DECISIONS

OF THE

DEPARTMENT OF THE INTERIOR

IN CASES RELATING TO

THE PUBLIC LANDS

EDITED BY

DANIEL M. GREENE

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TABLE OF CASES REPORTED

OPINIONS BY THE SOLICITOR

TABLE OF CASES CITED

The abbreviation "L. D." refers to this publication; "B. L. P.," to Brainard's Legal Precedents; "C. L. O." to Copp's Land Owner; "Copp's P. L. L.," or "C. L. L.," to Copp's Public Land Laws, edition of 1875, 1 volume, edition of 1882, 2 volumes, edition of 1890, 2 volumes; "How. Prac." to Howard's New York Practice Reports; "Hun" to Hun's New York Supreme Court Reports; "L. and R.," to the records of the General Land Office in the division of Lands and Railroads; "L. R. Eq." to Law Reports, Equity Cases; "Ops. A. G." to Opinions of the Attorney General; "Sawy," to Sawyer's Reports, United States Circuit Court, ninth circuit; "Terr. L." to Territories Law, Northwest Territories, Canada.—Editor.

TABLE OF OVERRULED AND MODIFIED CASES[1]

[Volumes 1 to 52, inclusive]

[Cases marked with star (*) are now authority]

Administrative Ruling (43 L. D. 293); modified, 48 L. D. 98.
Administrative Ruling (46 L. D. 32); vacated, 51 L. D. 287.
Alaska Commercial Company (39 L. D. 597); vacated, 41 L. D. 75.
Alaska Copper Company (32 L. D. 128); overruled in part, 37 L. D. 674; 42 L. D. 255.
Aldrich *v.* Anderson (2 L. D. 71); overruled, 15 L. D. 201.
Alheit, Rosa (40 L. D. 145); overruled, 43 L. D. 342.
Allen, Sarah E. (40 L. D. 586); modified, 44 L. D. 331.
Americus *v.* Hall (29 L. D. 677); vacated, 30 L. D. 388.
*Amidon *v.* Hegdale (39 L. D. 131); overruled, 40 L. D. 259. (See 42 L. D. 557.)
*Anderson, Andrew *et al.* (1 L. D. 1); overruled, 34 L. D. 606. (See 36 L. D. 14.)
Anderson *v.* Tannehill *et al.* (10 L. D. 388); overruled, 18 L. D. 586.
Armstrong *v.* Matthews (40 L. D. 496); overruled so far as in conflict, 44 L. D. 156.
Arnold *v.* Burger (45 L. D. 453); modified, 46 L. D. 320.
Arundell, Thomas F. (33 L. D. 76); overruled so far as in conflict, 51 L. D. 51.
Ashton, Fred W. (31 L. D. 356); overruled, 42 L. D. 215.
Atlantic and Pacific R. R. Co. (5 L. D. 269); overruled, 27 L. D. 241.
*Auerbach, Samuel H., *et al.* (29 L. D. 208); overruled, 36 L. D. 36. (See 37 L. D. 715.)

Baca Float No. 3 (5 L. D. 705; 12 L. D. 676; 13 L. D. 624); vacated, 29 L. D. 44.
Bailey, John W., *et al.* (3 L. D. 386); modified, 5 L. D. 513.
*Baker *v.* Hurst (7 L. D. 457); overruled, 8 L. D. 110. (See 9 L. D. 360.)
Barbour *v.* Wilson *et al.* (23 L. D. 462); vacated, 28 L. D. 62.
Barbut, James (9 L. D. 514); overruled, 29 L. D. 698.
Barlow, S. L. M. (5 L. D. 695); modified, 6 L. D. 648.
Barnhurst *v.* State of Utah (30 L. D. 314); modified, 47 L. D. 359.
Bartch *v.* Kenney (3 L. D. 437); modified, 6 L. D. 217.
Beery *v.* Northern Pacific Ry. Co. *et al.* (41 L. D. 121); overruled, 43 L. D. 536.
Bennett, Peter W. (6 L. D. 672); overruled, 29 L. D. 565.
Birkholz, John (27 L. D. 59); overruled, 43 L. D. 221.
Birkland, Bertha M. (45 L. D. 104); overruled, 46 L. D. 110.
Bivins *v.* Shelley (2 L. D. 282); modified, 4 L. D. 583.
*Black, L. C. (3 L. D. 101); overruled, 34 L. D. 606. (See 36 L. D. 14.)
Blenkner *v.* Sloggy (2 L. D. 267); modified, 6 L. D. 217.
Boeschen, Conrad William (41 L. D. 309); vacated, 42 L. D. 244.
Bosch, Gottlieb (8 L. D. 45); overruled, 13 L. D. 42.
Box *v.* Ulstein (3 L. D. 143); modified, 6 L. D. 217.
Boyle, William (38 L. D. 603); overruled, 44 L. D. 331.
Bradford, J. L. (31 L. D. 132); overruled, 35 L. D. 399.
Bradstreet *et al. v.* Rehm (21 L. D. 30); reversed, 21 L. D. 544.
Brady *v.* Southern Pacific R. R. Co. (5 L. D. 407 and 658); overruled, 20 L. D. 259.
Brandt, William W. (31 L. D. 277); overruled, 50 L. D. 161.
Braucht *et al v.* Northern Pacific Ry. Co. *et al.* (43 L. D. 536); modified, 44 L. D. 225.
Brayton, Homer E. (31 L. D. 364); overruled so far as in conflict, 51 L. D. 305.
Brick Pomeroy Mill Site (34 L. D. 320); overruled, 37 L. D. 674.
*Brown, Joseph T. (21 L. D. 47); overruled, 31 L. D. 222. (See 35 L. D. 399.)
Brown *v.* Cagle (30 L. D. 8); vacated, 30 L. D. 148. (See 47 L. D. 406.)
Browning, John W. (42 L. D. 1); overruled, 43 L. D. 342.
Bruns, Henry A. (15 L. D. 170); overruled so far as in conflict, 51 L. D. 454.
Bundy *v.* Livingston (1 L. D. 152); overruled, 6 L. D. 284.
Burdick, Charles W. (34 L. D. 345); modified, 42 L. D. 472.
Burgess, Allen L. (24 L. D. 11); overruled, 42 L. D. 321.
Burkholder *v.* Skagan (4 L. D. 166); overruled, 9 L. D. 153.

[1] For abbreviations, see "Table of Cases Cited," p. x.—Editor.

Burns, Frank (10 L. D. 365); overruled so far as in conflict, 51 L. D. 454.
Burns *v.* Bergh's Heirs (37 L. D. 161); overruled, 51 L. D. 268.
Buttery *v.* Sprout (2 L. D. 293); overruled, 5 L. D. 591.

Cagle *v.* Mendenhall (20 L. D. 447); overruled, 23 L. D. 533.
Cain *et al. v.* Addenda Mining Co. (24 L. D. 18); vacated, 29 L. D. 62.
California and Oregon Land Co. (21 L. D. 344); overruled, 26 L. D. 453.
California, State of (14 L. D. 253); vacated 23 L. D. 230.
California, State of (15 L. D. 10); overruled, 23 L. D. 423.
California, State of (19 L. D. 585); vacated, 28 L. D. 57.
California, State of (22 L. D. 428); overruled, 32 L. D. 34.
California, State of (32 L. D. 346); vacated, 50 L. D. 628. (See 37 L. D. 499, and 46 L. D. 396.)
California, State of (44 L. D. 118); overruled, 48 L. D. 98.
California, State of (44 L. D. 468); overruled, 48 L. D. 98.
California, State of, *v.* Moccettini (19 L. D. 359); overruled, 31 L. D. 335.
California, State of, *v.* Pierce (9 C. L. O. 118); modified, 2 L. D. 854.
California, State of, *v.* Smith (5 L. D. 543); overruled, 18 L. D. 343.
Call *v.* Swaim (3 L. D. 46); overruled, 18 L. D. 373.
Cameron Lode (13 L. D. 369); overruled, 25 L. D. 518.
Camplan *v.* Northern Pacific R. R. Co. (28 L. D. 118); overruled 29 L. D. 550.
Case *v.* Church (17 L. D. 578); overruled, 26 L. D. 453.
Case *v.* Kupferschmidt (30 L. D. 9); overruled so far as in conflict, 47 L. D. 406.
Castello *v.* Bonnie (20 L. D. 311); overruled, 22 L. D. 174.
Cate *v.* Northern Pacific Ry. Co. (41 L. D. 316); overruled, 43 L. D. 60.
Cawood *v.* Dumas (22 L. D. 585); vacated, 25 L. D. 526.
Central Pacific R. R. Co. (29 L. D. 589); modified, 48 L. D. 58.
Central Pacific R. R. Co. *v.* Orr (2 L. D. 525); overruled, 11 L. D. 445.
Centerville Mining and Milling Co. (39 L. D. 80); no longer controlling, 48 L. D. 17.
Chappell *v.* Clark (27 L. D. 334); modified, 27 L. D. 532.
Chicago Placer Mining Claim (34 L. D. 9); overruled, 42 L. D. 453.
Childress *et al. v.* Smith (15 L. D. 89); overruled, 26 L. D. 453.
Christofferson, Peter (3 L. D. 329); modified, 6 L. D. 284, 624.
Claflin *v.* Thompson (28 L. D. 279); overruled, 29 L. D. 693.
Claney *v.* Ragland (38 L. D. 550); 43 L. D. 486.
Clarke, C. W. (32 L. D. 233); overruled so far as in conflict, 51 L. D. 51.
Cline *v.* Urban (29 L. D. 96); overruled, 46 L. D. 492.
Cochran *v.* Dwyer (9 L. D. 478); see 39 L. D. 162, 225.
Coffin, Edgar A. (33 L. D. 245); overruled so far as in conflict, 52 L. D. 153.
Coffin, Mary E. (34 L. D. 564); overruled so far as in conflict, 51 L. D. 51.
Colorado, State of (7 L. D. 490); overruled, 9 L. D. 408.
Cook, Thomas C. (10 L. D. 324); see 39 L. D. 162, 225.
Cooke *v.* Villa (17 L. D. 210); vacated, 19 L. D. 442.
Cooper, John W. (15 L. D. 285); overruled, 25 L. D. 113.
Cooper Bullion and Morning Star Lode Mining Claims (35 L. D. 27); see 39 L. D. 574.
Corliss *v.* Northern Pacific R. R. Co. (23 L. D. 265); vacated, 26 L. D. 652.
Cornell *v.* Chilton (1 L. D. 153); overruled, 6 L. D. 483.
Cowles *v.* Huff (24 L. D. 81); modified, 28 L. D. 515.
Cox, Allen H. (30 L. D. 90, 468); vacated, 31 L. D. 114.
Crowston *v.* Seal (5 L. D. 213); overruled, 18 L. D. 586.
Culligan *v.* State of Minnesota (34 L. D. 22); modified, 34 L. D. 151.
Cunningham, John (32 L. D. 207); modified, 32 L. D. 456.

Dailey Clay Products Co., The (48 L. D. 429, 431); overruled so far as in conflict, 50 L. D. 656.
Dakota Central R. R. Co. *v.* Downey (8 L. D. 115); modified, 20 L. D. 131.
Davis, Heirs of (40 L. D. 573); overruled, 46 L. D. 110.
De Long *v.* Clarke (41 L. D. 278); modified, 45 L. D. 54.
Dempsey, Charles H. (42 L. D. 215); modified, 43 L. D. 300.
Dennison and Willits (11 C. L. O. 261); overruled, 26 L. D. 122.
Deseret Irrigation Co. *et al. v.* Sevier River Land and Water Co. (40 L. D. 463); overruled, 51 L. D. 27.
Devoe, Lizzie A. (5 L. D. 4); modified, 5 L. D. 429.
Dickey, Ella I. (22 L. D. 351); overruled, 32 L. D. 331.
Dierks, Herbert (36 L. D. 367); overruled by the unreported case of Thomas J. Guigham, March 11, 1909.
Dixon *v.* Dry Gulch Irrigation Co. (45 L. D. 4); overruled, 51 L. D. 27.
Douglas and Other Lodes (34 L. D. 556); modified, 43 L. D. 128.
Dowman *v.* Moss (19 L. D. 526); overruled, 25 L. D. 82.

Dudymott *v.* Kansas Pacific R. R. Co. (5 C. L. O. 69); overruled, 1 L. D. 345.
Dumphy, Elijah M. (8 L. D. 102); overruled, 36 L. D. 561.
Dyche *v.* Beleele (24 L. D. 494); modified, 43 L. D. 56.
Dysart, Francis J. (23 L. D. 282); modified, 25 L. D. 188.

East Tintic Consolidated Mining Co. (41 L. D. 255); vacated, 43 L. D. 80.
Easton, Francis E. (27 L. D. 600); overruled, 30 L. D. 355.
El Paso Brick Co. (37 L. D. 155); overruled so far as in conflict, 40 L. D. 199.
* Elliott *v.* Ryan (7 L. D. 322); overruled, 8 L. D. 110. (See 9 L. D. 360.)
Emblem *v.* Weed (16 L. D. 28); modified, 17 L. D. 220.
Epley *v.* Trick (8 L. D. 110); overruled, 9 L. D. 360.
Erhardt, Finsans (36 L. D. 154); overruled, 38 L. D. 406.
Esping *v.* Johnson (37 L. D. 709); overruled, 41 L. D. 289.
Ewing *v.* Rickard (1 L. D. 146); overruled, 6 L. D. 483.

Falconer *v.* Price (19 L. D. 167); overruled, 24 L. D. 264.
Fargo No. 2 Lode Claims (37 L. D. 404); modified, 43 L. D. 128.
Farrill, John W. (13 L. D. 713); overruled so far as in conflict, 52 L. D. 473.
Febes, James H. (37 L. D. 210); overruled, 43 L. D. 183.
Ferrell *et al. v.* Hoge *et al.* (18 L. D. 81); overruled, 25 L. D. 351.
Fette *v.* Christiansen (29 L. D. 710); overruled, 34 L. D. 167.
Field, William C. (1 L. D. 68); overruled so far as in conflict, 52 L. D. 473.
Fish, Mary (10 L. D. 606); modified, 13 L. D. 511.
Fisher *v.* Heirs of Rule (42 L. D. 62, 64); vacated, 43 L. D. 217.
Fitch *v.* Sioux City and Pacific R. R. Co. (216 L. and R. 184); overruled, 17 L. D. 43.
Fleming *v.* Bowe (13 L. D. 78); overruled, 23 L. D. 175.
Florida, State of (17 L. D. 355); reversed, 19 L. D. 76.
Florida, State of (47 L. D. 92, 93); overruled so far as in conflict, 51 L. D. 291.
Florida Mesa Ditch Co. (14 L. D. 265); overruled, 27 L. D. 421.
Florida Railway and Navigation Co. *v.* Miller (3 L. D. 324); modified, 6 L. D. 716; overruled, 9 L. D. 237.
Forgeot, Margaret (7 L. D. 280); overruled, 10 L. D. 629.
Fort Boise Hay Reservation (6 L. D. 16); overruled, 27 L. D. 505.
Freeman, Flossie (40 L. D. 106); overruled 41 L. D. 63.
Freeman *v.* Texas Pacific R. R. Co. (2 L. D. 550); overruled, 7 L. D. 18.
Fry, Silas A. (45 L. D. 20); modified, 51 L. D. 581.

Galliher, Marie (8 C. L. O. 57); overruled, 1 L. D. 17.
Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L. D. 304.
Garlis *v.* Borin (21 L. D. 542); see 39 L. D. 162, 225.
Garrett, Joshua (2 C. L. O. 1005); overruled, 5 L. D. 158.
Garvey *v.* Tuiska (41 L. D. 510); modified, 43 L. D. 229.
Gates *v.* California and Oregon R. R. Co. (5 C. L. O. 150); overruled, 1 L. D. 336.
Gauger, Henry (10 L. D. 221); overruled, 24 L. D. 81.
Gohrman *v.* Ford (8 C. L. O. 6); overruled, 4 L. D. 580.
Golden Chief "A" Placer Claim (35 L. D. 557); modified, 37 L. D. 250.
Goldstein *v.* Juneau Town Site (23 L. D. 417); vacated, 31 L. D. 88.
Gotebo Town Site *v.* Jones (35 L. D. 18); modified 37 L. D. 560.
Gowdy *v.* Connell (27 L. D. 56); vacated, 28 L. D. 240.
Gowdy *v.* Gilbert (19 L. D. 17); overruled, 26 L. D. 453.
Gowdy *et al. v.* Kismet Gold Mining Co. (22 L. D. 624); modified, 24 L. D. 191.
Grampian Lode (1 L. D. 544); overruled, 25 L. D. 495.
Gregg *et al v.* State of Colorado (15 L. D. 151); modified, 30 L. D. 310.
Grinnell *v.* Southern Pacific R. R. Co. (22 L. D. 438); vacated, 23 L. D. 489.
*Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L. D. 430); overruled, 34 L. D. 568. (See R. R. Rousseau, 47 L. D. 590.)
Guidney, Alcide (8 C. L. O. 157); overruled, 40 L. D. 399.
Gulf and Ship Island R. R. Co. (16 L. D. 236); modified, 19 L. D. 534.
Gustafson, Olof (45 L. D. 456); modified, 46 L. D. 442.

Halvorson, Halfor K. (39 L. D. 456); overruled, 41 L. D. 505.
Handsbrough, Henry C. (5 L. D. 155); overruled, 29 L. D. 59.
Hardee, D. C. (7 L. D. 1); overruled, 29 L. D. 698.
Hardee *v.* United States (8 L. D. 391; 16 L. D. 499); overruled, 29 L. D. 698.
Hardin, James A. (10 L. D. 313); revoked, 14 L. D. 233.
Harris, James G. (28 L. D. 90); overruled, 39 L. D. 93.
Harrison, Luther (4 L. D. 179); overruled, 17 L. D. 216.

Harrison, W. R. (19 L. D. 299); overruled, 33 L. D. 539.
Hart *v.* Cox (42 L. D. 592); vacated, 260 U. S. 427. (See 49 L. D. 413.)
Hastings and Dakota Ry. Co. *v.* Christenson *et al.* (22 L. D. 257); overruled, 28 L. D. 572.
Hayden *v.* Jamison (24 L. D. 403); vacated, 26 L. D. 373.
Heilman *v.* Syverson (15 L. D. 184); overruled, 23 L. D. 119.
Heinzman *et al. v.* Letroadec's Heirs *et al.* (28 L. D. 497); overruled, 38 L. D. 253.
Heirs of Davis (40 L. D. 573); overruled, 46 L. D. 110.
Heirs of Philip Mulnix (33 L. D. 331); overruled, 43 L. D. 532.
*Heirs of Stevenson *v.* Cunningham (32 L. D. 650); modified, 41 L. D. 119. (See 43 L. D. 196.)
Heirs of Talkington *v.* Hempfling (2 L. D. 46); overruled, 14 L. D. 200.
Heirs of Vradenburg *et al. v.* Orr *et al.* (25 L. D. 323); overruled, 38 L. D. 253.
Helmer, Inkerman (34 L. D. 341); modified, 42 L. D. 472.
Henderson, John W. (40 L. D. 518); vacated, 43 L. D. 106. (See 44 L. D. 112, and 49 L. D. 484.)
Henning, Nellie J. (38 L. D. 443, 445); recalled and vacated, 39 L. D. 211.
Herman *v.* Chase *et al.* (37 L. D. 590); overruled, 43 L. D. 246.
Herrick, Wallace H. (24 L. D. 23); overruled, 25 L. D. 113.
Hess, Hoy, Assignee (46 L. D. 421); overruled, 51 L. D. 287.
Hickey, M. A., *et al.*, (3 L. D. 83); modified, 5 L. D. 256.
Hildreth, Henry (45 L. D. 464); vacated, 46 L. D. 17.
Hindman, Ada I. (42 L. D. 327); vacated in part, 43 L. D. 191.
Hoglund, Svan (42 L. D. 405); vacated 43 L. D. 538.
Holden, Thomas A. (16 L. D. 493); overruled, 29 L. D. 166.
Holland, G. W. (6 L. D. 20); overruled, 6 L. D. 639; 12 L. D. 436.
Hollensteiner, Walter (38 L. D. 319); overruled, 47 L. D. 260.
Holman *v.* Central Montana Mines Co. (34 L. D. 568); overruled so far as in conflict, 47 L. D. 590.
Hon *v.* Martinas (41 L. D. 119); modified, 43 L. D. 197.
Hooper, Henry (6 L. D. 624); modified, 9 L. D. 86, 284.
Housman, Peter A. C. (37 L. D. 352); modified, 48 L. D. 629.
Howard, Thomas (3 L. D. 409); see 39 L. D. 162, 225.
Howard *v.* Northern Pacific R. R. Co. (23 L. D. 6); overruled, 28 L. D. 126.
Howell, John H. (24 L. D. 35); overruled, 28 L. D. 204.
Howell, L. C. (39 L. D. 92); see 39 L. D. 411.
Hoy, Assignee of Hess (46 L. D. 421); overruled, 51 L. D. 287.
Hughes *v.* Greathead (43 L. D. 497); vacated, 49 L. D. 413. (See 260 U. S. 427.)
Hull *et al. v.* Ingle (24 L. D. 214); overruled, 30 L. D. 258.
Huls, Clara (9 L. D. 401); modified, 21 L. D. 377.
Hyde, F. A. (27 L. D. 472); vacated, 28 L. D. 284.
Hyde, F. A., *et al.* (40 L. D. 284); overruled, 43 L. D. 381.
Hyde *et al v.* Warren *et al.* (14 L. D. 576; 15 L. D. 415); see 19 L. D. 64.

Ingram, John D. (37 L. D. 475); see 43 L. D. 544.
Inman *v.* Northern Pacific R. R. Co. (24 L. D. 318); overruled, 28 L. D. 95.
Iowa Railroad Land Co. (23 L. D. 79; 24 L. D. 125); vacated, 29 L. D. 79.

Jacks *v.* Belard *et al.* (29 L. D. 369); vacated, 30 L. D. 345.
Jackson Oil Co. *v.* Southern Pacific R. R. Co. (40 L. D. 528); overruled, 42 L. D. 317.
Johnson *v.* South Dakota (17 L. D. 411); overruled, 41 L. D. 22.
Jones, James A. (3 L. D. 176); overruled, 8 L. D. 448.
Jones *v.* Kennett (6 L. D. 688); overruled, 14 L. D. 429.

Kackmann, Peter (1 L. D. 86); overruled, 16 L. D. 464.
Kemper *v.* St. Paul and Pacific R. R. Co. (2 C. L. L. 805); overruled, 18 L. D. 101.
King *v.* Eastern Oregon Land Co. (23 L. D. 579); modified, 30 L. D. 19.
Kinsinger *v.* Peck (11 L. D. 202); see 39 L. D. 162, 225.
Kiser *v.* Keech (17 L. D. 25); overruled, 23 L. D. 119.
Knight, Albert B., *et al.* (30 L. D. 227); overruled, 31 L. D. 64.
Knight *v.* Heirs of Knight (39 L. D. 362, 491; 40 L. D. 461); overruled, 43 L. D. 242.
Kniskern *v.* Hastings and Dakota Ry. Co. (6 C. L. O. 50); overruled, 1 L. D. 362.
Kolberg, Peter F. (37 L. D. 453); overruled, 43 L. D. 181.
Krigbaum, James T. (12 L. D. 617); overruled, 26 L. D. 448.

Lackawanna Placer Claim (36 L. D. 36); overruled, 37 L. D. 715.
Lamb *v.* Ullery (10 L. D. 528); overruled, 32 L. D. 331.
Largent, Edward B., *et al.* (13 L. D. 397); overruled, 42 L. D. 321.
Larson, Syvert (40 L. D. 69); overruled, 43 L. D. 242.

Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C. L. O. 10); overruled, 14 L. D. 278.

Las Vegas Grant (13 L. D. 646; 15 L. D. 58); revoked, 27 L. D. 683.

Laughlin, Allen (31 L. D. 256); overruled, 41 L. D. 361.

Laughlin *v.* Martin (18 L. D. 112); modified, 21 L. D. 40.

Law *v.* State of Utah (29 L. D. 623); overruled, 47 L. D. 359.

Lemmons, Lawson H. (19 L. D. 37); overruled, 26 L. D. 389.

Leonard, Sarah (1 L. D. 41); overruled, 16 L. D. 464.

Lindberg, Anna C. (3 L. D. 95); modified, 4 L. D. 299.

Linderman *v.* Wait (6 L. D. 689); overruled, 13 L. D. 459.

*Linhart *v.* Santa Fe Pacific R. R. Co. (36 L. D. 41); overruled, 41 L. D. 284. (See 43 L. D. 536.)

Little Pet Lode (4 L. D. 17); overruled, 25 L. D. 550.

Lock Lode (6 L. D. 165); overruled, 26 L. D. 123.

Lockwood, Francis A. (20 L. D. 361); modified, 21 L. D. 200.

Lonergan *v.* Shockley (33 L. D. 238); overruled, 34 L. D. 314; 36 L. D. 199.

Louisiana, State of (8 L. D. 126); modified, 9 L. D. 157.

Louisiana, State of (24 L. D. 231); vacated, 26 L. D. 5.

Louisiana, State of (47 L. D. 366); overruled so far as in conflict, 51 L. D. 291.

Louisiana, State of (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.

Lucy B. Hussey Lode (5 L. D. 93); overruled, 25 L. D. 495.

Luton, James W. (34 L. D. 468); overruled, 35 L. D. 102.

Lyman, Mary O. (24 L. D. 493); overruled, 43 L. D. 221.

Lynch, Patrick (7 L. D. 33); overruled, 13 L. D. 713.

Madigan, Thomas (8 L. D. 188); overruled, 27 L. D. 448.

Maginnis, Charles P. (31 L. D. 222); overruled, 35 L. D. 399.

Maginnis, John S. (32 L. D. 14); modified, 42 L. D. 472.

Maher, John M. (34 L. D. 342); modified, 42 L. D. 472.

Mahoney, Timothy (41 L. D. 129); overruled, 42 L. D. 313.

Makela, Charles (46 L. D. 509); extended, 49 L. D. 244.

Makemson *v.* Snider's Heirs (22 L. D. 511); overruled, 32 L. D. 650.

Malone Land and Water Co. (41 L. D. 138); overruled in part, 43 L. D. 110.

Maney, John J. (35 L. D. 250); modified, 48 L. D. 153.

Maple, Frank (37 L. D. 107); overruled, 43 L. D. 181.

Martin *v.* Patrick (41 L. D. 284); overruled, 43 L. D. 536.

Mason *v.* Cromwell (24 L. D. 248); vacated, 26 L. D. 369.

Masten, E. C. (22 L. D. 337); overruled, 25 L. D. 111.

Mather *et al. v.* Hackley's Heirs (15 L. D. 487); vacated, 19 L. D. 48.

Maughan, George W. (1 L. D. 25); overruled, 7 L. D. 94.

Maxwell and Sangre de Cristo Land Grants (46 L. D. 301); modified, 48 L. D. 88.

McBride *v.* Secretary of the Interior (8 C. L. O. 10); modified, 52 L. D. 33.

McCalla *v.* Acker (29 L. D. 203); vacated, 30 L. D. 277.

McCornick, William S. (41 L. D. 661, 666); vacated, 43 L. D. 429.

*McCraney *v.* Heirs of Hayes (33 L. D. 21); overruled, 41 L. D. 119. (See 43 L. D. 196.)

McDonald, Roy, *et al* (34 L. D. 21); overruled, 37 L. D. 285.

*McDonogh School Fund (11 L. D. 378); overruled, 30 L. D. 616. (See 35 L. D. 399.)

McFadden *et al. v.* Mountain View Mining and Milling Co. (26 L. D. 530); vacated, 27 L. D. 358.

McGee, Edward D. (17 L. D. 285); overruled, 29 L. D. 166.

McGrann, Owen (5 L. D. 10); overruled, 24 L. D. 502.

McGregor, Carl (37 L. D. 693); overruled, 38 L. D. 148.

McKernan *v.* Bailey (16 L. D. 368); overruled, 17 L. D. 494.

*McKittrick Oil Co. *v.* Southern Pacific R. R. Co. (37 L. D. 243); overruled, 40 L. D. 528. (See 42 L. D. 317.)

McNamara *et al. v.* State of California (17 L. D. 296); overruled, 22 L. D. 666.

McPeek *v.* Sullivan *et al.* (25 L. D. 281); overruled, 36 L. D. 26.

*Mee *v.* Hughart *et al.* (23 L. D. 455); vacated, 28 L. D. 209. In effect reinstated, 44 L. D. 414, 487; 46 L. D. 434; 48 L. D. 195, 346, 348; 49 L. D. 260, 662.

*Meeboer *v.* Heirs of Schut (35 L. D. 335); overruled, 41 L. D. 119. (See 43 L. D. 196.)

Mercer *v.* Buford Townsite (35 L. D. 119); overruled, 35 L. D. 649.

Meyer, Peter (6 L. D. 639); modified, 12 L. D. 436.

Meyer *v.* Brown (15 L. D. 307); see 39 L. D. 162, 225.

Miller, Edwin J. (35 L. D. 411); overruled 43 L. D. 181.

Miller *v.* Sebastian (19 L. D. 288); overruled, 26 L. D. 448.

Milner and North Side R. R. Co. (36 L. D. 488); overruled, 40 L. D. 187.

Milton *et al. v.* Lamb (22 L. D. 339); overruled, 25 L. D. 550.
Milwaukee, Lake Shore and Western Ry. Co. (12 L. D. 79); overruled, 29 L. D. 112.
Miner *v.* Mariott *et al.* (2 L. D. 709); modified, 28 L. D. 224.
Minnesota and Ontario Bridge Company (30 L. D. 77); no longer followed, 50 L. D. 359.
*Mitchell *v.* Brown (3 L. D. 65); overruled, 41 L. D. 396. (See 43 L. D. 520.)
Monitor Lode (18 L. D. 358); overruled, 25 L. D. 495.
Moore, Charles H. (16 L. D. 204); overruled, 27 L. D. 482.
Morgan *v.* Craig (10 C. L. O. 234); overruled, 5 L. D. 303.
Morgan *v.* Rowland (37 L. D. 90); overruled, 37 L. D. 618.
Moritz *v.* Hinz (36 L. D. 450); vacated, 37 L. D. 382.
Morrison, Charles S. (36 L. D. 126); modified, 36 L. D. 319.
Morrow *et al. v.* State of Oregon *et al.* (32 L. D. 54); modified, 33 L. D. 101.
Moses, Zelmer R. (36 L. D. 473); overruled, 44 L. D. 570.
Mountain Chief Nos. 8 and 9 Lode Claims (36 L. D. 100); overruled in part, 36 L. D. 551.
Mt. Whitney Military Reservation (40 L. D. 315); see 43 L. D. 33.
Muller, Ernest (46 L. D. 243); overruled, 48 L. D. 163.
Muller, Esberne K. (39 L. D. 72); modified, 39 L. D. 360.
Mulnix, Philip, Heirs of (33 L. D. 331); overruled, 43 L. D. 532.

Nebraska, State of (18 L. D. 124); overruled, 28 L. D. 358.
Nebraska, State of, *v.* Dorrington (2 C. L. L. 647); overruled, 26 L. D. 123.
Neilsen *v.* Central Pacific R. R. Co. *et al* (26 L. D. 252); modified, 30 L. D. 216.
Newbanks *v.* Thompson (22 L. D. 490); overruled, 29 L. D. 108.
Newlon, Robert C. (41 L. D. 421); overruled, 43 L. D. 364.
New Mexico, State of (46 L. D. 217); overruled, 48 L. D. 98.
Newton, Walter (22 L. D. 322); modified, 25 L. D. 188.
New York Lode and Mill Site (5 L. D. 513); overruled, 27 L. D. 373.
*Nickel, John R. (9 L. D. 388); overruled, 41 L. D. 129. (See 42 L. D. 313.)
Northern Pacific R. R. Co. (20 L. D. 191); modified, 22 L. D. 224; overruled, 29 L. D. 550.
Northern Pacific R. R. Co. (21 L. D. 412); in effect overruled, 26 L. D. 265; 33 L. D. 426; 44 L. D. 218; 177 U. S. 435.
Northern Pacific R. R. Co. (23 L. D. 204); in effect overruled so far as in conflict, 26 L. D. 265; 33 L. D. 426; 44 L. D. 218; 177 U. S. 435.
Northern Pacific Ry Co. (48 L. D. 573); overruled so far as in conflict, 51 L. D. 196. (See 52 L. D. 58.)
Northern Pacific R. R. Co. *v.* Bowman (7 L. D. 238); modified, 18 L. D. 224.
Northern Pacific R. R. Co. *v.* Burns (6 L. D. 21); overruled, 20 L. D. 191.
Northern Pacific R. R. Co. *v.* Loomis (21 L. D. 395); overruled, 27 L. D. 464.
Northern Pacific R. R. Co. *v.* Marshall *et al.* (17 L. D. 545); overruled, 28 L. D. 174.
Northern Pacific R. R. Co. *v.* Miller (7 L. D. 100); overruled, 16 L. D. 229.
Northern Pacific R. R. Co. *v.* Sherwood (28 L. D. 126); overruled, 29 L. D. 550.
Northern Pacific R. R. Co. *v.* Symons (22 L. D. 686); overruled, 28 L. D. 95.
Northern Pacific R. R. Co. *v.* Urquhart (8 L. D. 365); overruled, 28 L. D. 126.
Northern Pacific R. R. Co. *v.* Walters *et al.* (13 L. D. 230); overruled so far as in conflict, 49 L. D. 391.
Northern Pacific R. R. Co. *v.* Yantis (8 L. D. 58); overruled, 12 L. D. 127.
Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L. D. 396); overruled, 6 L. D. 750.

O'Donnell, Thomas J. (28 L. D. 214); overruled, 35 L. D. 411.
Olson *v.* Traver *et al.* (26 L. D. 350, 628); overruled, 29 L. D. 480; 30 L. D. 382.
Opinion A. A. G. (35 L. D. 277); vacated, 36 L. D. 342.
Oregon Central Military Wagon Road Co. *v.* Hart (17 L. D. 480); overruled, 18 L. D. 543.
Owens *et al. v.* State of California (22 L. D. 369); overruled, 38 L. D. 253.

Pacific Slope Lode (12 L. D. 686); overruled, 25 L. D. 518.
Papini *v.* Alderson (1 B. L. P. 91); modified, 5 L. D. 256.
Patterson, Charles E. (3 L. D. 260); modified, 6 L. D. 284, 624.
Paul Jones Lode (28 L. D. 120); modified, 31 L. D. 359.
Paul *v.* Wiseman (21 L. D. 12); overruled, 27 L. D. 522.
Pecos Irrigation and Improvement Co. (15 L. D. 470); overruled, 18 L. D. 168, 268.
Pennock, Belle L. (42 L. D. 315); vacated, 43 L. D. 66.
Perry *v.* Central Pacific R. R. Co. (39 L. D. 5); overruled so far as in conflict, 47 L. D. 304.
Phebus, Clayton (48 L. D. 128); overruled so far as in conflict, 50 L. D. 281.
Phelps, W. L. (8 C. L. O. 139); overruled 2 L. D. 854.
Phillips, Alonzo (2 L. D. 321); overruled, 15 L. D. 424.
Phillips *v.* Breazeale's Heirs (19 L. D. 573); overruled, 30 L. D. 93.
Pieper, Agnes C. (35 L. D. 459); overruled, 43 L. D. 374.

Pietkiewicz *et al. v.* Richmond (29 L. D. 195); overruled, 37 L. D. 145.
Pikes Peak Lode (10 L. D. 200); overruled so far as analogous, 20 L. D. 204.
Pikes Peak Lode (14 L. D. 47); overruled, 20 L. D. 204.
Popple, James (12 L. D. 433); overruled, 13 L. D. 588.
Powell, D. C. (6 L. D. 302); modified, 15 L. D. 477.
Premo, George (9 L. D. 70); see 39 L. D. 162, 225.
Prescott, Henrietta P. (46 L. D. 486); overruled, 51 L. D. 287.
Pringle, Wesley (13 L. D. 519); overruled, 29 L. D. 599.
Provensal, Victor H. (30 L. D. 616); overruled, 35 L. D. 399.
Prue, widow of Emanuel (6 L. D. 436); vacated, 33 L. D. 409.
Pugh, F. M., *et al.* (14 L. D. 274); in effect vacated, 232 U. S. 452.
Puyallup Allotments (20 L. D. 157); modified, 29 L. D. 628.

Rancho Alisal (1 L. D. 173); overruled, 5 L. D. 320.
Rankin, James D., *et al.* (7 L. D. 411); overruled, 35 L. D. 32.
Rankin, John M. (20 L. D. 272); reversed, 21 L. D. 404.
Rebel Lode (12 L. D. 683); overruled, 20 L. D. 204; 48 L. D. 523.
*Reed *v.* Buffington (7 L. D. 154); overruled, 8 L. D. 110. (See 9 L. D. 360.)
Regione *v.* Rosseler (40 L. D. 93); vacated, 40 L. D. 420.
Rialto No. 2 Placer Mining Claim (34 L. D. 44); overruled, 37 L. D. 250.
Rico Town Site (1 L. D. 556); modified, 5 L. D. 256.
Rio Verde Canal Co. (26 L. D. 381); vacated, 27 L. D. 421.
Roberts *v.* Oregon Central Military Road Co. (19 L. D. 591); overruled, 31 L. D. 174.
Robinson, Stella G. (12 L. D. 443); overruled, 13 L. D. 1.
Rogers, Horace B. (10 L. D. 29); overruled, 14 L. D. 321.
Rogers *v.* Atlantic and Pacific R. R. Co. (6 L. D. 565); overruled, 8 L. D. 165.
*Rogers *v.* Lukens (6 L. D. 111); overruled, 8 L. D. 110. (See 9 L. D. 360.)
Romero *v.* Widow of Knox (48 L. D. 32); overruled so far as in conflict, 49 L. D. 244.
Roth, Gottlieb (50 L. D. 196); modified, 50 L. D. 197.
Rough Rider and Other Mining Claims (41 L. D. 242, 255); vacated, 42 L. D. 584.

Salsberry, Carroll (17 L. D. 170); overruled, 39 L. D. 93.
Sangre de Cristo and Maxwell Land Grants (46 L. D. 301); modified, 48 L. D. 88.
Santa Fé Pacific R. R. Co. *v.* Peterson (39 L. D. 442); overruled, 41 L. D. 383.
Satisfaction Extension Mill Site (14 L. D. 173). (See 32 L. D. 128.)
Sayles, Henry P. (2 L. D. 88); modified, 6 L. D. 797.
Schweitzer *v.* Hilliard *et al.* (19 L. D. 294); overruled, 26 L. D. 639.
Serrano *v.* Southern Pacific R. R. Co. (6 C. L. O. 93); overruled, 1 L. D. 380.
Shanley *v.* Moran (1 L. D. 162); overruled, 15 L. D. 424.
Shineberger, Joseph (8 L. D. 231); overruled, 9 L. D. 202.
Simpson, Lawrence W. (35 L. D. 399, 609); modified, 36 L. D. 205.
Sipchen *v.* Ross, 1 L. D. 634); modified, 4 L. D. 152.
Smead *v.* Southern Pacific R. R. Co. (21 L. D. 432); vacated, 29 L. D. 135.
Snook, Noah A., *et al.* (41 L. D. 428); overruled, 43 L. D. 364.
Sorli *v.* Berg (40 L. D. 259); overruled, 42 L. D. 557.
South Star Lode (17 L. D. 280); overruled, 20 L. D. 204; 48 L. D. 523.
Southern Pacific R. R. Co. (15 L. D. 460); reversed, 18 L. D. 275.
Southern Pacific R. R. Co. (28 L. D. 281); recalled, 32 L. D. 51.
Southern Pacific R. R. Co. (33 L. D. 89); recalled, 33 L. D. 528.
Southern Pacific R. R. Co. *v.* Burns (31 L. D. 272); vacated, 37 L. D. 243.
Spaulding *v.* Northern Pacific R. R. Co. (21 L. D. 57); overruled, 31 L. D. 151.
Spencer, James (6 L. D. 217); modified, 6 L. D. 772; 8 L. D. 467.
Spruill, Lelia May (50 L. D. 549); overruled, 52 L. D. 339.
State of California (14 L. D. 253); vacated, 23 L. D. 230.
State of California (15 L. D. 10); overruled, 23 L. D. 423.
State of California (19 L. D. 585); vacated, 28 L. D. 57.
State of California (22 L. D. 428); overruled, 32 L. D. 34.
State of California (32 L. D. 346); vacated, 50 L. D. 628. (See 37 L. D. 499, and 46 L. D. 396.)
State of California (44 L. D. 118); overruled, 48 L. D. 98.
State of California (44 L. D. 468); overruled, 48 L. D. 98.
State of California *v.* Moccettini (19 L. D. 359); overruled, 31 L. D. 335.
State of California *v.* Pierce (3 C. L. O. 118); modified, 2 L. D. 854.
State of California *v.* Smith (5 L. D. 543); overruled, 18 L. D. 343.
State of Colorado (7 L. D. 490); overruled, 9 L. D. 408.
State of Florida (17 L. D. 355); reversed, 19 L. D. 76.

State of Florida (47 L. D. 92, 93); overruled so far as in conflict, 51 L. D. 291.
State of Louisiana (8 L. D. 126); modified, 9 L. D. 157.
State of Louisiana (24 L. D. 231); vacated, 26 L. D. 5.
State of Louisiana (47 L. D. 366); overruled so far as in conflict, 51 L. D. 291.
State of Louisiana (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.
State of Nebraska (18 L. D. 124); overruled, 28 L. D. 358.
State of Nebraska *v.* Dorrington (2 C. L. L. 647); overruled, 26 L. D. 123.
State of New Mexico (46 L. D. 217); overruled, 48 L. D. 98.
State of Utah (45 L. D. 551); overruled, 48 L. D. 98.
*Stevenson, Heirs of, *v.* Cunningham (32 L. D. 650); modified, 41 L. D. 119. (See 43 L. D. 196.)
Stewart *et al v.* Rees *et al.* (21 L. D. 446); overruled, 29 L. D. 401.
Stirling, Lillie E. (39 L. D. 346); overruled, 46 L. D. 110.
Stockley, Thomas J. (44 L. D. 178; 180); vacated, 260 U. S. 532. (See 49 L. D. 460; 461; 492.)
*St. Paul, Minneapolis and Manitoba Ry. Co. (8 L. D. 255); modified, 13 L. D. 354. (See 32 L. D. 21.)
St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Hagen (20 L. D. 249); overruled, 25 L. D. 86.
St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Fogelberg (29 L. D. 291); vacated, 30 L. D. 191.
Strain, A. G. (40 L. D. 108); overruled so far as in conflict, 51 L. D. 51.
Stricker, Lizzie (15 L. D. 74); overruled, 18 L. D. 283.
Stump, Alfred M., *et al.* (39 L. D. 437); vacated, 42 L. D. 566.
Sumner *v.* Roberts (23 L. D. 201); overruled so far as in conflict, 41 L. D. 173.
Sweeney *v.* Northern Pacific R. R. Co. (20 L. D. 394); overruled, 28 L. D. 174.
*Sweet, Eri P. (2 C. L. O. 18); overruled, 41 L. D. 129. (See 42 L. D. 313.)
Sweeten *v.* Stevenson (2 B. L. P. 42); overruled, 3 L. D. 248.

Taft *v.* Chapin (14 L. D. 593); overruled, 17 L. D. 414.
Taggart, William M. (41 L. D. 282); overruled, 47 L. D. 370.
Talkington's Heirs *v.* Hempfling (2 L. D. 46); overruled, 14 L. D. 200.
Tate, Sarah J. (10 L. D. 469); overruled, 21 L. D. 211.
Taylor *v.* Yeats *et al.* (8 L. D. 279); reversed, 10 L. D. 242.
*Teller, John C. (26 L. D. 484); overruled, 36 L. D. 36. (See 37 L. D. 715.)
The Dailey Clay Products Co. (48 L. D. 429, 431); overruled so far as in conflict, 50 L. D. 656.
Thorstenson, Even (45 L. D. 96); overruled, 47 L. D. 258.
Tleck *v.* McNeil (48 L. D. 158); modified, 49 L. D. 260.
Toles *v.* Northern Pacific Ry. Co. *et al.* (39 L. D. 371); overruled, 45 L. D. 93.
Tompkins, H. H. (41 L. D. 516); overruled, 51 L. D. 27.
Traganza, Mertie C. (40 L. D. 300); overruled, 42 L. D. 612.
Traugh *v.* Ernst (2 L. D. 212); overruled, 3 L. D. 98.
Tripp *v.* Dunphy (28 L. D. 14); modified, 40 L. D. 128.
Tripp *v.* Stewart (7 C. L. O. 39); modified, 6 L. D. 795.
Tucker *v.* Florida Ry. & Nav. Co. (19 L. D. 414); overruled, 25 L. D. 233.
Tupper *v.* Schwarz (2 L. D. 623); overruled, 6 L. D. 624.
Turner *v.* Cartwright (17 L. D. 414); modified, 21 L. D. 40.
Turner *v.* Lang (1 C. L. O. 51); modified, 5 L. D. 256.
Tyler, Charles (26 L. D. 699); overruled, 35 L. D. 411.

