upon. The delivery of the draft mentioned to the escrow agent admits of no other reasonable explanation, other than it was intended as an ostensible compliance with Pruit's agreement to deposit the sum of $2,407.45 with the escrow agent. The obligation to do so rested upon Pruit at that time. It is no defense to say that payment to Taylor was not authorized until the assignment was approved, for the escrow agent would have been responsible to Pruit for losses arising from a premature payment of the purchase money in violation of the conditions under which it was deposited. The delivery of a draft which was immediately dishonored by the payor, and the maker's justification of that act, strongly indicates a gesture to mislead the permittee, and the failure of Pruit after ample opportunity and notice to deposit the sum agreed upon in escrow and his insistence upon the approval of the assignment without fulfilling the conditions under which the permittee was to part with his right and title, entitles the assignment that he obtained to no recognition.

The assignment to Pruit is therefore rejected; the assignment to McIntosh if otherwise regular may be submitted to the Department for approval. The decision of the Commissioner is reversed and the case is remanded for procedure consistent with these views.

SULPHUR PROSPECTING PERMITS AND LEASES IN THE STATE OF LOUISIANA—ACT OF APRIL 17, 1926

REGULATIONS

[Circular No. 1104]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 22, 1926.

REGISTER,
BATON ROUGE, LOUISIANA:

The act of Congress approved April 17, 1926 (44 Stat. 301), entitled "An act To promote the production of sulphur upon the public domain within the State of Louisiana," authorizes the Secretary of the Interior to grant prospecting permits and leases for sulphur lands belonging to the United States in that State.

The similarity of this act to the general mineral leasing act of February 25, 1920 (41 Stat. 437), is such that the provisions of Cir-

cular No. 672, approved March 11, 1920 (47 L. D. 437), relating to oil and gas permits and leases are generally applicable, and to the extent that they are not inconsistent with the said act of April 17, 1926, they will govern the procedure in applications for permits and leases under the latter act.

A sulphur permit may, however, be allowed for a maximum of 640 acres only.

The royalty in sulphur leases granted consequent upon a permit shall be 5 per centum of the quantity or gross value of the output of sulphur at the point of shipment to market.

An oil permittee who shall make a discovery of sulphur in lands covered by his permit shall have the same privilege of obtaining a sulphur lease as is given to a sulphur permittee.

All sulphur leases for lands known to contain valuable deposits of sulphur and not covered by permits or leases shall be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease and upon the payment in advance of a rental of 50 cents per acre per annum, the rental paid for any one year to be credited against the royalties accruing for that year.

No person, association, or corporation shall take or hold more than three sulphur permits or leases in any one State during the life of such permits or leases.

Approved:
E. C. FINNEY,
First Assistant Secretary.

WILLIAM SPRY,
Commissioner.

An Act To promote the production of sulphur upon the public domain within the State of Louisiana.

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 and directed, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for sulphur in lands belonging to the United States located in the State of Louisiana for a period of not exceeding two years: *Provided,* That the area to be included in such a permit shall be not exceeding six hundred and forty acres of land in reasonably compact form.

SEC. 2. Upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of sulphur have been discovered by the permittee within the area covered by his permit, and that the land is chiefly valuable therefor, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit, at a royalty of 5 per centum of the quantity or gross value of the output of sulphur at the point of shipment to market, such lease to be taken in compact form by legal subdivisions of the public land surveys; or if the land be not surveyed, by survey executed at the cost of the permittee in accordance with regulations prescribed by the Secretary of the Interior: *Provided,* That where any person having been granted an oil and gas permit makes a discovery of sulphur in lands covered by said permit, he shall have the same privilege of leasing not to exceed six hundred and forty acres of

said land under the same terms and conditions as are given a sulphur permittee under the provisions of this section.

SEC. 3. Lands known to contain valuable deposits of sulphur and not covered by permits or leases shall be held subject to lease by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt and in such areas as he shall fix, not exceeding six hundred and forty acres; all leases to be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease and the payment in advance of a rental of 50 cents per acre per annum, the rental paid for any one year to be credited against the royalties accruing for that year.

SEC. 4. Prospecting permits or leases may be issued in the discretion of the Secretary of the Interior under the provisions of this Act for deposits of sulphur in public lands also containing coal or other minerals on condition that such other deposits be reserved to the United States for disposal under applicable laws.