Ulin *v.* Colby (24 L. D. 311); overruled, 35 L. D. 549.
Union Pacific R. R. Co. (33 L. D. 89); recalled, 33 L. D. 528.
United States *v.* Bush (13 L. D. 529); overruled, 18 L. D. 441.
United States *v.* Central Pacific Ry. Co. (52 L. D. 81); modified, 52 L. D. 235.
United States *v.* Dana (18 L. D. 161); modified, 28 L. D. 45.
Utah, State of (45 L. D. 551); overruled, 48 L. D. 98.

Veatch *v.* Heir of Natter (46 L. D. 496); overruled so far as in conflict, 49 L. D. 461. (See 49 L. D. 492, for adherence in part.)
Vine, James (14 L. D. 527); modified, 14 L. D. 622.
Vradenburg's Heirs *et al. v.* Orr *et al.* (25 L. D. 323); overruled, 38 L. D. 253.

Wahe, John (41 L. D. 127); modified, 41 L. D. 637.
Walker *v.* Prosser (17 L. D. 85); reversed, 18 L. D. 425.
Walker *v.* Southern Pacific R. R. Co. (24 L. D. 172); overruled, 28 L. D. 174.
Walters, David (15 L. D. 136); revoked, 24 L. D. 58.
Warren *v.* Northern Pacific R. R. Co. (22 L. D. 568); overruled so far as in conflict, 49 L. D. 391.
Wasmund *v.* Northern Pacific R. R. Co. (23 L. D. 445); vacated, 29 L. D. 224.
Wass *v.* Milward (5 L. D. 349); vacated, 44 L. D. 72. (See unreported case of Ebersold *v.* Dickson, September 25, 1918.)

Waterhouse, William W. (9 L. D. 131); overruled, 18 L. D. 586.
Watson, Thomas E. (4 L. D. 169); modified, 6 L. D. 71.
Weber, Peter (7 L. D. 476); overruled, 9 L. D. 150.
Weisenborn, Ernest (42 L. D. 533); overruled, 43 L. D. 395.
Werden *v.* Schlecht (20 L. D. 523); overruled, 24 L. D. 45.
Western Pacific Ry. Co. (40 L. D. 411; 41 L. D. 599); overruled, 43 L. D. 410.
Wheaton *v.* Wallace (24 L. D. 100); modified, 34 L. D. 383.
White, Sarah V. (40 L. D. 630); overruled in part, 46 L. D. 56.
Wickstrom *v.* Calkins (20 L. D. 459); modified, 21 L. D. 553; overruled, 22 L. D. 392.
Widow of Emanuel Prue (6 L. D. 436); vacated, 33 L. D. 409.
Wiley, George P. (36 L. D. 305); modified, 36 L. D. 417.
Wilkerson, Jasper N. (41 L. D. 138); overruled, 50 L. D. 614. (See 42 L. D. 313.)
Wilkins, Benjamin C. (2 L. D. 129); modified, 6 L. D. 797.
Willamette Valley and Cascade Mountain Wagon Road Co. *v.* Bruner (22 L. D. 654); vacated, 26 L. D. 357.
Willamette Valley and Cascade Mountain Wagon Road Co. *v.* Chapman (13 L. D. 61); overruled, 20 L. D. 259.
Willingbeck, Christian P. (3 L. D. 383); modified, 5 L. D. 409.
Willis, Cornelius, *et al.* (47 L. D. 135); overruled, 49 L. D. 461.
Willis, Eliza (22 L. D. 426); overruled, 26 L. D. 436.
*Wilson *v.* Heirs of Smith (37 L. D. 519); overruled, 41 L. D. 119. (See 43 L. D. 196.)
Witbeck *v.* Hardeman (50 L. D. 413); overruled so far as in conflict, 51 L. D. 36.
Wright *et al. v.* Smith (44 L. D. 226); in effect overruled so far as in conflict, 49 L. D. 374.

Zimmerman *v.* Brunson (39 L. D. 310); overruled, 52 L. D. 715.

TABLE OF CIRCULARS AND INSTRUCTIONS

[1] Circular No. 1122, erroneously designated in the text as Circular No. 1132.—Editor.

CIRCULARS BY NUMBERS

[1] Circular No. 1122, erroneously designated in the text as Circular No. 1132.—Editor.

CIRCULARS AND INSTRUCTIONS CITED, CONSTRUED, AND MODIFIED

ACTS OF CONGRESS CITED AND CONSTRUED

[1] Erroneously cited as the act of February 14, 1901, on p. 557.—Editor.

[2] Erroneously cited in the text as (38 Stat. 212).—Editor.

[3] Erroneously cited in the text as the act of January 8, 1926.—Editor.

REVISED STATUTES CITED AND CONSTRUED

SECTIONS OF THE UNITED STATES CODE CITED AND CONSTRUED

RULES OF PRACTICE CITED AND CONSTRUED

DECISIONS

RELATING TO

THE PUBLIC LANDS

OPERATING REGULATIONS TO GOVERN THE PRODUCTION OF OIL AND GAS—ACTS OF FEBRUARY 25, 1920, JUNE 4, 1920, AND MARCH 4, 1923 [1]

DEPARTMENT OF THE INTERIOR,
GEOLOGICAL SURVEY,
Washington, D. C., July 1, 1926.[2]

DEFINITIONS

The following terms as used in these regulations shall have the meanings here given:

Supervisor.—An agent appointed by and with the power to act for the Secretary of the Interior under the direction of the Director of the United States Geological Survey, in supervising all operations under these regulations within the district to which he is assigned.

Representative, local representative.—Any employee of the Department of the Interior who is designated by a supervisor to act for him in any specified part or all of the supervisor's district.

Lessee.—Any holder of an oil and gas prospecting permit or lease issued under the general leasing act of February 25, 1920 (41 Stat. 437), the naval appropriation act of June 4, 1920 (41 Stat. 812, 813), or the act of March 4, 1923 (42 Stat. 1448), or under special agreement by the United States.

Permittee.—The holder of an oil and gas prospecting permit and a potential if not actual lessee who is regarded as such and is subject to the provisions of these regulations in so far as they are applicable to his operations.

Leased lands, leased premises, leased tract.—Any lands or deposits occupied under permit or lease granted to a lessee.

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[1] Revision of regulations of June 4, 1920 (47 L. D. 552).
[2] Omitted from volume 51.

WITH WHOM TO DEAL

In matters pertaining to drilling and producing operations and to the handling and gauging of oil or gas the lessee should deal with the supervisor or his representative in the district where the land under permit or lease is located. Should the lessee not know with whom to deal, he should inquire by letter to the Director, Geological Survey, Washington, D. C.

PURPOSE OF SUPERVISION

The supervisor and his representatives will require that lessees comply with these regulations and operate their properties in a manner in keeping with the best practice for the locality.

Inasmuch as any specific and binding regulations drawn for one field or even most fields may not be applicable to certain other fields, the following regulations are purposely broad in scope, the details of interpretation being left to the supervisor. Where they are adaptable, the suggestions for efficient operating discussed in Manual for Oil and Gas operations (Bureau of Mines Bulletin 232) will form the basis of the department's policy and requirements.

SECTION 1. POWERS AND DUTIES OF SUPERVISOR

It shall be the duty of the supervisor directly or through his representatives—

(*a*) To visit from time to time leased lands where operations for the discovery or production of oil and gas are conducted, to inspect and supervise such operations with a view to preventing waste of oil and gas, damage to formations or deposits containing oil, gas, or water or to coal measures or other mineral deposits, injury to life or property, or economic waste; and to issue, in accordance with the provisions of the lease and these regulations, such necessary instructions to lessees as will effectively prevent such waste or damage.

(*b*) To make reports to the Director of the Geological Survey as to the general condition of the leased property and the manner in which operations are being conducted and the departmental orders are being obeyed, and to submit from time to time information and recommendations for safeguarding and protecting the surface property and the underlying mineral-bearing formations.

(*c*) To prescribe the manner and form in which all records of operations, reports, and notices shall be made by lessees.

(*d*) To require that tests shall be made to detect wastes of oil and gas, as well as the presence of oil, gas, or water in a well, and to prescribe or approve the methods of making such tests.

(*e*) To require the correction, in a manner to be prescribed or approved by him, of any condition existing subsequent to the completion of a well which is causing or is likely to cause damage to any formation bearing oil, gas, or water or to coal measures or other mineral deposits or which is dangerous to life or property or wasteful of oil or gas.

(*f*) To determine the percentage of the potential capacity of any gas well which may be utilized when, in his opinion, such action is necessary to protect the gas-producing formations. He shall likewise specify the time and method for determining the potential capacity of gas wells.

(*g*) To assist and advise lessees making tests and carrying on experiments for the purpose of increasing the efficiency of operation.

(*h*) To compile records of production of oil, gas, and natural-gas gasoline and to compute and report the amount and value of accrued royalties.

(*i*) To sign division orders granting pipe-line companies authority to receive oil or gas from leased lands in accordance with Government rules and regulations; to sign run tickets or receipts of other forms for royalty oil delivered to an agent of the United States or to the Government account.

(*j*) On receipt of application for relief from any drilling or producing requirement under a lease, (1) to forward such application, together with his report and recommendation thereon, to the Director of the Geological Survey, and, pending action by the Secretary, to grant such temporary relief as he may deem warranted in the premises, or (2) to reject such application subject to the right of appeal as provided in section 6 hereof.

(*k*) To require, by written notice, immediate suspension of any operation or practice contrary to the requirements of these regulations or to the written orders of the supervisor or his representative until the lessee shall have complied with such requirements or orders.

(*l*) To receive and transmit promptly to the Director of the Geological Survey, for review by the Secretary of the Interior, all appeals from his written orders, together with his report in the premises. (See sec. 6.)

SECTION 2. REQUIREMENTS FOR LESSEES (INCLUDING PERMITTEES)

(*a*) The lessee shall conform to the terms of the lease or permit and regulations and to the written instructions of the supervisor or his representatives and shall take precautions to prevent waste of oil or gas, damage to formations or deposits bearing oil, gas, or water

or to coal measures or other mineral deposits, injury to life or property, or economic waste.

(*b*) The lessee shall designate in writing the name and post-office address of a local or resident representative for each permit or lease, on whom the supervisor or other authorized representative of the Department of the Interior may serve notice or with whom he may otherwise communicate in securing compliance with these regulations. The resident representative of the lessee shall be designated before drilling or other operations are begun.

If said designated local or resident representative shall at any time be incapacitated for duty or absent from his designated address, the lessee shall designate in writing a substitute to serve in his stead, and in the absence of such representative or of written notice of the appointment of a substitute, any employee of the lessee who is on the leased premises or the contractor or other person in charge of operations shall be considered the representative of the lessee for the service of written orders or notices as herein provided, and service in person or by ordinary mail upon any such employee, contractor, or other person shall be deemed service upon the lessee. All changes of address of the designated representative shall be immediately reported, in writing, to the supervisor or his local representative.

(*c*) The lessee shall not drill any well within 200 feet of any of the outer boundaries of the land covered by a permit or lease except as may be necessary to protect himself against offset wells on lands the title to which is not held by the United States of America, and then only on consent first had in writing from the supervisor or his representative.

(*d*) The lessee shall not begin to drill, redrill, make water-shut-off or formation test, deepen, shoot, plug, or abandon any well, or alter the casing in it without first notifying the supervisor or his representative of his plan or intention and receiving approval prior to commencing the contemplated work.

(*e*) The lessee shall permanently mark all rigs or wells in a conspicuous place with his name or the name of the actual operator and the number or designation of the well, and shall take all necessary means and precautions to preserve these markings. Abandoned wells shall be marked with a permanent monument which shall consist of a piece of pipe not less than 4 inches in diameter and not less than 10 feet in length, of which 4 feet shall be above the ground level, the remainder being embedded in cement. This pipe shall be capped with a screw cap.

(*f*) The lessee shall keep on the leased premises or at his headquarters in the field accurate records of the drilling, redrilling,

deepening, plugging, or abandoning of all wells and of all alterations to casing, the records to show all the formations penetrated, the content of oil, gas, or water (and if water, its character) in each formation, and the kinds, weights, landed depths, and sizes of casings used in drilling the wells. He shall furnish such characteristic samples of each formation penetrated as may be requested by the supervisor or his representative. Within 15 days after the completion of any well and within 15 days after the completion of any further operations on it the lessee shall transmit to the supervisor or his local representative copies of these records on prescribed forms (see sec. 5 of these regulations) furnished by the supervisor. The lessee shall also submit such other reports and records of operations as may be required in the manner and form prescribed by the supervisor. (See sec. 5.)

(*g*) In drilling in "wildcat" territory or in a gas or oil field where high pressures are likely to exist the lessee shall take all proper precautions necessary for bringing the well under control at any time and shall provide at the time the well is started the proper high-pressure fittings and equipment required for such work. Good practice under such conditions requires that the conductor string of casing be cemented around the casing shoe.

(*h*) When drilling with cable tools, the lessee shall provide at least one properly prepared slush pit, into which he must deposit mud and cuttings from clay or shale free of sand that will be suitable for the mudding of a well, except when he is drilling in a proved area where it is known that such precautions are unnecessary. When required, a second pit must be provided for sand pumpings and other material extracted from the well during the process of drilling that are not suitable for mudding.

(*i*) When drilling with rotary tools, the lessee shall provide when required by the supervisor or his representative an auxiliary mud pit of suitable capacity in which he can maintain a supply of extra heavy mud for emergency use in case of blow-outs or lost circulation. When required, surplus mud and cuttings shall be confined in suitable pits.

(*j*) The lessee, by methods approved by the supervisor or his local representative, shall effectually shut off and exclude all water from any oil or gas bearing stratum and shall make a casing and water shut-off test before suspending drilling operations or completing the well and drilling into the oil or gas sand.

The lessee shall also effectually test for commercial productivity all formations that give evidence of carrying oil or gas, the test to be made in a manner approved in advance by the supervisor or his local representative. Unless otherwise specifically approved by the supervisor or his representative, formation tests shall be made at the time

the formations are penetrated and in the absence of excessive back pressure from a column of water or mud fluid.

(*k*) The lessee shall not deepen an oil or gas well for the purpose of producing oil or gas from a deeper stratum unless the upper productive strata are properly protected.

(*l*) The lessee shall prevent any oil or gas well from blowing open and shall take immediate steps and exercise due diligence to bring under control any "wild" or burning oil or gas well or water well.

(*m*) The lessee shall operate his wells in such manner as to eliminate, so far as possible, the formation of emulsion, or so-called B. S. If the formation of emulsion, or B. S., can not be avoided and the oil can not be recovered from the emulsion by usual methods of treatment, the lessee shall treat the oil to put it into a marketable condition if it can be recovered at a profit. The supervisor is empowered to authorize a deduction, before the royalty is computed, on account of the cost of putting the oil into marketable condition by such unusual methods, in order to encourage the conservation of oil and oil products. To avoid excessive losses from evaporation or "burning the oil," the lessee shall not heat emulsified oil for the purpose of breaking down emulsions to temperatures above the minimum temperature required to put the oil into marketable condition.

(*n*) B. S. and salt water from tanks or wells shall not be allowed to pollute streams or damage the surface of adjoining land. If the B. S. can not be treated or burned and the volume of salt water is too great for disposal by seepage and evaporation, the lessee should consult the supervisor or his representative regardnig its disposal and dispose of it under some approved method.

(*o*) All oil run from leased lands shall be gauged according to methods approved by the supervisor or his representative. The lessee shall provide tanks suitable for containing and accurately measuring the crude oil produced from the wells and shall furnish to the supervisor or his representative at least two acceptable copies of all tank tables. The lessee shall not, except during an emergency and except by special permission of the supervisor or his representative, confirmed in writing, permit oil to be stored or retained in earthen reservoirs or in any other receptacles in which there may be undue waste of oil by seepage or evaporation.

(*p*) Before abandoning a well the lessee shall submit to the supervisor or his representative a statement of reasons for abandonment and his detailed plans for carrying on the work, together with duplicate copies of the log in case it has not already been submitted, and shall proceed with the abandonment only on receiving the written approval of the supervisor or his representative and in the manner prescribed by such official. No producing oil or gas well shall be

abandoned unless it is demonstrated that further operation is commercially unprofitable.

(*q*) The lessee shall prevent the waste of natural gas or its wasteful utilization. The use of gas in its natural state in engines, pumps, or similar equipment where its pressure is the direct operating force is prohibited unless the exhaust gas is conserved for use as fuel or unless special permission is obtained from the supervisor or his representative.

(*r*) The lessee shall exercise reasonable precaution in providing against accidents and fires and shall make a full report to the supervisor of all accidents or fires on the leased premises.

(*s*) The lessee shall file with the Secretary of the Interior, through the supervisor or his representative, triplicate signed copies of contracts for the disposition of oil, natural gas, and natural-gas gasoline produced, except that portion used for production purposes on the land leased, and in the event that the United States shall elect to take its royalties in money instead of in oil or gas or gasoline, he shall not sell or otherwise dispose of the products of the land leased except in accordance with the sales contract or other method first approved by the Secretary of the Interior.

(*t*) The lessee desiring relief from any drilling or producing requirement under a lease shall file, in duplicate, with the supervisor or his representative an application therefor, including a full statement of the circumstances that in his opinion render relief necessary or desirable.

(*u*) The lessee must immediately obey all orders intended to carry out the terms and spirit of these regulations, whether they are issued directly by the supervisor or through his representative. Subjects of controversy may be settled in conference between the lessee and the supervisor or his representative, but the supervisor or his representative shall have final authority subject to the right of appeal as provided in section 6 hereof.

SECTION 3.—OIL ROYALTIES

(*a*) Royalties payable in value shall be paid to the register of the United States land office for the district in which the leased land is situated. Royalties shall be due and payable on or before the 15th of each calendar month for all oil produced during the preceding calendar month.

If the Government elects to take its royalties in kind, the lessee shall furnish storage for such royalty oil free of charge for 30 days after the end of the calendar month in which the oil is produced. The oil is to be stored on the leased premises or at such place as the

supervisor or his representative and the lessee may mutually agree upon.

(*b*) The sliding-scale royalties are based on the average daily production per well. Ordinarily the average daily production per well for a lease is computed on the basis of a 28, 29, 30, or 31 day month (as the case may be) and the number of wells on the lease counted as producing. (Tables for computing royalty on the sliding-scale basis may be obtained upon application to the supervisor or his representative.) The supervisor will determine the number of producing wells for computing royalties in accordance with the following cases:

CASE I. On a previously producing leasehold, count as producing wells for every day of the month each previously producing well that produced for 15 days or more during the month and disregard those that produced for less than 15 days during the month.

CASE II. When the initial production of a leasehold is made during the calendar month, compute royalty on the basis of producing well days.

CASE III. When a new well or wells are brought in on a previously producing leasehold and produce for 10 days or more during the calendar month in which they are brought in, count such new well or wells as producing every day of the month, in arriving at the number of producing well days. Do not count new well or wells that produce for less than 10 days during the calendar month.

CASE IV. Consider "head wells" that make their best production by intermittent pumping or flowing as producing every day of the month, provided they are regularly operated in this manner.

CASE V. On a previously producing lease where no old well or wells produced for 15 days or more, compute royalty on a basis of actual producing well days.

CASE VI. On a previously producing lease where no wells were producing during the calendar month, but oil was shipped during the month, compute the royalty at the same royalty percentage as that of the last preceding calendar month in which production and shipments were normal.

Special cases not subject to definition, such as those arising from averaging the production from two distinct sands or horizons when the production of one sand or horizon is relatively insignificant as compared to that of the other, shall be submitted to the supervisor.

In the following summary of operations on a typical leasehold for the month of June, the wells considered in computing royalty on the entire production of the property for the month are indicated:

Well No.	Record	Count (marked X)
1	Produced full time for 30 days	X
2	Produced for 26 days; down 4 days for repairs	X
3	Produced for 28 days; down June 5, 12 hours, rods; June 14, 6 hours, engine down; June 25, 24 hours, June 26, 24 hours, pulling rods and tubing	X
4	Produced for 12 days; down June 13 to 30	
5	Produced for 8 hours every other day (head well)	X
6	Idle producer (not operated)	
7	New well, completed June 17; produced for 14 days	X

In this case there are seven wells on the leasehold, but wells No. 4 and No. 6 are not counted in computing royalties. Wells Nos. 1, 2, 3, 5, and 7 are counted as producing for 30 days. The royalty is taken on the total production of the leasehold for the month (including the oil produced by well No. 4).

Government leases stipulate that the royalty shall be paid on the basis of the actual production from the area leased. As a rule the pipe line runs from a property closely approximate the production from that property over a period of months. Because of the accurate gauging of clean (net) oil when running to the pipe line, the department prefers, when practicable, to compute the royalty on the basis of the monthly pipe-line runs from a leasehold rather than on the basis of the actual monthly production, but it reserves the right to compute royalty on a production basis, taking storage into account, whenever the supervisor or his representative may so elect.

(*c*) The lessee shall file with the supervisor or his representative the run tickets for all oil run from leased lands except as special conditions may justify other arrangements approved by the supervisor.

SECTION 4. NATURAL-GAS AND GASOLINE ROYALTIES

(*a*) Measurement of Natural Gas

The term "natural gas" as used in these regulations shall be interpreted to mean either gas from gas wells or so-called "casing-head gas" or "trapped gas" produced by oil wells. The term "dry natural gas" applies to natural gas containing so little gasoline that its extraction is not commercially feasible or to natural gas from which gasoline has already been extracted.

All gas subject to royalty shall be measured by meters (preferably of the orifice-meter type), approved by the supervisor or his representative and installed at the expense of the lessee at such places as

may be agreed to by the supervisor or his representative. The standard of pressure in all measurements of gas sold or subject to royalty shall be 10 ounces above an atmospheric pressure of 14.4 pounds to the square inch, regardless of the atmospheric pressure at the point of measurement, and the standard of temperature shall be 60° Fahrenheit. All measurements of gas shall be reduced by computation to these standards, no matter what may have been the pressure and temperature at which the gas was actually measured. By reason of higher altitudes in certain portions of the Rocky Mountain district the absolute pressure of the flowing gas in these fields shall be taken as the gauge pressure plus the actual average atmospheric pressure existing at the points of measurement, in order to reduce equitably the quantity of gas to the Government standard of 10 ounces above an atmospheric pressure of 14.4 pounds to the square inch. Tables for this correction have been computed for some of the fields situated at high altitudes. Information relative to these tables may be obtained through the supervisor or his representative.

(*b*) Payment of Royalties

Natural-gas and natural-gas gasoline royalties that are payable in value shall be paid to the register of the United States land office for the district in which the leased land is situated. Royalties shall be due and payable on or before the 15th of each calendar month for all natural gas and natural-gas gasoline produced during the preceding calendar month.

The royalties on natural gas and natural-gas gasoline from permits and leases under the act of February 25, 1920, the act of June 4, 1920, the act of March 3, 1923, and special agreement by the United States, unless otherwise specified in the permit, lease, or special agreement, shall be computed as stated in the following paragraphs *c* and *d*.

(*c*) Royalties on Natural Gas

The royalty on natural gas, whether gas from which the natural-gas gasoline has been extracted or otherwise, shall be 12½ per cent of the value of the gas as fixed by the Secretary of the Interior where the average production per day for the calendar month is less than 3,000,000 cubic feet, and 16⅔ per cent where the average daily production is 3,000,000 cubic feet or more.

In the sale of dry natural gas there is but one commodity involved, and on it the Government collects a royalty of 12½ per cent, or 16⅔ per cent, according to the average daily production. These royalties

are due regardless of whether the gas is produced as dry gas or whether it is the dry residual gas from a plant after natural-gas gasoline has been extracted.

In general, where natural gas is delivered or sold for purposes of extracting gasoline, two separate commodities are involved—the natural-gas gasoline and the dry residual gas. If, however, the lessee receives a higher price for such natural gas as a single commodity than the combined value of the two commodities, the natural-gas gasoline and the dry residual gas, as fixed by the Secretary of the Interior, the Government royalty shall be computed on natural gas alone and at the higher price received therefor by the lessee.

(*d*) Royalties on Natural-Gas Gasoline

A royalty of 16⅔ per cent shall be paid on the value as fixed by the Secretary of the Interior of one-third of all natural-gas gasoline extracted and sold from the natural gas produced on the leased land.

Natural-gas gasoline (also known as casing-head gasoline) is a manufactured product. The value of this product is contingent upon the value of the raw material and the cost of its manufacture. The Government does not wish to collect royalty on that part of the value which is derived from the cost of manufacturing, inasmuch as the Government's equity is confined to the value of the raw material involved. In computing royalty on natural-gas gasoline the value of the raw gasoline in the natural gas as produced is assumed to be one-third the value of the marketable natural-gas gasoline extracted from such gas, the remaining two-thirds being allowed to the lessee for the cost of manufacture. Thus the Government collects 16⅔ per cent of one-third of the market value as its royalty share of the natural-gas gasoline produced (or in effect one-eighteenth of the market value).

If the lessee derives revenue on natural gas from two sources, from natural-gas gasoline and dry (residual) gas sold, the Government will normally collect a royalty on the two products. Therefore, if there is a market for the dry residual gas from the natural-gas gasoline plant, a royalty on this dry gas as stipulated under headings (*b*) and (*c*) of this section must be paid to the Government.

The present policy of the department is to allow the use of a reasonable amount of dry gas for plant operation, subject to the advice and direction of the supervisor or his representative. The department will attempt to arrive at an equitable basis of settlement in determining what constitutes "a reasonable amount." Moreover, the department will investigate plants where gas is being wasted.

EXAMPLE OF METHOD FOR COMPUTING NATURAL-GAS GASOLINE ROYALTIES

Assume—

That the value of natural-gas gasoline is 18 cents a gallon.

That 3 gallons of gasoline is recovered from each 1,000 cubic feet of natural gas treated.

Then—

The Government takes its royalty on one-third of 3 gallons (per 1,000 cubic feet of gas), or 1 gallon, having a value of 18 cents.

The Government's royalty on gasoline in this case is ⅙ (=16⅔ per cent) × 1 (gallon) × 18 cents=3 cents (on each 1,000 cubic feet of natural gas treated).

(*e*) Relief Measures

Adverse climatic and economic conditions in certain portions of the Rocky Mountain district result in unusually high operating and marketing costs. In order to encourage the most complete practicable utilization of natural gas under such conditions the Secretary of the Interior will, in his discretion and on proper showing of the necessity therefor, modify by specific order the method of computation of royalty on natural-gas gasoline set forth in subsection (*d*) hereof, to provide for a royalty of 16⅔ per cent of the value of not less than one-fifth of all natural-gas gasoline extracted and sold from the natural gas produced on the leased land, such modification to be effective in specific areas and for a definite period to be fixed by him in each order.

(*f*) Royalty on Drip Gasoline

The royalty on all drip gasoline recovered and sold from gas produced on the leased lands shall be the same as that required for natural-gas gasoline manufactured within the same district.

(*g*) Determination of Gasoline Content

Tests to determine the gasoline content of natural gas delivered to plants manufacturing gasoline are required to check plant efficiency and to obtain an equitable basis for allocating the gasoline output of any plant to the several sources from which the natural gas treated is derived. The gasoline content of the natural gas delivered to each gasoline plant treating gas derived from leased lands shall be determined by methods approved by the supervisor and under his supervision on the basis of periodical field tests made at each meter.

(*h*) Quantity Basis for Computing Gasoline Royalty

The primary quantity basis for computing monthly royalties on natural-gas gasoline is the monthly net output of the plant at which the gasoline is manufactured, "net output" being defined as the

natural-gas gasoline that the plant is able to manufacture and sell, less a deduction of any portion thereof derived from naphtha or other blending materials.

(*a*) If the net output of a plant is derived from the natural gas obtained on only one leasehold the quantity of gasoline on which computations of royalty for the lease are based is the net output of the plant.

(*b*) If the net output of a plant is derived from natural gas obtained from several sources of gas of uniform gasoline content, the proportion of net output allocable to each lease as a basis for computing royalty will be determined by dividing the amount of natural gas delivered to the plant from the leasehold by the total amount of natural gas delivered to the plant from all sources.

(*c*) If, however, the net output of a plant is derived from natural gas obtained from several sources of gas of diverse gasoline content, the proportion of net output allocable to each lease as a basis for computing royalty will be determined by multiplying the amount of natural gas delivered to the plant from the leasehold by the gasoline content of the gas and dividing the arithmetical product thus obtained by the sum of arithmetical products similarly obtained for all separate sources of natural gas treated at the plant.

SECTION 5. REPORTS TO BE MADE BY LESSEE (INCLUDING PERMITTEE).

In operating, to know the property is to know the individual wells on it. For this reason much of the information requested by the Geological Survey concerns individual wells. Experience has shown that these data are essential to careful operation and are necessary for engineering studies that often enable the supervisor and his representatives to offer valuable advice on the handling of properties. Forms for making reports to the department, described in this section, can be obtained from the supervisor or his representatives, and such forms, unless others are specified by the supervisor, must be used by the lessee. Lessees must fill out all forms completely and file them punctually with the supervisor or his local representative. Failure of the lessee to submit the reports required herein constitutes noncompliance with the terms of these regulations and is cause for cancellation of the lease or permit.

(*a*) Sundry Notices and Reports on Wells (Form 9–331a)

Form 9–331a covers all notices and all reports pertaining to individual wells except those for which special blanks are provided. This form may be used for any of the purposes listed, or a special

heading may be inserted on the blank to adapt it for use for other similar purposes. Any written notice of intention to do work or of change in plans must be filed in triplicate unless otherwise directed and must reach the supervisor or his representative and receive his approval before commencement of the work. One copy of the form will be returned to the lessee if and when approved and will constitute his authority to begin work. The lessee is responsible for receipt of the notice by the supervisor or his representative in ample time for proper consideration and action. If in case of emergency any notice is given orally or by wire, and approval is obtained, the transaction shall be confirmed in writing as a matter of record. The examples following illustrate some of the uses to which Form 9–331a may be put.

NOTICE OF INTENTION TO DRILL (FORM 9–331A)

The notice of intention to drill a well must be filed in triplicate with the supervisor or his local representative and approval received before the work is commenced. This notice must give the location in feet from property lines and, if possible, the elevation of the derrick floor and the geologic name of the surface formation; also an estimate of the depth at which and the stratum or formation in which the oil or gas is expected and approximately the depths at which specified strings of casing will be set or landed; also the weight of the sizes of casing proposed to be set or landed at these depths, and a statement as to whether any cementing, muddling, or other special work is contemplated.

NOTICE OF INTENTION TO CHANGE PLANS (FORM 9–331A)

Owing to unexpected conditions, it may become necessary to change the plans of proposed work in connection with either the drilling or the repair of wells. Complete details of these changes should be submitted in triplicate to the supervisor or his representative on this form and approval obtained before the work is undertaken.

NOTICE OF DATE FOR CASING AND WATER SHUT-OFF TEST (FORM 9–331A)

As the exclusion of water from oil or gas bearing formations is one of the most important items of conservation, the supervisor or his local representative will witness as many casing and water shut-off tests as possible. Form 9–331a should be filled out and filed in triplicate with the supervisor or his local representative in advance of the approximate date on which the lessee expects to make the test. Later by agreement the exact day may be fixed.

REPORT ON RESULT OF CASING AND WATER SHUT-OFF TEST (FORM 9–331A)

If the supervisor or his representative authorizes but does not witness a casing or water shut-off test, the lessee shall submit in triplicate a statement signed by the employee in charge of the work giving details and results of the test. The information given must be complete and include such items as depth of shut-off; head of water found; depth and thickness of water strata penetrated before landing pipe; weight, nominal diameter, and depth of casing in the hole; fluid levels before and after test; length of time the well stood for each test; depth drilled out below shoe, if any; note of oil or gas showing; length and character of bridge, if used; method of shut-off; amount and name of cement and time given for set; and any other pertinent data.

NOTICE OF INTENTION TO REDRILL OR REPAIR WELL (FORM 9–331A)

If it seems desirable to make repairs in or to deepen a well, a detailed written statement of the plan of work shall be made in triplicate to the supervisor or his local representative and approval obtained before the work is started. In work that affects only rods, pumps, or tubing, or other routine work, such as cleaning out, no notice of report will be necessary.

NOTICE OF INTENTION TO SHOOT (FORM 9–331A)

Before shooting any well (whether for increasing production or in drilling, repair, or abandonment) notice of intention to shoot shall be given in triplicate to the supervisor or his local representative and approval obtained before shooting is done. When the notice of intention to shoot becomes a part of a notice of intention to redrill, repair, or abandon a well, the supervisor or his representative may accept such notice in lieu of a separate notice of intention to shoot.

The notice of intention to shoot (Form 9–331a) must be accompanied by the complete log of the well to date, provided the complete log has not previously been filed, and must state the object of shooting, the size and kind of the proposed shot, the exact location and distribution of the explosive in the well (by depths), and the name of the company that is to do the shooting. The notice shall also contain an accurate statement of the daily oil and water production, if any, at the time the notice is filed or at the date of last production.

SUBSEQUENT RECORD OF SHOOTING (FORM 9–331A)

After shooting any well a subsequent record of shooting must be filed in triplicate with the supervisor or his local representative. This record shall be filed separately on Form 9–331a within 30 days

after the shooting is done, except where such shooting record constitutes a part of the log (Form 9–330) or a part of a record of other subsequent work done (Form 9–331a) or a part of an abandonment record filed within that period.

The subsequent record of shooting shall include a statement of the size of the shot and the nature, exact location, and distribution of the explosive used in the well (by depths). The record shall contain also an accurate statement of the average daily production of oil and water for at least a 10-day period prior to the filing of the report. In addition, this report should include other pertinent information, such as depth of cleaning out, time spent in bailing and cleaning out, and possible injuries to the casing or the well.

RECORD OF PERFORATING CASING (FORM 9–331A)

Usually a statement covering the details of perforated casing in a well is made on the log form. When perforations are made after the log has been sent in, a report of the work shall be made in triplicate (Form 9–331a) to the supervisor or his local representative. Prior notice need not be given for such work, except that if it is intended to perforate casing that has excluded water from the well a notice in triplicate of intention to perforate and approval of the supervisor or his local representative are necessary before the work is begun.

NOTICE OF INTENTION TO PULL OR OTHERWISE ALTER CASING (FORM 9–331A)

If it desired to pull a portion or all of a string of casing, or to rip, perforate, or otherwise alter casing that has excluded water from a well, a notice (Form 9–331a) of such work must be given in triplicate and the approval of the supervisor or his local representative obtained before the work is started. When it is desired only to add casing without deepening the well and without altering the water string already in the well, it will be sufficient to report the operations on a subsequent notice of work done.

NOTICE OF INTENTION TO ABANDON WELL (FORM 9–331A)

Before beginning abandonment work on any well (whether drilling well, oil or gas well, water well, or so-called dry hole) notice of intention to abandon shall be filed in triplicate on Form 9–331a with the supervisor or his local representative and approval obtained before the work is started.

The notice of intention to abandon must show the reason for abandonment and must be accompanied by a complete log, in duplicate, of the well to date, provided the complete log has not been filed previously, and must give a detailed statement of the proposed

work, including such information as kind, location, and length of plugs (by depths) and plans for mudding, cementing, shooting, testing, and removing casing as well as any other pertinent information.

SUBSEQUENT REPORT OF ABANDONMENT (FORM 9–331A)

After abandoning or plugging a well a subsequent record of work done must be filed in triplicate with the supervisor or his local representative. This record shall be filed separately (on Form 9–331a) within 30 days after the work is done except where such record constitutes a part of the log (Form 9–330) or record of other subsequent work done (Form 9–331a) and is filed within that period.

The subsequent report of abandonment shall give a detailed account of the manner in which the abandonment or plugging work was carried out, including the nature and quantities of materials used in plugging and the location and extent (by depths) of the plugs of different materials. Records of any tests or measurements made and the amount, size, and location (by depths) of casing left in the well, as well as a detailed statement of the volume of mud fluid used, the pressures attained in mudding, and the names and positions of employees who carried on the work. If the well was shot, this report must include a complete statement of the shooting, giving the details as called for on page 12 of these regulations.

SUPPLEMENTARY WELL HISTORY (FORM 9–331A)

A report of all work done on any well since the filing of the log form (Form 9–330) or the last report covering work on the well shall be filed in triplicate with the supervisor or his local representative on Form 9–331a within 30 days after completion of the particular work, or before, if called for by the supervisor.

(*b*) LOG OF WELL (FORM 9–330)

The lessee shall furnish to the supervisor or his representative, upon his demand, a partial or complete log of any well and shall file in duplicate with the supervisor or his representative not later than 15 days after the completion of each well a complete and accurate log on Form 9–330.

The lessee shall require the drillers, whether company labor or contract labor, to record accurately the depth, character, fluid content, and fluid levels, where possible, of each formation as it is penetrated, together with all pertinent information called for by this form. The practice of compiling well logs from memory, sometimes after the work has been completed, will not be permitted.

57522—27—VOL 52——2

(*c*) LESSEE'S MONTHLY REPORT OF OPERATIONS (FORM 9–329)

A separate report for each lease or permit is to be made for each calendar month, beginning for a lease with the month in which lease is issued and for a permit with the month in which drilling operations are initiated, and filed in duplicate with the supervisor or his local representative on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor or his representative. The report on this form constitutes a general summary of the status of operations on the property and, whatever such status may be, the report must be submitted each month until the permit or lease is terminated.

In order that the supervisor or his representative may obtain from this form the desired information, it is particularly necessary that—

(1) The lease or permit be identified by insertion of the name of the local United States land office and the serial number in the space provided in the upper right corner.

(2) Each well be listed separately by number, its location be given by 40-acre subdivision (¼ or ¼ sec.), section number, township, and range.

(3) The actual number of days each well produced, whether oil or gas, be shown for the calendar month.

(4) The proper columns show the quantity of oil actually produced, the total amount of natural gas measured, and the total amount of gasoline recovered (total sales as distinguished from the total production here required should be shown in the footnote).

(5) In the "Remarks" column, the depth of wells being drilled, the reasons for every shutdown, the date and result of gasoline tests, and any other noteworthy information on operations not specifically provided for in the form should be shown. Separate reports on this form may be submitted by the lessee for oil and natural gas and gasoline.

The only information called for in this report that may occasion inconvenience to the operator is the statement of the number of barrels of oil and water produced by each well. Usually a method of gauging individual wells can be devised that will check, with a reasonable degree of accuracy, the production of the entire leasehold. The supervisor or his representative will advise the operator as to methods of gauging on the leased lands.

The lessee must report with accuracy the status of all wells on the leased lands, as this information is essential in computing royalties. (See sec. 3(*b*).)

(*d*) DAILY REPORT OF GAS-PRODUCING WELLS (FORM 9–352)

Unless otherwise directed by the supervisor or his representative, the readings of all meters showing production of natural gas from leased lands shall be submitted daily on Form 9–352, together with the meter charts. After a check has been had the meter charts will be returned.

(*e*) LESSEE'S STATEMENT OF OIL AND GAS RUNS AND ROYALTIES (FORM 9–361)

When directed by the supervisor or his representative, a monthly report shall be made by the lessee in duplicate, on Form 9–361, showing each run of oil and all sales of gas and gasoline and the royalty accruing therefrom to the Government. When use of this form is required it must be completely filled out and sworn to.

(*f*) SPECIAL FORMS

Because of the special conditions in certain localities, special forms other than those shown in these regulations, such as run or sales statements, may be necessary. Instructions for the filing of such forms will be given by the supervisor or his representative.

SECTION 6. APPEAL TO THE SECRETARY OF THE INTERIOR

The lessee must immediately obey all orders intended to carry out the terms and spirit of these regulations, whether issued directly by the supervisor or through his representative (see section 2) or sent to the lessee or his agent by ordinary mail, but any such order after being put into effect by the lessee shall be subject to review by the Secretary of the Interior upon appeal to him filed by the lessee with the supervisor or his representative within 30 days after the order has been served.

The administration of these regulations shall be under the direction of the Geological Survey.

GEO. OTIS SMITH,
Director of Geological Survey.

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

LEASES OF GOLD, SILVER, AND QUICKSILVER ON PRIVATE LAND GRANTS—ACT OF JUNE 6, 1926

REGULATIONS

[Circular No. 1107]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 3, 1927.

REGISTERS, UNITED STATES LAND OFFICES:

The act of Congress approved June 8, 1926 (44 Stat. 710), entitled "An act relating to patents issued pursuant to decrees of the Court of Private Land Claims," authorizes the Secretary of the Interior to lease to the grantee, or those claiming through or under him gold, silver, and quicksilver deposits, or mines or minerals of the same, on lands in private land claims patented pursuant to decrees of the Court of Private Land Claims with reservation of such minerals or mines.

The following rules and regulations will govern the issuance of such leases:

1. Applications for leases shall be filed in the United States land office of the district in which the lands are situated, by the owner of the land under the patent title; that is, the original grantee or his record transferee or successor in title, and may include all or any part of the grant for which the applicant holds title at the date of the application.

2. Applications shall be under oath, give name and address of the applicant, describe the land in which the deposits occur, by legal subdivisions of the public surveys, if so surveyed, otherwise by metes and bounds, or if for the entire area in the grant, the name of the grant, area, and date of patent will suffice. The mineral deposits must also be fully described, giving character, mode of occurrence, nature of the formation, kind and character of associated minerals, if any, proposed mining methods, estimate of amount of investment necessary to successful operation of the mine or mines contemplated, estimated amount of production of gold, silver, and quicksilver, or any of them, and such other pertinent information the applicant may desire to set forth, including what he considers a reasonable royalty rate under the lease. The applicant must also file with his application a duly authenticated abstract of title showing present ownership of the land, or a certificate of the county recorder of deeds that the record title stands in the applicant's name.

3. Any such application filed will be given a current serial number by the register, noted on his records and promptly transmitted to the Commissioner of the General Land Office.

4. When an application is received in the General Land Office it will be considered, and if found sufficient to authorize issuance of lease thereunder a rate of royalty, not less than 5 per cent nor more than 12½ per cent of the value of the output of gold, silver, or quicksilver at the mine, will be fixed and

the amount of investment under the lease will be determined and prescribed by the Secretary of the Interior.

5. When a lease has been authorized, forms of lease in accordance with the terms prescribed will be furnished to the applicant, through the district land office, who will be allowed 30 days from notice within which to execute and return the lease to the district land office and to furnish the required bond.

6. A bond with approved corporate surety in the sum of $2,000 will be required as a guarantee to the making of the investment fixed in the lease and compliance with the other terms and conditions thereof, but a larger bond may be fixed if that amount is determined to be inadequate for the purpose for which given.

The lease referred to in the preceding sections will be in form and substance substantially as that appended hereto.

WILLIAM SPRY,
Commissioner.

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

FORM OF LEASE

DEPARTMENT OF THE INTERIOR,
United States Land Office at ———.

Serial No. ———.

This indenture of lease entered into, in triplicate, this ——— day of ———, 19—, by and between the United States of America, acting in that behalf by the Secretary of the Interior, party of the first part, hereinafter called the lessor, and ——— of ———, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress approved June 8, 1926 (44 Stat. 710), entitled "An act relating to patents issued pursuant to decrees of the Court of Private Land Claims," which act is made a part thereof.

Witnesseth:

SEC. 1. *Subject.*—That the lessor, in consideration of the royalty to be paid and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to mine, remove, and dispose of all gold, silver, and quicksilver in, upon, or under the following-described tract or parcel of land, being all or part of the ——— grant, situated in ——— County, State of ———, and more particularly described as follows: ———, containing ——— acres, more or less, for a term of 20 years with the preference right in the lessee to renew the same for successive periods of 10 years each upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of any such period.

SEC. 2. In consideration of the foregoing, the lessee hereby covenants and agrees:

(*a*) *Investment and bond.*—To invest ——— dollars in actual mining development, mining improvements, and mining operations upon the described premises

within four years from the date hereof, not less than one-fourth of which shall be expended during each of said years, unless sooner expended and to furnish and maintain a bond in the sum of $2,000 conditioned upon the making of such investment and the full compliance with all the terms and provisions of this lease.

(*b*) *Royalty.*—To pay a royalty of ——— per cent of the net value at the mine of the output of gold, silver, and quicksilver mined from said premises, payable monthly to the register of the United States land office of the district in which the lands are situated, at the end of each month succeeding the extraction of the minerals from the mine or mines.

(*c*) *State taxes.*—To pay when due all taxes assessed and levied under the laws of the State upon the improvements, output of mines, or other rights, property, or assets of the lessee.

(*d*) *Reports.*—To furnish monthly certified statements in detail and in such form as may be prescribed by the lessor, of the amount and value of the output of the gold, silver, and quicksilver from the leased lands; the books, records, and property leased to be subject to inspection at any time by an accredited agent of the lessor.

(*e*) *Assignment.*—Not to assign this lease or any interest therein, nor sublet any of the rights and privileges herein granted without the written consent of the lessor first had and obtained.

(*f*) *Diligence.*—To proceed diligently and within 90 days after the delivery hereof to commence operations to develop a mine of gold, silver, or quicksilver, or any of said minerals, within the area covered by this lease, and to mine and produce same by such approved methods and the use of such appliances as to secure all or as large an amount as practicable of such minerals as may be found in the land, leaving no available minerals abandoned where the mining is being conducted, and to conform to such reasonable requirements as may be made by the lessor as to methods and practices in the mining of such minerals.

(*g*) *Minimum royalty.*—Beginning with the fifth year of the lease, except when such operations shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, the lessee shall each year mine and pay a royalty on not less than ——— dollars in value of the leased minerals, unless the lessee shall pay the royalty on such minimum amount for one year in advance, in which case operations may be suspended for that year.

SEC. 3. *Relinquishment.*—The lessee, upon consent in writing of the lessor, may make written relinquishment of this lease and thereupon be relieved of all future obligations hereunder, upon payment of all royalties due the lessor and of all wages and moneys due and payable to the workmen employed by the lessee, but in no case shall such permission be effective until the lessee shall have made provision for the preservation of any mines that may have been opened hereunder.

SEC. 4. *Forfeiture.*—If the lessee shall make default in any of the terms of this lease and such default shall continue for a period of 60 days after written notice thereof by the Secretary of the Interior, the lessor may by appropriate proceedings have this lease forfeited and canceled in a court of competent jurisdiction, but this provision shall not deprive the lessor of any legal or equitable remedy which the lessor would otherwise have, nor shall a waiver of any particular cause of forfeiture affect the right to proceed against the lessee for any other cause of forfeiture or for the same cause occurring at any other time.

SEC. 5. *Heirs and successors.*—It is further agreed that each obligation hereunder shall extend to and be binding upon and every benefit hereof shall inure to the heirs, executors, administrators, successors, or assigns of the respective parties hereof.

SEC. 6. *Unlawful interests.*—It is also further agreed that no Member of or Delegate to Congress or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part of this lease, or derive any benefit that may arise therefrom, and that the provisions of section 3741 of the Revised Statutes of the United States and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat. 1088), relating to contracts, enter into and form a part of this lease, so far as the same may be appliable.

In witness whereof:

THE UNITED STATES OF AMERICA,
By ------ ------,
Secretary of the Interior.

------ ------,

------ ------,

Witnesses:

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AN ACT Relating to patents issued pursuant to decrees of the Court of Private Land Claims

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter all gold, silver, or quicksilver deposits, or mines or minerals of the same on lands embraced within any land claim confirmed or hereafter confirmed by decree of the Court of Private Land Claims, and which did not convey the mineral rights to the grantee by the terms of the grant, and to which such grantee has not become otherwise entitled in law or in equity, may be leased by the Secretary of the Interior to the grantee, or to those claiming through or under him, for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years, upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods.

SEC. 2. That for the privilege of mining or extracting the gold, silver, or quicksilver deposits in the land covered by such lease, the lessee shall pay to the United States a royalty, which shall not be less than 5 per centum nor more than 12½ per centum of the net value of the output of gold, silver, or quicksilver at the mine, due and payable at the end of each month succeeding that of the extraction of the minerals from the mine. All moneys received from royalties and rentals under the provisions of this act shall be deposited in the Treasury of the United States, and disposed of in the same manner as rentals and royalties under the provisions of the act of February 25, 1920 (Forty-first Statutes, page 437).

SEC. 3. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying this act into full force and effect.

Approved, June 8, 1926 (44 Stat. 710).

WHEELER, ASSIGNEE OF McGRATH

Decided January 20, 1927

OIL AND GAS LANDS—PROSPECTING PERMIT—TEST WELL—EXTENSION OF TIME.

The rule announced in Circular No. 1041 (51 L. D. 278) that where sufficient geological data as to structures is wanting, the holder of an oil and gas prospecting permit will be denied the benefit of contribution to a test well on another permit area if the greater portion of the permit area is more than 3 miles from such test well, is modified and, in proper cases, an extension will be granted if any portion of the permit area, on which the permittee could lawfully drill, lies within 3 miles of the test well.

FINNEY, *First Assistant Secretary:*

On August 5, 1926, there was filed in the General Land Office an assignment to J. G. Wheeler of the oil and gas prospecting permit issued to Leigh J. McGrath on January 11, 1923, for the SW. ¼ Sec. 2, SE. ¼ Sec. 3, W. ½ Sec. 11, W. ½ Sec. 14, all of Sec. 15, N. ½ Sec. 22, N. ½ Sec. 23, and W. ½ Sec. 24, T. 34 N., R. 78 W., 6th P. M., Wyoming. At the same time there was filed an application for extension of time within which to comply with paragraph 2 of the permit, and in support thereof the assignee alleged in a corroborated affidavit that the permit area embraced a part of the geologic structure locally known as the North Geary field, which was one of three small geologic structures along a general anticlinal fold running from the Salt Creek oil field and Teapot Dome southeasterly to the Big Muddy field in central Wyoming; that a map attached for reference showed the relative positions of the field from northwest to southeast, namely, the Midway field, the North Geary field, and the Geary field; that of these three fields the North Geary field was generally considered by competent petroleum geologists to be the third choice, the other two fields appearing to be somewhat larger and less deep; that in 1923 a well was drilled to a depth of 4,900 feet in the Geary field and abandoned for the reason that, although some showings of oil and gas were obtained, oil or gas in commercial quantity was not found; that in the same year a well was drilled to a depth of 4,800 feet in the Midway field and abandoned for the same reason; that the assignee and his associates believed that if the structures were tested to a sufficient depth oil and gas would be obtained in paying quantities, but that it would require a large outlay of capital to drill to sufficient depth to reach production; that they had resumed negotiations with the Continental Oil Co. for the further drilling of a well in the Geary field, on the NE. ¼ NW. ¼ Sec. 32, T. 34 N., R. 77 W.; and that this permit area was the inducement and consideration for such further drilling.

The Director of the Geological Survey reported on September 10, 1926, under Circular No. 1041 (51 L. D. 278), as follows:

The records of the Geological Survey indicate that the land listed is so situated structurally that the results of the test well cited will not tend to establish the oil or nonoil character of the land described in oil and gas prospecting permit Cheyenne 037233.

I accordingly recommend that the application for extension of time be rejected.

The assignee was advised of the Survey's report through his local attorneys and in response there were filed the affidavits of two petroleum geologists, H. Leslie Parker and H. T. Morley. Parker alleged that for 10 years he had been seeking to procure the prospecting and development of the region locally known as the Midway Field, the North Geary Field, and the Geary Field; that the major portion of said lands was covered by wind-blown sand, making it difficult to make any accurate and definite map of the subsurface geological conditions; that the surface survey supplemented by pits and trenches through the wind-blown sand indicated that there were three relatively high domes along the general anticlinal fold, which have been referred to as the three fields mentioned; that the division between the three fields can not be very accurately defined, but the affiant believed that like conditions in respect to productivity of oil and gas would be found in all three of these fields. The allegations of Parker were corroborated in the affidavit by Morley.

Upon receipt and consideration of this additional showing the Geological Survey, on October 2, 1926, made a report as follows:

The showing submitted in the affidavits of H. Leslie Parker and H. T. Morley has been carefully considered by the Geological Survey and provides in my opinion no basis for a modification or reversal of my report of September 10, 1926, stating that the test well in the NE. ¼ NW. ¼ Sec. 32, T. 34 N., R. 77 W., will not tend to establish the oil or nonoil character of the land described in oil and gas prospecting permit Cheyenne 037233 and recommending that the application for extension of time be rejected.

By decision of October 11, 1926, the Commissioner of the General Land Office rejected the application for extension of time and held the permit for cancellation. The assignee has appealed, and in support of the appeal there has been filed another affidavit by H. Leslie Parker. He alleges—

The division between the two fields (Geary and North Geary) is very obscure and no one can say positively that the two fields are separated by any "saddle" or syncline of sufficient depth to actually separate the producing sands in the two fields if the sands be found to be producing. * * *

Unless approval of assignment of the said McGrath permit to the said J. G. Wheeler, and the extension of said permit is granted, it appears highly improbable and almost impossible for affiant and his associates to procure any further drilling to test the Geary field or North Geary field. That affiant and his associates have expended great amounts of money in their efforts to

procure the drilling and testing of said fields, and have heretofore procured the expenditure of enormous sums of money in said fields; and that the present negotiations appear to affiant to be the last chance to procure the drilling and testing of the said Geary field, and such test depends upon the procuring of the extension of the said McGrath permit and the approval of the assignment thereof to the said J. G. Wheeler.

Under departmental rules and regulations in pursuance of the general leasing act, the recommendation of the Director of the Geological Survey and the decision of the Commissioner of the General Land Office are correct. Since it is not shown that the test well and the permit area in question are actually on the same geologic structure, extension of time can not be granted on the ground of a test of one structure common to both. On the other hand, if it can be said that structural relations are not known, nevertheless extension can not be granted because the greater portion of the permit area is more than three miles distant from the test well.

But the department has for some time been considering the need of modifying Circular No. 1041 to the extent that a permit holder will be given the benefit of contribution to the cost of a test well if any portion of his permit area, on which portion he could lawfully drill, lies within three miles from the test well. Such modification is just and proper when it is considered that one permit may contain scattered tracts within the limits of a township—that is, an area six miles square—and that drilling upon any portion is considered sufficient for compliance with the terms of the permit, which may mean that part of the permit area will lie not less than six miles from the point of drilling. Of course, this applies only where the Geological Survey is without sufficient data as to structures.

In the present case the department is satisfied from the showing made that definite knowledge is wanting as to whether the NE. ¼ NW. ¼ Sec. 32, T. 34 N., R. 77 W., and the permit area in question are on different structures. Since that is not known, resort will be had to the three-mile rule. The NE. ¼ Sec. 23, and W. ½ Sec. 34, T. 34, N., R. 78 W., of the permit area are within three miles from the test well, and therefore this permit will be given the benefit of contribution to the test well.

The decision appealed from is reversed. The assignment, which appears to be regular, is approved and extension of time within which to comply with paragraph 2 of the permit is hereby granted until December 31, 1927. The case is closed and the record is returned to the General Land Office.

Circular No. 1041 is modified as hereinbefore stated.

Reversed.

FUR FARMING IN ALASKA

REGULATIONS

[Circular No. 1108]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 22, 1927.

REGISTER AND DIVISION INSPECTOR,
ANCHORAGE, ALASKA;
REGISTERS AND RECEIVERS,
FAIRBANKS AND NOME, ALASKA:

The act of July 3, 1926 (44 Stat. 821), entitled "An Act To provide for the leasing of public lands in Alaska for fur farming, and for other purposes," provides:

That the Secretary of the Interior, in order to encourage and promote development of production of furs in the Territory of Alaska, is hereby authorized to lease to corporations organized under the laws of the United States, or of any State or Territory thereof, citizens of the United States, or associations of such citizens, public lands of the United States in the Territory of Alaska suitable for fur farming, in areas not exceeding six hundred and forty acres, and for periods not exceeding ten years, upon such terms and conditions as he may by general regulations prescribe: *Provided*, That where leases are given hereunder for islands or lands within the same such lease may, in the discretion of the Secretary of the Interior, be for an area not to exceed thirty square miles: *Provided further*, That nothing herein contained shall prevent the prospecting, locating, development, entering, leasing, or patenting of the mineral resources of any lands so leased under laws applicable thereto: *And provided further*, That this act shall not be held nor construed to apply to the Pribilof Islands, declared a special reservation by the act of Congress approved April 21, 1910: *And provided further*, That any permit or lease issued under this act shall reserve to the Secretary of the Interior the right to permit the use and occupation of parts of said leased areas for the taking, preparing, manufacturing, or storing of fish or fish products, or the utilization of the lands for purposes of trade or business, to the extent and in the manner provided by existing laws or laws which may be hereafter enacted.

SEC. 2. That the Secretary of the Interior is hereby authorized to perform any and all acts, and to make such rules and regulations as may be necessary and proper, for the purpose of carrying the provisions of this act into effect, including provisions for the forfeiture of any lease for failure to stock the same with fur-bearing animals within a period of one year from the date of the lease, or in the event of the devotion of the lease area primarily to any purpose other than the rearing of such fur-bearing animals.

The following rules and regulations will govern the issuance of leases under said act:

Applications for leases, addressed to the Commissioner of the General Land Office, should be filed in duplicate in the proper district land office. After assignment of a serial number and due notation thereof one copy should be forwarded to the General Land Office

and the other to the division inspector at Anchorage, Alaska. A status report should be furnished with each. No specific form of application is required and no blanks will be furnished therefor. Applications should cover, in substance, the following points and be under oath:

(*a*) Applicant's name and post-office address.

(*b*) Proof of citizenship of applicant; if an association of individuals, proof of citizenship of each member thereof; and if a corporation, a certified copy of the articles of incorporation must be furnished.

(*c*) Description of the land for which the lease is desired, by legal subdivision if surveyed, and by metes and bounds if unsurveyed. In order to properly identify unsurveyed lands, if practicable, the metes and bounds description should be connected by course and distance with some corner of the public land surveys and their position with reference to rivers, creeks, mountains or mountain peaks, towns, islands, or other prominent topographical points or natural objects or monuments should be given.

(*d*) The approximate acreage if the application is for unsurveyed land.

(*e*) Two references as to applicant's reputation and business standing.

(*f*) The kind or kinds of fur-bearing animals to be raised and if foxes whether silver, blue, or white.

(*g*) The number of fur-bearing animals the applicant expects to have on the leased land within one year from the date of the lease.

(*h*) A showing that the applicant has a permit to take animals with which to stock the leased land.

(*i*) A statement as to whether the land is occupied, claimed, or used by natives of Alaska or others, and if so, the nature of the use and occupancy.

Anyone who in good faith is occupying an island or other tract of land for the purpose of raising fur-bearing animals and who was unable to obtain a permit or lease because of lack of legal authority shall have a preferred right to file an application for a lease at any time within six months from the date of these regulations. An applicant claiming such preference right must state fully the facts upon which this claim is based.

No lease under this act for the purpose of raising beavers shall be granted on any area already occupied by a beaver colony and no such lease shall be granted on streams or lakes which will interfere with the spawning grounds of salmon.

When the copy of the application is received by the division inspector he will cause an investigation to be made and report fully to the Commissioner of the General Land Office as to the improvements, if any, existing on the lands, as to their use and occupancy, and as to the feasibility of granting the lease.

Upon the issuance of a lease under this act the register of the United States district land office for the district within which the leased land is situated will furnish the newspaper nearest said land a statement of the issuance of the lease, containing the name of the lessee and a description of the leased land, such statement to be published as an item of news.

Every lessee under this act shall pay to the lessor in advance a minimum rental of $25 per annum, on leases for all tracts up to and including 640 acres, and a minimum of $50 annual rental on leases of tracts exceeding 640 acres, and shall pay a maximum rental equal to a royalty of 1 per cent on the gross returns derived from the sale of live animals and pelts, if the amount thereof exceeds the minimum rental mentioned, such yearly rental to be credited against the royalties as they accrue for that year.

A lease under this act will be subject to cancellation by the Secretary of the Interior for failure of the lessee to comply with any of the conditions enumerated therein or to exercise due diligence in raising the kind or kinds of fur-bearing animals specified in the lease or for the devotion of the leased area primarily to any purpose other than the raising of fur-bearing animals.

A lease will be automatically canceled for failure of the lessee to place on the leased area the number and kind of fur-bearing animals specified in the lease within a period of one year from the date of said lease as follows: When the lease embraces an area not exceeding 640 acres not less than two pairs (two males and two females) of such animals shall be placed on the land within the year, four pairs on areas between 640 and 3,000 acres, and six pairs on areas exceeding 3,000 acres.

Leases under this act, forms for which will be furnished you, will be in substance as appended hereto.

THOS. C. HAVELL,
Acting Commissioner.

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

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
WASHINGTON, D. C.

SERIAL _____

LEASE OF LANDS FOR FUR FARMING UNDER THE ACT OF JULY 3, 1926 (44 STAT. 821)

This indenture of lease, entered into, in triplicate, as of the _____ day of _____, by and between the United States of America, party of the first part, hereinafter called the lessor, acting in this behalf by the Secretary of the Interior, and _____

_____

party of the second part, hereinafter called the lessee, under, pursuant, and

subject to the terms and provisions of the act of Congress approved July 3, 1926 (44 Stat. 821), entitled "An Act To provide for the leasing of public lands in Alaska for fur farming, and for other purposes," hereinafter referred to as the act, which is made a part hereof,

Witnesseth:

SEC. 1. *Purposes.*—That the lessor, in consideration of rents and royalties to be paid and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege of raising and propagating _____ on the following described tract of land situated in the _____ and more particularly described as follows:

_____

_____

_____

together with the right to construct and maintain thereon all buildings, plants, or other structures necessary to the full enjoyment thereof, for a period of _____ years, with the preferential right in the lessee to renew this lease for successive periods of _____ years, upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods.

SEC. 2. In consideration of the foregoing the lessee hereby agrees:

(*a*) To pay the lessor in advance a minimum yearly rental of $_____ and a maximum yearly rental equal to a royalty of 1 per cent on the gross returns derived from the sale of live animals and pelts where the same exceeds the minimum rental above mentioned, such yearly rental to be credited against the royalties as they accrue for that year.

(*b*) To begin the actual operation of a fur farm on the leased land, by taking possession thereof within six months from the execution of this lease and by placing thereon not less than _____ pairs of _____ within one year and not less than _____ pairs of _____ within two years from the date of such execution; also by placing thereon such improvements as may be necessary to show good faith and thereafter develop the industry with reasonable diligence.

(*c*) The lessee must furnish affidavits, at the end of one and two years, respectively, corroborated by one or more witnesses, specifying the date when animals were placed on the land, and the number and kind thereof.

(*d*) To mark the boundaries of the leased land by posting notices containing a description of the land, the name of the lessee, and a statement that it is occupied as a fur farm, every one-half mile if the lease is for land on the mainland and in conspicuous places at each boat landing if for an island.

(*e*) To keep an accurate record in a book or books of all his fur-farming operations, including the number, kind, and sex of fur-bearing animals with which the leased land is stocked; the date when the stock was placed thereon, the number captured thereon for propagation and if removed elsewhere, the names and addresses of the purchasers, the price received therefor, with dates of each transaction; the number of skins of each kind of fur-bearing animal taken during each calendar year, together with the price received therefor; also, in so far as practicable, the number born during each calendar year and the number at the expiration of each calendar year of fur-bearing animals at large and in captivity, and a list and description of the improvements placed on the leased land during each calendar year.

(*f*) To submit a report to the Commissioner of the General Land Office by June 30, of each year, giving the information contained in the record required to be kept by the preceding paragraph, to be accompanied, where required, by a certified check or post-office money order made payable to the Commissioner

of the General Land Office, to be equal in amount to the difference between the annual rental already paid, and the amount of the royalty of 1 per cent on the gross returns, where the same exceeds such minimum rental, as provided in section 2 (*a*) hereof.

(*g*) Not to kill any game animals or birds or obtain birds' eggs and feed same to fur-bearing animals and to exercise all reasonable precaution to conserve game and wild birds on the lands covered by this lease and to strictly observe the Federal and territorial game and fur laws and regulations.

(*h*) To furnish the Commissioner of the General Land Office such further information in addition to that hereinbefore specified, as may be desired in regard to the operations and business conducted under the authority of this lease.

(*i*) Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior, first had and obtained.

(*j*) To record this lease with the recording officer for the judicial district within which the leased land is situated and to keep a copy of the lease in his possession at all times.

SEC. 3. The lessor expressly reserves:

(*a*) The right to permit prospecting, locating, development, entering, and leasing of the mineral resources of any of the lands embraced in this lease and the right to patent such resources, under laws applicable thereto.

(*b*) The right to permit the use and occupation of parts of the land embraced in this lease for the taking, preparing, manufacturing, or storing of fish or fish products or the utilization of the lands for purposes of trade or business to the extent and in the manner provided by existing laws or laws which may be hereafter enacted, as provided by the act.

SEC. 4. The lessee expressly agrees that authorized representatives of the lessor shall at any time, except at such times as the presence of persons other than the caretakers would be recognized as detrimental to the welfare of propagating operations, have the right to enter the leased premises for the purpose of inspection and shall have free access to books containing the records of the operations under the authority of this lease.

SEC. 5. The lessee also further agrees that he or his employees shall not molest totem poles, native burying grounds or improvements, nor interfere with natives cultivating lands which they may have been hitherto accustomed to cultivate.

SEC. 6. It is further understood and agreed—

(*a*) That the lessee shall not sell or remove for use elsewhere any timber growing on the leased land, but may take such timber thereon as may be necessary for the erection and maintenance of improvements required in the operation of this lease and for fuel purposes.

(*b*) That this lease is granted subject to valid existing rights.

(*c*) That upon the termination of this lease by expiration or forfeiture thereof pursuant to section 7 hereof in the absence of an agreement to the contrary, if all rental and royalty charges due the Government have been paid, the lessee may, within a reasonable period, to be determined by the lessor, remove all property, including fur-bearing animals belonging to him, together with any buildings or improvements of any kind that may have been erected by him, but if not removed within the period of time specified by the lessor, such property, buildings, and improvements shall become the property of the United States.

SEC. 7. If the lessee shall fail to pay the rental and royalty as herein specified or shall fail to comply with the provisions of the act or make default in the

performance or observance of any of the terms, covenants, and stipulations hereof or of the general regulations promulgated and in force at the date hereof and such default shall continue after service of written notice thereof by the lessor, then the lessor may, in his discretion, terminate and cancel this lease.

SEC. 8. It is also further agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and that the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat. 1088), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

In witness whereof:

THE UNITED STATES OF AMERICA,
By _____,
Secretary of the Interior.

_____ _____.

_____ _____.

Witness to signature of—

_____

_____

_____

J. F. ROSE

Decided February 2, 1927

PATENT—RECORDS—COMMISSIONER OF GENERAL LAND OFFICE—JURISDICTION.

Where a patent, after its execution, has been canceled and mutilated by the General Land Office, without the consent of the grantee, and a request for its delivery for recordation on the county records is made, the patent should be delivered with a notation over the signature and seal of the Commissioner of the General Land Office to the effect that the cancellation and mutilation were erroneous and without authority.

PRIOR DEPARTMENTAL INSTRUCTIONS MODIFIED.

Instructions of February 28, 1881 (8 C. L. O. 10), modified.

FINNEY, *First Assistant Secretary:*

This is an appeal by J. F. Rose from a decision of the Commissioner of the General Land Office dated December 4, 1926, denying his request for the issuance of a patent for that portion of the NW. ¼ SW. ¼ Sec. 7, T. 49 N., R. 17 W., 5th P. M., Missouri, not in conflict with the patented claim of Antoine Gautier.

It appears that on November 12, 1833, the board of commissioners appointed pursuant to the act of July 9, 1832 (4 Stat. 565), for the purpose of passing on private land claims in the State of Missouri decided that the claim of Antoine Gautier should be confirmed for 4,000 arpents, in accordance with his application dated November 29, 1796. The claim was surveyed in March, 1848, and the plat thereof approved December 12, 1848. It was designated as Survey No. 3327,

embraced land in Ts. 49 and 50 N., Rs. 17 and 18 W., 5th P. M., and was confirmed by the act of July 4, 1836 (5 Stat. 126). Patent issued September 3, 1860. According to the plat of survey, the claim of Gautier covers most of the NW. ¼ and a part of the NW. ¼ SW. ¼ Sec. 7, T. 49 N., R. 17 W., 5th P. M.

On September 1, 1837, William B. Gibson made cash entry No. 15891 at the Fayette office for NW. ¼ and NW. ¼ SW. ¼ Sec. 7, T. 49 N., R. 17 W., 5th P. M. (215.10 acres), describing the tract in accordance with a plat of survey made in November, 1816. Patent issued to Gibson on November 10, 1841, but was not delivered. It was returned to the General Land Office on March 26, 1852, and pursuant to a letter addressed to the Boonville land office under date of November 8, 1879, the final certificate issued to Gibson was noted as canceled because of conflict with survey No. 3327, and across the face of the patent was indorsed the following:

Canceled. Conflicts with Survey No. 3327, private claim of Antoine Gautier. See letter "B" November 8, 1879. S. W. Clark, Recorder, G. L. O.

A like notation was made on the record of the patent. In addition to the notation on the patent, it was mutilated by cutting the parchment across the signatures thereto and across the official seal.

In the decision appealed from the Commissioner conceded that the attempt to cancel the entry and patent of Gibson was ineffective, citing *Bicknell* v. *Comstock* (113 U. S. 149), and that the present owner of any portion of the land covered by the Gibson entry and patent is entitled to delivery of the patent under the ruling of the Supreme Court of the United States in *United States ex rel. McBride* v. *Schurz* (102 U. S. 378). Although refusing to issue a new patent for that portion of the land now owned by Rose, the Commissioner offered to surrender the patent for recordation after he had indorsed thereon a notation in accordance with the instructions of February 28, 1881 (8 C. L. O. 10).

The instructions referred to directed that in cases such as the court considered in *United States ex rel. McBride* v. *Schurz*, *supra*, the patent should be delivered after a notation thereon of the following, to be dated and signed by the Commissioner:

Delivered under Secretary's instructions of February 28, 1881, in accordance with the decision of the United States Supreme Court in *McBride* v. *Schurz*, October term, 1880.

The Commissioner correctly denied the application for a new patent. Having no jurisdiction over the land, the Land Department could not assume to issue a patent therefor.

However, it is the opinion of this department that the notation provided for in the instructions of February 28, 1881, *supra*, is too

brief and that a notation in substantially the following form should be attached to the patent, over the signature and seal of the Commissioner of the General Land Office:

The notation of cancellation of the attached patent issued to William B. Gibson on November 10, 1841, and its mutilation, were without the consent of the grantee and erroneous, and under the decision of the Supreme Court of the United States in *Bicknell* v. *Comstock* (113 U. S. 149) do not affect the validity of the patent, which is delivered for recording on the county records pursuant to the decision of the Supreme Court of the United States in *United States* v. *Schurz* (102 U. S. 378).

A like notation should be attached to the record of the patent.

The case is remanded for action in accordance with the foregoing.

Remanded.

GEORGE J. FRYMUTH AND RALPH BLAIR

Decided February 5, 1927

OIL AND GAS LANDS—PROSPECTING PERMIT—SCHOOL LANDS—WITHDRAWAL—NEW MEXICO.

Permits will not be granted to prospect for oil and gas on unsurveyed school sections, withdrawn on behalf of a State under the act of August 18, 1894, in the absence of a classification of the lands by the Geological Survey as prospectively valuable for oil and gas.

FINNEY, *First Assistant Secretary*:

On January 14, 1927, the Commissioner of the General Land Office recommended the granting of two oil and gas prospecting permits as follows:

To George J. Frymuth on an application (Las Cruces 032544) filed July 9, 1926, all of Secs. 15, 16, 31, and 32, unsurveyed, T. 24 S., R. 7 E., N. M. P. M., New Mexico.

To Ralph Blair on an application (Las Cruces 032554) filed July 13, 1926, the N. ½, SE. ¼ SW. ¼, SE. ¼ Sec. 15, NE. ¼ NE. ¼ Sec. 20, T. 24 S., R. 8 E., all of Secs. 1, 2, and 36, unsurveyed, T. 24 S., R. 7 E.

The records of the General Land Office show that Secs. 2, 16, 32, and 36, T. 24 S., R. 7 E., were on May 14, 1923, withdrawn for the State of New Mexico, under the act of August 18, 1894 (28 Stat. 372, 394), and that on August 2, 1923, the Commissioner advised the governor of said State, in regard to the withdrawal, that "Evidence (of publication) is satisfactory and lands above described are hereby declared to have been effectively withdrawn."

Said act of August 18, 1894, which is extended to New Mexico by section 11 of the act of June 20, 1910 (36 Stat. 557, 565), provides that lands "shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, * * *."

The department has held that school sections can thus be withdrawn. *Ensign* v. *State of Montana* (34 L. D. 433); *Williams* v. *State of Idaho* (36 L. D. 20).

The withdrawal which has been declared to be effective should not be rendered partially ineffective through the granting of prospecting permits in the absence of classification of the land by the Geological Survey as prospectively valuable for oil and gas. In cases of settlers upon unsurveyed lands or lands suspended for survey, the procedure directed in section 12 (c) of the oil and gas regulations approved March 11, 1920 (47 L. D. 437), is followed when applications for permits under section 13 of the leasing act are filed. (Circular No. 932, 50 L. D. 400.)

At the request of the department the Acting Director of the Geological Survey has, under date of January 27, 1927, made a report upon, and classification of, these school sections as follows:

> The records of the Geological Survey show that the land listed is in the southern part of the Tularosa basin, a broad valley between the San Andres Mountains on the west and the Hueco Mountains on the east. The valley is filled to an unknown depth with deposits of sand, gravel, and clay, which permit no observation of stratigraphic and structural conditions in the bedrock underneath. Inference based on evidence disclosed on the flanks of the distant mountain ranges mentioned provides no warrant for an opinion that the conditions, either stratigraphic or structural, affecting the land described are favorable to the occurrence or accumulation of oil or gas in commercial quantities.
>
> I accordingly classify this land under paragraph 12 (c) of the oil and gas regulations (47 L. D. 437), as without prospective oil or gas value.

Inasmuch as these school sections were reserved from any adverse appropriation and as they have been classified as being without prospective value for oil or gas, the department would not be warranted in granting any permits covering said sections.

The department therefore declines to grant any permits as recommended. The applications are finally rejected as to the school sections and the papers are returned for appropriate action in harmony with the ruling herein.

Reversed and remanded.

CITY OF TUCSON v. DODSON

Decided February 10, 1927

TIMBER AND STONE ENTRY—TOWN SITE—EVIDENCE.

Land which is shown to be more valuable at date of application for townsite purposes than for the stone it contains is not subject to acquisition under the timber and stone law.

FINNEY, *First Assistant Secretary:*

Christine M. Dodson has appealed from the decision of the Commissioner of the General Land Office dated July 22, 1926, holding for cancellation her timber and stone entry 056016, for the NW. ¼ SW. ¼ Sec. 14, T. 14 S., R. 13 E., G. and S. R. M., Phoenix, Arizona, land district, as the result of a contest against the same by the city of Tucson, Arizona.

The appellant is the widow of James R. Dodson, who also made timber and stone entry for 160 acres of adjoining land, and whose entry, like her own, was the subject of a contest by the city of Tucson. These cases well might have been consolidated for trial, as their facts are almost identical and as nearly all the witnesses who testified in one of them also testified in the other. The testimony at best was largely cumulative and when the two records, which aggregate 561 closely typed pages, are taken together, they present several hundred pages of needless and tedious repetition. All the testimony and exhibits submitted, however, have been carefully examined.

On November 15, 1923, Christine M. Dodson made application to purchase the land in controversy under the timber and stone act of June 3, 1878 (20 Stat. 89). The land was appraised at $15 per acre, and that amount was paid by the applicant. Final proof was submitted on July 12, 1924. On March 13, 1925, the contest now under consideration was filed by the city of Tucson.

Nine charges were contained in the contest affidavit, which may be summarized as having stated that the land in question was not chiefly valuable for timber or stone; that the timber and stone application was made in an attempt to acquire land which had been used by the public for recreational purposes for many years; and that the application sought to acquire land already appropriated by the students of the University of Arizona through the construction and maintenance thereon of a symbolic letter "A" built of stone.

The case was heard during October, 1925, and resulted in a decision by the register of the local office in favor of the city of Tucson. The action of the local office was affirmed on appeal by the Commissioner in his decision of July 22, 1926. The Commissioner found that the preponderance of evidence showed that the land was not chiefly val-

uable for stone, as it was worth $50 an acre for other purposes. What those purposes were was not specifically stated.

The testimony showed that at the time of filing her application Mrs. Dodson was the wife of James R. Dodson, a real estate agent and dealer who was engaged in business in the city of Tucson, and who was a member of a firm known as the Benedict Realty Company. The land was shown to Mrs. Dodson by her husband, and it was under his advice that she filed her application. He accompanied her to Phoenix, Arizona, at the time her application was filed, and gave his personal check for filing fees. Prior to the date of her application on, to wit, November 28, 1922, her husband had made the timber and stone application for 160 acres of adjoining land already referred to.

The land, which is situated on the slope of a mountain known as Sentinel Peak, was shown to have no timber upon it, and to have no greater value for stone than that which attached to miles upon miles of land lying on the slopes of the mountain range of which Sentinel Peak is a part, except such greater value as its proximity to the city of Tucson, a town of approximately 33,000 inhabitants, lent to it. Such value, however, was shown to be minimized and practically eliminated by the existence, but a short distance away and a little nearer to town, of a quarry which had been owned and operated by a Mr. Griffith for 20 years before the date of the hearing, and which had acquired a monopoly of the market for quarried and crushed stone in its vicinity. It was shown that the demand for stone was limited and that the Griffith quarry was not always in operation, and that in the 20 years of its existence only about an acre of surface had been covered. It was also shown that the owners of a neighboring quarry, known as the Welch quarry, after an unsuccessful attempt to operate in competition with Griffith, had found that there was not sufficient demand to support the two enterprises and had shut down; that operations had been permanently abandoned; and that the plant and the equipment were for sale without any purchaser in prospect.

It appeared on the other hand that the land was located near the city of Tucson, and very close to a subdivision known as Menlo Park, in which the entrywoman resided and which had been promoted and which had been partly owned by her late husband; that the land was capable of subdivision for building purposes; and that its value if subdivided would be from $75 to $200 an acre, as estimated by various witnesses. It was shown that 95 acres of adjoining land had been priced to the city of Tucson at $5,000 by an organization known as the Tucson Farms Company, which claimed that this price was less than the real value of the land, and that certain citizens of Tucson had offered that company $50 an acre for

20 acres, which also adjoined the land in controversy, and which covered the summit of Sentinel Peak, but that the offer had not been accepted at the time of the hearing. It was shown that the land commanded an exteneded view of the city of Tucson and the surrounding country, and that it embraced a portion of the slope of Sentinel Peak which had been used for many years by the citizens of Tucson as a public pleasure ground; that the land was rich in historic associations; and that Sentinel Peak and its slopes were regarded with veneration and affection by the people of the community.

The testimony presents other phases of the case which have not been referred to, as it is too voluminous to quote in detail, but the statements just made outline what the department considers as its most essential features. It is enough to say that taken as a whole it has convinced the department that at the date of the entrywoman's application the land had, and now has, a greater value for townsite purposes than for the stone it contains. This being the case the land was not subject to sale under the timber and stone law.

The decision appealed from is

Affirmed.

ZIGELHOFER v. REYNOLDS

Decided February 14, 1927

CONTEST—CONTESTANT—NOTICE—PRACTICE.

Rule 10 of Practice merely fixes the time limit for mailing of notices at not to exceed 10 days after the date of first publication; it does not compel a contestant to wait until the notice is published, but he may, at any time after its issuance and within 10 days after its first publication, mail the notices required.

CONTESTS—CONTESTANT—NOTICE—PRACTICE.

Where a contestant is misled by an officer of the Land Department as to the Rules of Practice pertaining to the service of notice, and cancellation of the entry can not be sustained because of improper service of notice, the contest will not be dismissed but the contestant will be permitted to proceed *de novo*.

FINNEY, *First Assistant Secretary:*

This is an appeal by Charles P. Zigelhofer from a decision of the Commissioner of the General Land Office dated September 1, 1926, holding that he had not complied with the Rules of Practice in serving notice of his contest against the homestead entry of Vaughn B. Reynolds, made October 29, 1921, for SW. ¼ Sec. 28, T. 12 N., R. 80 W., 6th P. M., Colorado, and dismissing the contest, which charged abandonment.

Notice of the contest for service by publication was issued April 5, 1926. It was published in a newspaper published in the county wherein the land lies in the issues of April 15, 22, and 29, and May 6, 1926. Proof of such publication was filed May 12, 1926. On the same date there was filed an affidavit of posting of the notice on the land on April 17, 1926, and an affidavit by the attorney for contestant to the effect that she had mailed a copy of the notice by registered letters addressed to the entryman at Cowdrey, Colorado, and Boulder, Colorado, "the receipt for which is hereto attached." Attached to the affidavit are two unclaimed registered letters addressed to entryman and the postmasters' receipts therefor. One of the letters, containing a copy of the notice of contest for personal service, issued March 10, 1926, and a copy of the affidavit of contest, were mailed March 15, 1926, addressed to Boulder, Colorado, the address given when the entry was made. The other letter was mailed April 6, 1926, addressed to Cowdrey, Colorado, the post office nearest the land, and contained a copy of the notice issued April 5, 1926, and a copy of the affidavit of contest.

The Commissioner held, in effect, that the mailing of notices prescribed by the second paragraph of Rule 10 of Practice can only be performed within ten days after the first publication of the notice.

The paragraph referred to provides:

> 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.

The department is of opinion that the paragraph was not properly construed by the Commissioner. It merely fixes the time limit for the mailing of the notices at not to exceed ten days after the date of the first publication. A contestant need not wait until the notice is published, but may, at any time after its issuance and within ten days after its first publication, mail the notices required.

When the affidavits were filed on May 12, 1926, they should have been scrutinized by the register and the defects pointed out, in order that the contestant could take proper action. That the proof of service was inacceptable has been indicated.

In the first place, the affidavit of mailing the notice did not allege that a copy of the affidavit of contest was inclosed with the notice as published. Second, a copy of the notice as published was not sent to the entryman's record address, Boulder, Colorado. The copy of the notice mailed on March 15, 1926, to Boulder, Colorado, was issued for personal service.

The Rules of Practice were not complied with, and the cancellation of the entry under the contest would be erroneous.

Inasmuch as the action of the register misled the contestant, and the Commissioner of the General Land Office misconstrued the provisions of Rule 10 of Practice, the department is of opinion that the contest should not be dismissed. *Kennedy* v. *Severance* (44 L. D. 373). The contestant will be allowed to proceed *de novo*.

The decision appealed from is modified to agree with the foregoing.

Modified

BONDS WITH OIL AND GAS PROSPECTING PERMITS—SECTION 4(h), CIRCULAR NO. 672, MODIFIED—CIRCULAR NO. 754 REVOKED

INSTRUCTIONS

[Circular No. 1111] [1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 21, 1927.

REGISTERS, UNITED STATES LAND OFFICES:

Hereafter applicants for oil and gas prospecting permits under the act of February 25, 1920 (37 Stat. 437), will not be required to furnish the bond at the time of filing of the application for the permit, conditioned against failure of the permittee to repair damage to the oil strata or deposits resulting from improper methods of operation, as provided by section 4 (h) of Circular No. 672 (47 L. D. 437) and Circular No. 754 (48 L. D. 112). Such applicants, however, will be required, prior to the issuance of permit, to furnish bond in the sum of $1,000, or such other amount as may be fixed, in special cases where a permit application embraces reserved deposits in lands theretofore entered or patented with reservation of the oil and gas to the United States, together with the right to prospect for, mine, and remove the same pursuant to the act of July 17, 1914 (38 Stat. 509), or where the lands constitute a portion of a reclamation project or are included in a reclamation homestead entry.

Before a permittee, or any one claiming through or under him, shall begin drilling a test well or wells upon the land embraced in an oil and gas permit, he shall give notice to the supervisor of oil and gas operations, Geological Survey, of the district in which the land is situated of his intention to drill, submitting his drilling plan for approval, together with a bond, with qualified corporate surety, in the sum of $5,000 conditioned against failure, (*a*) to carry on all

[1] See interpretative instructions of March 18, 1927, page 41.

operations in accordance with approved methods and practice and in conformity with the operating regulations to the satisfaction of said supervisor; (*b*) to carry out, at the expense of the permittee, all reasonable orders of the Secretary of the Interior, or his authorized representatives; (*c*) to take all reasonable precautions to prevent waste of oil or gas, damage to formation or deposits, injury to life or property, or economic waste; and (*d*) to repair promptly, so far as possible, any damage to mineral deposits or mineral-bearing formations resulting from his operations.

The notice of intention to drill and drilling plan must be furnished in triplicate. Blank forms of such notice and bond can be obtained from the supervisor on request. If the plan is approved and the bond is acceptable, the supervisor will return to the permittee one copy of the notice with his approval endorsed thereon, upon receipt of which drilling may be commenced and carried on in accordance with the approved plan.

The bond will be transmitted by the supervisor to the Commissioner of the General Land Office for consideration and filing.

All instructions and regulations in conflict herewith are modified to conform hereto, and Circular No. 754 is hereby revoked.

You will give such publicity hereto as may be possible without expense to the Government.

WILLIAM SPRY,
Commissioner.

I concur:
GEO. OTIS SMITH,
Director, Geological Survey.
Approved:
E. C. FINNEY,
First Assistant Secretary.

BONDS WITH OIL AND GAS PROSPECTING PERMITS—PARAGRAPH 1, CIRCULAR NO. 1111, AMPLIFIED

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 18, 1927.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Paragraph 1, Circular No. 1111, (52 L. D. 40), relating to bonds in connection with oil and gas permits, seems to be not entirely clear, in that at least some parties in interest have the impression that thousand-dollar bonds are still required to be furnished, not at the time of filing of application, but prior to the issuance of the permit, and that in special cases where the application embraces reserved deposits, bonds are to be in such other amount as may be fixed.

As you are aware, that is not the purpose or intention. The purpose is to do absolutely away with the requirement for a thousand-dollar bond heretofore required in connection with oil-permit applications. No such bond will be required, either at the time of filing the application or afterwards. Bonds will be required only in two classes of cases:

(1) Where the permit is upon lands the surface of which has been disposed of by the United States under applicable laws with the oil and gas deposit reserved to the United States. In such cases, a bond will be exacted for the protection of the surface owner.

(2) All permittees before beginning to drill upon the land, or, in other words, at the time when they are ready to begin drilling, will be required to furnish a $5,000 bond for the purposes stated in paragraph 2, Circular No. 1111.

I suggest that registers of local land offices and others interested in the administration of this act be furnished a copy of this letter.

E. C. FINNEY,
First Assistant Secretary.

SALE OF DEAD OR DOWN AND FIRE KILLED OR DAMAGED TIMBER—PARAGRAPH 2, CIRCULAR NO. 1093 (51 L. D. 574), AMENDED

INSTRUCTIONS

[Circular No. 1112]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 25, 1927.

DIVISION INSPECTORS:

Circular No. 1093 of September 11, 1926 (51 L. D. 574), is hereby amended by substituting for paragraph 2 thereof, the following:

2. After consideration of the report, the Commissioner of the General Land Office will, if deemed advisable, direct the division inspector to offer the timber for sale under sealed bids by advertising for a period of thirty (30) days, as follows:

(*a*) In cases of small quantities of timber amounting in value to $1,000 or less, the sale should be advertised by the posting of notices only.

(*b*) Where larger quantities of timber are involved, the sale should be advertised in one or two representative newspapers of general circulation in the field division wherein the timber to be sold is situated, once a week for four weeks, if in a daily paper, or if in a weekly

paper, for four consecutive weeks, next preceding the time set for the opening of the bids. And if the proposed sale be for 20,000,000 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. During the period of advertising the division inspector will also post copies of the advertisement where they will attract the notice of the general public.

WILLIAM SPRY,
Commissioner.

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

RIGHT OF A DESERTED WIFE TO CLAIM CREDIT FOR THE MILITARY SERVICE OF HER HUSBAND UPON SUBMISSION OF HOMESTEAD FINAL PROOF

Instructions, February 25, 1927

HOMESTEAD ENTRY—SETTLEMENT—DESERTED WIFE—MILITARY SERVICE—FINAL PROOF.

Under the act of October 22, 1914, a deserted wife is entitled to credit for the military service of her husband when submitting final proof upon an entry made by him or initiated by him as a settler, but the act has no application to a case where she makes entry in her own right.

HOMESTEAD ENTRY—DESERTED WIFE—FINAL PROOF—MILITARY SERVICE—FORFEITURE.

The perfection of a husband's homestead entry by a deserted wife pursuant to the act of October 22, 1914, does not operate, of itself, to restore his rights under the homestead laws, including the right to claim credit for military service.

FINNEY, *Assistant Secretary:*

In your [Commissioner of the General Land Office] letter of February 18, 1927, the department is requested to define the right of a deserted wife to claim credit for her husband's military service in cases where final proof is submitted under the act of October 22, 1914 (38 Stat. 766).