SEC. 5. The general provisions of section 1 and sections 26 to 38, inclusive, of the Act of February 25, 1920, entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," are made applicable to permits and leases under this Act, the first and thirty-seventh sections thereof being amended to include deposits of sulphur, and section 27 being amended so as to prohibit any person, association, or corporation from taking or holding more than three sulphur permits or leases in any one State during the life of such permits or leases.

SEC. 6. That the provisions of this act shall apply only to the State of Louisiana.

Approved, April 17, 1926 (44 Stat. 301).

FILTROL COMPANY v. BRITTAN AND ECHART

Decided December 23, 1926

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—SEGREGATION—PREFERENCE RIGHT.

The filing of an allowable oil and gas prospecting permit application has a segregative effect and confers upon the applicant a priority of right over any adverse interest thereafter sought to be initiated.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—RELINQUISHMENT—RESTORATIONS—PREFERENCE RIGHT.

An oil and gas prospecting permittee can not, by filing a relinquishment, acquire a preference right to apply for a new permit, but will, upon the restoration of the land, be accorded merely the privilege of filing application in accordance with existing regulations.

MINING CLAIM—OIL AND GAS LANDS—PROSPECTING PERMIT—ADVERSE CLAIM—RELINQUISHMENT.

A mining claim can not be located upon land embraced in an oil and gas prospecting permit, and a mining location which was without legal effect *ab initio* because at the time of the initiation of the claim the land was covered by an oil and gas prospecting permit does not attach upon cancellation of the permit.

MINING CLAIM—STOCK-RAISING HOMESTEAD—RELINQUISHMENT—SURFACE RIGHTS.

The title of a mining claimant who had acquired only the minerals in lands which, at the time of the initiation of his claim were covered by a stock-raising homestead entry, does not become automatically enlarged, upon cancellation of the entry, to include the land and the minerals, but the surface continues to remain a separate estate.

FINNEY, *First Assistant Secretary:*

On June 19, 1924, M. G. Brittan was granted a permit under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas on lots 1, 2, 3, 4, 5, 6, N. ½ NW. ¼ NE. ¼, E½ SE. ¼, SW. ¼ SE. ¼, Sec. 34, T. 29 S., R. 30 E., M. D. M., Visalia, California, land district. Application for permit was filed on February 25, 1924.

On May 31, 1925, the permittee signed a relinquishment of the permit, which relinquishment was filed June 11, 1925. On April 20, 1926, an assignment of the permit to Pete Echart, executed on the 15th of that month, was filed. In a letter dated April 26, 1926, the Commissioner of the General Land Office directed that the parties in interest be required to show compliance with the terms of the permit or to file an allowable application for extension of time, stating that action on the relinquishment had not been taken for the reason that it had not been determined whether the tracts embraced in the permit should be restored to further filing under section 13 of the leasing act.

On May 15, 1926, the assignee filed application for extension of time. He stated that the permittee had not complied with drilling requirements, but that if extension should be granted he, the assignee, would immediately "proceed to erect or cause to be erected or make a contract for the erection of a suitable, adequate, and substantial derrick for the sinking of a well to prospect for oil upon the said land," and would diligently sink, or cause to be sunk, such well.

On June 24, 1926, the Filtrol Company, a corporation, filed a protest against approval of assignment and granting extension of time. alleging that—

> This protestant is now, as is shown by the certified copies of location notices hereto attached and made a part hereof, the complete owner of the following valid and subsisting mining claims, to wit:
>
> Old Cabin Placer, located on the SE. ¼ SW. ¼, Sec. 34, T. 29 S., R. 30 E., June 1, 1924; and also the Sundown, the Suffragette, and the Horse Placers, located on the W. ½ NE. ¼ NW. ¼, NW. ¼ NW. ¼, and SW. ¼ NW. ¼ (lot 1) said section, respectively, September 1, 1924; all of which locations were based on valid and sufficient discoveries of valuable clay suitable for and used in the refinement of petroleum oil; and have been amply maintained by a full compliance with all the requirements of the mining laws.