Under the act referred to the deserted wife is entitled to credit, upon final proof, for the husband's residence upon, cultivation, and improvement of the land; and, under the act of June 16, 1898 (30 Stat. 473), his military service is "*equivalent to all intents and purposes*" [italics supplied] to residence upon and cultivation of land entered or settled upon by him. That act applies where the settlement or entry is made by the husband, and all credits to which he is

entitled are available upon final proof. The settlement or entry, though completed by the deserted wife, remains his, and his rights under the homestead law, including the right to claim credit for military service, are not restored by abandonment of his family and the homestead.

The foregoing is in harmony with the decision in *Elizabeth J. Vaughn* (51 L. D. 189).

The rule is different where a wife, deserted by her husband, settles upon or enters, under the homestead law, a tract of public land in her own right. In proper cases the department has treated the desertion as removing the disqualification of coverture. A settlement or entry so made is the wife's, and the act of October 22, 1914, *supra*, has no application.

It is to this class of cases that departmental letter of April 21, 1921 (unpublished) should be applied. In that letter the distinction between settlements and entries made by the husband and those made by the deserted wife was not considered or defined.

I. A. SMOOT

Decided March 5, 1927

MINERAL LANDS—POTASH LANDS—PATENT—OIL AND GAS LANDS—PROSPECTING PERMIT.

A patent issued under the act of October 2, 1917, confers title to the surface and to everything contained within the land, and precludes the granting of a permit to prospect for oil and gas thereupon under the act of February 25, 1920.

POTASH LANDS—PROSPECTING PERMIT—SECRETARY OF THE INTERIOR—WORDS AND PHRASES—STATUTES.

The words "authorized and directed" in section 1 of the act of October 2, 1917, are not to be construed as mandatory, but the same discretionary authority is conferred upon the Secretary of the Interior thereby to issue permits as that conferred upon him by section 13 of the act of February 25, 1920.

MINERAL LANDS—POTASH LANDS—OIL AND GAS LANDS—PROSPECTING PERMIT.

Permits may be issued to prospect for different minerals upon the same lands concurrently.

OIL AND GAS LANDS—GEOLOGICAL SURVEY—LAND DEPARTMENT—POTASH LANDS—PROSPECTING PERMIT—PATENT—WAIVER.

Where the Geological Survey has reported that lands have a prospective value for oil and gas, the department may, in the exercise of its discretionary authority, reject an application for a potassium permit under the act of October 2, 1917, if the right to select a one-fourth part for patent is not waived.

POTASH LANDS—PROSPECTING PERMIT—LEASE—PREFERENCE RIGHT—PATENT—WAIVER.

The department may issue a potassium permit under the act of October 2, 1917, carrying a preference right to a lease upon discovery for not to exceed one-fourth the area covered by the permit, with a provision that the permittee waive his right to a patent.

FINNEY, *First Assistant Secretary:*

I. A. Smoot has appealed from a decision of the Commissioner of the General Land Office requiring him, as a condition to favorable consideration of his application, Salt Lake City 036031, for a permit to prospect for potassium upon section 17, T. 23 S., R. 21 E., S. L. M., to waive any and all right to a patent for part, for which provision is made upon discovery in section 2 of the act of October 2, 1917 (40 Stat. 297), under which the application is made.

Section 17 aforesaid, and sections 20, 21, and 29 of the same township and range, theretofore embraced in an oil and gas prospecting permit which had been canceled, were on May 28, 1925, under departmental regulations of April 23, 1924 (Circular 929, 50 L. D. 387), thrown open for filing and a drawing in the event of competing applicants. Smoot, who had applied for section 17 and other tracts not within the order of restoration, drew No. 3 at the drawing held and was the first among applicants for section 17. All participants in the drawing had filed potassium permit applications, except Henry T. Jackson, whose application is for an oil and gas permit and who drew No. 10 and who at the time held an outstanding like permit upon the same geologic structure which had been held for cancellation. The grounds for exacting the waiver were that the Director of the Geological Survey had reported that the sections in question disclosed stratigraphic and structural conditions warranting their classification as prospectively valuable for oil and gas and that present knowledge of geologic conditions as to deposits of potassium on the land did not justify exclusive prospecting for that mineral. A recent report of the director in more detail expressed the conclusion as to section 17 that "Available evidence, therefore, in my opinion, indicates that the land described was known to have a prospective value for oil and gas as contemplated by paragraph 12 (c) of the oil and gas regulations, and to that extent properly subject to classification as oil and gas land on and prior to May 28, 1925."

Smoot has withdrawn his application for the other sections, insisting upon the right to a permit as to section 17, without waiver of patent, and assigned as error that under the circumstances disclosed concurrent permits for oil and gas and for potassium may not be granted for the same land; that Jackson is disqualified because of the provisions of section 27 of the leasing act forbidding the holding of more than one permit on the same geologic structure of an oil and

gas field; that he having drawn No. 3, his rights may not be restricted because of application No. 10 for oil and gas rights.

In the case of lands covered by an unperfected nonmineral entry, without reservation of oil and gas, the department has held in effect that a report of the Geological Survey to the effect that the land has a prospective value for oil and gas, has the force of impressing the land with a *prima facie* value for those minerals sufficient to require a consent from the entryman to a reservation of such minerals or assume the burden of proving the contrary (*Foster* v. *Hess*, 50 L. D. 276). The department has also held in its instructions of October 9, 1924 (50 L. D. 650), that there can be no room for the contemporaneous operation of the mining laws and one or other of the leasing acts with respect to the same lands, if known at the time a mining location is sought to be made thereof after the passage of the applicable leasing act, to be valuable on account of any minerals named in the acts, and the department would be constrained to hold that as to such lands, even if containing metalliferous mineral deposits, the mining laws have been repealed by the later acts, and would be unable to recognize any validity to a mining location made under the known conditions as stated above.

Although a potassium prospecting permit coupled with a right to a patent for lands valuable for potassium is not technically a mining location, yet the estate that passes under the patents in both cases is absolute and unrestricted. The underlying reason for the rule above referred to, as expressed in the decisions above cited "that a mineral patent if issued for the land would carry title to the surface and everything contained within the land and would defeat the right of the permittee during the period covered by his permit to prospect for oil and gas," applies with equal force to a patent issued pursuant to the provisions of the act of October 2, 1917.

True, in the case at bar, there is no paramount right in Jackson because he seeks oil and gas rights. The regulations above cited under which the drawing was made recognizes no preferred class among the participating applicants (see the unreported departmental decision of November 9, 1926, in the case of Charles E. White and Nina Williamson, A. 9465). Nevertheless, the views of the department above mentioned contemplate not merely situations where prior rights under oil and gas applications have been initiated but those where the vacant and unappropriated lands applied for are stamped with a prospective value for oil and gas and known to be such at the time a form of appropriation is attempted which entails, if perfected, the conveyance of an absolute estate.

In *Martin Wolfe* (49 L. D. 625) the department has construed the first clause of section 13 of the act of February 25, 1920, worded as follows:

That the Secretary of the Interior is authorized under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act a prospecting permit * * *

as conferring discretionary authority to grant or refuse an oil and gas prospecting permit provided for in that section, and the word "authorized" there used as not mandatory. The corresponding words in the first clause of section 1 of the act of October 2, 1917, are "authorized and directed." The word "directed" standing alone might imply something mandatory, but it must be taken with the context and the general scope and object of the provisions in order to ascertain the legislative intent. *Binney* v. *The Chesapeake and Ohio Canal Co.* (8 Pet. 201, 212). Considering the provisions of the acts of October 2, 1917, and the kindred act of February 25, 1920, their object and purpose, no intent on the part of Congress is perceived to withhold in the former act the executive discretion conferred in the latter. The department may, therefore, exercise its discretion where the lands have a *prima facie* value for oil and gas and reject the application for a potassium permit where the right to select a one-fourth part for patent is not surrendered.

The department has determined that it has authority to grant prospecting permits for different minerals specified in the above-mentioned acts to run concurrently upon the same area; that the issuance under the act here invoked of a patent is not mandatory; and that a potassium permit may issue carrying a preference right to a lease upon discovery for not to exceed one-fourth the area covered by the permit, upon lands embraced within a subsisting oil and gas prospecting permit, provided the permittee waives his rights to a patent (instructions of August 17, 1925, 51 L. D. 180). There is no legal impediment, and it is in furtherance of the objects of the leasing acts mentioned to annex the same conditions to the grant of a potassium permit, where the lands at the date of application therefor were known to have a prospective value for oil and gas.

The contention that the oil and gas applicant is disqualified for the reason above stated is without merit. The Commissioner indicated that action upon his application would be held in abeyance pending the disposition of his existing permit. An application for permit is a mere request that a license be granted and confers no interest in the land or mineral deposits applied for. *Enlow* v. *Shaw et al.* (50 L. D. 339). The restrictions in section 27 as to holding upon the same structure of more than one oil and gas permit apply to simultaneous, not successive, holdings. *Charles H. Loud, on rehearing* (50 L. D. 153).

No error is found in the Commissioner's decision, and it is therefore

Affirmed.

MISSOURI PACIFIC RAILROAD COMPANY

Instructions, March 14, 1927

RAILROAD GRANT—SUCCESSOR IN INTEREST.

Directions given for recognition of the Missouri Pacific Railroad Company as the successor in interest to the land-grant rights of the St. Louis, Iron Mountain and Southern Railway Company.

FINNEY, *First Assistant Secretary:*

February 2, 1927, the department denied the request of the Missouri Pacific Railroad Company that it be recognized as the successor in interest to the St. Louis, Iron Mountain and Southern Railway Company, in the approval of lists and issuance of patents on account of the grant to the latter company, the conclusion being that the evidence submitted did not justify such action.

You [Commissioner of the General Land Office] have now submitted additional evidence in support of the application, consisting of—

1. Certified copy of the order or final decree of the United States District Court for the Eastern Division of the Eastern District of Missouri, at St. Louis, dated December 21, 1916, directing the sale of the railroads and other property of the St. Louis, Iron Mountain and Southern Railway Company, in receivership; and

2. Certified copy of a deed dated May 12, 1917, in pursuance of the decree, from Lee W. Hagerman, special master, and others, conveying said railroads and other property to the Missouri Pacific Railroad Company.

Lands granted in aid of the construction of the railroad are referred to in the order of the district court on page 34, and in the deed of Lee W. Hagerman, on page 28.

In view thereof no reason appears why the Missouri Pacific Railroad Company should not be recognized as successor in interest to the land-grant rights of the St. Louis, Iron Mountain and Southern Railway Company.

THADDEUS M. GRAY

Decided March 15, 1927

ENLARGED HOMESTEAD—ADDITIONAL—FOREST HOMESTEAD—NATIONAL FOREST—ACT OF SEPTEMBER 8, 1916.

The act of September 8, 1916, which provided for the addition of certain public lands to the Colorado National Forest and authorized the Secretary of the Interior, in his discretion, to continue the allowance of additional entries under section 3 of the enlarged homestead act, did not confer upon that officer authority to allow an additional entry for lands within that national forest based upon an entry made under the act of June 11, 1906.

ENLARGED HOMESTEAD—ADDITIONAL—FOREST HOMESTEAD—NATIONAL FOREST—ACT OF MARCH 4, 1923.

The act of March 4, 1923, authorizes the Secretary of the Interior to designate as subject to the enlarged homestead acts lands embraced, at the time of such designation, within valid subsisting entries in national forests, and to permit additional entries of designated lands outside of national forests similarly as provided by section 7 of the enlarged homestead act, but it contains no authority for the allowance of additional entries embracing lands within national forests.

FINNEY, *First Assistant Secretary:*

At the Denver, Colorado, land office on May 21, 1926, Thaddeus M. Gray applied to make entry under section 3 of the enlarged homestead act for lots 6, 7, and 8, Sec. 24, T. 12 N., R. 73 W., 6th P. M. (124.50 acres), as additional to his entry under the act of June 11, 1906 (34 Stat. 233), embracing SW. ¼, said Sec. 24 (List No. 2-2537).

A dependent resurvey of said Sec. 24 has been made, and the land in the original entry is now described as lots 3, 4, 9, and 10 (176.93 acres).

The tract applied for was withdrawn and included within the Colorado National Forest by proclamation of June 12, 1917, under authority of the act of September 8, 1916 (39 Stat. 848), which provides that the Secretary of the Interior may, in his discretion, continue to allow additional entries for the land under the provisions of section 3 of the enlarged homestead act.

The application can not be allowed unless the land originally entered as well as that applied for is designated as of the character contemplated by the enlarged homestead acts. Thus the question is presented: Is there authority for designating the lands embraced in the original entry?

The enlarged homestead act is limited by its terms to lands which, among other things, are unreserved. That the lands in Gray's original entry are reserved for national forest purposes, subject to his right to perfect his entry therefor, must be admitted. The act of September 8, 1916, *supra*, was enacted with knowledge that in the large area described in the act were many homestead entries, made under section 2289, Revised Statutes, and it was to protect such homesteaders that the act authorized the Secretary of the Interior, in his discretion, to continue to allow additional entries under section 3 of the enlarged homestead act of February 19, 1909 (35 Stat. 639), as amended, for the withdrawn land. Inasmuch as, after the inclusion of the lands in the Colorado National Forest, no original entries could be allowed except under the provisions of the act of June 11, 1906, *supra*, it is apparent that Congress intended to limit

the right of additional entries to those persons who, prior to the withdrawal of the lands, had made entry for less than the area allowed by the enlarged homestead acts.

That lands within national forests embraced in entries under the act of June 11, 1906, *supra*, were not subject to designation under the enlarged homestead acts was recognized by Congress when it passed the act approved March 4, 1923 (42 Stat. 1445). Section 1 of the latter act authorizes the Secretary of the Interior, "for the purposes of this act," to designate as subject to the enlarged homestead acts lands embraced, at the time of such designation, within valid subsisting entries within national forests—the act providing that any homestead entryman of 160 acres or less of lands which have been or may hereafter be designated or classified as subject to entry under the provisions of the enlarged homestead acts, and who owns and resides upon his homestead entry, where the land is within a national forest, may make an additional entry for and obtain patent to such an amount of land, of the same character, not in a national forest, and within a radius of 20 miles from the homestead entry, as when the area thereof is added to the area of the original entry, will not exceed 320 acres.

To qualify a person to make an additional entry under section 7 of the enlarged homestead acts for lands incontiguous to the original entry it has always been proper to designate under the enlarged homestead acts lands embraced in perfected homestead entries made prior to the inclusion of the lands in a national forest. Hence, in passing the act of March 4, 1923, *supra*, Congress must have had in mind only homestead entries for lands allowed under the provisions of the act of June 11, 1906, *supra*.

Prior to March 4, 1923, the department had uniformly ruled that an entry under the act of June 11, 1906, *supra*, for approximately 160 acres exhausted the entryman's rights under the homestead law. This ruling was adopted and followed by Congress in the act of March 4, 1923, *supra*.

The act of September 8, 1916, *supra*, merely authorizes the Secretary of the Interior to continue to do what theretofore he could have done lawfully. As he never had authority to allow an additional entry under section 3 of the enlarged homestead acts for lands in a national forest based on an entry under said act of June 11, 1906, the act of 1916 can not be construed as giving him the authority.

The lands applied for by Gray being within the limits of a national forest, the act of 1923 has no application.

For the reasons aforesaid the application in question is

Rejected.

CONFIRMATION IN STATES AND TERRITORIES OF SCHOOL LANDS CONTAINING MINERALS—ACT OF JANUARY 25, 1927

INSTRUCTIONS

[Circular No. 1114]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 15, 1927.

REGISTERS, UNITED STATES LAND OFFICES,
DIVISION INSPECTORS AND DISTRICT CADASTRAL ENGINEERS:

The first paragraph of section 1 of the act of Congress approved January 25, 1927 (44 Stat. 1026), reads as follows:

> That, subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

The beneficiaries of this grant are the States of Arizona, California, Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. The grant also extends to the unsurveyed school sections reserved, granted, and confirmed to the State of Florida by the act of Congress approved September 22, 1922 (42 Stat. 1017).

The additional grant thus made, subject to all the conditions in the statute making same, applies to school section lands known to be of mineral character at the effective date thereof as hereinafter defined. It does not include school section lands nonmineral in character, those not known to be mineral in character at time of grant, but afterwards found to contain mineral deposits, such lands not being excepted from the grants theretofore made (*Wyoming et al* v. *United States*, 255 U. S. 489, 500, 501), nor does it include lands in numbered school sections in lieu of or as indemnity for which lands were conveyed to the States first above named, or to the State of Florida with respect to school section lands coming within the purview of the act of September 22, 1922, *supra*, prior to January 25, 1927.

Determinations heretofore made by the Secretary of the Interior or the Commissioner of the General Land Office to the effect that lands in school sections were excepted from school land grants because of their known mineral character do not, of themselves, prevent or affect in any way the vesting of title in the States pursuant to the provisions of the statute making the additional grant.

Subsection (a) of section 1 of the act provides—

> That the grant of numbered mineral sections under this act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

Grants to the States of school lands in place (the numbered sections), of the character and status subject thereto, as a rule, are effective and operate to vest title upon the date of the approval of the statute making the grant or the date of the admission of the State into the Union, as to lands then surveyed, and as to lands thereafter surveyed upon the date of the acceptance of the survey thereof by the Commissioner of the General Land Office (*United States* v. *Morrison*, 240 U. S. 192; *United States* v. *Sweet*, 245 U. S. 563; *Wyoming et al.* v. *United States*, *supra*). It is held, therefore, that the grant made by the first paragraph of section 1 of the present statute, subject to the provision therein with respect to indemnity or lieu lands, to the provisions of subsections (b) and (c) of said section 1 and following the plain provisions of subsection (a) thereof is effective upon the date of the approval of the act (January 25, 1927), as to lands then surveyed and the survey thereof accepted by the Commissioner of the General Land Office and as to the unsurveyed school sections in the State of Florida granted to that State by the act of September 22, 1922. The grant, as to other lands thereafter surveyed, subject to the same provisions, is effective upon the acceptance of the survey thereof as above indicated.

Subsection (b) of section 1 of the act provides—

> That the additional grant made by this act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or 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 lease by the State as the State legislature may direct, the proceeds of rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools: *Provided*, That any lands or minerals disposed of contrary to the provisions 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.

The lands granted to the States by the act of January 25, 1927, and the mineral deposits therein are to be disposed of by the States in the manner prescribed in subsection (b) thereof, provision being made for judicial forfeiture in case of disposal of any of the lands or minerals contrary to the provisions of the act.

Subsection (c) of section 1 of the act provides—

> That any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceedings in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such application, claim, or right is relinquished or canceled, and all lands in the Territory of Alaska are excluded from the provisions of this act.

School-section lands included within the limits of existing reservations of or by the United States, specifically reserved for water-power purposes, or included in any suit or proceedings in the courts of the United States, prior to January 25, 1927, and all lands in the Territory of Alaska are excluded from the provisions of the act.

The words "existing reservations" as used in subsection (c) are construed generally and subject to specific determination in particular cases if the need therefor shall arise, as including Indian and military reservations, naval and petroleum reserves, national parks, national forests, stock driveways, reservations established under the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), and all forms of Executive withdrawal recognized and construed by this department as reservations existent prior to January 25, 1927.

Valid applications, claims, or rights protected by the provisions of subsection (c) include applications, entries, selections, locations, permits, leases, and other forms of filing initiated or held pursuant to existing laws of the United States prior to January 25, 1927, embracing known mineral school-section lands then surveyed and otherwise within the terms of the additional grant, and as to lands thereafter surveyed, valid applications, claims, or rights so initiated or held prior to the date of the acceptance of the survey. The additional grant to the State will attach upon the effective date of the relinquishment or cancellation of any claim, so asserted, in the absence of any other valid existing claim for the land and if same be then surveyed. Should the validity of any such claim be questioned by the State, proceedings with respect thereto by protest, contest, hearing, etc., will be had in the form and manner prescribed by existing rules governing such cases. This procedure will be followed in the matter of all protests, contests, or claims filed by individuals, associations, or corporations against the States affecting school-section lands.

The present grant, like other grants in aid of public or common schools, is subject to the rights and claims of those who settle upon, with a view to homestead entry, or occupy, with a view to desert-land entry, prior to survey in the field, lands which on survey are found to be in numbered school sections.

Section 2 of the act reads as follows:

SEC. 2. That nothing herein contained is intended or shall be held or construed to increase, diminish, or affect the rights of States under grants other than for the support of common or public schools by numbered sections in place, and this act shall not apply to indemnity or lieu selections or exchanges or the right hereafter to select indemnity for numbered school sections in place lost to the State under the provisions of this or other acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect.

The only grants affected in any way by the provisions of the act of January 25, 1927, are those of numbered sections of land in place made to the States for the support of common or public schools. The adjudication of claims to land asserted under other grants, for indemnity or lieu lands and exchanges of lands, will proceed as heretofore, being governed by the provisions of existing laws applicable thereto. The States will be afforded full opportunity, however, if the facts and conditions are such as to authorize such action, either to assign new base in support of or to withdraw pending unapproved indemnity school land selections in support of which mineral school section lands have been tendered as base.

Administrative order of May 26, 1926 (Circular No. 1067, not reported), suspending action on hearings and other proceedings initiated by or for the United States, not specifically directed or authorized by Congress, involving the mineral or nonmineral character of school section lands, is hereby revoked. Pending contests, protests, or other proceedings so instituted in the Department of the Interior, its offices or bureaus, on the ground that because of the existence of known mineral deposits therein, title in and to school section lands did not vest in the State under prior laws, and grants will be considered and disposition thereof made in the light of the additional grant of known mineral lands herein discussed, subject to all the conditions and provisions of the act of January 25, 1927, making same, and in accord with these instructions.

Cadastral engineers, in reporting the completion of surveys in the field, will omit any special reference to the survey of school section lands.

The practice, generally, of making mineral examinations of school section lands is hereby discontinued and hereafter division inspectors will cause such examinations to be made and reports submitted only when directed to take such action, unless there are convincing reasons for believing that, as to particular tracts, examination and report should be made.

WILLIAM SPRY,
Commissioner.

Approved:
HUBERT WORK,
Secretary.

PROCEDURE FOR OBTAINING OIL AND GAS LEASES FOR UNALLOTTED LANDS WITHIN EXECUTIVE ORDER INDIAN RESERVATIONS[1]

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., March 15, 1927.

The act of March 3, 1927 (44 Stat. 1347), makes unallotted lands within Executive order Indian reservations subject to lease for oil and gas mining purposes, in accordance with the provisions of the act of May 29, 1924 (43 Stat. 244), which applies to tribal lands of treaty reservations. It is recommended therefore that the regulations prescribed under the latter act apply also to Executive order lands with the exception of the lands which are subject to lease under section 5 of the act of March 3, 1927. Section 5 reads:

That the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to allow any person who prior to May 27, 1924, filed an application for a permit in accordance with the provisions of the Act of February 25, 1920, to prospect for oil and gas upon land within an Indian reservation or withdrawal created by Executive order who shall show to the satisfaction of the Secretary of the Interior that he, or the party with whom he has contracted, has done prior to January 1, 1926, any or all of the following things, to wit, expended money or labor in geologically surveying the lands covered by such application, has built a road for the benefit of such lands, or has drilled or contributed toward the drilling of the geologic structure upon which such lands are located, or who in good faith has either filed a motion for reinstatement or rehearing; or performed any other act which in the judgment of the Secretary of the Interior entitles him to equitable relief, to prospect for a period for two years from the date this Act takes effect, or for such further time as the Secretary of the Interior may deem reasonable or necessary for the full exploration of the land described in his application under the terms and conditions therein set out, and a substantial contribution toward the drilling of the geologic structure thereon by such applicant for a permit thereon may be considered as prospecting under the provisions hereof; and upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil and gas have been discovered within the limits of the land embraced in any such application, he shall be entitled to a lease for one-fourth of the land embraced in the application: *Provided*, That the applicant shall be granted a lease for as much as one hundred and sixty acres of said lands if there be that number of acres within the application. The area to be selected by the applicant shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public land surveyed; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and regulations to be prescribed by the Secretary of the Interior, and

[1] See case of *E. M. Harrison* (49 L. D. 139), which held that the provisions of the act of February 25, 1920 (41 Stat. 437), relating to oil and gas, were applicable to Executive order Indian reservations, and the opinion of the Attorney General (34 Ops. A. G. 181), *contra*.—ED.

the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposit made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre, the rental paid for any one year to be credited against the royalties as they may accrue for that year, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior. The applicant shall also be entitled to a preference right to a lease for the remainder of the land in his application at a royalty of not less than 12½ per centum in amount or value of the production, the royalty to be determined by competitive bidding or fixed by such other methods as the Secretary of the Interior may by regulations prescribe: *Provided further*, That the Secretary of the Interior shall have the right to reject any or all bids.

It is recommended that in order for an applicant to be entitled to receive favorable consideration he must on or before June 1, 1927, surrender any permit which may have been granted him under the act of February 25, 1920 (41 Stat. 437) or in case no permit has been granted furnish evidence of his application, and also furnish an affidavit that he has personally done any or all of the things enumerated in the section or in the event that he has contracted with some other person to do the work or has contributed toward the drilling of the structure he must in addition to his own affidavit furnish affidavits of the contractor or the one to whom the contribution was made, and that when satisfactory evidence is furnished that he has complied with the act, a prospecting permit be granted him somewhat similar to that issued under the general leasing act of February 25, 1920. A form of permit is inclosed, with the recommendation that its use be authorized. [Form omitted.]

There is also inclosed a form of lease to be used in the event production is obtained and the permittee entitled to a lease of one-fourth of the land covered by his permit. [Form omitted.] This form follows the one used under the general leasing act with necessary changes therein required by the general leasing act, but not by the act of March 3, 1927. Recommendation is made that its use be authorized. As to the remaining three-fourths of the land within a permit upon which production is obtained, it is recommended that the applicant be given one year from the date of execution of the lease by the Secretary of the Interior within which to exercise his preference right to a lease thereof, such lease to be on the form prescribed for tribal lands which provides for a royalty on oil as follows:

For all oil produced of 30° Baumé or over which the wells on this lease average not exceeding 20 barrels per day per well for the calendar month, 12½ per cent; on an average of more than 20 barrels and not more than 50 barrels, 16⅔

per cent; on an average of 50 barrels and not more than 100 barrels, 20 per cent; and on an average of more than 100 barrels, 25 per cent.

For all oil produced of less than 30° Baumé on an average not exceeding 20 barrels per day per well for the calendar month, 12½ per cent; on an average of more than 20 barrels and not more than 50 barrels, 14⅔ per cent; on an average of more than 50 barrels and not more than 100 barrels, 16⅔ per cent; and on an average of more than 100 barrels, 20 per cent.

In the event the lessee fails to exercise his privilege of leasing within one year, it is recommended that the land thereafter be offered for lease at public auction as in the case of other unallotted lands on Indian reservations.

In order that all persons interested may have an opportunity to have considered any claims they may have to a permit, it is recommended that the following procedure be adopted:

Immediately upon the filing of an application for a permit under section 5 of the act, the Commissioner of Indian Affairs will cause to be published, at the expense of the applicant, in a newspaper designated by the Commissioner, published in the vicinity of the land and most likely to give notice to the general public, a notice of said application in substantially the following form:

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
————, 1927.

Notice is hereby given that ———, of ———, has applied for an oil and gas permit under section 5 of the act of March 3, 1927, covering ——— surveyed lands in the ——— Indian reservation, State of ———, described as: ———.

Any and all persons having adverse or conflicting claims to an oil and gas permit covering said land or any part thereof or interest therein under this act, are hereby notified that a full statement under oath of such claim must be filed in this office on or before ———, 1927, showing in detail an equal or superior right to a permit covering said land; otherwise such claim will be deemed waived and abandoned.

———, ———,
Commissioner of Indian Affairs.

The Commissioner will fix a date in the notice on or before which adverse or conflicting claims may be asserted which shall be not less than 30 days nor more than 40 days after the date of first publication. Such notice will be published in the regular issue of the newspaper once each week for five consecutive issues if in a weekly paper, or for a period of 30 days if in a daily paper. Proof of publication will be filed with the Commissioner.

In case of adverse or conflicting claims respecting permits under section 5 of the act or for any part or interest therein, the Secretary of the Interior will hear and determine the claims presented and award permits to one or more of the applicants as shall be deemed just. To have their claim considered adverse or conflicting, claimants must make a full showing under oath in their own behalf. If

in the judgment of the Commissioner of Indian Affairs any adverse or conflicting claimant fails to make out a *prima facie* case in his own behalf, the showing will be rejected; subject to appeal to the Secretary of the Interior. But if the adverse or conflicting claimant makes out a *prima facie* case, the Commissioner will take such course as may be required by the particular case to determine the rights of the parties, and if a material issue of fact arises, a formal hearing to determine it will be ordered. In the absence of appeal to the Secretary of the Interior, the final order or awards of the Commissioner of Indian Affairs shall be conclusive.

When two or more contiguous permits are granted on a structure and it is desired among the parties interested to straighten and adjust inner boundary lines, such changes may be made by agreement between the parties with the approval of the Secretary of the Interior, and any permittee may likewise straighten and adjust outer boundary lines of his permit by including therein unappropriated land and excluding therefrom a similar acreage.

CHAS. H. BURKE,
Commissioner.

Approved:
HUBERT WORK,
Secretary.

NORTHERN PACIFIC RAILWAY COMPANY

Order, March 16, 1927

SELECTION—INDEMNITY—RAILROAD LAND—OIL AND GAS LANDS—SURFACE RIGHTS.

A railroad company may make a selection, subject to the provisions and reservations of the act of July 17, 1914, of lands valuable for oil and gas.

PRIOR DEPARTMENTAL INSTRUCTIONS REAFFIRMED.

Instructions of September 17, 1925 (51 L. D. 196), which overruled *Northern Pacific Railway Company* (48 L. D. 573), in so far as in conflict, reaffirmed.

FINNEY, *First Assistant Secretary:*

By decision of April 4, 1923, the department affirmed a decision of the Commissioner of the General Land Office dated October 2, 1922, rejecting the election filed on behalf of the Northern Pacific Railway Company on November 16, 1916, under the provisions of the act of July 17, 1914 (38 Stat. 509), to accept a patent reserving to the United States the oil and gas in the land described in its indemnity selection list serialized as Lander 07561, filed October 22, 1915, involving lands included in Petroleum Reserve No. 41, Wyoming No. 16, by Executive order of December 6, 1915.

A motion for rehearing was denied by decision of June 30, 1923, whereupon the railway company instituted a suit in equity in the Supreme Court of the District of Columbia to restrain the Secretary of the Interior from canceling the selection. A motion to dismiss the suit was filed by the Secretary of the Interior, upon consideration of which the court held, in effect, that the company was within its rights in selecting lands valuable for oil and gas so long as the selection was made subject to the provisions and reservations of the act of July 17, 1914, *supra*.

The department having concluded to abide by the court decision referred to without appealing therefrom, the decisions of April 4 and June 30, 1923, are recalled and vacated, and the decision appealed from is reversed.

The decision of January 31, 1922, in *Northern Pacific Railway Company* (48 L. D. 573), in so far as it conflicts with the decision of the Supreme Court of the District of Columbia in the suit referred to, is overruled. (See also 51 L. D. 196.)

FEES PAID PURSUANT TO THE LEASING ACT OF FEBRUARY 25, 1920—CIRCULARS NOS. 672 AND 1004 AMENDED

INSTRUCTIONS

[Circular No. 1115]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 17, 1927.

REGISTERS, UNITED STATES LAND OFFICES:

The regulations approved March 11, 1920, Circular No. 672 (47 L. D. 437), and May 2, 1925, Circular No. 1004 (51 L. D. 138), relating to fees paid with applications for permits, leases, or other rights under the mineral leasing act of February 25, 1920 (41 Stat. 437), are amended as follows:

There shall be paid in connection with each application for prospecting permit filed pursuant to the provisions of the regulations approved April 23, 1924, Circular No. 929 (50 L. D. 387), and amendments thereof, a drawing service fee of $10 in addition to the fees required under existing regulations. The drawing service fee shall be immediately earned, applied, and credited on the compensation of the register within the limitations provided by law. Such fee shall constitute a flat service charge, and shall neither be returned by the register nor repaid.

Upon receiving the required payment the register will stamp on each application for permit filed as aforesaid the following:

Drawing service fee $10, neither returnable nor repayable.

The fees required by Circular No. 672 will be collected and applied in the manner required by the regulations approved May 2, 1925, Circular No. 1004.

WILLIAM SPRY,
Commissioner.

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

ROYALTY INTERESTS IN OIL AND GAS PROSPECTING PERMITS NOT TO RECEIVE RECOGNITION

Instructions, March 22, 1927

OIL AND GAS LANDS—PROSPECTING PERMIT—ROYALTY INTERESTS.

Directions given to refuse to recognize or consider in any way mere contingent or royalty interests in oil and gas prospecting permits.

FINNEY, *First Assistant Secretary:*

I have carefully considered your [Director of The Geological Survey and Commissioner of the General Land Office] letters of February 10 and March 1, 1927, relative to approval of assignments of royalty interests in prospecting permits.

It is clear that royalty interests in the minerals which may be discovered in and taken from lands included in prospecting permits under the leasing act of February 25, 1920 (41 Stat. 437), are of such conditional, uncertain, and speculative nature that there is in reality no actual interest in the land involved. The recognition of such interests imposes upon the department and its bureaus a large amount of work, which is not considered warranted or necessary.

Hereafter the policy of the department will be to refuse to approve or recognize or consider in any way mere contingent or royalty interests in prospecting permits.

NORMAN E. THACKERAY

Decided March 23, 1927

PUBLIC LAND—PATENT—EXCHANGE—STATUTES.

The exchange by the United States of a tract of unpatented public land for a tract of patented land is an unusual procedure, and authority therefor is not to be inferred when another construction of the statute is more probable.

RECLAMATION HOMESTEAD—PATENT—EXCHANGE—STATUTES.

The right granted by subsection M of section 4 of the act of December 5, 1924, to an entryman or assignee on a project farm unit "not yet patented" to make an exchange for another farm unit of unentered public land, has reference to a farm unit, unpatented at the time that the application to make the exchange is made.

FINNEY, *Acting Secretary:*

Receipt is acknowledged of your [Hon. Robert G. Simmons, House of Representatives] letter of March 19, 1927, inclosing an appeal by Norman E. Thackeray from a decision of the Bureau of Reclamation, denying Mr. Thackeray's right to an exchange of farm units, North Platte reclamation project, under subsection M of section 4 of the act of December 5, 1924 (43 Stat. 672).

The part of said subsection M material in this connection reads as follows:

> That every entryman or assignee on a project farm unit not yet patented, which unit shall be found by the Secretary to be insufficient to support a family and pay water charges, shall have the right upon application to exchange his entry for another farm unit of unentered public land on the same or another project located in the same State, in which event all installments of construction charges theretofore paid on account of the relinquished farm unit shall be credited on account of the new farm unit taken in exchange.

The unit held by Mr. Thackeray was not patented on December 5, 1924, the date of the above referred to act, but was patented May 13, 1925. The farm unit is insufficient for the support of a family, and the only question is whether the act, above referred to, permits the exchange, which was applied for after the issuance of the patent.

It seems quite plain that the words "not yet patented" in the above quotation from subsection M are to be referred, not to December 5, 1924, the date of the approval of the act, but to the date when application for exchange of entry is made. Near the end of the quotation it is stated that construction charges paid before exchange upon the *relinquished farm unit* shall be credited upon the new farm unit. This shows that Congress had in mind an exchange of one tract of unpatented public land for another tract of unpatented public land. The exchange by the United States of a tract of its unpatented public land for a tract of patented land is an unusual procedure, and authority therefor is not to be inferred when another construction of the statute is more probable.

Under appellant's theory of the law, land patented before December 5, 1924, would not be entitled to the benefits of the exchange provisions of the statute, but land patented after December 5, 1924, would be entitled to such benefits. The fact that no reason is apparent for this arbitrary date line tends to demonstrate the incorrectness of appellant's conclusion.

The department is desirious of assisting the appellant in any manner permitted by the law, but it appears that the particular exchange which the appellant seeks is not authorized by the statute.

Rejected.

KATIE CASSIDAY (ON REHEARING)

Decided March 25, 1927

DESERT LAND—SETTLEMENT—SURVEY—PREFERRED RIGHT—APPLICATION—RELATION.

Settlement upon a tract of surveyed desert land prior to the filing of an application to make entry thereof will not confer a preferred status upon an entryman and the doctrine of relation can not be invoked to bring such a claim within the remedial provisions of section 5 of the act of March 4, 1915.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

Case of *Lucy M. Day* (45 L. D. 200), distinguished.

FINNEY, *First Assistant Secretary:*

By decision dated February 25, 1927, the department affirmed the action of the Commissioner of the General Land Office rejecting final proof submitted in support of a desert-land entry, embracing lots 3, 6, and SE. ¼ NW. ¼ Sec. 7, T. 26 N., R. 43 E., Montana, and denied application for relief under the last two paragraphs of section 5 of the act of March 4, 1915 (38 Stat. 1161), as amended by the act of March 21, 1918 (40 Stat. 458). Relief was denied on the ground that the benefits of the remedial act as amended extend only to lawful pending entries made prior to March 4, 1915. Miss Cassiday filed her desert-land application June 1, 1915, and entry was allowed October 29, 1918.

Motion for rehearing has been filed contending that the principle announced in the case of *Lucy M. Day* (45 L. D. 200) is applicable to the facts in the instant case, and that ample authority exists for granting the relief prayed for. Two other cases claimed to be in point are those of Barbara T. Ebersold (Glasgow 030605) and Katherine F. Kilpatrick (Glasgow 028175), unreported.

True, in the *Day case* there was no entry of record on the date specified in the relief act, but claimant had taken possession of the land in 1909, long prior to survey, and in good faith erected improvements thereon and commenced the work of reclaiming same pursuant to the provisions of the act of March 28, 1908 (35 Stat. 52), thus acquiring a preferred right or status. Entry was applied for immediately on the filing of the plat of survey in 1915, and it was held in the decision referred to that all rights under the application related back to the initiatory step for the acquisition of the land, and that the claim came

within the spirit of the remedial act. In the Ebersold case entry was made August 8, 1914. Relief was extended to lawful pending entries initiated prior to March 4, 1915, by the amendatory act of March 21, 1918, *supra*, and such relief was granted by the Commissioner under date of November 22, 1918. In the Kilpatrick case desert-land application was filed September 3, 1914, and inasmuch as the claim was initiated prior to March 4, 1915, relief was authorized under the terms of the amended act, and was granted by the Commissioner February 13, 1926.

The principle of the cases cited is not applicable to the case at bar. The facts and circumstances are different. Here, the application was filed subsequent to the passage of the act of March 4, 1915. The lands were surveyed long prior to any attempt or effort on the part of Miss Cassiday to take possession of them, and the act of March 28, 1908, *supra*, was not applicable thereto. It is well settled that a desert-land claim can not be initiated upon surveyed lands except by the filing of an application to make entry, and while it appears that Miss Cassiday hauled some posts and performed some labor on the land in the fall of 1914, in contemplation of law she acquired no rights antedating the presentation of her application on June 1, 1915.

Under the circumstances she can not successfully invoke the doctrine of the cases referred to. She is not entitled to the benefits of the relief act and the decision of February 25, 1927, is therefore adhered to.

Motion denied.

T. A. WANN

Decided March 25, 1927

OIL AND GAS LANDS—PROSPECTING PERMIT—WITHDRAWAL—CONTEST—PREFERENCE RIGHT.

Section 20 of the leasing act does not confer a preference right to an oil and gas prospecting permit upon one who is allowed to make a surface entry subject to the provisions of the act of July 17, 1914, as a reward for a successful contest initiated after the inclusion of the land within the reserve, notwithstanding that the contested entry was made prior to the withdrawal.

FINNEY, *First Assistant Secretary:*

An appeal has been filed by resident counsel on behalf of T. A. Wann from a ruling of the Commissioner of the General Land Office in a letter dated August 28, 1926, to the effect that Wann is not entitled to a preference right to a permit under section 20 of the act of February 25, 1920 (41 Stat. 437), for the N. ½ SW. ¼, SE. ¼

SW. ¼ and SW. ¼ SE. ¼ Sec. 26, T. 26 S., R. 27 E., M. D. M., California, embraced in his homestead entry, Visalia 06311.

The facts as outlined by the Commissioner are as follows: On February 28, 1910, Jay G. Brown made homestead entry 02263, Visalia series, for the land in question. March 19, 1913, Wann filed contest against the above homestead entry and the entry was canceled as a result of the contest on June 16, 1913. The land was included in petroleum reserve No. 18 by Executive order of January 26, 1911. On June 17, 1913, Wann was advised that should the land be restored to entry it would be subject to his preferred right to make entry within 30 days from receipt of notice. On June 7, 1916, he was further advised that he might enter the land within 30 days. July 7, 1916, he filed homestead application 06311 and the entry was allowed July 28, 1916, subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509). July 26, 1920, Lawrence H. McNeil filed oil and gas application 09211 and permit was granted under section 13 of the leasing act on August 31, 1922. June 21, 1926, extension of time was granted to December 31, 1926, within which to comply with paragraph 2 of the permit and on August 19, 1926, the department approved the assignment of the permit to the Midland Oilfields Company, Limited.

The Commissioner held that the fact that Wann contested the entry made prior to the petroleum withdrawal and secured cancellation thereof did not give him a preference right under section 20 of the act of February 25, 1920, *supra*.

In substance it is contended on appeal that Wann is entitled to a preference right by reason of the fact that he had contested the Brown entry, which was made prior to the petroleum withdrawal and secured its cancellation, and that he possessed the same rights as an entryman that were previously held by Brown. Counsel therefore submits that the permit granted to McNeil would be canceled and a preference right accorded to Wann.

The act of May 14, 1880 (21 Stat. 140) provides that "'in all cases where any person has contested, paid the land-office fees, and procured the cancellation of any preemption homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which said land is situated of such cancellation and shall be allowed thirty days from date of such notice to enter such lands."

It has been held that the act merely confers a privilege on the successful contestant to enter the land in preference to others. As to other claimants he has a superior right for a limited period to

enter the land. His right is not of such a character as to reserve the land from other disposal. *Emma H. Pike* (32 L. D. 395); *David A. Cameron* (37 L. D. 450).

It has also been held that no preference right of entry accrues as a result of a contest until final judgment of cancellation has been rendered and in the exercise of such right the contestant is bound by the regulations in force at the time his application is filed. *Virinda Vinson* (39 L. D. 449).

In this case the contest was initiated, and Brown's entry canceled in 1913, after the withdrawal. Wann was notified as appears from the copy of notice dated June 17, 1913, attached to the appeal that should the land be restored it would then be subject to his preferred right. The land was not restored, and it was not until after the act of July 17, 1914 (38 Stat. 509), was enacted and which permitted agricultural entries of withdrawn lands with a reservation that he was advised that he might exercise his preference right to enter the land. Upon receipt of this advice he thereupon filed application and made entry subject to the provisions of the act of July 17, 1914, *supra*.

The entryman having gained no right through his contest of the Brown entry other than a preference right to enter the land and the entry having been made upon withdrawn lands under the applicable laws and regulations, he is not entitled to a preference right to a permit under the provisions of section 20 of the leasing law. Under the facts the principle in the unreported departmental decision of August 13, 1926 (A. 9587), in the case of Ashe v. Hyde *et al.*, referred to by counsel in the appeal is not applicable to the case at bar.

The decision of the Commissioner from which appeal has been taken is therefore

Affirmed.

SURVEY AND DISPOSITION OF INDIAN AND ESKIMO POSSESSIONS IN TRUSTEE TOWN SITES, ALASKA

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 25, 1927.

DIVISION INSPECTOR, ANCHORAGE, ALASKA:

Reference is had to your letter of February 11, 1927, requesting further instructions relative to the procedure necessary to obtain

patent to Indian town sites under the act of May 25, 1926 (44 Stat. 629).

Section 3 of said act provides in part—

> 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 lands so claimed and occupied, exclusive of that embraced in streets or alleys.

Section 6 of Circular No. 1082, approved July 20, 1926 (51 L. D. 501), containing the regulations issued under said act of May 25, 1926, designates the division inspector for Alaska 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 and directs that in any case in which the division inspector thinks it would be an advantage to the Indian or Eskimo occupants to have the lands occupied and claimed by them surveyed as a town or village he should bring the matter to the attention of the Commissioner of the General Land Office with appropriate recommendations. From this it appears that your recommendation that an Indian village should be established will be sufficient proof for the trustee to make application for an entry of such town site.

As this act makes no provisions for any fees for filing, no charge will be made by the district land officers who will assist the trustee as far as practicable in the preparation of all papers necessary in making entry for such a town site.

It is not considered that publication of notice of intention to make proof and corroborated proof of the town-site entry are necessary.