By decision of July 9, 1926, the Commissioner rejected the assignment and held the permit for cancellation, "subject to the right of appeal within 15 days," stating—

> This permit has been outstanding more than two years. No drilling has been performed on the permit area and there is nothing to show that the permittee has been diligent in his efforts to test the land. It would therefore appear that permittee has no equity in the permit which he may assign, and for this reason the relinquishment should be accepted and the permit cancelled.

Beyond a mere mention of the fact that a protest had been filed by the Filtrol Company, the Commissioner took no notice of said protest.

It is shown that Brittan and Echart received notice and copies of the Commissioner's decision on July 22 and 26, 1926, respectively. On August 10, 1926, local counsel for the permittee and assignee filed a request for additional time within which to appeal, and on August 19, 1926, the Commissioner granted the request stating that "the application for 30 days' additional time in which to comply with office letter of July 9, 1926, is granted." On September 28, 1926, the permittee and assignee, by their attorney, filed an appeal in which it is stated that although the permittee had made every possible effort to have drilling commenced he had been unable to do so on account of lack of funds and failure to interest any drilling company; that with a view to obtaining additional time he filed a reliquishment with the intention that upon cancellation he would file application for another permit and continue his efforts; that prior to acceptance of the relinquishment he succeeded in interesting the assignee, Echart; also that—

> The assignee, Echart, is financially able to erect adequate and substantial derrick upon the lands and commence drilling operations. It would be inequitable at this time when the efforts of the permittee have resulted in commencing drilling after three years of endeavor to deny him the opportunity to obtain the results of his labors.

The Filtrol Company, by its attorneys, filed, on August 18, 1926, a protest against allowance of appeal and extension of time on the grounds that no notice of proposed appeal had been filed in time; that no appeal had been filed; that no notice of proposed appeal had been served on the protestant in time, or at all; that no facts had been alleged which would warrant the asking or justify the granting of appeal on equitable grounds through the exercise of supervisory power.

On October 22, 1926, the attorneys for the protestant company filed a motion for dismissal of the appeal on the grounds that said appeal was out of time and was insufficient in form and substance,

and that the Commissioner had failed to consider and sustain said company's protest against allowance of extension of time for appeal.

The plat of survey of the township shows that lots 1, 2, 3, 4, 5, and 6, said Sec. 34, correspond to the subdivisions which would ordinarily be described as the SW. ¼ NW. ¼, SE. ¼ NW. ¼, NE. ¼ SW. ¼, NW. ¼ SW. ¼, SW. ¼ SW. ¼, and SE. ¼ SW. ¼, respectively. It will thus be seen that of the four alleged placer claims involved two are within and two are without the permit area. Upon examination of the record it has been found that there are alleged rights to the land involved, other than those set forth in the appeal and protest, which should properly be considered in this case.

In transmitting the protest of the Filtrol Company against this permit the register also transmitted a protest by said company against the stock-raising homestead application of Pete Echart, the assignee herein. It is found that on November 30, 1920, Jean P. Giraud made stock-raising homestead entry 09078 for all public land in said section 34, consisting of the NE. ¼, E ½ SE. ¼, SW. ¼ SE. ¼, N. ½ NW. ¼, and lots 1, 2, 3, 4, 5, 6; that a relinquishment of said entry together with stock-raising homestead application 014177 of Pete Echart for the same land was filed on November 20, 1925; and that entry was allowed to Echart on his application on April 3, 1926, upon authority of the Commissioner. The allegations and showing of the Filtrol Company in its protest against Echart's application, or entry, are substantially the same as those against the permit.

The act of February 25, 1920, *supra*, contains the following provisions:

> SECTION 1. That 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 * * *.
>
> SEC. 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil and gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field * * *.
>
> SEC. 37. 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 the passage of this act and thereafter maintained in compliance with the laws under which initiated.

In *Manuel* v. *Wulff* (152 U. S. 505), the Supreme Court of the United States said (p. 510):

And by section 2322 (of the Revised Statutes) it is provided that when such qualified persons have made discovery of mineral lands and complied with the law, they shall have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and that when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. *Forbes* v. *Gracey*, 94 U. S. 762; *Belk* v. *Meagher*, 104 U. S. 279; *Gwillim* v. *Donnellan*, 115 U. S. 45; *Noyes* v. *Mantle*, 127 U. S. 348.

It is clear from consideration of the statutes and decisions in which they have been construed that a mining claim can not be located on land embraced in an oil and gas prospecting permit. In this connection see also *Joseph E. McClory et al.* (50 L. D. 623) and the opinion of this Department dated October 9, 1924 (50 L. D. 650).

The department has ruled (48 L. D. 98, 99) that—

* * * qualified persons who filed proper applications for oil or gas prospecting permits under the act of February 25, 1920, can not and should not be deprived of their rights if, because of delay in action upon the applications so filed, there intervenes a designation by this Department of the lands as being within the geological structure of a producing oil or gas field occasioned by a discovery of oil or gas subsequent to the filing of the application in the local land office.

Under the rulings of the Department the filing of an allowable oil and gas prospecting permit application has a segregative effect and the applicant has priority of right over any adverse interest thereafter sought to be initiated. When a permit is issued upon such application, the permittee's rights date back to the filing of his application. Hence, the alleged mining locations within the area for which Brittan had applied for a permit and for which he was later granted a permit were without legal effect, and being so from the beginning they have not since become valid as against a surface entry. When Echart filed his homestead application and when his entry was allowed there was no appropriation of any kind which conflicted with his filing and entry, at least so far as all land except the N. ½ NW. ¼, said Sec. 34, was involved.

The Filtrol Company had no ground of protest whatever through any valid or recognizable interest in the land. The Commissioner properly ignored its protest against extension of time for appeal. The motion for dismissal of appeal need not be given any consideration as the movent is not a party in interest.

But neither the permittee nor the assignee has made any showing which would warrant the granting of extension of time. The permittee had made clear his intension of abandoning the permit by making and filing a relinquishment thereof early in 1925. The state-

ment that he intended to apply for the land again is without force, because Circular No. 929 (50 L. D. 387), which prescribes how permitted lands shall be restored to application for permit, had been in effect more than a year, and the permittee could not obtain any preference right to apply for another permit. The application for extension of time and approval of the assignment are therefore denied and the permit is canceled.

Under date of November 27, 1926, the Director of the Geological Survey made report to the Department upon this permit area as follows:

> Available geological evidence, resulting from a field examination by the Geological Survey in 1911, provides no basis for a report that the land listed is valuable, prospectively or otherwise, for deposits of oil or gas or that the geological conditions present are particularly favorable to oil and gas accumulation.
>
> The tracts described are, therefore, properly subject to classification as nonoil and nongas land.

Inasmuch as it has been alleged that the SW. ¼ NW. ¼ (lot 1) and SE. ¼ SW. ¼ Sec. 34 are valuable for mineral which is subject to appropriation under the mining laws, and as said tracts have been classified as nonoil and nongas, said subdivisions will not be subject to further prospecting permit application. The Filtrol Company will be considered as having thereon mining claims subject to the provisions of section 9 of the act of December 29, 1916 (39 Stat. 862).

There remains to be considered the protest of the Filtrol Company against Echart's homestead entry to the extent of conflict with mining locations outside of the permit area. It has hereinbefore been stated that when mining locations were made of the W. ½ NE. ¼ NW. ¼ and NW. ¼ NW. ¼, said Sec. 34, said tracts were embraced in the stock-raising homestead entry of Jean P. Giraud. Consequently, the locations were made for the mineral deposits as distinguished from *the land and minerals*. In section 9 of the stock-raising homestead act of December 29, 1916, *supra*, it is 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 any entryman under this act.

It is clear that the title of a mineral claimant evidenced by such a patent would not automatically be enlarged to include land and minerals if the cause of the restricted title were an unperfected entry which should be canceled. And the Department does not hold the opinion that the rights of a mineral claimant who has located a mining claim for mineral deposits in land covered by a stock-raising

homestead entry are automatically enlarged to include the land upon cancellation of the entry. This does not involve the denial of any rights to the mineral claimant, because if he should amend his location prior to the assertion of any new right under the stock-raising act he would be in a position to obtain patent for the land, including the minerals.

The protest of the Filtrol Company is dismissed and Echart's entry is left intact. In view of the fact that the protest against the homestead entry had not been passed upon by the Commissioner, the case is not closed, but the Filtrol Company will be given opportunity to file motion for rehearing in accordance with Rule 83 of Practice.

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