Application to make entry should be filed with the proper district land office and notice of such application should be posted on the land, describing the tract applied for in the terms employed in the application and a copy of such notice should accompany the application as is done in making allotments to Indians and Eskimos in Alaska, under the act of May 17, 1906 (34 Stat. 197), Circular No. 749 (48 L. D. 70), which require no publication or corroborated proof.

WILLIAM SPRY,
Commissioner.

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

IRRIGATION OF ARID LANDS IN NEVADA—ACTS OF OCTOBER 22, 1919, AND SEPTEMBER 22, 1922

REGULATIONS

[Circular No. 666][1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 8, 1927.

REGISTERS, UNITED STATES LAND OFFICES, NEVADA:

The following instructions are issued under the provisions of the act of Congress approved October 22, 1919 (41 Stat. 293), entitled "An act to encourage the reclamation of certain arid lands in the State of Nevada, and for other purposes," as amended by the act of September 22, 1922 (42 Stat. 1012).

BENEFICIARIES UNDER THE ACT

1. The act, as the title indicates, is limited in its operation to lands in the State of Nevada and is designed to encourage the development and utilization of subterranean waters for irrigation purposes. It confers upon the Secretary of the Interior authority to grant permits to citizens of the United States, or associations of such citizens, giving the exclusive right to explore not to exceed 2,560 acres of land selected by them.

The only qualifications provided in the act for persons receiving the benefits thereof are that the applicant, or each member of an association of applicants, shall be a citizen of the United States; that he shall not be a beneficiary under any other application or permit under this act for land situated within an area of 40 miles square, and that he has not been a permittee under any other permit under this act, which has been canceled for failure to comply with its terms.

Married women, if their interest is actual and bona fide, have the same privileges as unmarried persons. A corporation is not considered as an association of persons within the meaning and purpose of the act.

A permit under the act is not assignable, but the interest of a deceased permittee will pass to his legal representative.

The 40-mile square limitation is construed to mean an area of that extent in which the lands covered by a permit theretofore granted are in the approximate center; to avoid possible violation of this provision of the act, applicants for more than one permit are advised

[1] Revision of the regulations approved Oct. 25, 1922 (49 L. D. 328).

not to include in their applications for additional permits any lands within less than 20 miles of *any boundary* of the lands included in any other application or permit in which the applicant is interested.

LANDS SUBJECT TO THE ACT

2. Lands to be designated and made subject to disposition under this act are those public lands which are unreserved, unappropriated, nonmineral, nontimbered, and not known to be susceptible of successful irrigation from any known source of water supply at a reasonable cost. Lists will be furnished the registers of the different local land offices from time to time and they will be advised of the dates when the designations become effective.

APPLICATION

3. Any qualified applicant desiring to explore for water under the terms of this act should file with the register of the land office of the district in which the land is situated, an application for permit, together with a corroborated affidavit as to the character of the land, and pay the filing fee of 1 cent an acre for each acre of land involved.

No blank forms will be furnished, but the application and affidavit may be combined *substantially as* in Form A, printed at the end of these regulations. Same should be filed in duplicate and cover the following points:

(*a*) *Name* and *post office* address of the applicant or each member of an association of applicants.

(*b*) *Citizenship.*—If the applicant or each member of the association of applicants is a native-born citizen of the United States, the application and affidavit must so state. If a naturalized citizen, the application should state the fact, and be accompanied by a certified copy (special form for land cases) of certificate of naturalization. It should be noted that, unlike most public-land laws, no rights may be initiated under this act by an alien who has only filed a declaration of intention to become a citizen.

(*c*) *Special requirements.*—In accordance with the specific requirements found in sections 1, 2, and 3 of the act, the application should include an averment that neither the applicant nor any member of an association of applicants has filed an application under this act for lands within an area of 40 miles square embracing the lands in the present application; that no permit heretofore granted to him, or to any association of which he was a member, has ever been canceled for noncompliance with the terms and conditions of such permit; that the application is honestly and in good faith made for the purpose of reclamation and cultivation, and not for the benefit of any other

person or corporation, and that he is not acting as agent for any person, corporation, or syndicate, to give them the benefit of the land applied for, or any part thereof, and that he will faithfully and honestly endeavor to comply with all the requirements of the act.

The application should also include an averment that no spring or water hole exists, if it be a fact, upon any legal subdivision of the land involved, if surveyed, and if unsurveyed, within one-quarter of a mile from the exterior limits thereof. If there be any spring or water hole, the exact location and size should be stated, and an estimate furnished of the quantity of water in gallons which it is capable of producing daily, together with any other information necessary to determine whether or not it is valuable or essential as a public water reserve.

(*d*) *Description of land applied for.*—If the land is *surveyed*, it should be described by legal subdivisions. If the land is *unsurveyed*, it should be described with reference to locality, natural objects, and permanent monuments as fully and carefully as possible, with such detail and precision that the boundaries and location of the land may be readily traced and ascertained; if the land is situated within a reasonable distance from a known corner of the public land survey, the course and distance should be given from such Government corner to a described point on the boundary of the land applied for; also, where practicable, the land should be described, as nearly as can be ascertained, in accordance with the legal subdivisions of the regular extension of the Government survey over the land. In this connection all applicants for unsurveyed lands are urged to make a complete metes and bounds survey of the land applied for, with an accurate tie-line by course and distance to a Government corner; otherwise, with the large areas that may be embraced in applications under this act, it will be impossible to prevent conflicts and consequent controversy and litigation. If impracticable to make such a survey prior to filing the application, it may be made later, and the descriptions in the application and permit, if granted, may be amended accordingly. All corners of unsurveyed land selected should be marked with substantial post or rock monuments.

All land applied for must be contiguous and situated in reasonably compact form; in the absence of special or unusual conditions, an application for land extending more than 4 miles in any one direction will not be considered acceptable.

A map should accompany each application, showing by legal subdivisions the land selected, if surveyed; if the land is unsurveyed, then it should be shown by legal subdivisions as nearly as possible in accordance with the regular extension of the Government survey.

(*e*) *Character of the land.*—This showing should not only allege that the land applied for is "unreserved, unappropriated, nonmin-

eral, nontimbered public land of the United States in the State of Nevada, not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply," but should also include such a complete statement of pertinent specific facts as will afford an adequate basis for classification and designation, such as (1) the lay of the land, slope; (2) whether timber, sagebrush, or grass land; (3) kind of soil; (4) altitude; (5) length of growing season; (6) rainfall and distribution thereof through the year; (7) location with respect to any surface water supply for irrigation; (8) what is known as to underground water supply on the land or in the vicinity; (9) whether land will mature crops by dry-farming methods; together with any additional facts having a direct or indirect bearing on the question of whether the land may properly be designated, the chances of successful development, and the good faith of the applicant.

(*f*) *Corroboration.*—If, at the time of filing application, the land has *not* been designated as subject to the act, all that portion of the combined application and affidavit (Form A) relative to the character of the land *must be corroborated by two disinterested witnesses*, having personal knowledge of the facts, substantially in the manner shown in Form B; or by a separate and independent affidavit containing an affirmative statement of the facts; but, if the land is already designated at time of filing application, no corroborating witnesses are required.

(*g*) *Verification.*—The application and corroborating affidavits, if required, may be subscribed and sworn to before any officer authorized to administer oaths and having an official seal.

ACTION ON APPLICATION

4. Upon receipt of the papers, the register will carefully examine the same and if found regular transmit them to the General Land Office for appropriate action. In case the land has not been designated, the application will be suspended by the General Land Office until such time as it shall have been designated, or until it shall have been determined that it is not of the character contemplated by the act. If the land shall subsequently be designated under the act, the application will then be approved and a permit issued, if no good and sufficient reason for disapproval be then apparent; otherwise it will be rejected, subject to the right of appeal. During the term of suspension the land will not be subject to disposal in any way.

CONDITIONS OF PERMITS

5. Permits will be granted only upon condition that active operations be begun for the development of underground water within six

months from date of approval and continued diligently in good faith until water has been developed in quantity sufficient for the practicable irrigation of not less than 20 acres, or until the date of expiration of the permit; and if the permittee shall not continue such operations in good faith and with reasonable diligence, or if he shall violate any of the terms of the permit, upon presentation of satisfactory proof thereof, the permit will be forthwith canceled and he will not again be granted a permit under the act. (See, however, par. 9.)

PROGRESS REPORTS

6. At or near the end of the six months' period, beginning with the date of the permit, and again at the end of the first year of the life of the permit, if final proof of water development and reclamation has not been submitted, the permittee, or at least one member of an association of permittees, must file in the proper local land office a properly executed affidavit, corroborated by at least two disinterested witnesses, having knowledge of the facts, showing when the work of exploration was begun, in what manner and to what extent it has been prosecuted, and what results have been obtained. This affidavit may be made before any officer authorized to administer an oath. (See, however, par. 9.)

7. (*a*) Unless granted an extension of time the permittee is allowed two years from the date of his permit in which to complete the work of exploration, and whenever he shall within that time satisfactorily establish that sufficient water has been discovered, developed, and made permanently available to produce a profitable agricultural crop other than native grasses, upon not less than 20 acres of the land described in the permit, he will be entitled to patent for one-fourth of the land embraced in the permit. No mere perfunctory or questionable compliance with the law will be accepted. It must appear that an agricultural crop has been actually raised—not necessarily a paying or profitable crop, but such a crop as will satisfy the Secretary of the Interior that in time and under ordinary circumstances profitable crops of some sort can be produced from the land. No patent will be granted until the full 20 acres have been cleared, leveled, ditched, plowed, fenced, and an agricultural crop actually planted and raised by irrigation, all in accordance with good farming practice. The wells, pumps, or other works and equipment for the development and supplying of water must be of a permanent and dependable character, suitable for use year after year. A detailed statement of costs of irrigation and production of crops from such water supply will be required; to this end, accurate account should be kept of such costs. No patent can be granted under the act if

the cost of irrigation from the developed water supply is practically prohibitive. The act requires a successful development and demonstration of the use of subterranean water, as the principal condition precedent for patent.

(*b*) *The land selected for patent* shall be in compact form according to legal subdivisions of the public-land surveys, if the land be *surveyed*. If the land be *unsurveyed*, the permittee may, at any time during the life of his permit, apply to the district cadastral engineer, public survey office, Reno, Nev., for a survey of the land for which he intends to make application for patent. The district cadastral engineer will thereupon make an estimate of the cost and call on the permittee for a deposit of the amount of the estimate. If the deposit made should prove insufficient, an additional deposit will be called for. If the applicant has not taken steps to procure a survey before submitting final proof, after final proof has been submitted and examined, if same is found satisfactory and acceptable, and in the meantime the public-land system of surveys has not been extended over the lands in question, call will be made on the permittee to make the necessary deposit with the district cadastral engineer to cover the cost of survey, in which case the issuance of patent will be suspended until the survey is made and accepted. Wherever practicable, such official survey will be an extension of the regular system of township surveys, in which case the selection for patent must be conformed to the legal subdivisions of such survey.

(*c*) The act provides that all entries made and patents issued under its provisions shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands entered and patented, together with the right to prospect for, mine, and remove the same.

(*d*) On the issuance of patent the remaining area within the limits of the land embraced in the permit will thereafter be subject to entry and disposal only under the act of May 20, 1862 (Sec. 2289, U. S. Rev. Stat.), entitled "An act to secure homesteads to actual settlers on the public domain," and amendments thereto, in areas not exceeding 160 acres.

FINAL PROOF

8. (*a*) Final proof of the discovery, development, and availability of sufficient water to justify patent may be made by the permittee, or, in case of his death, by his heirs, executors, or administrators, or in case the permittee is an association of individuals, by any member of such association at any time after such discovery and development as hereinbefore defined, but must be made within two years after the

date of the permit; but an additional period, not to exceed one year, may, upon proper showing, be allowed within which to make the required proof of actual irrigation and cultivation.

(*b*) When a permittee has reclaimed the land and is ready to make final proof, he should apply to the register for a notice of intention to make such proof. This notice must contain a complete description of the land selected by him for patent and give the serial number of the permit and name of the claimant. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in the notice, two of whom must be used in making proof. Care should be exercised to select as witnesses persons who are familiar, from personal observation, with the land in question and with what has been done by the claimant toward reclaiming and improving it. Care should also be taken to ascertain definitely the names and addresses of the proposed witnesses, so that they may correctly appear in the notice.

(*c*) This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the land, and it must also be posted in a conspicuous place in the local land office for the same period of time. The permittee must pay the cost of the publication, but it is the duty of registers to procure the publication of proper final-proof notice, and registers should accordingly exercise the utmost care in that behalf. The date fixed for the taking of the proof must be at least 30 days after the date of first publication. Proof of publication must be made by the affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local office.

(*d*) On the day set in the notice (or in the case of accident or unavoidable delay, within 10 days thereafter) and at the place and before the officer designated, the claimant will appear with two of the witnesses named in the notice and make proof of the reclamation of the land. The testimony of each claimant should be taken separately and apart from and not within the hearing of either of his witnesses, and the testimony of each witness should be taken separately and apart from and not within the hearing of either the applicant or of any other witness, and both the applicant and each of the witnesses should be required to state, in and as part of the final-proof testimony given by them, that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others.

(*e*) Final proof may be made before the register of the land district in which the land is located, or before a United States commissioner, or a judge or clerk of a court of record in the county or land

district in which the land is situated. The only condition permitting the taking of such evidence outside the proper land district is where the county in which the land is situated lies partly in two or more land districts, in which case such evidence may be taken anywhere in the county. In case the proof be taken outside the county wherein the land lies, then, unless it was taken before the proper register, the applicant or entryman must show by his affidavit that the qualified officer employed was the one whose place of business *in the land district* is nearest to or most accessible from the land in question. Forms of final proofs will be furnished in due time.

EXTENSIONS OF TIME

9. The act of September 22, 1922 (42 Stat. 1012), authorizes the allowance under certain conditions of an extension of time for a period not exceeding two years for the beginning, recommencement, or completion of the work of water development and the submission of final proof of reclamation. This does not mean that the extension will be granted as a matter of course, and applications for extension will not be granted unless it be clearly shown that the failure to complete the work of exploration and water development or of reclamation, as the case may be, within the required period was due to no fault on the part of the permittee but to some unavoidable delay for which he was not responsible and could not have readily foreseen.

A permittee who desires to make application for extension of time should file with the register an affidavit setting forth fully the facts, showing how and why he has been prevented from beginning or completing the work of water development and making final proof within the regular period. This affidavit may be subscribed and sworn to before any officer authorized to administer oaths and having an official seal, and must be corroborated by at least two witnesses who have personal knowledge of the facts. The register, after carefully considering all the facts, will forward the application to the General Land Office with appropriate recommendation.

The register is required to suspend any application for extension of time if he considers the affidavits defective in form or substance and to allow the applicant 30 days to make such amendments therein as may be deemed necessary to remove the defects or to file exceptions to the requirements made, advising him that upon his failure to take any action within the time specified appropriate recommendation will be made. After the expiration of the time thus granted the original application and the amended affidavits or exceptions, as the case may be, together with the proper report and recommendations, will be transmitted to the General Land Office for consideration.

CONTESTS AND PROTESTS

10. Contests and protests may be made against applications, permits, and final proofs under this act, the same as other entries or selections under the public land laws, and same will be disposed of in accordance with the Rules of Practice so far as applicable. No preference right, however, can be gained by such contest or protest, but if successful the entire area embraced in the permit will revert to the public domain and the land will be subject to the applicable public land laws.

WILLIAM SPRY,
Commissioner.

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

FORM A

APPLICATION FOR PERMIT

(Act of Oct. 22, 1919—41 Stat. 293)

United States Land Office_____

Serial Number _____

Receipt Number _____

APPLICATION AND AFFIDAVIT

I, _____ (male or female) of _____
_____
_____, a _____
(Applicant must state whether native born or naturalized. See par. 3b)
citizen of the United States, of the age of _____ years, do hereby apply for a permit under the act of October 22, 1919 (41 Stat. 293), to drill or otherwise explore for water beneath the surface of the following-described land in the county of _____, State of Nevada, to wit (see par. 3d):
_____
_____

and in support of this application I do solemnly swear that I have not heretofore been granted a permit under this act within an area of forty miles square, in the approximate center of which the land described in this application is located, and have no application for such a permit pending at this time, except Permit No. ____, issued on _____; nor has any permit, covering lands within the State of Nevada, heretofore issued to me under this act, been canceled for failure to comply with its provisions; that this application is honestly and in good faith made for the purpose of reclamation and cultivation, and not for the benefit of any other person, corporation, or syndicate;

that it is my intention to begin active operations looking to the development of the subterranean waters of the lands described within six months from the date of the approval of this application and the issuance of a permit, and to conduct such operations in good faith and with reasonable diligence until water has been developed in quantity sufficient for the practical irrigation of not less than twenty acres of said land, or until the date of expiration of the permit, unless it shall be sooner satisfactorily demonstrated that the development of subterranean water for irrigation of said land is impracticable; that I will honestly endeavor to comply with all other requirements of the act under which this application is filed and with the terms and conditions of the permit if issued; that the facts herein stated are based on my personal knowledge of the conditions obtaining with respect to the land herein described; and to the best of my knowledge and belief said land is unreserved, unappropriated, nonmineral, nontimbered public land of the United States, not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply; that it is _____

_____

(Here state character of the land and other data required by par. 3e)

_____

_____

_____

Subscribed and sworn to before me at my office at _____ in _____ County, within the _____ land district, this ____ day of _____, 19__.

_____

_____

(Official designation)

FORM B

CORROBORATING AFFIDVIT

(Required only in cases where land applied for has not been designated)

STATE OF _____,

County of _____, *ss:*

The undersigned citizens of _____, County of _____, State of Nevada, being duly sworn under oath according to law each for himself and not one for the other, deposes and says that he has personally examined the land described in the within application of _____ for a permit under the act of October 22, 1919 (41 Stat. 243), to explore for subterranean waters on said land; that he has read the foregoing application and affidavit and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

_____

_____

[S. 9]

AN ACT To encourage the reclamation of certain arid lands in the State of Nevada, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to grant to any citizen of the United States, or to any association

of such citizens, a permit, which shall give the exclusive right, for a period not exceeding two years, to drill or otherwise explore for water beneath the surface of not exceeding two thousand five hundred and sixty acres of unreserved, unappropriated, nonmineral, nontimbered public lands of the United States in the State of Nevada, not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply: *Provided, however*, That not more than one such permit shall be issued to the same citizen or the same association of citizens within an area of forty miles square: *And provided further*, That said land shall not be fenced or otherwise exclusively used by the permittee except as herein provided: *And provided further*, That said land shall theretofore have been designated by the Secretary of the Interior as subject to disposal under the provisions of this act.

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate the lands subject to disposal under the provisions of this act: *Provided, however*, That where any person or association qualified to receive a permit under the provisions of this act shall make application for such permit upon land which has not been designated as subject to disposal under the provisions of this act (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal.

SEC. 3. That any qualified applicant for a permit under section 1 of this act shall file with the register or receiver of the land district in which said land is located the application for such permit and shall make and subscribe before the proper officer and file with said register or receiver an affidavit that such application is honestly and in good faith made for the purpose of reclamation and cultivation and not for the benefit of any other person or corporation, and that the applicant is not acting as agent for any person, corporation, or syndicate in making such application, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land applied for or any part thereof, and that the applicant will faithfully and honestly endeavor to comply with all of the requirements of this act, and shall pay to said register and receiver a filing fee of 1 cent per acre for each acre of land embraced in said application, and such applicant shall then be entitled to receive such permit after the lands embraced therein are designated as provided in section 2 of this act.

SEC. 4. That such a permit shall be upon condition that the permittee shall begin operations for the development of underground waters within six months from the date of the permit and continue such operations with reasonable diligence until water has been discovered in the quantity hereinafter described, or until the date of the expiration of the permit. Upon the presentation at any time of proof satisfactory to the Secretary of the Interior that any permittee is not conducting such operations in good faith and with reasonable diligence, or has violated any of the terms of the permit, the Secretary shall forthwith cancel such permit, and such permittee shall not again be granted a permit under this act.

SEC. 5. That on establishing at any time within two years from the date of the permit to the satisfaction of the Secretary of the Interior that underground

waters in sufficient quantity to produce at a profit agricultural crops other than native grasses upon not less than twenty acres of land has been discovered and developed and rendered available for such use within the limits of the land embraced in any permit, the said permittee shall be entitled to a patent for one-fourth of the land embraced in the permit, such area to be selected by the permittee in compact form according to the legal subdivisions of the public land surveys if the land be surveyed, or to be surveyed at his expense under rules and regulations established by the Secretary of the Interior if located on unsurveyed land.

SEC. 6. That the remaining area within the limits of the land embraced in any such permit shall thereafter be subject to entry and disposal only under "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and amendments thereto, known as the one-hundred-and-sixty-acre homestead act.

SEC. 7. That the receipts obtained from the sale of lands under the provisions of section 6 hereof shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress approved June 17, 1902, known as the reclamation act.

SEC. 8. That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations, declaring them to be subject to the provisions of this act with reference to the disposition, occupancy, and use of the surface of the land.

SEC. 9. That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act.

Approved, October 22, 1919 (41 Stat. 293).

[S. 2983]

AN ACT To authorize the Secretary of the Interior to grant extensions of time under permits for the development of underground waters within the State of Nevada, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may, if he shall find that any permittee has been unable, with the exercise of diligence, to begin or continue operations for the development of underground waters within the time prescribed by sections 4 and 5 of the act of Congress approved October 22, 1919 (Forty-first Statutes, page 295), extend the time for the beginning, recommencement, or completion of the said operations described in said sections for such time, not exceeding two years, and upon such conditions as he shall prescribe.

Approved, September 22, 1922 (42 Stat. 1012).

HEIRS OF JEPTHA H. BRASHER

Decided April 13, 1927

STOCK-RAISING HOMESTEAD—CONTEST—PREFERENCE RIGHT—WIDOW; HEIRS; DEVISEE—RESIDENCE.

Where the heirs of a deceased contestant have made homestead entry in the exercise of the preference right, the requirements of the law may be fulfilled by one of the heirs for the benefit of all the heirs, notwithstanding that he be a minor.

FINNEY, *First Assistant Secretary:*

This is an appeal by Mamie Brasher from a decision of the Commissioner of the General Land Office dated September 28, 1926, in the matter of two entries under section 1 of the stock-raising homestead act, one made by her for the heirs of Jeptha H. Brasher, deceased, and the other made in her own right.

It appears that said Jeptha H. Brasher died while he was prosecuting a contest against the stock-raising homestead entry of Early D. Hilderbrand. The widow of Brasher proceeded with the contest and secured the cancellation of the entry. On June 17, 1925, Mrs. Brasher made entry for the land—all of Sec. 9, T. 2 N., R. 12 W., N. M. M., New Mexico—as the widow of the contestant.

On August 4, 1925, Mrs. Brasher made entry for N. ½ Sec. 20, and W. ½ Sec. 21, said township, in her own right.

By decision dated April 24, 1926, the Commissioner of the General Land Office held that both entries could not stand, and Mrs. Brasher

was required to elect which entry she would perfect. She thereupon filed a petition requesting that a son of her deceased husband be allowed to perfect (for the benefit of the heirs) the entry first made.

In the decision appealed from the Commissioner held that the son referred to, then 16 years of age, was not considered a qualified person to perfect the entry.

The second proviso to section 2 of the act of May 14, 1880 (21 Stat. 140), as amended by the act of July 26, 1892 (27 Stat. 270), reads as follows:

> That should any such person who has initiated a contest die before the final termination of the same, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred.

The first entry made by Mrs. Brasher as widow of the deceased contestant should have been allowed as if made "for the heirs of Jeptha H. Brasher, deceased," and Mrs. Brasher has requested that the entry be so amended. The widow was interested in the entry only to the extent of her interest in her late husband's estate. He died intestate.

Section 1842 of the 1915 codification of the statutes of New Mexico provides—

> Subject to the provisions of sections 1840 and 1841 of this article, when any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed subject to the payment of his debts in the following manner: One-fourth thereof to the surviving husband or wife and the remainder in equal shares to the children of decedent and further, as provided by law.

The sections (1840 and 1841) referred to in the foregoing relate to the distribution of comumnity property.

In an affidavit executed by Mrs. Brasher on July 20, 1926, the heirs of the deceased contestant were stated to be herself, Jeptha H. Brasher, jr., then 16 years of age, and Vern H. Brasher, of Waldron, Arkansas, aged 30 years. Inasmuch as the relation of the latter to the deceased contestant is not stated, it can not be determined whether he is one of the heirs under the laws of New Mexico.

Under the act of July 26, 1892, *supra*, the heirs of a deceased contestant, qualified by citizenship, succeed to the same rights that contestant would have had had his death not occurred, and burdened with the same duties and obligations as to residence and improvement, upon making entry in exercise of the preference right as would have rested upon contestant. See *Heirs of Robert M. Averett* (40 L. D. 608) and cases there cited.

Having made an entry in her own right the widow of contestant is not in position to comply with the law as to residence on the entry made for the benefit of the heirs, and no good reason appears for holding that the son of the couple, now over 17 years of age, may not reside on the land for the benefit of the heirs. To attempt to thus restrict a right granted by the act of July 26, 1892, *supra*, is not warranted.

The decison appealed from is therefore reversed, and both entries will remain intact, subject to compliance with the law under which they were made.

Reversed.

UNITED STATES v. CENTRAL PACIFIC RAILWAY COMPANY

Decided April 20, 1927

RAILROAD GRANT — MINERAL LANDS — MINING CLAIM — SURVEY — PAYMENT — PATENT.

Where the definition of boundaries is needed to give precision to a railroad grant, requiring a survey to exclude mineral lands, the cost of such survey must be paid by the grantee and the Government can withhold patent until the costs are paid; the provisions of paragraph 108 of the mining regulations imposing the costs of survey upon the Government are inapplicable.

COURT DECISION CITED AND DISTINGUISHED.

Case of *Work et al.* v. *Central Pacific Railway Company* (12 Fed., 2d series, 834), cited and distinguished.

FINNEY, *First Assistant Secretary:*

Upon review of the testimony taken in adverse proceedings against certain tracts claimed by the Central Pacific Railway Company under its grant, list No. 93, serial 014233, filed December 18, 1922, the Commissioner of the General Land Office found, *inter alia*, that the S. ½ NW. ¼ Sec. 33, T. 28 N., R. 34 E., M. D. M., Nevada, "outside" the Packard Nos. 4 and 5 lode mining claims, was nonmineral in character and that the lands within these lodes were mineral in character.

The Commissioner proceeded to instruct the local register as follows:

The S. ½ NW. ¼ said Sec. 33, outside the Packard Nos. 4 and 5 claims are nonmineral in character. However, before patent can issue for nonmineral lands in the S. ½ NW. ¼ said Sec. 33, a segregation survey of the Packard Nos. 4 and 5 claims must be made, the cost of which must be borne by the railway company, in accordance with Circular No. 1077 of July 9, 1926. Said instructions for such survey will be issued by this office, provided the railway company furnishes location certificates of these claims, and is willing to deposit the estimated cost of such survey. If the railway company is unwilling to pay

for the survey, the list will be canceled to the extent of the S. ½ NW. ¼ said Sec. 33.

The pertinent part of Circular No. 1077 (51 L. D. 487) reads—

> 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 segregate 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 railway company has appealed, contending that Circular No. 1077 does not apply; that the survey should be made at the cost of the United States in accordance with the provisions for segregation surveys in paragraph 108 of the mining regulations (49 L. D. 15, 84), which declare that: "The work will be performed without expense to the agricultural claimant or to the mineral claimants"; that the contest was not decided nor the land disposed of in accordance with the holding in *Work et al.* v. *Central Pacific Railway Company* (12 Fed., 2d series, 834); that having previously determined that a part of the land was nonmineral, it is contrary to law to cancel the list for failure to tender the cost of survey or for any other cause.

The land in the S. ½ NW. ¼ Sec. 33, without the boundaries of the Packard lodes Nos. 4 and 5, having been adjudged to be nonmineral land, under the principle announced in *Work et al.* v. *Central Pacific Railway Company*, *supra*, passed to the railway under its grant. What is needed is a definition of boundaries to give precision to the grant, and that requires a survey setting apart the mineral lands. The department is not aware of any law that requires the Government to assume the expense of a survey in such a case to enable the railway grantee to perfect its title. On the contrary, the law positively imposes upon a railroad grantee the duty of paying costs of such surveys. Section 881, Title 43, U. S. C., provides that—

> Before any land granted to any railroad company by the United States shall be conveyed to such company, or any persons entitled thereto under any of the acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest. (July 15, 1870, c. 292, 16 Stat. 305; July 31, 1876, c. 246, 19 Stat. 121.)

Section 833 (act of July 10, 1886, Sec. 3, 24 Stat. 143), provides for the collection of the unpaid costs of surveying, selecting, and conveying the granted lands by suit against the company. Section 887 (acts of February 27, 1899, 30 Stat. 892, of March 3, 1925, 43 Stat. 1141, 1144), provides for the deposit of costs in advance of the survey, and section 909 (act of June 25, 1910, 36 Stat. 834), provides for proceedings for forfeiture of any granted lands where the grantee neglects or refuses to pay the costs of survey required by law.

It would seem that whatever surveys are necessary in order to identify and describe with certainty and precision the lands to which the railway grantee is entitled are fully within the terms of the sections above cited imposing the costs of the survey thereof upon such grantee, and it is immaterial that the survey is a supplemental one arising out of the particular necessities of the case. Circular No. 1077, *supra*, is but an extension of the regulations of long standing, based upon the statutes cited and others of kindred nature, and such circular has been issued to facilitate the disposition of such fractional areas as may pass to the railway under the rule in the case last cited. Special provisions of law having been made governing the costs of survey in the administration of railroad grants, it is manifest that the general provisions of paragraph 108 of the mining regulations above mentioned have no application.

Work et al. v. *Central Pacific Railway Company* did not decide that the grantee company was entitled to the issuance of a patent to any irregular tract incompletely surveyed. That case dealt with a certainly described aliquot portion of a 40-acre subdivision, and it was held that the Government can not refuse to issue patent for such portion of it on the ground that the remaining portion has been found to contain mineral deposits; the question of withholding patent to an unsurveyed tract was not in issue in that case.

It is settled that the Government can withhold the patent until the costs of selecting, surveying, and conveying the land are paid. In *Deseret Salt Company* v. *Tarpey* (142 U. S. 241, 253), the Supreme Court, in construing section 21 of the act of July 2, 1864 (13 Stat. 356), which provides that before any land granted by the act shall be conveyed to any company or party entitled thereto, there shall first be paid into the Treasury of the United States, the costs of selecting, surveying, and conveying the same, said: "The object of this provision was to preserve to the Government such control over the property granted as to enable it to enforce the payment of these costs, and for that purpose to withhold the patents from the parties entitled to them until such payment."

The provision for the costs of survey, nevertheless, does not impair the force of the operative words of transfer in the grant, *Deseret* v. *Tarpey*, *supra*. It is proper, however, to reject the list as to the S. ½ of the NW. ¼ Sec. 33, if the railway company neglects or refuses within 90 days from notice to deposit a sum demanded and estimated to be sufficient to meet the expense of the necessary survey.

As modified, the decision appealed from is

Affirmed.

POTASH PROSPECTING PERMITS AND LEASES—ACT OF FEBRUARY 7, 1927

REGULATIONS

[Circular No. 1120]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 20, 1927.

REGISTERS, UNITED STATES LAND OFFICES:

The act of Congress approved February 7, 1927 (44 Stat. 1057), entitled "An Act To promote the mining of potash on the public domain," authorizes the Secretary of the Interior, under such rules and regulations as he may prescribe, to issue prospecting permits, for a period not to exceed two years, for the exploration of the land described therein for potassium in any of the forms named in said act, and under authority thereof the following rules and regulations will govern the issuance of such permits:

1. *Qualifications of applicants.*—Permits may be issued to (*a*) citizens of the United States, (*b*) an association of such citizens, (*c*) or a corporation organized under the laws of any State or Territory thereof.

2. *Area and description.*—A permit may be issued for not more than 2,560 acres of public lands of the United States in reasonably compact form, by legal subdivisions if surveyed; if unsurveyed, by metes and bounds description.

3. *Rights under permit.*—The permit will confer upon the recipient the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium on the lands embraced therein. In the exercise of this right the permittee shall be authorized to remove from the premises only such material as may be necessary to experimental work and the demonstration of the existence of such deposits or any of them in commercial quantities.

4. *Reward for discovery.*—A permittee who shows that he has made a discovery of valuable deposits of potassium within the area of the permit and within the two-year period for which issued, is entitled, under section 2 of the act, to a lease of any or all of the land embraced in the permit containing such deposits and chiefly valuable therefor, the area to be taken in compact form. The lease will be issued at such royalty and acreage rental as may be fixed pursuant to section 3 of the act. A discovery of a valuable deposit of potassium shall be construed as the discovery of a deposit which yields commercial potassium in commercial quantities.

5. *Lease—Royalty.*—Under authority of section 3 of the act, unless otherwise specified in the permit when issued, a permittee who makes the first discovery in any district and becomes entitled to a lease, will be granted a lease at the minimum royalty of 2 per cent of the quantity or gross value of the output of potassium compounds and other related products, except sodium, at the point of shipment to market, and at the minimum rental of 25 cents per acre, for 20 years succeeding the issue of the lease.

6. *Form and contents of application.*—Applications for permits should be filed in the proper district land office, addressed to the Commissioner of the General Land Office, and after due notation promptly forwarded for his consideration. No specific form of application is required, but it should cover, in substance, the following points, namely:

(*a*) Applicant's name and address.

(*b*) Proof of citizenship of applicant; by affidavit of such fact, if native born; or, if naturalized, by the certificate thereof or affidavit as to time and place when issued; if a corporation, by certified copy of the articles thereof, and showing as to residence and citizenship of its stockholders.

(*c*) A statement of all holdings by the applicant of permits and leases under this act and pending applications therefor, and interests directly or indirectly held in such permits and leases.

(*d*) Description of land for which the permit is desired, by legal subdivisions, if surveyed, and by metes and bounds, if unsurveyed, in which latter case, if deemed necessary, a survey sufficient more fully to identify and segregate the land may be required before the permit is granted; also a statement whether the land is vacant and unclaimed.

(*e*) Reasons why the land is believed to offer a favorable field for prospecting.

(*f*) Proposed method of conducting exploratory operations, amount of capital available for such operations, and the diligence with which such explorations will be prosecuted.

(*g*) Statement of the applicant's experience in operations of this nature, together with references as to his character, reputation, and business standing.

7. *Bonds.*—Where an application includes reserved deposits in lands theretofore entered or patented with reservation of potassium to the United States pursuant to the act of July 17, 1914 (38 Stat. 509), or where the lands constitute a portion of a reclamation project, the applicant will be required prior to issuance of the permit to furnish a bond with qualified corporate surety in the sum of $1,000, or such other amount as may be fixed, conditioned against damage

to the crops and improvements of the surface owner, or damage to the reclamation project or water supply thereof.

A bond with qualified corporate surety in the sum of $1,000, or such other amount as may be fixed, conditioned against failure of the permittee to comply with the provisions of paragraph 5 of the permit, may be required either before or after the permit is issued, where the conditions are such as to warrant requiring such bond.

8. *Form of permit.*—The form of permit issued under this act will be in substance as follows:

Serial No_____

THE UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT _____,
_____, 19__.

POTASH PROSPECTING PERMIT

Know all men by these presents, that the Secretary of the Interior, under and by virtue of the act of Congress entitled "An act to promote the mining of potash on the public domain," approved February 7, 1927, has granted and does hereby grant a permit to _____ of _____, of the exclusive right for a period of two years from date hereof to prospect the following-described lands _____ for chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium, but for no other purpose, upon the express conditions following:

1. To mark each corner of the outer boundaries and post a notice hereof in a conspicuous place on the land within 90 days, and to begin prospecting for said minerals within six months from date hereof, and diligently prosecute the exploratory and experimental work during the period of the permit, in manner and extent as follows, to wit: _____

2. To remove from said premises only such material as may be necessary to experimental work and the demonstration of the existence of such deposits in commercial quantities.

3. To afford all facility for inspection of such exploratory work on behalf of the Secretary of the Interior, and to report fully when required all matters pertaining to the character, progress, and results of such exploratory work, and to that end to keep and maintain such accounts, logs, or other records, as the Secretary of the Interior may require.

4. Not to assign or transfer the permit granted hereby without the express consent in writing of the Secretary of the Interior.

5. To carry out, at the expense of the permittee, all reasonable orders of the Secretary of the Interior, or his authorized representatives (mining supervisors, U. S. Geological Survey), issued in pursuance of the operating regulations; to carry on all operations hereunder in accordance with approved methods and practice and in conformity with the operating regulations to the satisfaction of said representatives; to take all reasonable precautions to prevent waste of or damage to mineral deposits, injury to life, health, or property, or economic waste; and to repair promptly, so far as possible, any damage to mineral deposits or mineral-bearing formations resulting from his operations.

6. To furnish such bond or bonds with qualified corporate surety, as the Secretary of the Interior may at any time require, conditioned against the failure

of the permittee to comply with the provisions of paragraph 5 hereof, and against damage to the crops and improvements of any surface owner entitled to such bond, or damages to any reclamation project embracing any of the lands herein described.

Expressly reserving to the Secretary of the Interior the right to permit for joint or several use such easements or right of way upon, through, or in the lands covered hereby as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in said act; and further reserving the right and authority to cancel this instrument for failure of the permittee to exercise due diligence in the execution of the prospecting work in accordance with the terms hereof.

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

Dated _____.

_____,
First Assistant Secretary of the Interior.

POTASH LEASES

Section 3 of the act authorizes the Secretary of the Interior, under such general regulations as he may adopt, to lease, for the production of the potassium and other mineral deposits contained therein, public lands known to contain potassium in commercial quantity and character and found in some or any of the forms described in said act, leases to be issued for periods of 20 years, with preferential right in the lessee to renew the lease for successive periods of 10 years, upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the expiration of any such period.

9. *Qualifications of applicants.*—Applications for leases in the form as herein provided may be filed in the proper district land office, addressed to the Commissioner of the General Land Office, by citizens of the United States, an association of such citizens, or corporations organized under the laws of any State or Territory thereof, the qualifications of the applicant in this respect to be fully covered by the application.

10. *Area and description.*—Leases are authorized by the terms of the act for an area not exceeding 2,560 acres, but will be granted only for such area as may be shown to the satisfaction of the Secretary of the Interior to contain deposits of potassium in such form and quantities as to constitute a commercial value, and will be limited to lands reasonably compact in form and described by legal subdivisions of the public land surveys, if surveyed, or if unsurveyed, by the approximate description they will bear when surveyed; the survey in the latter case to be made at the expense of the applicant if the application for lease is otherwise found satisfactory, the descriptions of the land in the lease when granted to conform to the official survey.

11. *Royalty and rentals.*—Except leases issued to permittees under claims of discovery, as stated in paragraph 5 hereof, the rate of royalty will be fixed prior to the issuance of the lease, but in no case can the royalty rate be less than 2 per centum of the quantity or gross value of the output of the potassium compounds and other related products, except sodium, at the point of shipment to market.

The rentals fixed by the act are to be paid annually in advance—25 cents per acre or fraction of an acre for the first calendar year or fraction thereof, 50 cents per acre for the second, third, fourth, and fifth years, respectively, and $1 per acre for each year thereafter, such rental for any year being credited against royalties accruing for that year.

12. *Leases for potassium and sodium.*—Under section 4 of the act, potash leases may also provide for the development of sodium, magnesium, aluminum, or calcium deposits, associated with the potassium deposits, on terms not inconsistent with the terms of the act of February 25, 1920. In cases of application for leases under this provision of the act, the terms of the lease, including rate of royalty, rentals, and production requirements, will be in accord with the provisions of both acts.

13. *Form and contents of application.*—Applications for leases must be under oath and should be filed in the proper district land office, addressed to the Commissioner of the General Land Office. No specific form of application is required, and no blanks will be furnished, but it should cover in substance the following points:

(*a*) Applicant's name and address.

(*b*) Proof of citizenship of applicant, by affidavit of such fact, if native born; if naturalized, by a certified copy of a certificate thereof in the form provided for use in public-land matters, unless such copy is on file. If the applicant is an association, each member thereof must show his qualifications as above stated; if a corporation, a certified copy of the articles of incorporation must be filed, together with a showing as to the residence and citizenship of its stockholders.

(*c*) A statement of all holdings by the applicant of permits and leases under this act, pending applications therefor, and interests directly or indirectly held in such permits and leases.

(*d*) Description of land for which the lease is desired, by legal subdivisions if surveyed, and by metes and bounds if unsurveyed, in which latter case the description should be connected to some corner of the public land surveys where practicable, or to some permanent landmark. If the land is unsurveyed, the applicant, after he has been awarded the right to a lease, but before the issuance thereof, will be required to deposit with the district cadastral engineer of the public survey office of the State or district in which the land is located

the estimated cost of making a survey of the lands, any balance remaining after the work is completed to be returned. This survey will be an extension of the public land surveys over the tract applied for, the leased land to be conformed to legal subdivisions of such survey when made.

(*e*) Evidence that the land is valuable for its potassium content, except so much thereof as is necessary for the extraction and reduction of the leased minerals, with a statement as accurate as may be of the character and extent and mode of occurrence of the potassium deposits in the lands applied for.

(*f*) Proposed method, so far as determined, as to the process of mining and reduction to be adopted, the diligence with which such operations will be carried on, and the contemplated investment in reduction works and development, and the capital available therefor.

(*g*) The application shall be accompanied by a notice for publication, in duplicate, prepared for the signature of the register, in substantially the following form:

Serial No. ------

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE AT ----------,
----------, 19--.

NOTICE OF APPLICATION FOR POTASH LEASE

Notice is hereby given that in pursuance of the act of Congress approved February 7, 1927, ----------, whose post-office address is ----------, ----------, has made application for potash lease covering the following described lands: ----------

Said application will be submitted to the Commissioner of the General Land Office within 30 days from ----------, 19--, and any and all persons claiming adversely any of the described lands are required to file their claims in this office on or before said date, otherwise their claims will be disregarded in the granting of said lease.

Other applications for lease of the described lands may be filed at any time prior to said date, in which case all applications so filed will be considered as prescribed by section 15 of the potash regulations.

------ ------, *Register.*

The register will fix the time within which adverse or conflicting claims and other potash lease applications may be filed at not less than 30 nor more than 40 days from first publication.

14. *Disposition of applications.*—(*a*) The application will be given current serial number by the register, noted on his records, and the notice for publication will be signed by the register.

After the receipt of such application, no applications, filings, or selections for the lands embraced therein will be permitted until so directed, except applications for leases under this act.

(*b*) The notice shall be published at the expense of the applicant, and proof of publication furnished promptly at the expiration thereof.

One copy of the signed notice will be delivered to the applicant, who will cause the same to be published in a newspaper, to be designated by the register, of general circulation and best adapted to give the widest publicity in the county where the land is situated. If the land is in two or more counties, notice may be published in either. Notice must also be posted in the district land office during the period of publication.

(*c*) At the expiration of the period fixed in the notice, the evidence of publication and posting in said office should be promptly transmitted by the register to the Commissioner of the General Land Office, with a statement of the status of the land involved as to conflicts, withdrawals, protests, and any other matters that may be necessary to determine the availability of the land or deposits therein for lease.

15. *Action in General Land Office.*—On the receipt of the application or applications in the General Land Office the same will be considered, investigation made, if deemed necessary, and submitted to the Secretary of the Interior with appropriate recommendation and report as to the proper action to be taken thereon, giving due consideration to the proposed effectual development of the alleged potash deposits and the amount of capital to be invested therein; the award of priority in case of conflicting applications to be determined by the respective proposed investments, date of productive development proposed by the several applicants, and any equities that may exist in one or more of the applicants resulting from improvement or development under claims made under other laws.

In the award of lease of any lands or deposits hereunder the right is reserved to order a sale of the lease at public auction to the bidder offering the highest cash bonus for lease thereof on such terms as may be prescribed for lease of the lands, in which case any application for lease theretofore filed will give the applicant no priority or preference in securing a lease of the lands.

16. *Lease by permittee.*—The permittee has a preference right within the two years of his permit to lease any or all of the land included in his permit, upon showing to the satisfaction of the Sectary of the Interior that he has discovered a valuable deposit of potash thereon and that such land is chiefly valuable therefor. Any lands not leased by the permittee will be subject to be leased by others under the terms set forth in these regulations.

17. *Form of lease.*—

Serial No. ------

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE AT ------,
----------, 19--

POTASH LEASE

Date.—Parties. This indenture of lease entered into in triplicate this ---------- day of ----------, 19--, by and between the United States of America, acting in this behalf by the Secretary of the Interior, party of the first part, hereinafter called the lessor, and ----------, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress approved February 7, 1927 (44 Stat. 1057), entitled "An act to promote the mining of potash on the public domain," hereinafter referred to as the act, which is made a part hereof, witnesseth:

SEC. 1. *Purposes.*—That the lessor, in consideration of the rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to mine, remove, and dispose of all the potassium and associated minerals in, upon, or under the following-described tracts ----------, containing ---------- acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, or reservoirs necessary to the full enjoyment hereof, together also with the right to use any timber, stone, or other materials on said land in connection with the operations to be conducted hereunder, for a period of 20 years, with preferential right in the lessee to renew the same for successive periods of 10 years under such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the expiration of any such period: *Provided*, That this lease shall extend only to or include any right or interest in the lands, or the minerals therein, reserved to the United States under any entry that may be allowed, or patent that may issue, or may have issued, with a reservation of minerals to the United States.

SEC. 2. In consideration of the foregoing the lessee hereby agrees:

(*a*) *Investment.*—To invest in actual development or improvements upon the land leased, or for the benefit thereof, the sum of -------- dollars, of which sum not less than one-third shall be so expended during the first year succeeding the execution of this instrument and a like sum each of the two succeeding years, unless sooner expended; and submit annually, at the expiration of each year for the said period, an itemized statement of the amount and character of said expenditure during each year.

To furnish and maintain a bond in the sum of $5,000, conditioned upon the expenditure of the amount specified in (*a*) hereof and compliance with the terms and provisions of this lease.

(*b*) *Royalty.*—To pay for the output of potassium and all other related products a royalty of -------- per cent, and for the output of sodium compounds a royalty of 12½ per cent, of the gross value thereof at the point of shipment to market. Such royalties shall be paid monthly, the royalties for each month to be paid during the next succeeding month to the register of the United States land district in which the land is situated, or if not in a land district, to the Commissioner of the General Land Office.

(*c*) *Rents.*—To pay the register of the district land office on all leases annually, in advance, beginning with the date of the execution of the lease, the following rentals: Twenty-five cents per acre for the first calendar year or fraction thereof; 50 cents per acre for the second, third, fourth, and fifth years.

respectively, and $1 per acre for each and every calendar year thereafter during the continuance of the lease, such rental for any year to be credited against the royalties as they accrue for that calendar year.

(*d*) *Taxes.*—To pay when due all taxes assessed and levied under the laws of the State upon the improvements, output of mines, or other rights, property, or assets of the lessee.

(*e*) *Monthly statements.*—To furnish monthly certified statements in detail in such form as may be prescribed by the lessor of the amount and value of output from the leasehold as a basis for determining amount of royalties. All books and accounts of the lessee shall be open at all times for the inspection by any duly authorized officer of the department. Falsification of such statements shall be a basis for action for the cancellation of the lease.

(*f*) *Plats and reports.*—To furnish annually a plat in the manner and form prescribed by the Secretary of the Interior showing all prospecting and development work on the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon said leased lands, as well as any buildings, reduction works, or equipment, situated elsewhere and owned or operated in conjunction with, or as a part of, the operations conducted hereunder, accompanied by a report, in detail, as to the stockholders, business transacted, assets and liabilities of the lessee, together with a statement of the amount of potash, and other minerals produced and secured by operations hereunder, and the cost of production thereof.

(*g*) *Potassium in solution.*—Where the minerals are taken from the earth in solution, such extraction shall not be within 500 feet of the boundary line of leased lands without permission from the Secretary of the Interior.

(*h*) *Diligence—Prevention of waste—Health and safety of workmen.*—To develop and produce in commercial quantities, with reasonable diligence, the potassium and other mineral deposits susceptible of such production in the lands covered hereby; to carry out, at the expense of the lessee, all reasonable orders of the Secretary of the Interior, or his authorized representatives (mining supervisors, U. S. Geological Survey), issued in pursuance of the operating regulations; to carry on all mining, reducing, refining, and other operations in accordance with approved methods and practice and in conformity with the operating regulations to the satisfaction of said representatives; to take all reasonable precaution to prevent damage to mineral deposits, injury to life, health, or property, or economic waste; to observe all State laws relative to the health and safety of workmen and employees; and to provide access at all times to mining and related productive operations for examination and inspection by authorized representatives of the lessor.

(*i*) *Forfeiture of lease.*—To deliver up to the lessor in good order and condition and subject to the provisions of section 5 hereof on the termination of this lease as a result of forfeiture thereof pursuant to section 31 of the act of February 25, 1920, the lands covered thereby, including all fixtures, machinery, improvements, and appurtenances, together with such personal property situate on any of said lands as may be necessary or convenient for the continued operation to the full extent and capacity of the leased premises.

(*k*) *Reserved deposits.*—To comply with all statutory requirements where the surface of the lands embraced herein has been disposed of under laws reserving to the United States the mineral deposits therein.

(*l*) *Assignment.*—Not to assign or sublet, without the consent of the Secretary of the Interior, the premises covered hereby.

(*m*) *Excess holdings.*—To observe faithfully the provisions of section 27 of the act of February 25, 1920, as amended by act of April 30, 1926, in so far as applicable hereto.

(*n*) *Minimum production.*—Beginning with the fourth full calendar year of the lease, except when operations are interrupted by strikes, the elements, or casualties not attributable to the lessee, to produce each year potassium or associated minerals from the premises covered hereby, to the gross value of not less than _____ dollars at the point of shipment, or to pay royalty on said gross value if the value of actual production be less.

SEC. 3. The lessor expressly reserves:

(*a*) *Easements and rights of way.*—The right to permit for joint or several use such easements or rights of way upon, through, or in the lands hereby leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act; and the treatment and shipment of the products thereof, by or under authority of the Government, its lessees or permittees, and for other public purposes.

(*b*) *Disposition of surface.*—The right to dispose of the surface of the land embraced herein under existing law, or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein.

(*c*) *Monopoly and fair prices.*—Full power and authority to carry out and enforce all the provisions of section 30 of said act of February 25, 1920, to insure the sale of the production of said leased lands to the United States and to the public at reasonable prices, to prevent monopoly, and to safeguard the public welfare.

SEC. 4. *Surrender and termination of lease.*—The lessee may, on consent of the Secretary of the Interior first had and obtained, surrender and terminate this lease at any time after the first four years of the term herein provided for, by giving six months' notice in writing to the lessor, and upon payment of all rents, royalties, and other debts due and payable to the lessor, and upon payment of all wages or money due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary of the Interior that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mines or productive works or permanent improvements on the lands covered by such relinquishment.

SEC. 5. *Purchase of materials, etc., on termination of lease.*—That on the termination of this lease, by surrender or forfeiture, the lessor, his agent, licensee, or lessee, shall have the exclusive right, at the lessor's election, to purchase at any time within six months, at the appraised value thereof, any or all buildings, machinery, equipment and tools, whether fixtures or personalty, placed by the lessee in or on the land leased hereunder, save and except equipment such as underground timbering, supports, shaft linings, and well casings, necessary for the preservation of the mine or other development works, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to be paid for said buildings, machinery, equipment, and tools to be purchased as aforesaid shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party thereto and the third by the two so designated), the valuation of the three or a majority of them to be conclusive; that pending such election to purchase within said period of six months none of said buildings, or other property, shall be removed from their normal position; that at any time within a period of 90 days after election by the lessor not to purchase or after expiration of said period of six months without election by the lessor, the lessee shall have the privilege of removing from the premises said buildings and other property except said underground equipment and structures as aforesaid.

SEC. 6. *Judicial proceedings in case of default.*—If the lessee shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at date hereof, and such default shall continue for 90 days after service of written notice thereof by the lessor, then the lessor may institute appropriate proceedings in a court of competent jurisdicition for the forfeiture and cancellation of this lease as provided in section 31 of the act of February 25, 1920. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

SEC. 7. *Heirs and successors in interest.*—It is further agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

SEC. 8. *Unlawful interest.*—It is also further agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part of this lease, or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States, approved March 4, 1909 (35 Stat. 1109), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA,
By _____
Secretary of the Interior, Lessor.
_____, *Lessee.*
_____, *Lessee.*
_____, *Lessee.*

Witnesses:
_____
_____
_____

18. *Operations.*—Prospecting and mining operations under permits and leases will be governed by operating regulations, approved by the Secretary of the Interior. Administration of the operating regulations and supervision of operations on permits and leases will be under the direction of the Geological Survey. Before beginning operations permittees and lessees should consult with the mining supervisor of the Geological Survey for the area in which operations are to be conducted and obtain from him a copy of the operating regulations.

19. *Limitation on holdings.*—The act provides that the general provisions of the act of February 25, 1920, shall be applicable. The Secretary of the Interior is given authority to prescribe necessary and proper rules and regulations, and in view of the limitations fixed by section 27 of the latter act on holdings of permits and leases of the

minerals enumerated therein no person, association, or corporation will be granted, either directly or indirectly or by approval of assignments, permits or/and leases for more than 2,560 acres or which will when added to the area already held exceed in the aggregate 2,560 acres in the same potassium prospecting or leasing field, except in cases where, because of the character of the deposits, the capital necessary for their proper development, or other conditions, a larger area is found necessary for economic mining operations and to secure the best development thereof, but in such cases the total shall not exceed 7,680 acres.

20. *Repealing and saving clause.*—By section 6 of the act, the act of October 2, 1917 (40 Stat. 297), is repealed, with provision that the repeal shall not affect pending applications for permits or leases filed prior to January 1, 1926, or valid claims existing at the passage of the act and thereafter maintained in compliance with the law under which initiated, which claims may be perfected under such law, including discovery.

Under these provisions applications for permits or leases filed prior to January 1, 1926, will be considered under the act of October 2, 1917, and if allowable permits or leases will be issued under said act unless an applicant request permit or lease under the later act.

Pending applications filed under the act of October 2, 1917, subsequent to January 1, 1926, will be allowed to proceed to permits or leases provided the applicants file supplemental applications agreeing to accept permits or leases under the law now in force and pay the filing fees prescribed for applications filed under these regulations.

As to potash mining claims, only those claims may be patented which were initiated prior to and were valid existing claims on October 2, 1917, and have since been duly maintained as such.

21. *Fees and commissions.*—(*a*) For receiving and acting upon each application for prospecting permit or lease filed in the district land office in accordance with these regulations there shall be paid by the applicant a fee of $2 for every 160 acres or fraction thereof in the application, such fee in no case to be less than $10, the same to be considered as earned when paid and to be credited to the compensation of the register within the limitations provided by law.

(*b*) Registers shall be entitled to a commission of 1 per cent of all moneys received in each register's office. Such commission will not be collected from the applicant or lessee in addition to the moneys otherwise provided to be paid.

It should be understood that the commissions herein provided for will not affect the disposition of the proceeds arising from opera-

tions under the act, as provided in section 35 of the act of February 25, 1920; also that such commissions will be credited on compensation of registers only to the extent of the limitation provided by law for maximum compensation of such officer.

WILLIAM SPRY,
Commissioner.

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

[PUBLIC—No. 579—44 STAT. 1057]

AN ACT To promote the mining of potash on the public domain

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium in lands belonging to the United States for a period of not exceeding two years: *Provided,* That the area to be included in such a permit shall not exceed two thousand five hundred and sixty acres of land in reasonably compact form: *Provided further,* That the prospecting provisions of this act shall not apply to lands and deposits in or adjacent to Searles Lake, California, which lands may be leased by the Secretary of the Interior under the terms and provisions of this act.

SEC. 2. That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in this act has been discovered by the permittee within the area covered by his permit, and that such 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 not less than 2 per centum of the quantity, or gross value of the output of potassium compounds and other related products, except sodium, 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.

SEC. 3. That lands known to contain valuable deposits enumerated in this act 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 two thousand five hundred and sixty acres; all leases to be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease, not less than 2 per centum of the quantity or gross value of the output of potassium compounds and other related products, except sodium, at the point of shipment to market, and the payment in advance of a rental of 25 cents per acre for the first calendar year or fraction thereof; 50 cents per acre for the second, third, fourth, and fifth years, respectively; and $1 per acre per annum thereafter during the continuance of the lease, such rental for any year being credited against royalties accruing for that year. Leases under this act shall be for a period of twenty years, with preferential

right in the lessee to renew for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the expiration of such periods. In the discretion of the Secretary of the Interior the area involved in any lease resulting from a prospecting permit may be exempt from any rental in excess of 25 cents per acre for twenty years succeeding its issue, and the production of potassium compounds under such a lease may be exempt from any royalty in excess of the minimum prescribed in this act for the same period.

SEC. 4. That prospecting permits or leases may be issued under the provisions of this act deposits of potassium in public lands, also containing deposits of coal or other minerals, on conditions that such other deposits be reserved to the United States for disposal under appropriate laws: *Provided*, That if the interests of the Government and of the lessee will be subserved thereby, potassium leases may include covenants providing for the development by the lessee of chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium, magnesium, aluminum, or calcium, associated with the potassium deposits leased, on terms and conditions not inconsistent with the sodium provision of the act of February 25, 1920 (Forty-first Statutes at Large, page 437): *Provided further*, That where valuable deposits of mineral now subject to disposition under the general mining laws are found in fissure veins on any of the lands subject to permit or lease under this act, the valuable minerals so found shall continue subject to disposition under the said general mining laws notwithstanding the presence of potash therein.

SEC 5. That the general provisions of sections 1 and 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 potassium.

SEC. 6. That the act of October 2, 1917 (Fortieth Statutes at Large, page 297), entitled "An act to authorize exploration for and disposition of potassium," is hereby repealed, but this repeal shall not affect pending applications for permits or leases filed prior to January 1, 1926, or valid claims existent at date of the 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.

Approved, February 7, 1927.

[PUBLIC—No. 146—41 STAT. 437]

AN ACT To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the act known as the Appalachian forest act, approved March 1, 1911 (Thirty-sixth Statues, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United

States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof; *And provided further*, That citizens of another country the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country shall not by stock ownership, stock holding, or stock control own any interest in any lease acquired under the provisions of this act.

(Sections 2 to 25, inclusive, relate to coal, oil, and gas, oil shale, phosphate, and sodium.)

GENERAL PROVISIONS APPLICABLE TO COAL, PHOSPHATE, SODIUM, OIL, OIL SHALE GAS, AND POTASH LEASES

SEC. 26. That the Secretary of the Interior shall reserve and may excercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit, and shall insert in every such permit issued under the provisions of this act appropriate provisions for its cancellation by him.

SEC. 27 (as amended by act approved April 30, 1926, Forty-fourth Statutes, page 373). 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 two thousand five hundred and sixty 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 seven thousand six hundred and eighty acres granted hereunder in any one State, and not more than two thousand five hundred and sixty 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, of 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, trusteed, 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 any wise 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.

SEC. 28. That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line operating a lease or purchasing gas or oil under the provisions of this act: *Provided further*, 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. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

SEC. 29. That any permit, lease, occupation, or use permitted under this act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels, upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this act,

may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

SEC. 30. That no lease issued under the authority of this act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: *Provided*, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

SEC. 31. That any lease issued under the provisions of this act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this act, of the lease, or of the general regulations promulgated under this act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 32. 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: *Provided*, That nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the rights to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

SEC. 33. That all statements, representations, or reports required by the Secretary of the Interior under this act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require.

SEC. 34. That the provisions of this act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, subject to such conditions as are or may hereafter be provided by such laws reserving such deposits.

SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress, known as the reclamation act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the provisions of this act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

SEC. 36. That all royalty accruing to the United States under any oil or gas lease or permit under this act on demand of the Secretary of the Interior shall be paid in oil or gas.

Upon granting any oil or gas lease under this act, and from time to time thereafter during said lease, the Secretary of the Interior shall, except whenever in his judgment it is desirable to retain the same for the use of the United States, offer for sale for such period as he may determine, upon notice and advertisement on sealed bids or at public auction, all royalty oil and gas accruing or reserved to the United States under such lease. Such advertisement and sale shall reserve to the Secretary of the Interior the right to reject all bids whenever within his judgment the interest of the United States demands; and in cases where no satisfactory bid is received or where the accepted bidder fails to complete the purchase, or where the Secretary of the Interior shall determine that it is unwise in the public interest to accept the offer of the highest bidder, the Secretary of the Interior, within his discretion, may readvertise such royalty for sale, or sell at private sale at not less than the market price for such period, or accept the value thereof from the lessee: *Provided, however*, That pending the making of a permanent contract for the sale of any royalty oil or gas as herein provided, the Secretary of the Interior may sell the current product at private sale, at not less than the market price: *And provided further*, That any royalty oil or gas may be sold at not less than the market price at private sale to any department or agency of the United States.

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), 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.

SEC. 38. That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States land offices on account of business transacted under the provisions of this act.

Approved, February 25, 1920.

EFFECT OF AN EXECUTIVE WITHDRAWAL UPON TIMBER AND STONE ENTRIES PRIOR TO SUBMISSION OF FINAL PROOF AND PAYMENT OF PURCHASE MONEYS

Instructions, April 21, 1927

WITHDRAWAL—TIMBER AND STONE ENTRY—APPLICATION—FINAL PROOF—PAYMENT.

Prior to the submission of final proof and payment of the purchase money an application to make entry under the timber and stone law does not operate to defeat a withdrawal made pursuant to the act of June 25, 1910, as amended by the act of August 24, 1912.

WITHDRAWAL—TIMBER AND STONE ENTRY—NATIONAL FORESTS—SEGREGATION—LAND DEPARTMENT—JURISDICTION—PATENT.

An Executive withdrawal under the act of June 25, 1910, as amended by the act of August 24, 1912, for classification and pending determination as to the advisability of including lands in a national forest, effectually segregates the lands, except as to claims coming within the exceptions in those acts, placing them beyond the jurisdiction of the Land Department, and final certificates and patents thereafter issued are void.

FINNEY, *First Assistant Secretary:*

In your [Commissioner of the General Land Office] letter of April 12, 1927, you set forth contemplated adverse procedure to be taken against claimants of certain described tracts included in the Executive withdrawal of October 14, 1926, made under the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), for classification and pending determination as to the advisability of including such lands in the Superior National Forest, Minnesota, the inclusion of such lands in the forest being recommended by the Department of Agriculture. These tracts are either embraced in pending applications or pending entries upon which final proof and payment of purchase money have been made or are tracts that have been entered and patented all under the provisions of the timber and stone law, but in each instance it appears that final proof and the payment of the purchase money were not made until after the withdrawal was made and became effective.

The action proposed is to hold for rejection the unperfected applications; hold for cancellation those entries and final certificates where

final proof and payment of the purchase price were made; and to recommend to the Attorney General that the suit be brought to cancel the patents in the cases mentioned where patents have issued.

You base the propriety of this course of action upon the theory that no such vested right was acquired by the filing of these timber and stone applications prior to the submission of the final proof as would deprive Congress of the power to make other disposition of the lands, attention being invited to the fact that the withdrawal contains no exceptions other than is made by the aforementioned acts, which acts, other than certain claims under the mining laws, excepts only lands that on the date of such withdrawal are embraced in any lawful homestead or desert-land entry theretofore made or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law.

The department has adhered to the view that no right is vested under a timber and stone application until final proof has been submitted and the purchase money paid; that until such time no right is acquired as against the Government which would deprive Congress of the power to dispose of the land. (32 L. D. 387, 472; 33 L. D. 426; 36 L. D. 18.) Also in *United States* v. *Braddock* (50 Fed. 669, 672) it was held that the mere filing of an application to purchase land under the timber and stone act confers upon the applicant no right as against the United States, and that until the applicant has acquired a vested right in the land, it is within the power of the Government to withdraw it from sale or make any other disposition of it. See to the same effect *Brown* v. *Baker* (173 Pac. 89). The holdings cited are but recognitions of the manifest distinction pointed out in the *Yosemite Valley case* (15 Wall. 77, 93), between the acquisition of a legal right against the owner, the United States, and the acquisition of a legal right as against other parties to be preferred in its purchase when the United States determines to sell. This principle has been frequently applied by the Supreme Court. See cases cited under administrative ruling with respect to withdrawals under the act of 1910 (43 L. D. 293, 294), where it is held:

> Congress having power to withdraw lands and devote them to a public use, notwithstanding the existence of the inchoate claims mentioned, having authorized the withdrawals and reservations by the act cited, and withdrawals having been made for public purposes, as prescribed in the act, the Secretary of the Interior has no power or authority to approve or accept such selections or exchanges or to relieve them from the force and effect of an existing reservation.

It also seems to be settled law, that the lands withdrawn under this order except as to lands affected by claims falling within the exceptions in the acts were effectually segregated from the public domain and passed beyond the control and jurisdiction of the Land Department and any action taken resulting in the issuance of final certificate

or patent to the same had no binding force or effect whatever but is subject to attack whenever and wherever it should be asserted as a basis of title. *Burfenning* v. *Chicago, St. Paul, Minneapolis and Omahaa Ry. Co.* (163 U. S. 321); *Lake Superior Ship Canal Ry. and Iron Co.* v. *Cunningham* (155 U. S. 354); *Doolan* v. *Carr* (125 U. S. 618); *Wilcox* v. *Jackson* (13 Pet. 498); *King* v. *McAndrews* (11 Fed. 880); *Florida Town Imp. Co.* v. *Gigalsky* (33 So. 451). If the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable, but void. *Smelting Co.* v. *Kemp* (104 U. S. 636, 646); *Noble* v. *Union River Logging Co.* (147 U. S. 165), and cases there cited; *Scott* v. *Carew* (196 U. S. 100, 109).

The situation as disclosed appears to render the action proposed by you both necessary and proper and must receive the concurrence of the department.

PURCHASE OF FIVE-ACRE TRACTS FOR HOMESTEAD OR HEADQUARTERS IN ALASKA—ACT OF MARCH 3, 1927

INSTRUCTIONS

[Circular No. 1121]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 23, 1927.

REGISTER AND DIVISION INSPECTOR,
ANCHORAGE, ALASKA;
REGISTER AND RECEIVER,
FAIRBANKS AND NOME, ALASKA:

Your attention is called to the act of March 3, 1927 (44 Stat. 1364), entitled—

An act to amend section 10 of the act entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," approved May 14, 1898 (Thirtieth Statutes at Large, page 409),

which provides—

That section 10 of the act entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," approved May 14, 1898 (Thirtieth Statutes at Large, page 409), be, and the same is hereby, amended by adding thereto the following after the word "otherwise" in line 14 of the section:

"*Provided*, That any citizen of the United States twenty-one years of age employed by citizens of the United States, associations of such citizens, or by corporations organized under the laws of the United States, or of any State

or Territory, whose employer is engaged in trade, manufacture, or other productive industry, and any citizen of the United States twenty-one years of age who is himself engaged in trade, manufacture, or other productive industry may purchase one claim, not exceeding five acres, of unreserved public lands, such tract of land not to include mineral, coal, oil, or gas lands, in Alaska as a homestead or headquarters, under rules and regulations to be prescribed by the Secretary of the Interior, upon payment of $2.50 per acre."

The purpose of this statute is to enable fishermen, trappers, traders, manufacturers, or others engaged in productive industry to purchase small tracts of unreserved land in Alaska, not exceeding 5 acres, as homesteads or headquarters.

The use of lands authorized to be so purchased for unlawful purposes is, therefore, inconsistent with the intent and purpose of the act; and care will be taken in all cases before patent issues, to see that such intent and purpose are made effective.

Applications under said act must be filed in duplicate in the district land office within which the land is situated. Applications may be for surveyed or unsurveyed land but not to exceed 5 acres. The register will give each application a current serial number, and if in proper form, will forward the original to this office as in trade and manufacturing cases and the duplicate to the division inspector for the usual report and recommendations, including the mineral, coal, oil, or gas character of the land. The division inspector will submit his report direct to this office.

The procedure as to the survey, execution of affidavits, and posting and publication of notice will be in accordance with the current regulations governing trade and manufacturing sites, except that applicant will be required to furnish proof, corroborated by two witnesses, showing the following facts instead of the proof required under said trade and manufacturing site regulations:

First: The age and citizenship of applicant.

Second: The actual use and occupancy of the land for which application is made for a homestead or headquarters.

Third: The date when the land was first occupied as a homestead or headquarters.

Fourth: The nature of the trade, business, or productive industry in which applicant or his employer, whether a citizen, an association of citizens, or a corporation is engaged.

Fifth: The location of the tract applied for with respect to the place of business and other facts demonstrating its adaptability to the purpose of a homestead or headquarters.

Sixth: That the tract applied for does not include mineral, coal, oil, or gas lands, and is essentially nonmineral in character.

Seventh: That no portion of the tract applied for is occupied or reserved for any purpose by the United States, or occupied or claimed by any natives of Alaska, or occupied as a town site or missionary station or reserved from sale, and that the tract does not include improvements made by or in possession of another person, association, or corporation.

Eighth: Whether or not the land abuts on any navigable stream, inlet, gulf, bay, or seashore, and if so that it is not within 80 rods of any other tract sold, entered, or claimed under said act of May 14, 1898, as modified by the act of March 3, 1903 (32 Stat. 1028), as to reserved spaces.

You will make proper notations of this act on your records and acknowledge receipt hereof.

WILLIAM SPRY,
Commissioner.

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

LAWS AND REGULATIONS RELATING TO TOWN SITES, PARKS, CEMETERIES, AND RECREATIONAL SITES

[Circular No. 1132] [1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 27, 1927.

TOWN SITES

TOWN SITES RESERVED BY THE PRESIDENT

(United States Revised Statutes)

SEC. 2380. The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population.

SEC. 2381. When, in the opinion of the President, the public interests require it, it shall be the duty of the Secretary of the Interior to cause any of such reservations, or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisement of disinterested persons their cash value, and to offer the same for sale at public outcry to the highest bidder, and thence afterwards to be held subject to sale at private entry according to such regulations as the Secretary of the Interior may prescribe; but no lot shall be disposed of at public sale or private entry for less than the appraised value thereof. And all such sales shall be conducted by the register and receiver of the land office in the district in which the reservations may be situated, in accordance with the instructions of the Commissioner of the General Land Office.

1. *Reservation of land.*—Under section 2380, United States Revised Statutes, public land may be reserved by the President for town-site purposes on his own motion, or petitions may be addressed to him therefor, setting forth facts warranting his action under said section, duly verified by the affidavit of one or more persons, such

[1] For prior regulations see 5 L. D. 265, 32 L. D. 156, and 38 L. D. 92.

petitions to be filed with the President, the department, the General Land Office, or with the district land office for transmission to the General Land Office.

2. *Survey and appraisal.*—Town sites reserved under section 2380, or under any other law directing their disposition under section 2381, will be surveyed, when ordered by the department, under the supervision of the General Land Office, into urban, or urban and suburban, lots and blocks, and thereafter the lots and blocks will be appraised by such disinterested person or persons as may be appointed by the Secretary of the Interior. Each appraiser must take his oath of office and transmit the same to the General Land Office before proceeding with his work. Said office must be notified by wire of the time when such appraiser or appraisers enter on duty. They will examine each lot to be appraised and determine the fair and just cash value thereof. Improvements on such lots, if any, must not be considered in fixing such value. Lots reserved for public purposes will not be appraised.

3. *Schedule of appraisement.*—The schedule of appraisement must be prepared in triplicate on forms furnished by the General Land Office, and the certificates at the end thereof must be signed by each appraiser, and on being so completed they must be immediately transmitted to said office, and when approved by the Secretary of the Interior one copy will be sent to the district land office. In the case of reclamation town sites, one copy of the schedule will be sent to the Commissioner of Reclamation.

4. *Notice of sale.*—Each sale will be given such publicity as may be deemed proper in the particular case. Appropriate instructions in this connection will be given in the order for sale.

5. *Time, place, and terms of sale.*—Special regulations will be issued in each case prescribing the time when, the place where, and the terms under which the lots will be offered.

6. *Qualifications and restrictions.*—No restriction is made as to the number of lots one person may purchase. Bids and payments may be made through agents, but not by mail or at any time or place other than that fixed in the notice of sale.

7. *Combinations in restraint of the sale.*—All persons are warned against forming any combination or agreement which will prevent any lot from selling advantageously, or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under section 59 of the Criminal Code of the United States, which reads as follows:

> Whoever, before or at the time of the public sale of any of the lands of the United States, shall bargain, contract, or agree, or attempt to bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or whoever by

intimidation, combination, or unfair management shall hinder or prevent, or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.

8. *Certificates.*—All lots purchased at the same time, for cash in the same town site, and by the same person should be included in one certificate, in order to prevent unnecessary multiplicity of patents.

Where cash certificates can not immediately issue, because payment for the lots has not been made in full, and where the regulations authorize the issuance of nontransferable memorandum certificates, more than one lot should not be included in the same certificate.

9. *Reoffering at public sale—Private entry.*—In the absence of special instructions in a particular case, an offering at public sale may be adjourned or closed, in the discretion of the officer conducting the sale. If adjourned, the unsold lots will be held for future disposition at public sale. If closed, the unsold lots will become subject to private entry at the appraised price.

Lots sold at public sale and forfeited because of nonpayment of the purchase price, or for any other reason, will be held for further offering at public sale, unless reentry of the lots at private sale, at a designated price, is authorized by the regulations under which the lots are sold.

Lots sold at private sale should be accompanied by an application therefor, signed by the applicant.

TOWN SITES PLATTED BY OR FOR OCCUPANTS

(United States Revised Statutes)

SEC. 2382. In any case in which parties have already founded, or may hereafter desire to found, a city or town on the public lands, it may be lawful for them to cause to be filed with the recorder for the county in which the same is situated, a plat thereof for not exceeding six hundred and forty acres, describing its exterior boundaries according to the lines of the public surveys, where such surveys have been executed; also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed four thousand two hundred square feet, with a statement of the extent and general character of the improvements; such map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish such city or town; and within one month after such filing there shall be transmitted to the General Land Office a verified transcript of such map and statement, accompanied by the testimony of two witnesses that such city or town has been established in good faith, and when the premises are within the limits of an organized land district, a similar map and statement shall be filed with the register and receiver, and at any time after the filing of such map, statement, and testimony in the General Land Office it may be lawful for the President to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of ten dollars for each lot, and such lots as may not be disposed of at

public sale shall thereafter be liable to private entry at such minimum, or at reasonable increase or diminuation thereafter as the Secretary of the Interior may order from time to time, after at least three months notice, in view of the increase or decrease in the value of the municipal property. But any actual settler upon any one lot, as above provided, and upon any additional lot in which he may have substantial improvements shall be entitled to prove up and purchase the same as a preemption, at such minimum, at any time before the day fixed for the public sale.

SEC. 2383. When such cities or towns are established upon unsurveyed lands it may be lawful, after the extension thereto of the public surveys, to adjust the extension limits of the premises according to those lines, where it can be done without interference with rights which may be vested by sale; and patents for all lots so disposed of at public or private sale shall issue as in ordinary cases.

SEC. 2384. If within twelve months from the establishment of a city or town on the public domain the parties interested refuse or fail to file in the General Land Office a transcript map, with the statement and testimony called for by the provisions of section twenty-three hundred and eighty-two, it may be lawful for the Secretary of the Interior to cause a survey and plat to be made of such city or town, and thereafter the lots in the same shall be disposed of as required by such provisions, with this exception, that they shall each be at an increase of fifty per centum on the minimum of ten dollars per lot.

SEC. 2385. In the case of any city or town in which the lots may be variant as to size from the limitation fixed in section twenty-three hundred and eighty-two, and in which the lots and buildings, as municipal improvements, cover an area greater than six hundred and forty acres, such variance as to size of lots or excess in area shall prove no bar to such city or town claim under the provisions of that section; but the minimum price of each lot in such city or town which may contain a greater number of square feet than the maximum named in that section, shall be increased to such reasonable amount as the Secretary of the Interior may by rule establish.

SEC. 2386. Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States.

In a town site platted and disposed of under sections 2382 to 2386, inclusive, United States Revised Statutes, the procedure is as follows:

1. *Survey and plat.*—The occupants, at their own expense, must cause a survey of the land into lots, blocks, streets and alleys to be made, and the plat and field notes thereof to be filed with the recorder of the county in which the land is situated. The plat must show (1) that the land does not include an area in excess of 640 acres, unless the lots, buildings, and improvements cover a greater area, and then only to the extent so occupied and improved; (2) that the boundaries of the land are correctly shown and described thereon according to the lines of the public surveys, or if not so surveyed, then that the exterior lines of the town-site survey are tied to a designated, permanent, and thoroughly identified monument; (3) that the streets,

squares, blocks, lots, and alleys, the dimensions of the same, with measurements, courses, and area of each municipal subdivision, and the name of the town are correctly delineated thereon; and (4) the exterior lines of all existing railroad rights of way and station grounds. The lots should not exceed 4,200 square feet, except in cases where the configuration necessitates a different area. The above-required facts should be verified by the oath of the surveyor entered upon the margin of the plat.

A statement of the extent and general character of the improvements on the land must be filed with the plat and field notes, and such plat and statement must be verified by the oath of the party acting for and in behalf of the occupants of the land.

2. *Transcript of plat and statement.*—Within one month after filing such plat, field notes, and statement, a transcript thereof in duplicate, each duly verified by the certificate of the county recorder, and accompanied by the testimony of two witnesses that such town has been established in good faith, and showing the number of inhabitants thereof, and when it was so established, shall be filed with the register of the land district in which the town site is located, who will immediately transmit the same to the General Land Office for consideration, and upon the approval thereof one of said duplicate plats and statements will be returned to the register for his files.

3. *Notice of filing plat.*—On filing such plat and statement the register will prepare and conspicuously post in his office a notice to the effect that the official plat of such town site has been filed and that he is ready to receive applications by lot occupants to make proof for and purchase the lots occupied by them, respectively. The newspapers in the vicinity should be given copies of the notice as an item of news, and such other publicity should be given it as can be done without expense.

4. *Adjustment to lines of public survey.*—When the town site is upon land over which the township surveys have not been extended, the district cadastal engineer will be notified of the town-site survey and be furnished by the General Land Office with an outline plat showing the exterior lines thereof, with courses and distances, the date of the survey and the approval thereof, and thereafter when the township surveys have been extended over the land the exterior lines of the town site may be adjusted thereto where it can be done without impairing vested rights.

5. *Department may make town-site survey.*—Refusal or failure to file such transcript, plat, field notes, and statement, with the testimony, as above required, within twelve months from the establishment of a town on the public domain, will authorize the Secretary of the Interior to cause a survey and plat to be made thereof, the

lots in which shall be disposed of at an increase of fifty per centum on the minimum price.

6. *Price of lots.*—The minimum price for all lots of 4,200 square feet or less is $10 per lot, except in cases where the Secretary of the Interior causes the survey into lots and blocks to be made by the Government, in which case the minimum price is $15 per lot for such lots. The minimum price for all lots in excess of 4,200 square feet will be computed by adding to said minimum price of $10 or $15, as the case may be, the sum of $4 for each additional 1,000 square feet or fractional part thereof in excess of 4,200 feet in the absence of special provisions in a particular case.

7. *Preemption claims.*—A preemption right of purchase at the minimum price, at any time before the day fixed for the public sale, of not exceeding two lots, is accorded an actual resident, to secure which he must file in the district office his application therefor, and therein state the date of settlement, the value and character of his improvements thereon, that he is 21 years of age or over or the head of a family, and that he is a citizen of the United States or has declared his intention to become such. The notice of intention to make proof must be filed and the notice for publication must be issued, published, and posted at the applicant's expense as in ordinary cases and in manner and form and for the time as provided in the act of March 3, 1879 (20 Stat. 472). See 38 L. D. 131; 40 L. D. 459; and 43 L. D. 216.

Where a husband and wife are joint settlers, and the husband purchases two lots, as stated, the wife may also purchase an "additional lot" upon which she has placed substantial improvements. (39 L. D. 516.)

8. *Preemption proof.*—Preemption proof may be made before the register, or any officer duly authorized by law, and must show by record or documentary evidence where such evidence is usually required, and where not so required by the testimony of witnesses, (1) due publication of the register's notice; (2) the claimant's age; (3) his citizenship; and (4) his actual residence upon one lot and substantial improvements on the second lot, if two lots be included in the application. The proof must embrace the testimony of the applicant and of at least two of his advertised witnesses. The purchase price for the lot or lots must be paid when the proof is made. Entry of public lands under other laws, or in other town sites, or ownership of more than 320 acres, will not disqualify an applicant from making such entry. No entry can be made of an improved lot on which the claimant does not reside unless his residence lot is included in the same or a previous entry.

9. *Hearings.*—Hearings will be ordered and conducted in accordance with the Rules of Practice where two or more adverse applica-

tions are filed for the same lot, or where a sufficient contest affidavit is filed against an application, on or before the day fixed for making proof, but no purchase money will be collected from the applicants until the final determination of the case, whereupon the successful applicant will be required to pay the purchase price within 30 days from notice thereof.

10. *Conflicting mineral claims.*—Mineral surveys, locations, applications, and entries covering lots in such town sites will not prevent the entry of such lots hereunder and the issuance of patent thereon, but such mineral claims, if held under prior and valid mineral rights, are amply protected by the law from prejudice by the allowance of such town-lot entries and patents, and paramount patents may be issued thereafter to such mineral claimants.

11. *Mineral patents.*—Lots wholly covered by outstanding mineral patents are not subject to entry under the town-site law, and applications therefor will be rejected. Lots partly covered by mineral patents may be entered at the price fixed for the whole lot, but the certificate and receipt must contain at the end of the description an exception clause as follows: "Excepting and excluding the portion of said lot (or lots) embraced in mineral patent (or patents) heretofore issued."

12. *Mill sites.*—The continued use and occupation within a town site of a duly located mill-site claim under section 2337, United States Revised Statutes, from a time prior to a settlement and occupation thereon for town-site purposes, will defeat the rights of the claimant under the town-site laws to any part of the land within such mill site.

13. *Railroad rights of way.*—Railroad rights of way and station grounds, when approved by the department, are subject to all valid rights existing at the date of filing the application for such rights of way or station grounds.

14. *Forfeiture of preemption right.*—All right to preempt and purchase occupied and improved lots for which no entry has been allowed prior to or on the date fixed for the public sale will be forfeited unless a contest be pending thereon as hereinbefore provided, and such lots will be offered for sale together with the unoccupied lots. When notified of the date fixed for the public sale, the register will refuse to receive or consider any such application for entry where due publication could not be had and proof made thereon prior to the date so fixed for the public sale.

15. *Public sale.*—The public sale will be conducted in the form and manner herein provided for the sale of town lots under section 2381, United States Revised Statutes, except that no lots shall be sold for less than the minimum price herein fixed therefor, and such lots as may not be so disposed of shall thereafter be liable to private entry

at such minimum, or at such reasonable increase or diminution as the Secretary of the Interior may order from time to time after at least three months' notice.

TOWN SITES ENTERED BY TRUSTEES

(United States Revised Statutes)

SEC. 2387. Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the agricultural preemption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

SEC. 2388. The entry of the land provided for in the preceding section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town site shall be filed with the register of the proper land office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States; but in any Territory in which a land office may not have been established, such declaratory statements may be filed with the suveyor-general of the surveying district in which the lands are situated, who shall transmit the same to the General Land Office.

SEC. 2389. If upon surveyed lands, the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law; and where the inhabitants are in number one hundred, and less than two hundred, shall embrace not exceeding three hundred and twenty acres; and in cases where the inhabitants of such town are more than two hundred, and less than one thousand, shall embrace not exceeding six hundred and forty acres; and where the number of inhabitants is one thousand and over one thousand, shall embrace not exceeding twelve hundred and eighty acres; but for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of three hundred and twenty acres shall be allowed.

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SEC. 2391. Any act of the trustees not made in conformity to the regulations alluded to in section twenty-three hundred and eighty-seven shall be void.

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SEC. 2394. The inhabitants of any town located on the public lands may avail themselves, if the town authorities choose to do so, of the provisions of sections twenty-three hundred and eighty-seven, twenty-three hundred and eighty-eight, and twenty-three hundred and eighty-nine; and, in addition to the minimum price of the lands embracing any town site so entered, there shall be paid by the parties availing themselves of such provisions all costs of surveying and platting any such town site, and expenses incident thereto incurred by the United

States, before any patent issues therefor; but nothing contained in the sections herein cited shall prevent the issuance of patents to persons who have made or may hereafter make entries, and elect to proceed under other laws relative to town sites in this chapter set forth.

ADDITIONAL ENTRIES

AN ACT Respecting the limits of reservations for town sites upon the public domain

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SEC. 4. It shall be lawful for any town which has made, or may hereafter make entry of less than the maximum quantity of land named in section twenty-three hundred and eighty-nine of the Revised Statutes to make such additional entry, or entries, of contiguous tracts, which may be occupied for town purposes as when added to the entry or entries theretofore made will not exceed twenty-five hundred and sixty acres: *Provided*, That such additional entry shall not together with all prior entries be in excess of the area to which the town may be entitled at date of the additional entry by virtue of its population as prescribed in said section twenty-three hundred and eighty-nine.

Approved, March 3, 1877 (19 Stat. 392).

1. *Segregation of town-site settlement.*—Public lands settled upon and occupied as a town site are thereby segregated from entry under the agricultural land laws, and may be entered under sections 2387 to 2389, subject to the restrictions contained in sections 2386 and 2391 to 2393, inclusive, United States Revised Statutes.

2. *By whom entry may be made.*—If the town is incorporated the entry must be made by the corporate authorities or by the mayor or other principal officer authorized so to do by resolution or ordinance of the town board or city council. If the town is not incorporated, the entry must be made by the judge of the county court upon petition addressed to him therefor, signed by such number of actual occupants of lots therein as may be required by the laws of the State or Territory in which the town is situated. Private individuals, organizations, or corporations are not authorized to make such entries.

3. *Trust.*—The entry must be made in trust (1) as to the occupied lots, for the several use and benefit of the occupants thereof according to their respective interests, and (2) as to the unoccupied lots, for the use and benefit of the municipality, the public, or the occupants collectively as a community. Such entries can not be made for the benefit of one individual, or organization, or corporation, but only for the benefit of the actual inhabitants and occupants of an established town. Prospective town sites can not be so entered.

4. *Execution of trust.*—The execution of the trust as to the disposal of the lots and the proceeds of sales is to be conducted under regulations prescribed by the State or Territorial laws. Acts of trustees not in accordance with such regulations are void.

5. *Area that may be entered.*—The amount of land that may be entered under this act is proportionate to the number of inhabitants.

One hundred and less than 200 inhabitants may enter not to exceed 320 acres; 200 and less than 1,000 inhabitants may enter not to exceed 640 acres; and where the inhabitants number 1,000 and over an amount not to exceed 1,280 acres may be entered; and for each additional 1,000 inhabitants, not to exceed 5,000 in all, a further amount of 320 acres may be allowed. When the number of inhabitants of a town is less than 100 the town site shall be restricted to the land actually occupied for town purposes, by legal subdivisions.

6. *Entry of unsurveyed land.*—Unsurveyed public land upon which a town has been established may be entered hereunder. In such case a special survey should be procured by application to the district cadastral engineer therefor, the cost of which survey will be paid out of the general appropriations for public surveys. When the plat of such survey is filed in the district office, application may be made to enter the land described therein.

7. *Declaratory statements.*—Declaratory statements may be filed as the initiatory step for the entry of the land in all cases where the occupants are not ready to apply for entry, and should be so filed in order to protect their rights. The statement should be signed and filed by the officer entitled to make entry under the law, and should show the number of inhabitants, that the land is occupied for trade, business, and other town-site purposes, and the date when first so occupied, and declare the purpose of the occupants to enter it under the town-site laws. It should include only such lands as the town is entitled to enter by Government subdivisions where surveyed, and if not surveyed the land should be described so it may be easily identified.

8. *Proof.*—The notice of intention to make proof must be filed and the notice for publication must be issued, published, and posted at the applicant's expense as in ordinary cases, and in manner and form and for the time provided in the act of March 3, 1879 (20 Stat. 472). (See 38 L. D. 131; 40 L. D. 459; and 43 L. D. 216.) The proof may be made before the register or any officer duly authorized by law, and must show, by record or documentary evidence, where such evidence is usually required, and where not so required, by the testimony of at least two of the advertised witnesses, (1) due publication of the register's notice; (2) if an incorporated town, proof of incorporation, which should be a certified copy of the order of incorporation, or if by legislative enactment, a citation to such act; (3) certified record evidence of the election, qualification, and the authority of the officer making entry; (4) the number of town-site occupants and claimants on each occupied Government subdivision; (5) the number of inhabitants in the town site; (6) the character, extent, and value of town-site improvements located on each Government subdivision; and (7) the date when the land was first used for town-site purposes.

9. *Area enterable.*—Entry can not be made hereunder of a greater quantity of land than 2,560 acres, unless the excess in area is actually settled upon, inhabited, improved, and used for business and municipal purposes.

10. *Conflicting mineral claims.*—Under said sections 2386, 2392, and section 16 of the act of March 3, 1891 (26 Stat. 1101), the title to lands acquired hereunder will be subject to all valid prior rights to unpatented mining claims or possessions held under existing law, and paramount patents may be issued thereafter to such mineral claimants, notwithstanding the prior town-site patent.

All lands covered by patented mineral claims must be omitted from town-site entries hereunder. Government subdivisions of land, made fractional by the omission of such patented claims, will be designated by lot numbers on segregation diagram prepared by the district cadastral engineer.

11. *Public reservations.*—Reservations for the use of the United States Government are not subject to entry hereunder.

12. *Mill sites.*—The continued use and occupation within a town site of a duly located mill-site claim under section 2337, United States Revised Statutes, from a time prior to a settlement and occupation thereof for town-site purposes, will defeat the rights of the claimant under the town-site laws to any part of the land within such mill site.

13. *Railroad rights of way.*—Railroad rights of way and station grounds, when approved by the department, are subject to all valid rights existing at the date of filing the application for such rights of way or station grounds.

14. *Change in method of entry.*—Where proceedings have been had for the entry of lots under sections 2382 to 2386, inclusive, United States Revised Statutes, but no patent has issued thereunder, the occupants may avail themselves, if the town authorities choose to do so, of the provisions of said sections 2387 to 2389 and make proof and entry thereunder; provided, however, that in addition to the minimum price for the land applied for there shall be paid, before patent issues therefor, by the parties applying for such change of entry, all costs of surveying and platting such town site and expenses incident thereto incurred by the Government under the provisions of said sections 2382 to 2386. On application to this office the applicants will be informed of the amount of said expense to be paid in excess of the purchase price of the land in order to effectuate such change of entry.

15. *Additional entries.*—Where town-site entry has been or may hereafter be made, under the provisions of said sections 2387 to 2393, additional entries may be made, under the provisions of section 4 of the act approved March 3, 1877 (19 Stat. 392), of such contiguous tracts as may be occupied for town-site purposes, but such additional

entry shall not, together with all prior entries made for such town site, be in excess of the area to which the town may be entitled at date of the additional entry by virtue of its population as prescribed in said section 2389; provided, however, that such area shall not exceed 2,560 acres. Such additional entries will be made in the same manner and under the same regulations as are herein provided for entries under said sections 2387 to 2393, inclusive.

16. *Entry and payment.*—When town-site proof has been submitted hereunder the register will, if he approves the same, forward it to the General Land Office with his recommendation thereon, without collecting the purchase money and without issuing the final papers. If the proof so submitted is found satisfactory, the register will be notified thereof, and if no objections exist in his office he will notify the applicant thereof, and on payment of the minimum price fixed by the law for the purchase of the land he will issue the final papers.

TOWN SITES IN RECLAMATION PROJECTS

AN ACT Providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may withdraw from public entry any lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, not exceeding one hundred and sixty acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes.

SEC. 2. That the lots so surveyed shall be appraised under the direction of the Secretary of the Interior and sold under his direction at not less than their appraised value at public auction to the highest bidders, from time to time, for cash, and the lots offered for sale and not disposed of may afterwards be sold at not less than the appraised value under such regulations as the Secretary of the Interior may prescribe. Reclamation funds may be used to defray the necessary expenses of appraisement and sale, and the proceeds of such sales shall be covered into the reclamation fund.

SEC. 3. That the public reservations in such town sites shall be improved and maintained by the town authorities at the expense of the town; and upon the organization thereof as municipal corporations the said reservations shall be conveyed to such corporations by the Secretary of the Interior, subject to the condition that they shall be used forever for public purposes.

SEC. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation

fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken.

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Approved, April 16, 1906 (34 Stat. 116).

AN ACT Providing for the subdivision of lands entered under the reclamation act, and for other purposes

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SEC. 3. That any town site heretofore set apart or established by proclamation of the President, under the provisions of sections twenty-three hundred and eighty and twenty-three hundred and eighty-one of the Revised Statutes of the United States, within or in the vicinity of any reclamation project, may be appraised and disposed of in accordance with the provisions of the act of Congress approved April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes"; and all necessary expenses incurred in the appraisal and sale of lands embraced within any such town site shall be paid from the reclamation fund, and the proceeds of the sales of such lands shall be covered into the reclamation fund.

SEC. 4. * * * Providing that the limitation on the size of town sites contained in the act of April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," shall not apply to the town sites named in this section; and whenever, in the opinion of the Secretary of the Interior, it shall be advisable for the public interest, he may withdraw and dispose of town sites in excess of one hundred and sixty acres under the provisions of the aforesaid act, approved April sixteenth, nineteen hundred and six, and reclamation funds shall be available for the payment of all expenses incurred in executing the provisions of this act, and the aforesaid act of April sixteenth, nineteen hundred and six, and the proceeds of all sales of town sites shall be covered into the reclamation fund.

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Approved, June 27, 1906 (34 Stat. 519).

AN ACT Providing for the reappraisement of unsold lots in town sites on reclamation projects, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized, whenever he may deem it necessary, to reappraise all unsold lots within town sites on projects under the reclamation act heretofore or hereafter appraised under the provisions of the act approved April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," and the act approved June twenty-seventh, nineteen hundred and six, entitled "An act providing for the subdivision of lands entered under the reclamation act, and for other purposes"; and thereafter to proceed with the sale of such town lots in accordance with said acts.

SEC. 2. That in the sale of town lots under the provisions of the said acts of April sixteenth and June twenty-seventh, nineteen hundred and six, the Secre-

tary of the Interior may, in his discretion, require payment for such town lots in full at time of sale or in annual installments, not exceeding five, with interest at the rate of six per centum per annum on deferred payments.

Approved, June 11, 1910 (36 Stat. 465).

1. *Withdrawals—Surveys.*—The Commissioner of Reclamation shall from time to time recommend to the Secretary of the Interior, through the Commissioner of the General Land Office, the withdrawal and reservation of such lands for town-site purposes, under the acts of April 16 and June 27, 1906 (34 Stat. 116 and 519), as he may deem advisable. He shall, when in his judgment the public interests require it, from time to time, cause not less than a legal subdivision, according to the official township surveys, of the lands so reserved to be surveyed into town lots, with appropriate reservations for public purposes. The plats and field notes of such surveys shall be prepared in triplicate for each town site, and shall be submitted for the approval of the Commissioner of the General Land Office, who, after such approval, shall submit the original plat for the approval of the Secretary of the Interior.

2. *Time and place of sale, appraisements, etc.*—The Commissioner of Reclamation shall from time to time recommend to the Secretary of the Interior the sale, the time and place of sale, the appraisement, the appraisers to be appointed, the officer to superintend the sale, and the compensation of the appraisers and superintendent, and the newspapers for the publication of the notice of sale, of such portions of the surveyed lots as in his judgment the public interest may then require to be appraised and sold. The recommendations in this regulation above required shall be submitted through the Commissioner of the General Land Office for his concurrence or dissent. The Commissioner of the General Land Office shall prepare and submit to the Secretary of the Interior the details and appointments of the appraisers and the superintendent of sale in accordance with the approved recommendations, and when detailed or appointed he shall give them all necessary instructions; and he shall also prepare and transmit the notice of sale for publication. The report of the appraisers shall be transmitted to the Secretary of the Interior through the Commissioner of the General Land Office. The sale will be conducted in accordance with the general regulations under section 2381, United States Revised Statutes, and subject to the special regulations herein prescribed.

3. *Installment payments.*—Whenever the Secretary of the Interior, in the exercise of the discretion conferred upon him by section 2 of the act of June 11, 1910 (36 Stat. 465), shall order the payment of the purchase price of lots, sold in town sites created under the laws in said act mentioned, to be made in annual installments, the same will be done under such regulations as may be issued in each particular instance.

4. *Reappraisements.*—In all cases where the Secretary of the Interior shall direct the reappraisement of unsold lots under the first section of the said act of June 11, 1910, the reappraisement will be conducted under the regulations provided for under the original appraisement of lots in town sites created under the laws in said act mentioned. The lots to be reappraised will not, from the date of the order therefor, be subject to disposal until offered at public sale at the reappraised value, which offering will be conducted under the regulations providing for the public sale of lots in such town sites.

5. *Additional town sites.*—The Commissioner of Reclamation from time to time in like manner may cause one or more additional legal subdivisions of the lands so reserved for town-site purposes to be so surveyed into town lots, with appropriate reservations for public purposes; and he shall submit such further recommendations for appraisal and sale, in accordance with these regulations, as he may deem necessary or advisable; and he may in like manner submit recommendations for the reappraisal and sale of lots previously offered for sale and remaining unsold, as authorized by act of June 11, 1910 (36 Stat. 465).

6. *Public reserves.*—The public reservations in each town shall be improved and maintained by the town authorities at the expense of the town; and upon the organization thereof as a municipal corporation, said reservations shall be conveyed to such corporation in its corporate name, subject to the condition that they shall be used forever for public purposes. To secure such conveyances the municipality shall apply through its proper officer for a patent to such reservations, and furnish proof in manner, form, and substance as required under the regulations in this circular for patents to public reserves in Oklahoma town sites under section 22 of the act approved May 2, 1890 (26 Stat. 91).

GRANT OF LANDS IN RECLAMATION TOWN SITES FOR SCHOOL PURPOSES

AN ACT Granting lands for school purposes in Government town sites on reclamation projects

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby authorized, upon application by the proper officers of a school district located wholly or in part within the boundaries of a project of the United States Reclamation Service, to issue patent conveying to such district such unappropriated undisposed of lands, not exceeding six acres in area, within any Government reclamation town site situated within such school district as, in the opinion of the Secretary of the Interior, are necessary for use by said district for school buildings and grounds: *Provided,* That if any land

so conveyed cease entirely to be used for school purposes title thereto shall revert to and revest in the United States.

Received by the President, October 20, 1919. Referred to as act of October 31, 1919 (41 Stat. 326).

[NOTE BY THE DEPARTMENT OF STATE.—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

At any time after the approval of the survey of any Government reclamation town site and the subdivision thereof into town lots, with appropriate reservations for public purposes, a school district, in order to obtain title under the act of October 31, 1919, should file, through its proper officers, its application for patent to the unreserved, unappropriated, undisposed of lands it may desire, not exceeding 6 acres in area, therein specifically describing the same by lot and block numbers, as delineated and designated on the approved town-site plat; submit sufficient and satisfactory reasons showing that the area applied for is needed for its use; that the land is unappropriated and subject to disposition under the act, in order that this department may be fully advised that there is no adverse claim for the land applied for; and therewith furnish the certificate of the superintendent of public instruction, or other officer performing such function, having jurisdiction over the county in which the town site is situate, showing that the district is a duly organized district under the laws of the State and entitled to hold real estate in its corporate name.

The applicant must also procure and file with the application, at the time of the filing of the same or as early as practicable after the filing of such application, a statement by the project manager of the Reclamation Service having charge of the project in which the land is located, showing that the disposal of the land applied for will not in any manner interfere with said project, such statement having been previously approved by the Commissioner of Reclamation.

There is no limit to the number of applications which may be filed by a qualified school district, the only limitation being that the total acreage which may be patented to such a district shall not exceed 6 acres in area within any Government reclamation town site situated within such school district. Whenever, therefore, more than one application is filed by the same applicant, such applicant should refer by serial number to all previous applications filed by it.

The application and proof must be filed in the district land office wherein the land applied for is situate, and if the register thereof finds the same sufficient under these regulations, and if the Reclamation Service makes favorable report upon the said application, the

register will issue certificate entry, the same to provide that if any land so conveyed cease entirely to be used for school purposes title thereto shall revert to and revest in the United States.

TOWN SITES IN FORMER INDIAN RESERVATIONS IN OKLAHOMA

AN ACT To provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes.

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SEC. 22. That the provisions of title thirty-two, chapter eight of the Revised Statutes of the United States[1] relating to "reservation and sale of town sites on the public lands" shall apply to the lands open, or to be opened to settlement in the Territory of Oklahoma, except those opened to settlement by the proclamation of the President on the twenty-second day of April, eighteen hundred and eighty-nine: *Provided*, That hereafter all surveys for town sites in said Territory shall contain reservations for parks (of substantially equal area if more than one park) and for schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres; and patents for such reservations, to be maintained for such purposes, shall be issued to the towns, respectively, when organized as municipalities: *Provided further*, That in case any lands in said Territory of Oklahoma, which may be occupied and filed upon as a homestead, under the provisions of law applicable to said Territory, by a person who is entitled to perfect his title thereto under such laws, are required for town-site purposes, it shall be lawful for such person to apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof for town-site purposes. He shall file with the application a plat of such proposed town site, and if such plat shall be approved by the Secretary of the Interior, he shall issue a patent to such person for land embraced in said town site, upon the payment of the sum of ten dollars per acre for all the lands embraced in such town site, except the lands to be donated and maintained for public purposes as provided in this section. And the sums so received by the Secretary of the Interior shall be paid over to the proper authorities of the municipalities when organized, to be used by them for school purposes only.

Approved May 2, 1890 (26 Stat. 81, 91).

AN ACT To provide for the disposal of public reservations in vacated town sites or additions to town sites in the Territory of Oklahoma

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where a town site, or an addition to a town site, entered under the provisions of section twenty-two of an act entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," approved May second, eighteen hundred and ninety, shall be vacated in accordance with the laws of the Territory of Oklahoma, and patents for the public reservations in such vacated town site, or addition thereto, have not been issued, it shall be lawful for the Commissioner of the General Land Office, upon an official showing that such town

[1] Secs. 2380 to 2394, inclusive.

site, or addition thereto, has been vacated, and upon payment of the homestead price for such reservations, to issue a patent for such reservations to the original entryman.

If the original entryman shall fail or neglect to make application for the reservations within six months from the vacation of such town site, or from the passage of this act, the reservations shall be subject to disposal under the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States, as amended by the act approved February twenty-sixth, eighteen hundred and ninety-five.

SEC. 2. That if a patent has already issued, or shall hereafter issue, for any such reservation, to any town or municipality, such town or municipality, upon the vacation of the town site or addition thereto, as aforesaid, may sell the same at public or private sale to the highest bidder after thirty days' public notice of such sale, and convey said lands to the purchaser by proper deed of conveyance, and cover the proceeds of such sale into the school fund of such town or municipality: *Provided*, That where, by reason of the vacation of an entire town site and all its additions, the municipal organization has ceased to exist, the reservations in such vacated town site which may have been patented to the town may be disposed of as isolated tracts under the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States, as amended by the act approved February twenty-sixth, eighteen hundred and ninety-five.

SEC. 3. That all laws and parts of laws, in so far as they conflict with this act, are hereby repealed.

Approved, May 11, 1896 (29 Stat. 116).

AN ACT Providing for the commutation for town-site purposes of homestead entries in certain portions of Oklahoma

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That that portion of section twenty-two of the act approved May second, eighteen hundred and ninety, entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," providing for the commutation for town-site purposes of homestead entries in certain instances, be, and the same is hereby, made applicable to the lands in the Territory of Oklahoma ceded to the United States by the Wichita and affiliated bands of Indians and the Comanche, Kiowa, and Apache tribes of Indians, under agreements, respectively, ratified by the acts of Congress of March second, eighteen hundred and ninety-five, and June sixth, nineteen hundred.

Approved, March 11, 1902 (32 Stat. 63).

1. *Town-site entries.*—The entry of lands in former Indian reservations in Oklahoma for town-site purposes is governed by section 22 of the act of May 2, 1890 (26 Stat. 81, 91), and the act of March 11, 1902 (32 Stat. 63).

Town-site entries made under section 22 of the act of May 2, 1890, must conform to the applicable regulations herein provided for entries under sections 2380 to 2394, inclusive, United States Revised Statutes, but in addition proof of the requirements made in the said

section 22 and in the special regulations issued thereunder approved August 7, 1909 (38 L. D. 92, 115), must be furnished. The regulations are not reprinted here because there is but little present need for reference thereto.

2. *Entry of public reserves in existing Oklahoma town sites.*—Applications for patents to the tracts reserved for public purposes in all towns in Oklahoma created under said section 22 or under any other act where tracts have been reserved for such purposes under said section 22, may be filed on behalf of the municipalities whose corporate limits cover the land in which such reservations are situated. The application should be made by the mayor or other proper municipal officer and describe the reservations to be patented according to the approved plats of said town site, and the same should be accompanied with the proof of the municipal organization of the town similar to that above provided for the disposition of the proceeds derived from the commutation of homestead entries for town-site purposes under said section 22, and proof must also be filed therewith of the authority of the officer filing the application to make the same with the proper record evidence of his election and qualification as such officer. The application and proof must be filed in the district land office; and if the register thereof find the same sufficient under these regulations, he will issue the certificate of entry in the form provided therefor.

3. *Entry of public reserves in vacated Oklahoma town sites.*—Under the act approved May 11, 1896 (29 Stat. 116), where a town site or an addition to a town site in a homestead commuted to a town-site entry under the second proviso of section 22 of the act approved May 2, 1890 (26 Stat. 91), has been vacated under the laws of Oklahoma and patents for the public reservations therein have not been issued such reservations will be disposed of in the following manner:

(1) *Application and proof by the original entryman.*—Application for a patent to such reservations may be filed by the original entryman within six months from the vacation of the town site, and proof must be filed by him, with the register, of the due vacation of such town site in accordance with the requirements of the laws of Oklahoma, which proof must consist of a copy of the record evidence of such vacation duly certified. Such proof must also be accompanied with evidence that the corporate authorities of the municipality, if one be organized, in which the reservations were situated prior to such vacation, have been personally served 30 days prior to making such proof with notice of the application and of the date

the proof will be made. If the proof be found sufficient the entry will be allowed for the reservations as described in the town-site plat upon receipt of the payment of the homestead price. If the municipality is represented at the time of making proof, it may be heard in opposition to the application and decision be rendered thereon subject to appeal as in other cases.

(2) *Reservations disposed of as isolated tracts.*—In case of the failure of the original entryman to apply for patent to such reservations within six months from the vacation of such town site, or in case such reserves have been patented to the municipality and it has ceased to exist by reason of such vacation, the reservations will be disposed of as isolated tracts under the provisions of section 2455, United States Revised Statutes, and the acts amendatory thereof, and the regulations issued thereunder.

4. *Sale of patented public reserves in vacated Oklahoma town sites.*—Reservations may be sold by an existing municipal corporation, upon the vacation of the town site, where patent has been issued to such municipality therefor, the proceeds of such sale to be covered into the school fund of such corporation. See *City of Enid* (30 L. D. 352).

TOWN SITES IN FORMER INDIAN RESERVATIONS IN MINNESOTA

AN ACT To extend the provisions of chapter eight, title thirty-two, of the Revised Statutes of the United States, entitled "Reservation and sale of town sites on the public lands," to the ceded Indian lands in the State of Minnesota

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter eight, title thirty-two, of the Revised Statutes of the United States,[1] entitled "Reservation and sale of town sites on the public lands," be, and is hereby, extended to and declared to be applicable to ceded Indian lands within the State of Minnesota. This act shall take effect and be in force from and after its passage.

Approved, February 9, 1903 (32 Stat. 820).

NOTE.—Town sites on ceded Indian lands in Minnesota will be disposed of in accordance with regulations herein prescribed for town sites created or disposed of under sections 2380 to 2394, inclusive, United States Revised Statutes.

TOWN SITES IN FORMER INDIAN RESERVATIONS IN STATES OTHER THAN OKLAHOMA AND MINNESOTA

Authority for the survey and disposal of town sites in former Indian reservations, in States other than Oklahoma and Minnesota, is contained in the acts of Congress authorizing the survey and disposal of lands in such reservations.

[1] Secs. 2380 to 2394, inclusive.

Below is noted a list of reservations and the acts of Congress authorizing the establishment of town sites therein:

RESERVATION	ACT OF CONGRESS
Blackfeet, Mont	Mar. 1, 1907 (34 Stat. 1015, 1039).
Cheyenne River, S. Dak	May 29, 1908 (35 Stat. 461, 463).
Coeur d'Alene, Idaho	June 21, 1906 (34 Stat. 325, 337).
Colorado River, Ariz. and Calif	Apr. 30, 1908 (35 Stat. 70, 77).
Colville, Wash	Mar. 22, 1906 (34 Stat. 80, 82).
Crow, Mont	Apr. 27, 1904 (33 Stat. 360, 361).
Flathead, Mont	June 21, 1906 (34 Stat. 325, 354).
Fort Belknap, Mont	Mar. 3, 1921 (41 Stat. 1355, 1356).
Fort Berthold, N. Dak	June 1, 1910 (36 Stat. 456, 457).
Fort Hall, Mont	May 31, 1918 (40 Stat. 592).
Fort Peck, Mont	May 30, 1908 (35 Stat. 561, 563).
Pine Ridge, S. Dak	May 27, 1910 (36 Stat. 440, 441).
Rosebud, S. Dak	Mar. 2, 1907 (34 Stat. 1230, 1231).
Rosebud, S. Dak	May 30, 1910 (36 Stat. 448, 449).
Shoshone, Wyo	Mar. 3, 1905 (33 Stat. 1020, 1021).
Spokane, Wash	May 29, 1908 (35 Stat. 458, 459).
Standing Rock, N. Dak. and S. Dak	May 29, 1908 (35 Stat. 461, 463).
Standing Rock, N. Dak	Feb. 14, 1913 (37 Stat. 675, 676).
Uintah, Utah	Mar. 3, 1905 (33 Stat. 1048, 1069).
Walker River, Nev	May 27, 1902 (32 Stat. 245, 261).
Wind River, Wyo	Mar. 3, 1905 (33 Stat. 1020, 1021).
Yuma, Ariz	Apr. 30, 1908 (35 Stat. 70, 77).

TOWN SITES ON MINERAL LANDS [1]

(United States Revised Statutes)

SEC. 2392. No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining claim or possession held under existing laws.

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

* * * * * * *

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

* * * * * * *

Approved, March 3, 1891 (26 Stat. 1095–1101).

[1] Also see sec. 2386, United States Revised Statutes.

The general town-site laws, comprised in sections 2380 to 2394, United States Revised Statutes, authorize the entry of town sites, or the sale of lots therein, upon public lands which may include unpatented mineral claims, but the rights of mineral claimants upon any land entered or sold under said town-site laws are expressly protected by sections 2386 and 2392. These two sections recognize the superior rights, as against any town-site claimant—whether corporate, community, or individual—of all claimants for mineral veins possessed agreeably to local custom, or for any vaild mining claim or possession held under existing law. The precedence and superiority so accorded to mineral claims, however, depend in final analysis upon the question of fact whether, at date of town-site entry or lot sale, the lands claimed under the mining laws were "known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them" (39 L. D. 356). Where an affirmative showing in such behalf is made in due course by the mineral claimant, his right to a patent for the land (subject to the distinction hereinafter noted as to incorporated towns) will not be prejudiced by any previous town-site entry, deed, or patent covering the same land (26 L. D. 144; 29 L. D. 426; 32 L. D. 211; 34 L. D. 276 and 596).

Under said general town-site laws, as construed by the department and the courts, an entry including unpatented mineral lands may be made for an incorporated town as well as for an unincorporated town, the law requiring that in the former case the entry shall be made by the corporate authorities, and in the latter by the county judge (34 L. D. 24). While such general right of entry by or for incorporated towns and cities is therefore independent of anything contained in section 16 of the act of March 3, 1891 (26 Stat. 1095), it will be seen that that section in terms announces the right to enter mineral lands. The protection afforded to mineral claims by the body of section 16 is similar to that given generally in said sections 2386 and 2392, Revised Statutes, but the proviso to section 16 is as follows:

> *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

The department has never viewed said proviso as warranting, under any circumstances, the allowance of entry for a mineral vein independently of "the surface ground appertaining thereto," nor is such an entry provided for in the general mining laws. But said proviso creates one distinction between unincorporated and incorporated towns as regards the relative rights of town-site occupants

and mineral claimants, which is, that whereas the town-site patent will, in either case, carry absolute title to any mineral not known to exist at the date of town-site entry, the adverse rights of mineral and town-lot claimants within incorporated towns are hinged upon priority of initiation. That is to say, that after entry is made for such town, no entry by a mineral-vein applicant will be allowed for any land owned and occupied under the town-site law by a party whose possession antedated the inception of the mineral applicant's claim, even though such land was known, at date of the town-site entry, to contain valuable minerals.

Subject to the distinction above noted, the foregoing principles apply to all mineral claims within town sites entered or disposed of under any of the laws above mentioned, and also to mineral claims within town sites disposable under special acts containing no reference to the rights of mining claimants.

The law does not require that town-site entries shall exclude any mineral claim or possession except such as may have been patented (29 L. D. 21). Mineral claims which have not been patented may be excluded from a town-site entry at the option of the town-site applicant, who must, in that event, furnish satisfactory proof that the exclusion covers a "valid mining claim or possession held under existing law" (33 L. D. 542). The exclusion of a mill-site claim from a town-site entry is necessary only in cases where the mill-site claimant shall have been in occupation of the ground, under regular location, from a time antedating its occupation for town-site purposes. The issue of priority in such cases may be raised by the town-site applicant, the mill-site claimant, or the Government.

COUNTY-SEAT TOWN SITES

(United States Revised Statutes)

SEC. 2286. There shall be granted to the several counties or parishes of each State and Territory, where there are public lands, at the minimum price for which public lands of the United States are sold, the right of preemption to one quarter section of land, in each of the counties or parishes, in trust for such counties or parishes, respectively, for the establishement of seats of justice therein, but the proceeds of the sale of each of such quarter sections shall be appropriated for the purpose of erecting public buildings in the county or parish for which it is located, after deducting therefrom the amount originally paid for the same. And the seat of justice for such counties or parishes, respectively, shall be fixed previously to a sale of the adjoining lands within the county or parish for which the same is located.

NOTE.—The instructions contained in circular of Aug. 7, 1909 (38 L. D. 92, 107), will be followed in connection with applications for county-seat town sites. The regulations are not reprinted here because there is but little present need for reference thereto.

LIMITS OF RESERVATIONS FOR TOWN SITES

AN ACT Respecting the limits of reservation for town sites upon the public domain

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from preemption or homestead entry a greater quantity than twenty-five hundred and sixty acres of land, or the maximum area which may be entered as a town site under existing laws, unless the entire tract claimed or incorporated as such town site shall, including and in excess of the area above specified, be actually settled upon, inhabited, improved, and used for business and municipal purposes.

SEC. 2. That where entries have been heretofore allowed upon lands afterwards ascertained to have been embraced in the coporate limits of any town, but which entries are or shall be shown, to the satisfaction of the Commissioner of the General Land Office to include only vacant unoccupied lands of the United States, not settled upon or used for municipal purposes, nor devoted to any public use of such town, said entries, if regular in all respects are hereby confirmed and may be carried into patent: *Provided,* That this confirmation shall not operate to restrict the entry of any town site to a smaller area than the maximum quantity of land which by reason of present population it may be entitled to enter under said section twenty-three hundred and eighty-nine of the Revised Statutes.

SEC. 3. That whenever the corporate limits of any town upon the public domain are shown or alleged to include lands in excess of the maximum area specified in section one of this act the Commissioner of the General Land Office may require the authorities of such town, and it shall be lawful for them, to elect what portion of said lands, in compact form and embracing the actual site of the municipal occupation and improvement, shall be withheld from preemption and homestead entry; and thereafter the residue of such lands shall be open to disposal under the homestead and preemption laws. And upon default of said town authorities to make such selection within sixty days after notification by the commissioner, he may direct testimony respecting the actual location and extent of said improvements to be taken by the register and receiver of the district in which such town may be situated; and, upon receipt of the same, he may determine and set off the proper site according to section one of this act, and declare the remaining lands open to settlement and entry under the homestead and preemption laws; and it shall be the duty of the secretary of each of the Territories of the United States to furnish the surveyor general of the Territory for the use of the United States a copy duly certified of every act of the legislature of the Territory incorporating any city or town, the same to be forwarded by such secretary to the surveyor general within one month fom date of its approval.

* * * * * * *

Approved, March 3, 1877 (19 Stat. 392).

LANDS NOT SUBJECT TO TOWN-SITE RESERVATION OR ENTRY

(United States Revised Statutes)

SEC. 2393. The provisions of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations

for lighthouses, customhouses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the land office by title derived from the Crown of Spain, or otherwise.

RIGHTS OF TRANSFEREES OF TOWN LOTS

AN ACT Providing for the issuance of patents to transferees of town lots purchased from the United States at public sale in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where town lots were sold by the United States at public sale, and the purchaser at such sale had transferred his interests in any such lot prior to the eleventh day of October, nineteen hundred and eleven, and patent has not been issued in the name of the original purchaser, the Commissioner of the General Land Office may issue a patent in the name of the transferee where full payment of the purchase price has been made and satisfactory evidence of the transfer has been furnished: *Provided,* That it be shown that the original purchaser is dead, or that after due inquiry his whereabouts can not be ascertained, and the instrument of transfer given by the original purchaser has been lost or destroyed.

Approved, July 9, 1914 (38 Stat. 454).

The purchaser of a town lot, which is sold on the installment plan, may transfer his equitable interest in the lot, prior to the payment of the last installment of the purchase price, but the Government will not recognize anyone but the original purchaser and will issue all necessary papers and also the patent in his name. By such course, the Government is relieved of all unnecessary responsibility, and the patent, when issued, inures to the benefit of the transferee.

Formerly patents were issued to transferees, but based on departmental instructions of October 11, 1911, patents are now issued only in the names of the original purchasers, except where their issuance to transferees is authorized by the act of July 9, 1914 (38 Stat. 454), and instructions thereunder approved August 5, 1914 (43 L. D. 361).

TOWN SITES IN ALASKA

Information relative to the special town-site laws which have been enacted relating to the disposition of lands as town sites in the Territory of Alaska is contained in Circular No. 491 (50 L. D. 27, 45).

TOWN-SITE PLATS

Photolithographic copies of town-site plats will be furnished, when available, at the rate of 50 cents each.

ACQUISITION OR HOLDING OF TOWN LOTS IN THE TERRITORIES BY ALIENS

AN ACT To better define and regulate the rights of aliens to hold and own real estate in the Territories

* * * * * * *

SEC. 2. * * * This act shall not be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of lands in any incorporated or platted city, town, or village, or in any mine or mining claim, in any of the Territories of the United States.

* * * * * * *

Approved, March 2, 1897 (29 Stat. 618).

PARKS AND CEMETERIES

SALE OF PUBLIC LANDS TO CITIES AND TOWNS FOR PARKS AND CEMETERIES

AN ACT To authorize entry of the public lands by incorporated cities and towns for cemetery and park purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That incorporated cities and towns shall have the right, under rules and regulations prescribed by the Secretary of the Interior, to purchase for cemetery and park purposes not exceeding one quarter section of public lands not reserved for public use, such lands to be within three miles of such cities or towns: *Provided,* That when such city or town is situated within a mining district, the land proposed to be taken under this act shall be considered as mineral lands, and patent to such lands shall not authorize such city or town to extract mineral therefrom, but all such mineral shall be reserved to the United States, and such reservation shall be entered in such patent.

Approved, September 30, 1890 (26 Stat. 502).

1. *Entry of surveyed land.*—The right of entry under the act approved September 30, 1890 (26 Stat. 502), is restricted to incorporated cities and towns, and each of such cities and towns shall be allowed to make entries of tracts of unreserved and unappropriated public land, including land in Alaska, by Government subdivisions, not exceeding, in all entries hereunder by such city or town, a quarter section in area, all of which must lie within 3 miles of the corporate limits of the city or town for which the entries are made.

2. *Entry of unsurveyed land.*—If the public surveys have not been extended over the land sought by any city or town under the provisions of said act, it shall first be necessary for the proper corporate authority to apply to the district cadastral engineer of the district in which the tract in question is located for a special survey of the outboundaries of such tract. The application should describe the

character of the land sought to be surveyed and, as accurately as possible, its area and geographical location. Tracts covered by such special surveys must be as nearly as practicable in square form, and entries of the same will not be allowed until after the surveys shall have been approved by the district cadastral engineer and accepted by the Commissioner of the General Land Office. The current appropriation for "surveying the public lands" being applicable to the survey of lines of reservations, as well as to the extension of the ordinary lines of the system of public-land surveys, the cost of the surveys of all unsurveyed lands selected under the provisions of said act of September 30, 1890, will be paid for out of said appropriation, the same as the special surveys of the outboundaries of town sites and for like reasons (see case of *Fort Pierre*, 18 C. L. O. 117), and the surveyors who execute such special surveys will report whether the land is either mineral in character or within an organized mining district.

3. *Application and proof.*—An application for the purposes indicated herein can only be made by the municipal authorities of an incorporated city or town; and in all cases the entries will be made and patents issued to the municipality in its corporate name, for the specific purpose or purposes mentioned in said act.

The land must be paid for at the Government price per acre, after proof has been furnished satisfactorily showing—

(1) Thirty days' publication of notice of intention to make entry, in the same manner as in homestead and other cases. (38 L. D. 131; 40 L. D. 459; and 43 L. D. 216.)

(2) The official character and authority of the officer or officers making the entry.

(3) A certificate of the officer having custody of the record of incorporation, setting forth the fact and date of incorporation of the city or town by which entry is to be made, and the extent and location of its corporate limits.

(4) The testimony of the applicant and two published witnesses to the effect that the land applied for is vacant and unappropriated by any other party, and as to whether the same is either mineral in character or located within an organized mining district or within a mining region.

(5) In case the land applied for is described by metes and bounds, as established by a special survey of the same, that the applicant and two of the published witnesses have testified from personal knowledge obtained by observation and measurements that the land to be entered is wholly within 3 miles of the corporate limits of the city or town for which entry is to be made.

4. *Certificates.*—Where the proof shows that the land is mineral in character, located in a mining district, or is within a region known as mineral lands, the certificate of entry shall contain the following proviso:

Provided, That no title shall be hereby acquired to any mineral deposits wthin the limits of the above-described tract of land, all such deposits therein being reserved as the property of the United States.

SALE OF PUBLIC LANDS TO ASSOCIATIONS AND CORPORATIONS FOR CEMETERIES

AN ACT To authorize the sale of public lands for cemetery purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to sell and convey to any religious or fraternal association, or private corporation, empowered by the laws under which such corporation or association is organized or incorporated to hold real estate for cemetery purposes, not to exceed eighty acres of any unappropriated nonmineral public lands of the United States for cemetery purposes, upon the payment therefor by such corporation or association of the sum of not less than one dollar and twenty-five cents per acre: *Provided,* That title to any land disposed of under the provisions of this act shall revert to the United States should the land or any part thereof be sold or cease to be used for the purpose herein provided.

Approved, March 1, 1907 (34 Stat. 1052).

1. *Entry of surveyed land.*—Under the act approved March 1, 1907 (34 Stat. 1052), the right to purchase public land for cemetery purposes is limited to religious, fraternal, and private corporations or associations, empowered to hold real estate for cemetery purposes by the laws under which they are organized. Such corporation or association shall be allowed to make but one entry of not more than 80 acres of contiguous tracts by Government subdivisions of nonmineral, unreserved, and unappropriated public land, including public land in Alaska.

2. *Entry of unsurveyed land.*—If the public surveys have not been extended over the land so sought to be entered, the corporation or association should first apply to the proper district cadastral engineer for a special survey of the exterior lines of the tract desired, describing the topographical character of the land and its area and geographical location as accurately as possible. Such tracts must be as nearly as practicable in a rectangular form, and after the survey and plat thereof has been made, approved by the district cadastral engineer, accepted by the General Land Office, and filed in the district office, application may then be made for the entry of the land under said act. The cost of such surveys will be paid out of the current appropriation for "surveying the public lands," and the

deputies employed will report whether the land is mineral in character.

3. *Proof.*—The proof must satisfactorily show—

(1) The filing of a notice of intention to make proof, the issuance, in manner and form so far as possible as in other cases provided, of the publication notice, to be published and posted for the time and in the manner provided by the act of March 3, 1879 (20 Stat. 472), and the regulations thereunder (38 L. D. 131; 40 L. D. 459; 43 L. D. 216).

(2) The official character of the officer or officers applying on behalf of the association or corporation to make the entry, and his or their express authority to do so conferred by action of the association.

(3) A copy of the record, certified by the officer having charge thereof, showing the due incorporation and organization and date thereof of the association or corporation and its location and address. The law under which it is organized and by which it derives its authority to hold real estate for cemetery purposes must also be cited.

(4) That the land applied for is nonmineral, vacant, and unappropriated public land, and the extent to which it is used for cemetery purposes, and when first so used, if it is so used, which must be shown by the testimony of the applicant and two of the advertised witnesses.

4. *Price.*—The land must be paid for at such price per acre as shall be determined by the Commissioner of the General Land Office, provided that in no case shall the price be less than $1.25 per acre.

5. *Procedure.*—Entries under this act must issue to the association or corporation in its corporate name, and the granting clause in the certificate should state that the patent to be issued for the tract described is "for cemetery purposes, subject to reversion 'to the United States should the land or any part thereof be sold or cease to be used for the purpose' in said act provided." Inasmuch, however, as the Commissioner of the General Land Office determines the amount of the purchase price under the existing conditions in each particular case, the register will, when proof is made to his satisfaction, immediately forward such proof to the General Land Office with his recommendation thereon without collecting any money as the purchase price and without issuing the final papers. If said office finds the proof satisfactory, the commissioner will fix the purchase price, and the register will, on being notified thereof and no objection appearing thereto in his office, notify the applicant of the amount required and allow him 30 days from service of such notice to pay such purchase price, and on receipt thereof cash certificate will be issued.

RECREATIONAL SITES

ACQUISITION OR USE OF PUBLIC LANDS BY STATES, COUNTIES, OR MUNICIPALITIES FOR RECREATIONAL PURPOSES

AN ACT To authorize acquisition or use of public lands by States, counties, or municipalities for recreational purposes

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, 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 report to Congress, giving in detail a list of lands exchanged under the provisions of this act.

Approved, June 14, 1926 (44 Stat. 741).

1. *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 of June 14, 1926 (44 Stat. 741), 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 prose-

cuting the necessary preliminary work in connection with the recreational project involved.

2. *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.

3. *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.

4. *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 dis-

trict 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.

5. *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.

RESERVATION OF PUBLIC LANDS IN RECLAMATION PROJECTS FOR COUNTRY PARKS, PUBLIC PLAYGROUNDS, AND COMMUNITY CENTERS

AN ACT To authorize the reservation of public lands for country parks and community centers within reclamation projects, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to withdraw from other disposition and reserve for country parks, public playgrounds, and community centers for the use of the residents upon the lands such tracts as he may deem advisable not exceeding twenty acres in any one township in each reclamation project or the several units of such reclamation projects undertaken under the act of June seventeenth, nineteen hundred and two, known as the reclamation act.

SEC. 2. That subject to the provisions hereinafter contained every such tract of land so set apart shall be supplied with water from the Government irrigation system, the cost thereof to be charged to the remaining lands of the project as a part of the construction charge of such project, and shall be maintained and used in perpetuity by the people upon said reclaimed lands for a pleasure park, public playground, and community center.

SEC. 3. That for the purpose of carrying out and effecting the objects of this act the Secretary of the Interior is authorized to enter into a contract with the organization formed by the owners of the lands irrigated within said project or project unit pursuant to section six of the act of June seventeenth, nineteen hundred and two, stipulating and providing that the organization will maintain and use such of the lands so reserved for the purposes prescribed in this act as such organization may desire, and that upon failure to so maintain and use such lands, or in the event that same shall be permitted to be used or occupied for other purposes than those stipulated in this act, the control of the lands shall revert to the United States.

SEC. 4. That any of such lands not contracted for in accordance with the provisions of section three of this act within ten years from the time water is available for the same, or sooner, if the Secretary of the Interior may deem it desirable, shall be disposed of in accordance with the public-land laws applicable thereto, and the proceeds from the disposition of lands reverting to the United States under the provisions of this act, and from sales of water rights, shall be covered into the reclamation fund and placed to the credit of the project wherein the lands are situate.

Approved, October 5, 1914 (38 Stat. 727).

LEASING OF PUBLIC LANDS NEAR SPRINGS, FOR ERECTION OF BATH HOUSES, HOTELS, OR OTHER IMPROVEMENTS

AN ACT To authorize the Secretary of the Interior to lease certain lands.

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, 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 bath houses, 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 a period not exceeding twenty years.

Approved, March 3, 1925 (43 Stat. 1133).

The filing of applications under the act of March 3, 1925 (43 Stat. 1133) 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 Commisisoner 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 application 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 Secretary 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.

WILLIAM SPRY,
Commissioner.

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

APPENDIX

FORMS

SCHEDULE OF APPRAISEMENT

Valuation of lots and blocks in the town site of ———, State of ———, appraised under—

Block	Lot	Area	Valuation		Character of land	Remarks
			Dollars	Cents		

——— ———, ——— —, 19—.

We, the undersigned, constituting the Board of Appraisers appointed under ——— ——— ———, to examine and appraise the surveyed and platted lots described in the foregoing list and designated on the approved plat of the town site of ——— ———, do hereby certify that on the —— day (or days) of ———, 19—, we visited and examined each of said town lots; and that the valuation placed upon each lot as designated in the foregoing list is the fair, just, and full cash value thereof according to the best of our judgment.

——— ———
——— ——— } *Board of Appraisers.*
——— ———

———

Serial No. ——.

APPPLICATION UNDER SECTION 2387, U. S. REV. STATS.

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT ———, ———,
——— —, 19—.

—, ——— ———, as ——— ———, of ——— County, State of ———, do hereby apply to purchase, under sections 2387 to 2393, inclusive, U. S. Rev. Stats., ——— ———, Sec. ——, T. ——, R. —— of ——— Principal Meridian, containing ——— acres, at the sum of $——— for the town site of ———.

My post-office address is ———, ———.

——— ———.

I hereby certify that the land above described contains ——— acres, and that the purchase price therefor is $———.

——— ———, *Register.*

Serial No.——.

APPLICATION TO PURCHASE TOWN LOTS

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT ——, ——,
—— —, 19—.

—, —— ——, of —— County, State of —— ——, do hereby apply to purchase, under ——, Lot ——, Block No. ——, in the town site of ——, ——, as delineated and designated in the approved plat thereof, containing —— ——, at the sum of $——.

My post-office address is ——, ——.

—— ——.

I hereby certify that the land above described contains —— ——, and that the purchase price therefor is $——.

—— ——, *Register.*

Serial No.——.

APPLICATION TO PREEMPT TOWN LOTS

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT ——, ——,
—— —, 19—.

I, —— ——, of —— County, State of ——, do hereby apply to purchase, under ——, Lot No. ——, in Block No. ——, in the town site of ——, ——, as delineated and designated in the approved plat thereof, containing ——, at the sum of $——, basing said application on the following facts: That I am — years of age (and, if under 21 years of age, add, and the head of a family); that I am a native-born citizen of the United States (or have declared my intention to become a citizen of the United States); that my post-office address is ——, ——; and that my settlement, the date thereof, and the value and character of my improvements on said lot are as follows: —— ——.

—— ——.

I hereby certify that the lot above described contain— ——, and that the purchase price thereof is $——.

—— ——, *Register.*

NOTICE OF INTENTION TO MAKE PROOF

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT ——, ——,
—— —, 19—.

—, —— ——, as —— ——, having applied to purchase, under —— ——, the —— ——, hereby give notice of —— intention to make proof, to establish —— right under said law to enter the land above described, before the —— ——, at ——, ——, on —— —, 19—, by two of the following witnesses:

—— ——, of ——, ——.
—— ——, of ——, ——.
—— ——, of ——, ——.
—— ——, of ——, ——.

—— ——.

Notice of the above application will be published in the —— ——, printed at ——. ——, which I hereby designate as the newspaper published nearest the land described.

—— ——, *Register.*

NOTICE FOR PUBLICATION OF MAKING PROOF

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT ———, ———,
——— —, 19—.

Notice is hereby given that ——— ———, as ——— ———, has filed notice of his intention to make proof of his right to enter, under ——— ———, the ——— ———, and that said proof will be made before ——— ——— at ———, ———, on ——— —, 19—, and he names as his witnesses in making such proof—

——— ———, of ———, ———.
——— ———, of ———, ———.
——— ———, of ———, ———.
——— ———, of ———, ———.

——— ———, *Register.*

BUMSTEAD v. HEIRS AND MORTGAGEES OF FRANKLIN

Decided May 3, 1927

PREFERENCE RIGHT—ASSIGNMENT—CONTEST—CONTESTANT—HOMESTEAD ENTRY—MORTGAGE—MORTGAGEE—WAIVER.

The preference right accorded a successful contestant is personal and non-assignable, and a waiver thereof will not constitute such a valuable consideration for a mortgage as to confer upon the mortgagee any rights in the land which will receive recognition by the department.

CONTEST—CONTESTANT—HOMESTEAD ENTRY—FINAL PROOF—EVIDENCE—PREFERENCE RIGHT—LAND DEPARTMENT.

The Land Department is chargeable with knowledge as to what homestead final proof discloses, and one who is permitted to prosecute a contest, after proof has been submitted, with the understanding that should his allegations be proven cancellation of the entry would be warranted, will not be denied the rights of a successful contestant because the charges did not allege any material fact not previously shown by the final proof.

FINNEY, *First Assistant Secretary:*

This case is before the department on appeals by Dale Bumstead, the contestant, and Edith R. C. Hickey, one of the defendants therein, from the decision of the Commissioner of the General Land Office dated November 20, 1926, having reference to original homestead entry 039619, of Herbert Franklin, deceased, for the NW. ¼ Sec. 10, T. 2 N., R. 1 W., G. & S. R. M, Phoenix, Arizona, land district.

Bumstead has appealed because the Commissioner's decision denied him the status of a successful contestant, although it held the contested entry for cancellation, while Miss Hickey has appealed from the cancellation of the entry.

It appears from the record that the land in question was entered prior to May 1, 1918, by E. G. Stone, and that his entry was canceled on that day as the result of a contest against the same by James A.

Francois, who was represented in the contest proceeding by Edith R. C. Hickey, an agent authorized to practice before the Phoenix, Arizona, district land office. On May 7, 1918, a preference right of entry was awarded to Francois. On May 18, 1918, a waiver of his preference right was filed in the district land office by Francois. On the same day Herbert Franklin, a young colored man, filed application 039619 to make homestead entry for the land, and this application was allowed forthwith. On the same day Miss Hickey entered her appearance as the attorney for Franklin.

On May 25, 1918, Francois filed a notice of mortgage in the district land office, to the effect that on the 18th day of May, 1918, Franklin had executed a mortgage for $1,000 in his favor, covering the land embraced in Franklin's entry.

Herbert Franklin died of tuberculosis on November 5, 1918, within six months after the date of his entry, in destitute circumstances. He had never established residence upon the land or done any act toward improving or cultivating the same. There are many references in the record to an undated paper writing, said to have been written and signed by Franklin shortly before his death, and while he was an inmate of a hospital, in which he expressed a desire that all of his belongings should be given to his brother, Wesley Franklin, of Fitzhugh, Arkansas. A copy of this paper was filed as a part of the contest affidavit in this case. The paper was said to be entirely in Herbert Franklin's handwriting, and to be good as a holographic will under the laws of Arizona. At the time of the hearing in this case the paper had never been probated as a will. Both sides proceeded apparently upon the theory that this paper gave Wesley Franklin a status before the Land Department as the devisee of the deceased entryman. Such, however, was not the case, as the Land Department can take no cognizance of the paper until it is established as a will in accordance with the laws of Arizona. For the purposes of this case the entryman must be considered as having died intestate.

As final proof was not submitted within the required time, the local office sent a notice to Wesley Franklin, under date of December 24, 1923, allowing him 30 days within which to show cause why the entry should not be canceled.

On February 28, 1924, Miss Hickey gave notice of intention to submit three-year final proof on the entry, stating that she was the mortagee of the deceased entryman, Herbert Franklin. Proof was submitted by her before the Phoenix, Arizona, district land office on April 17, 1924. In her testimony Miss Hickey stated that she was the assignee of James A. Francois, the mortgagee of the deceased entryman; that in 1919, 10 acres of the entry had been cleared, broken,

and seeded to barley; that in 1920, 10 additional acres had been cleared and broken, and the entire 20 acres planted with barley; that in 1921, 20 acres had been planted with barley; that there had been no crop in any year, as it was too dry; and that all of the cultivation had been done by herself. She also stated that there was a frame house upon the entry, which was habitable at all times, and that the total value of the improvements amounted to $500. The proof was protested by the chief of field division.

On June 7, 1924, Dale Bumstead filed contest against the entry, and on June 16, 1924, he filed a supplemental contest enlarging the charges originally made. The papers were transmitted to the General Land Office by the register and receiver with a request for instructions. In a decision dated August 22, 1924, the Commissioner stated that if the charges preferred against the entry were true, the heirs of the deceased entryman had not complied with the requirements of the homestead law, and that the fact that a mortgagee had attempted to submit final proof would not deprive the contestant of the right to proceed with his contest. The Commissioner directed the register and receiver to allow the contest and to issue notice accordingly.

Miss Hickey, on behalf of herself and the original mortgagee, James A. Francois, appealed to the Department from the Commissioner's decision. The appeal was disposed of in a decision dated January 24, 1925, wherein it was said that if the facts alleged in the affidavit of contest were proven, they would warrant cancellation of the entry, and that the Commissioner properly had directed that notices of contest should be issued and served.

On April 11, 1925, Bumstead filed an amended contest against the entry, wherein he stated that after diligent search he had been able to learn of but two heirs of the entryman, a brother and a sister, whose names and addresses were given. The charges in the amended contest affidavit were a repetition and enlargement of the charges contained in the affidavit of contest which had been found to be sufficient in the concurring decisions of the Commissioner and of the department. In substance they alleged that the mortgage to Francois was not based upon a valuable consideration and represented a speculation in a preference right; that the entry had been abandoned by the entryman, his heirs, the alleged mortgagee, and the assignee of the mortgagee, without pretense of any compliance with the requirements of the homestead law; that Edith R. C. Hickey had no interest in the land, and that her attempt to submit final proof was a subterfuge resorted to without legal right; that about the time of final proof Miss Hickey had placed a dilapidated shack upon the land in an attempt to fortify her showing on final proof; and that shortly after final proof the shack was removed from the land.

Notice of contest was given by publication to Wesley Franklin and Hattie Williams, the brother and sister of the entryman; to King Williams, the husband of Hattie Williams; to James A. Francois and Edith R. C. Hickey, as the mortgagee of the entryman and assignee of a portion of the mortgage, respectively; and to the other heirs of Herbert Franklin, if any.

Thereafter an answer was filed on behalf of Wesley Franklin, James A. Francois and Edith R. C. Hickey. The registered lettters addressed to King Williams, to Hattie Williams and to the unknown heirs of the entryman, were returned unclaimed. The record discloses the existence of no heirs other than those named.

The case was heard before the register of the district land office on October 3, 1925. Bumstead was represented by an attorney, while Miss Hickey appeared in her own behalf and as the agent of Wesley Franklin and James A. Francois. The hearing was not completed until December 10, 1925, as there were numerous adjournments. The transcript of the testimony covers 479 pages.

In spite of the volume of the record the facts it discloses are simple. It appears, in addition to the facts already stated, that, after the death of Herbert Franklin, Miss Hickey had considerable correspondence with his brother, Wesley Franklin, with respect to perfecting the entry. Wesley Franklin advanced between $75 and $100 for that purpose, which Miss Hickey testified was applied toward the cultivation of the land. As Wesley Franklin was unable or unwilling to supply additional money, Miss Hickey proceeded to expend between $200 and $300 of her own money for the same purpose. The testimony establishes to the satisfaction of the department that she had the land cleared and cultivated to the extent and at the times stated in her proof. With respect to the house mentioned in the proof it appears that it had been a part of a garage located on an entry belonging to Miss Hickey, and that about a week prior to the submission of proof she had it transported to and placed upon the land in question. It remained upon the land until November following the proof, when Miss Hickey removed it to the homestead of an acquaintance about 3½ miles distant. The testimony shows that the house was a shack 6 by 9 feet in dimension, and 7 or 8 feet high, built of lumber and sheet iron, and that it was not "a habitable house" as that term is commonly understood. It is not shown that the heirs of the entryman had any knowledge that the house was placed upon the land, and the testimony with respect to it is insufficient to establish a transfer of title from Miss Hickey to the heirs. There was also much testimony with respect to use of the land for grazing purposes pursuant to permission from Miss Hickey.

It was shown that Wesley Franklin would not consent to submit final proof, or even to execute the preliminary papers necessary to

that end, unless Miss Hickey advanced him money to reimburse him for the amount he had already expended in cultivating the land, and for the expenses of his brother's funeral which had been borne by him. Miss Hickey declined to comply with Franklin's demand. Francois, the mortgagor, also refused to submit final proof, but made an arrangement with Miss Hickey through his brother that she should submit proof at her own expense. On April 24, 1924, seven days after the submission of proof by Miss Hickey, Francois executed an assignment to her of a five-eighths interest in the $1,000 mortgage given to him by the deceased entryman. This assignment also constituted Miss Hickey the attorney for Francois to recover the money and interest secured by the mortgage, but provided that this should be done at her own expense. The assignment was said to have been executed in pursuance of a precedent agreement between the parties thereto.

After reviewing the testimony in the case the Commissioner held that the contestant had not proved by the preponderance of the evidence any material fact charged by him which had not been shown by the final proof previously submitted. He also held that a mortgagee should not be permitted to submit final proof in the absence of a clear refusal by the devisee or heir to do so, and that an assignee of a mortgagee should not be permitted to submit final proof unless the mortgagee in turn also refused to do so. The Commissioner stated that the testimony did not show that Wesley Franklin had refused outright to submit proof. With respect to the mortgage given by the entryman to Francois the Commissioner held that the waiver of the preference right accorded to Francois was not a sufficient consideration to support the mortgage. In conclusion the Commissioner held that the contest should be dismissed, that the final proof should be rejected, and that the entry should be canceled for failure to submit satisfactory proof within the statutory period.

The department finds that the Commissioner's action canceling the entry was correct. Franklin's heirs never perfected their right to the land after his death, they submitted no proof themselves, and the evidence satisfies the department that one of them, Wesley Franklin, in effect directly refused to submit final proof.

As regards the proof submitted by Miss Hickey it appears that the mortgage given by the entryman to her assignor, Francois, was based upon no other consideration than the waiver of his preference right of entry by Francois. The department in its administration of the public domain can not recognize the validity of a mortgage executed by a homestead entryman which is based upon such a consideration. When a contestant has been successful in securing the cancellation of a homestead entry the law rewards his efforts by

holding the land subject to his exclusive right of entry for 30 days. This preference right, however, is personal to the contestant and is not assignable, and it can not be indirectly assigned through the device of a mortgage given by a succeeding entryman in consideration of the waiver of the preference right. When a successful contestant formally waives his preference right he terminates his interest in the land, which then becomes open to entry by any qualified person, and a mortgage given under such conditions by a succeeding entryman because the prior successful contestant waived his preference right is founded upon no valuable consideration, or at all events upon no consideration which the Land Department will protect. The succeeding entryman acquires a full and untrammeled right to the land by virtue of the public-land laws of the United States, and any agreement on his part to limit or encumber that right in favor of a prior successful contestant who failed to make entry for the land himself is a mere *nudum pactum*.

From what has just been said it is apparent that Francois acquired no interest in Franklin's entry by virtue of his mortgage which authorized him to submit final proof upon the entry. Such being the case it is plain that Miss Hickey stood in no better position in that respect than Francois himself, and that the proof submitted by her was a nullity.

The department, however, is not in accord with the Commissioner's action dismissing Bumstead's contest, and in that way denying him a preference right of entry. When the decisions of the Commissioner and the department referred to above, dated August 22, 1924, and January 24, 1925, respectively, were rendered, final proof had been submitted by Miss Hickey and the Land Department was, or should have been, fully advised as to what that proof disclosed. The department stated in its decision that if the facts alleged in Bumstead's affidavit of contest were proven they would warrant the cancellation of Franklin's entry. That statement became the law of the case, and it was upon its faith that Bumstead undertook a long and expensive hearing. It is now too late to say that because he proved no material fact of his charges which was not already shown by the final proof, his contest should be dismissed. Further than that the department is by no means convinced of the accuracy of the Commissioner's finding with respect to the scope of the testimony submitted by Bumstead. It is unnecessary, however, to prolong this decision by a discussion of details. The department holds that the entry should be canceled pursuant to Bumstead's contest.

The department can not bring this case to a close without commenting upon the manner in which it was presented before the district land office. While the register before whom it was tried

showed great patience and forbearance, and exhibited a commendable desire to have the issues fully presented, he should have asserted his authority and restrained the contending parties from encumbering the record with page after page of utterly irrelevant matter, and he should have instructed the reporter not to take down, or at all events not to transcribe the long and frequent conversations and arguments which helped to extend the record beyond all reason. It would be hard to imagine how any case could be presented in a worse manner than was the one at hand.

In accordance with the foregoing the Commissioner's decision is affirmed in so far as it holds Franklin's entry for cancellation, but is reversed in so far as it dismisses Bumstead's contest, and the Commissioner is directed to grant Bumstead the status of a successful contestant and to award him a preference right of entry.

Affirmed in part and reversed in part.

BUMSTEAD v. HEIRS AND MORTGAGEES OF FRANKLIN

Motion for rehearing of departmental decision of May 3, 1927 (52 L. D. 144), denied by First Assistant Secretary Finney, June 14, 1927.

STATE LEGISLATION RELATING TO DISPOSITION OF ANTIQUITIES ON PUBLIC LANDS

Opinion, May 6, 1927

NATIONAL MONUMENTS—PUBLIC LANDS—RESERVATIONS—JURISDICTION.

By virtue of the power conferred upon Congress by section 3, article 4 of the Constitution respecting the territory or the property of the United States, Congress may make reservations of the public domain for the preservation of antiquities and authorize executive officers to make rules and regulations for their preservation and protection.

NATIONAL MONUMENTS—PUBLIC LANDS—ARIZONA—JURISDICTION.

Under the act of June 8, 1906, Congress has authorized the Executive to prescribe regulations relating to excavation and exploration for antiquities upon lands owned and controlled by the United States, and for the disposition of articles, implements, and material discovered thereon, and a State legislature has no power to restrict in any wise the methods thus prescribed.

PATTERSON, *Solicitor:*

In accordance with the request of the Assistant Secretary, I have considered the question presented by the Chief of the Bureau of American Ethnology, Smithsonian Institution, regarding the authority of the Legislature of the State of Arizona to enact certain proposed legislation embodied in a bill under the title of "An act to

prevent further despoilation of the prehistoric sections of Arizona, providing regulations under which exploration and recovery of prehistoric material may be prosecuted, and providing a penalty for any violation of the provisions of this act." Section 1 of the bill reads as follows:

> Any person, persons, corporation, or institution making investigations, exploration, or excavations in or on the prehistoric ruins of Arizona, either on Federal, State, or private lands, shall donate to the State fifty per cent (50%) of all articles, implements, and material found or discovered by such investigation, exploration, or excavation, which shall be deposited with the Arizona State Museum at Tucson, Arizona, to become the property of the State of Arizona for the uses, benefits, and purposes of the people of the State, to be forever open to the public free of charge for study and investigation.

Section 2 provides, as a penalty for violation of the above section, the forfeiture of all articles and materials discovered, together with fine and imprisonment.

The specific question submitted is "whether the State has authority to annul permits granted to any department of the Government to excavate and deposit specimens in the National Museum."

By the act approved June 8, 1906 (34 Stat. 225), entitled "An act for the preservation of American antiquities," Congress enacted legislation concerning historic or prehistoric ruins, or objects of antiquity, situated on lands owned or controlled by the Government of the United States. The law authorizes the President to declare by public proclamation such objects situated on lands owned or controlled by the United States to be national monuments and to reserve parcels of land for their protection and management. The act provides for the granting of permits by the Secretaries of Interior, Agriculture, and War, under appropriate rules and regulations, to qualified institutions for exploration and gathering of objects on lands under their respective jurisdictions. A penalty is provided for unauthorized operations. In accordance with the authority granted uniform rules and regulations were prescribed by the three Secretaries under date of December 28, 1906, jurisdiction thereunder to be exercised by the Secretary of Agriculture over lands within the exterior limits of forest reserves, by the Secretary of War over lands within the exterior limits of military reservations, by the Secretary of the Interior over all other lands owned or controlled by the Government of the United States, and provided for cooperative action in appropriate cases.

It is noted that the proposed State legislation is designed to apply to investigations, explorations, or excavations, either on Federal, State, or private lands. Inasmuch as the act of June 8, 1906, *supra*, and the regulations thereunder, provide for the granting of permits on lands owned or controlled by the Government of the United

States, the question submitted is understood as applying to permits granted in accordance with the provisions of that act.

Section 3, article 4, of the Constitution, provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States." The full scope of this paragraph has never definitely been settled. It has been held that primarily, at least, it is a grant of power to the United States of control over its property. *Light* v. *United States* (220 U. S. 523); *Kansas* v. *Colorado* (206 U. S. 46).

It has also been held that Congress in the exercise of its control of the property of the United States could constitutionally enact the act of March 3, 1891 (26 Stat. 1095, 1103), under which public forest reservations may be established on the public domain without the consent of the State where the land lies; and that Congress may authorize an executive officer to make rules and regulations as to the use, occupancy, and preservation of forests, and that such authority so granted is not unconstitutional as a delegation of legislative power. *United States* v. *Grimaud* (220 U. S. 506); *Light* v. *United States*, *supra*.

Clearly Congress, within the authority of the foregoing article of the Constitution, could make like reservations of the public domain for the preservation of antiquities and authorize executive officers to make rules and regulations for their preservation and protection. With respect to lands within the limits of national monuments created by Executive proclamation it seems clear that Congress has exclusive jurisdiction in the matter.

Lands owned or controlled by the United States would also include unreserved public lands. With respect to these the Government has the right of an ordinary proprietor to maintain its possession when situated within a State and to prosecute trespassers. It has a power over its own property analogous to the police powers of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case when directed to its own protection. *United States* v. *Camfield* (167 U. S. 518).

The question submitted is "whether the State has any authority to annul permits granted to any department of the Government to excavate and deposit specimens in the National Museum." There is nothing in the proposed legislation providing for the annulment of permits. It requires that any of the parties named making investigations, exploration, or excavations shall donate to the State fifty per cent of all articles, implements, and material found, which shall be deposited with the Arizona State Museum, to become the property of the State.

It seems clear from the authorities cited that jurisdiction over the subject matter of the proposed legislation, in so far as lands owned or controlled by the Government of the United States are concerned, rests exclusively with Congress. I am, therefore, of the opinion that the legislation would be null and void as to said property, and that such disposition may be made of all articles, implements, and material found thereon as is authorized under the terms of permits granted by proper officers under the provisions of the act of June 8, 1906, *supra*.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

ASSIGNMENT OF UNDIVIDED INTERESTS IN SOLDIERS' ADDITIONAL RIGHTS

Instructions, May 13, 1927

SOLDIERS' ADDITIONAL—WIDOW; HEIRS; DEVISEE—DESCENT AND DISTRIBUTION—ASSIGNMENT.

A soldiers' additional right, not exercised or assigned by the soldier, nor by his widow during widowhood, in the absence of minor children, descends to those who are his heirs under the laws of the State of his domicile at the time of his death.

SOLDIERS' ADDITIONAL—WIDOW; HEIRS; DEVISEE—UNDIVIDED INTERESTS—ASSIGNMENT.

Each of the heirs entitled to the exercise of a soldiers' additional right may separately locate or assign his share of the right.

PRIOR DEPARTMENTAL DECISION OVERRULED SO FAR AS IN CONFLICT.

Case of *Edgar A. Coffin* (33 L. D. 245) overruled so far as in conflict.

FINNEY, *First Assistant Secretary:*

The department has considered your [Commissioner of the General Land Office] letter of the 9th instant, requesting instructions as to whether or not an assignment executed by one or more, but less than all, of the surviving heirs of a soldier, who have succeeded to his soldiers' additional right, should be recognized as conveying the proportionate share or shares of the heir or heirs who executed such assignment or assignments.

It being well settled that a soldiers' 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, Revised Statutes, to the widow and minor orphan children (*Anderson* v. *Clune*, 269 U. S. 140), it only remains to be determined whether there is any administrative objection to allowing each of the heirs, if there be more than one, to separately locate or assign his share of the right.

In the case of *Edgar A. Coffin* (33 L. D. 245) it was held that "the Land Department does not and can not deal with or recognize undivided interests."

The department is now of the opinion that no good reason exists for further adhering to the ruling above quoted.

Accordingly, if one claiming a portion of a soldiers' additional right as the heir of a soldier furnishes convincing proof of his heirship, the names of the other heirs, and that there are no debts due by the estate of the soldier, his application to locate his portion of the right, or an assignment thereof, will be recognized.

In this connection it should be observed that a soldiers' additional right not exercised (or assigned) by the soldier, nor by his widow during widowhood, in the absence of minor children, descends to those who are his heirs under the laws of the State of his domicile at the time of his death, and, in making proof of the undivided interest to be located or assigned, the applicant should be required to furnish evidence showing the succession in the same manner as in the case of estates generally.

DAVIDSON v. TAYLOR

Decided May 31, 1927

CONTEST—HOMESTEAD ENTRY—NOTICE—MISNOMER—PRACTICE.

Omission of a contestee's middle name in the application to contest his homestead entry and in the notice subsequently issued thereupon does not constitute a misnomer or variance within the purview of the Rules of Practice, and is not such a defect as to warrant dismissal of the contest.

FINNEY, *First Assistant Secretary:*

Hattie Davidson has appealed from the decision of the Commissioner of the General Land Office dated January 12, 1927, dismissing her contest against the original stock-raising homestead entry, 026844, of Claude Henry Taylor, for 640 acres in Secs. 17 and 20, T. 1 S., R. 14 E., N. M. P. M., Las Cruces, New Mexico, land district.

The entry was allowed on November 17, 1920, as Roswell 048395. Hattie Davidson filed contest against the same on September 13, 1926, alleging lack of residence and abandonment. Notice of the contest was served by publication. The register of the district land office, under date of December 1, 1926, recommended the cancellation of the entry because of the contestee's failure to file an answer.

In his decision of January 12, 1927, the Commissioner stated that it was found upon examination of the papers in the case that the contest proceedings were fatally defective by reason of the fact that the application to contest, and all other papers with reference to the

contest, gave the name of the contestee as Claude Taylor, whereas the entry had been made by Claude Henry Taylor. The Commissioner, accordingly, dismissed Mrs. Davidson's contest.

The department does not concur in the action taken by the Commissioner. Rule 2 (a) of the Rules of Practice requires that an application to contest shall contain the name and residence of each party adversely interested. Rule 9 also requires that published notice of contest must give the names of the parties thereto. It must be assumed that the department in preparing these rules had in mind the established principle of law with reference to what constitutes an individual's name.

The common law recognized but two names, the surname or family name, and the first or Christian name. This principle has been adhered to by all of the Federal and State courts so far as is known, including the Supreme Court of the United States, and has been applied in both civil and criminal cases. Even in such a technical pleading as an indictment, the omission of the accused party's middle name does not constitute a misnomer or a variance. The principle also has been applied in cases involving notice by publication, with respect to the defendant's name.

There is no reason why the Land Department should be more exacting than the courts. In the instance at hand, the entryman's name was Claude Taylor. The contest against his entry, in which he was designated as the party defendant by that name alone, was not defective because it omitted his middle name, Henry. See *Keene* v. *Meade* (3 Pet. 1); *Games* v. *Stiles* (14 Pet. 322); *Corrigan* v. *Schmidt* (126 Mo. 304; 28 S. W. 874); *Johnson* v. *Day* (2 N. D. 295; 50 N. W. 701).

The decision appealed from is

Reversed.

STATE IRRIGATION DISTRICTS IN THEIR RELATION TO THE PUBLIC LANDS OF THE UNITED STATES

REGULATIONS

[Circular No. 592 [1]]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 3, 1927.

REGISTERS, UNITED STATES LAND OFFICES:

1. The act of August 11, 1916, chapter 319 (39 Stat. 506), entitled "An act to promote the reclamation of arid lands," reads as follows:

[1] Revision of the regulations of Mar. 6, 1918, Circular No. 592, and of reprint of Aug. 16, 1920, unpublished.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when in any State of the United States under the irrigation district laws of said State there has heretofore been organized and created or shall hereafter be organized and created any irrigation district, for the purpose of irrigating the lands situated within said irrigation district, and in which irrigation district so created or to be created there shall be included any of the public lands of the United States, such public lands so situated in said irrigation district, when subject to entry, and entered lands within said irrigation district, for which no final certificates have been issued, which may be designated by the Secretary of the Interior in the approval by him of the map and plat of an irrigation district as provided in section 3, are hereby made and declared to be subject to all the provisions of the laws of the State in which such lands shall be situated relating to the organization, government, and regulation of irrigation districts for the reclamation and irrigation of arid lands for agricultural purposes, to the same extent and in the same manner in which the lands of a like character held under private ownership are or may be subject to said laws: *Provided*, That the United States and all persons legally holding unpatented lands under entry made under the public land laws of the United States are accorded all the rights, privileges, benefits, and exemptions given by said State laws to persons holding lands of a like character under private ownership, except as hereinafter otherwise provided: *Provided further*, That this act shall not apply to any irrigation district comprising a majority acreage of unentered land.

SEC. 2. That the cost of constructing, acquiring, purchasing, or maintaining the canals, ditches, reservoirs, reservoir sites, water, water right, rights of way, or other property incurred in connection with any irrigation project under said irrigation district laws shall be equitably apportioned among lands held under private ownership, lands legally covered by unpatented entries, and unentered public lands included in said irrigation district. Officially certified lists of the amounts of charges assessed against the smallest legal subdivision of said lands shall be furnished to the register and receiver of the land district within which the lands affected are located as soon as such charges are assessed; but nothing in this act shall be construed as creating any obligation against the United States to pay any of said charges, assessments, or debts incurred.

That all charges legally assessed shall be a lien upon unentered lands and upon lands covered by unpatented entries included in said irrigation district; and said lien upon said land covered by unpatented entries may be enforced upon said unpatented lands by the sale thereof in the same manner and under the same proceeding whereby said assessments are enforced against lands held under private ownership: *Provided*, That in the case of entered unpatented lands the title or interest which such irrigation district may convey by tax sale, tax deed, or as a result of any tax proceeding, shall be subject to the following conditions and limitations: If such unpatented land be withdrawn under the act of Congress of June 17, 1902 (Thirty-second Statutes, page 388), known as the reclamation act, or subject to the provisions of said act, then the interest which the district may convey by such tax proceedings or tax deed shall be subject to a prior lien reserved to the United States for all the unpaid charges authorized by the said act of June 17, 1902; but the holder of such tax deed or tax title resulting from such district tax shall be entitled to all the rights and privileges in the land included in such tax title or tax deed of an assignee under the provisions of the act of Congress of June 23, 1910 (Thirty-sixth Statutes, page 592), and upon submission to the United States land office of the district in which the land is located of satisfactory proof of such tax

title, the name of the holder thereof shall be indorsed upon the records of such land office as entitled to the rights of one holding a complete and valid assignment under the said act of June 23, 1910, and such person may, at any time thereafter receive patent upon submitting satisfactory proof of the reclamation and irrigation required by the said act of Congress of June 17, 1902, and acts amendatory thereto, and making the payments required by said acts.

SEC. 3. That no unentered lands and no entered lands for which no final certificates have been issued shall be subject to the lien or liens herein contemplated until there shall have been submitted by said irrigation district to the Secretary of the Interior, and approved by him, a map or plat of said district and sufficient detailed engineering data to demonstrate to the satisfaction of the Secretary of the Interior the sufficiency of the water supply and the feasibility of the project, and which shall explain the plan or mode of irrigation in those irrigation districts where the irrigation works have not been constructed, and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and which shall also show the source of water to be used for irrigation of land included in said district: *Provided*, That the Secretary of the Interior may, upon the expiration of ten years from the date of his approval of said map and plan of any irrigation district, release from the lien authorized by this act any unentered land or lands upon which final certificate has not issued, for which irrigation works have not been constructed and water of such district made available for the land: *Provided further*, That in those irrigation districts already organized, and whose irrigation works have been constructed and are in operation, as soon as a satisfactory map, plat, and plan shall have been approved by the Secretary of the Interior, as in this act provided, such entered and unentered lands shall be subject to all district taxes and assessments theretofore actually levied against the lands in said district, and in the same manner in which lands of a like character held under private ownership are subject to liens and assessments.

SEC. 4. That upon the approval of the district map or plat as hereinbefore provided by the Secretary of the Interior, the register and receiver will note said approval upon their records where any unentered or entered and unpatented lands are affected.

SEC. 5. That no public lands which were unentered at the time any tax or assessment was levied against same by such irrigation district shall be sold for such taxes or assessments, but such tax or assessment shall be and continue a lien upon such lands, and not more than one hundred and sixty acres of such land shall be entered by any one person; and when such lands shall be applied for, after said approval by the Secretary of the Interior, under the homestead or desert land laws of the United States, the application shall be suspended for a period of thirty days to enable the applicant to present certificate from the proper district or county officer showing that no unpaid district charges are due and delinquent against said land.

SEC. 6. That any entered but unpatented lands not subject to the reclamation act of June 17, 1902 (Thirty-second Statutes, page 388), sold in the manner and for the purposes mentioned in this act may be patented to the purchaser thereof or his assignee at any time after the expiration of the period of redemption allowed by law under which it may have been sold (no redemption having been made) upon the payment to the receiver of the local land office of the minimum price of $1.25 per acre, or such other price as may be fixed by law for such lands, together with the usual fees and commissions charged in entries of like lands under the homestead laws, and upon a satisfactory showing

that the irrigation works have been constructed and that water of the district is available for such land; but the purchaser or his assignee shall, at the time of application for patent, have the qualification of a homestead entryman or desert-land entryman, and not more than one hundred and sixty acres of said land shall be patented to any one purchaser under the provisions of this act.

These limitations shall not apply to sales to irrigation districts, but shall apply to purchasers from such irrigation districts of such land bid in by said district.

That unless the purchaser or his assignee of such lands shall, within ninety days after the time for redemption has expired, pay to the proper receiver all fees and commissions and the purchase price to which the United States shall be entitled as provided for in this act, any person having the qualification of a homestead entryman or a desert-land entryman may pay to the proper receiver, for not more than one hundred and sixty acres of said lands, for which payment has not been made, the unpaid purchase price, fees, and commissions to which the United States may be entitled; and upon satisfactory proof that he has paid to the purchaser at the tax sale, or his assignee, or to the proper officer of the district for such purchaser or for the district, as the case may be, the sum for which the land was sold at sale for irrigation district charges or bid in by the district at such sale, and in addition thereto the interest and penalties on the amount bid at the rate allowed by law, shall be subrogated to the rights of such purchaser to receive patent for said land.

In any case where any tract of entered land lying within such approved irrigation district shall become vacant by relinquishment or cancellation for any cause, any subsequent applicant therefor shall be required, in addition to the qualifications and requirements otherwise provided, to furnish satisfactory proof by certificate from the proper district or county officer that he has paid all charges then due to the district upon said land and also has paid to the proper district or county officer for the holder or holders of any tax certificates, delinquency certificates, or other proper evidence of purchase at tax sale the amount for which the said land was sold at tax sale, together with the interest and penalties thereon provided by law.

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

SEC. 8. That all moneys derived by the United States from the sale of public lands herein referred to shall be paid into such funds and applied as provided by law for the disposal of the proceeds from the sale of public lands.

PURPOSE AND EFFECT OF STATUTE

2. The purpose and effect of this statute is to empower the Secretary of the Interior, following the presentation of proper applications, to investigate the plans and financial and physical resources of irrigation districts heretofore or hereafter organized pursuant to the law of any State, and if he shall find and conclude that any such

applicant has planned and is executing an altogether meritorious and feasible irrigation undertaking, to grant his approval of its plan and undertaking, provided a majority acreage thereof is not unentered land, to the end that upon such approval, and upon compliance by such districts with the conditions in said act specifically set forth, all unentered public land and land which has been entered, but upon which final certificate has not issued, shall be subject to all the provisions of the laws of the State in which such lands shall be situated relating to the organization, government, and regulation of irrigation districts for the reclamation and irrigation of arid lands for agricultural purposes to the same extent upon like terms as are privately owned lands within the district. This includes the right of the district to levy and collect taxes on unpatented land for the purpose of raising funds with a view to the construction, operation, and maintenance of the irrigation system, but does not grant the right to tax generally or for any purpose not definitely connected with the construction and maintenance of the irrigation works. The right of the district to sell lands which were entered at the date of the levy of any such lawful tax or assessment remaining unpaid is also provided for, together with the right of individuals to make entry of such land after the period of redemption from tax sales has expired.

REGULATIONS

3. *Application.*—Any irrigation district desiring to obtain the benefits of this act should file in the local United States land office within which the lands are situated an application, in duplicate, consisting of the following:

(*a*) A statement setting forth concisely the legal address of the district; the date when, by court decree or otherwise, it was finally declared to be fully organized; the name and title of all officers of the district, qualified at the date of the filing of the application; the gross amount of land embraced in the district; the amount of irrigable land within the district; the amount of privately owned land within the district; the amount of entered land for which final certificate has not issued; the amount of unentered public land; the amount of land embraced within a withdrawal for a United States reclamation project; the amount of land otherwise withdrawn (within Indian, forest, power site, or other withdrawal); how much (per cent) of the project has been completed; what bond issue, if any, has been finally consummated, and the present bonded debt; whether contract has been made with the United States under the reclamation act of June 17, 1902 (32 Stat. 388), or is pending, and if any such, the date thereof; and any other facts or circumstances

which would throw light on, or be pertinent to, a full understanding of the present condition or future prospects of the district.

(*b*) Proof of organization.

(*c*) Evidence of water right and sufficiency of available water supply.

(*d*) Maps showing the project.

(*e*) Plans and specifications.

(*f*) Such data as may be necessary to a full understanding of the situation.

DETAILS OF APPLICATION

4. *Proof of Organization* (*see par.* 3*b*).—A properly authenticated copy in duplicate of the proceedings through which the district claims corporate existence should be filed. The character of this proof will, of course, depend upon the State statute under which the organization was effected.

5. *Evidence of Water Right* (*see par.* 3*c*).—If the lands to be reclaimed are wholly withdrawn lands within a United States reclamation project, and the right to the use of the water depends solely upon an appropriation by the Government, no evidence of water right will be required, but if dependence is placed upon any water appropriation other than one claimed by the Government, either for the reclamation of the whole or a portion of the lands sought to be made subject to this act, certified copies of such instruments as will show title to the water rights claimed should be filed with the application. A statement as to whether the stream or other body of water from which the water supply is to be secured has been adjudicated, and if so, the court in which the decree was granted and the date thereof should be given. If water measurements have not been taken, a detailed report showing the foundation for the belief that sufficient water exists should be filed.

6. *Maps.*—There should also be filed in duplicate with the application tracings showing by smallest legal subdivision, in accordance with the latest official survey, all of the lands embraced within the confines of the district; the status of the various tracts should be differentiated, by markings on each legal subdivision, in black india ink, letters corresponding to the status of the land, as follows:

(*a*) Privately owned land.

(*b*) Lands which have been entered but for which final certificate has not been issued.

(*c*) Lands withdrawn under the reclamation act.

(*d*) Lands otherwise withdrawn.

(*e*) Unentered public lands.

NOTE.—If a tract of land appears to come within two of the designations, both letters should be used.

Unless one-eighth of any smallest legal subdivision (of 40 acres or less) is susceptible of reclamation from the irrigation system as planned or constructed, the district should not request its designation, except where it is shown that such irrigable area, where less than one-eighth of the subdivision, will when reclaimed be more valuable than the entire subdivision in its native state.

These tracings should be made on tracing linen with india ink. Three scales are permissible—2,000 feet to the inch, 1,000 feet to the inch, or 500 feet to the inch. No other scales should be used, and the scale most adaptable to a clear showing of the matters and things set forth thereon should be used, but in no case should any one tracing be over 36 inches in width.

The tracings should also show the outlines, properly tied, of any reservoirs, canals, ditches, power plants, transmission lines, or other aids to reclamation which are included in the system, as well as cross sections, properly drawn to scale, of dams and canals.

If the irrigation system relied upon for the reclamation of the lands within the district is entirely a United States reclamation project, it will be unnecessary to furnish a map. See section 3 of the act of May 15, 1922 (42 Stat. 541), hereinafter quoted. If, however, public lands are to be reclaimed in whole or in part, by means other than under a United States reclamation project, such system or the portion thereof not connected with the United States reclamation project should be shown by map.

7. *Plans and specifications* (*see par. 3e*).—If the district irrigation works have been constructed, either fully or partially, plans and specifications of the principal structures, sufficient to show the designs and methods of construction, prepared by a competent engineer, should be filed, together with an authenticated statement of the amount actually expended upon the construction and the estimated amount necessary to complete the system.

If no construction has been undertaken, preliminary plans showing the estimated cost of the project and the salient features thereof in sufficient detail to establish the feasibility of the project will be sufficient.

8. *Other data* (*see par. 3f*).—As each project must necessarily stand or fall upon its own merits, it will be impossible to specify minutely all of the data that may be required. In every instance, however, the data should be so full and complete as to place before the Secretary of the Interior all of the information necessary to an intelligent consideration of the feasibility of the project as a whole. Additional information may be required by the department if the data stated upon the original application prove insufficient.

9. *Affidavits and certificates.*—Each of the maps filed with the application for recognition should bear the certificate of the president or other presiding or chief officer of the district, countersigned by the secretary, clerk, or other recording officer and attested by the seal of the district, in accordance with Form No. 1 attached hereto. They should also bear the affidavit of the district's chief engineer, in accordance with Form No. 2 attached hereto. This certificate and affidavit should be inscribed upon the maps in india ink.

10. *Rights of way.*—If any unpatented public land or any reservation of the United States is affected by any of the proposed works of the irrigation district, application for right of way therefor must be filed by the district under the appropriate act before the application for recognition will be finally approved.

11. *Unsurveyed lands.*—Where any proposed district includes within its confines unsurveyed lands the lines of survey nearest such unsurveyed lands will be protracted.

PROCEDURE

12. *Lands in more than one district.*—Where the lands within the confines of the proposed irrigation district lie within more than one local land district it will only be necessary to file the data in duplicate hereinbefore adverted to in one of the land districts; a blueprint copy of the map and one copy of the statement, however, should be filed in the other districts, together with a notice to the register that the application, in duplicate, has been filed in the other district (naming it).

13. *Duty of register.*—Upon the filing of such an application in the local office the register will assign a serial number to same and note upon the maps filed with the application the name of the land office and the date of filing over his written signature. After testing by his records the accuracy of the notations on said map, as required by paragraph 6 of these regulations, he will note upon his records opposite all unpatented lands shown upon the map the fact and date of such filing, after which he will at once transmit the entire record to the General Land Office.

14. *Consideration of application.*—Upon receipt of the record in the General Land Office, it will be considered with reference to its regularity and compliance with the terms of these regulations and disposed of as follows:

(*a*) If all the unpatented lands are within a United States reclamation project, depending solely upon Government water appropriation, and the record is regular, it will be referred to the Bureau of Reclamation for consideration as to feasibility, which bureau will

make its recommendation in the premises to the Secretary of the Interior through the General Land Office.

(*b*) If the lands within the district are partially within a United States reclamation project and partially unpatented public lands, depending for water upon other than Government appropriations, the case will be referred to the Bureau of Reclamation for such report as it may deem proper, after which and after field investigation the Commissioner of the General Land Office will consider the record with respect primarily to the lands not affected by the United States reclamation project, and transmit the record with proper recommendation to the Secretary of the Interior for appropriate action.

(*c*) If the unpatented lands within the district are all public and unaffected by United States reclamation withdrawal, the Commissioner of the General Land Office will, after investigation in the field, consider and transmit the record to the Secretary of the Interior with recommendation.

15. Upon the approval of an application by the Secretary of the Interior the Commissioner of the General Land Office will cause to be noted upon the tract books of his office the fact and date of such approval, and will transmit to the local land office or offices wherein the lands affected are situated one copy of the map. Upon receipt of such copy, the register will at once note on his records opposite each tract of unentered or entered and unpatented land designated, the fact and date of such approval and notify the irrigation district thereof.

ACT OF MAY 15, 1922 (42 STAT. 541)

16. Section 3 of the act of May 15, 1922 (42 Stat. 541), provides as follows:

> That upon the execution of any contract between the United States and any irrigation district pursuant to this act, the public lands included within such irrigation district when subject to entry, and entered lands within such irrigation district, for which no final certificates shall have been issued and which may be designated by the Secretary of the Interior in said contract, shall be subject to all the provisions of the act entitled "An act to promote the reclamation of arid lands," approved August 11, 1916: *Provided*, That no map or plan as required by section 3 of the said act need be filed by the irrigation district for approval by the Secretary of the Interior.

This section is construed as an amendment of the act of August 11, 1916 (39 Stat. 506), in that it makes unnecessary the filing of a map or plan of the district for the approval of the Secretary of the Interior in those cases where the lands within a district are to be reclaimed by the Bureau of Reclamation under a contract between the Secretary of the Interior and the irrigation district entered into

under the act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof, and in lieu thereof provides for the designation by the terms of such contract of the public lands included in such a district where subject to entry and entered lands on which no final certificates shall have been issued, such designation to make the land subject to all the provisions of the act of August 11, 1916, *supra*.

Accordingly it will not be necessary for a district, under such circumstances, to file formal application for the designation of the land, as provided for in the act of August 11, 1916, *supra*, but in connection with its negotiations with the Secretary of the Interior for the construction of the irrigation system or for repayment of cost if already constructed, it should make request for the designation of the lands under the act of August 11, 1916, *supra*, filing a list thereof.

In such a case the contract between the Secretary of the Interior and the irrigation district must contain a description according to the approved plats of survey of the lands within such district, properly subject to designation under said act of August 11, 1916, and the approval of such a contract by the Secretary, unless otherwise stipulated, will have the effect of designating the lands as provided for in said act and making them subject to all the provisions thereof.

In practice the Bureau of Reclamation will require the district to present a list of the land which it desires to have designated under the act of August 11, 1916. (39 Stat. 506.) From this list the Bureau of Reclamation will eliminate tracts which for any reason will not be irrigated (at least to such an extent as to make the irrigable portion more valuable than the whole tract when unreclaimed) by the system as constructed or to be constructed.

These lists should then be referred by the Bureau of Reclamation to the General Land Office with a view to the elimination of any lands not subject to entry (i. e., withdrawn or reserved), whereupon the remaining tracts will be included in the contract between the district and the Secretary of the Interior.

The Commissioner of the Bureau of Reclamation will furnish the Commissioner of the General Land Office with two copies of all such contracts, together with two blue-print maps of the district.

From these the Commissioner of the General Land Office will cause proper notations to be made on the records of his office, and will also issue the necessary instructions to the local office with a view to the proper notation of the records and the enforcement of the provisions of the act of August 11, 1916, *supra*, as to the lands designated.

17. *Taxes and assessments.*—(*a*) Where an irrigation district has been approved by the Secretary of the Interior the district must, after each assessment, file with the register of the local land office

within which the lands of the district are situated an officially certified list showing the amount assessed against each smallest legal subdivision of unentered or entered and unpatented public land within the district, which list shall contain a statement that such assessment was made in due form, in compliance with the provisions of the State law and of this act. Any assessment or sale, or attempted sale, of such lands prior to the approval of the district is without authority of law and void.

(*b*) Where contracts heretofore or hereafter made between the United States and irrigation districts involving public lands of the United States inhibit the assessment of unentered public land while in that status, the provisions of such contracts must, of course, be complied with by the district.

ENTRIES GENERALLY

18. For the purpose of entry the act of August 11, 1916 (39 Stat. 506), may be considered as dividing the unpatented lands within a State irrigation district into two general classes, namely, lands withdrawn under the act of June 17, 1902 (32 Stat. 388), and lands not so withdrawn.

For the purpose of administration the lands within such a district may be considered as divided into the following subordinate classes:

(1) Unpatented public lands when subject to entry.

(2) Entered unpatented lands.

(3) Entered lands which shall become vacant by relinquishment or cancellation for any cause.

The approval of a legally organized irrigation district by the Secretary of the Interior under said acts, unless otherwise provided by contract between the district and the United States, makes the public lands within such district, when subject to entry, and the entered lands on which no final certificates have issued, subject to a lien for all taxes and assessments thereafter lawfully levied by the district to the same extent and in the same manner as lands of a like character held under private ownership.

The following instructions will govern in the case of entries for lands within irrigation districts approved by the Secretary of the Interior either in the manner provided by the act of August 11, 1916 (39 Stat. 506), or section 3 of the act of May 15, 1922 (42 Stat. 541).

ENTRIES UNDER RECLAMATION ACT

19. Lands within an approved district withdrawn under the act of June 17, 1902 (32 Stat. 388), shall during the continuance of such withdrawal be subject to entry only in the manner provided by said act, and amendments thereto and the regulations thereunder.

When lands included in entries made under the act of June 17, 1902, *supra*, are sold for nonpayment of district taxes or assessments the purchaser on the presentation of proper evidence of his tax title shall be considered as one holding a complete and valid assignment under the act of June 23, 1910 (36 Stat. 592), and shall perfect the entry in the same manner required of an assignee under said act.

The evidence of such tax title shall be the same as hereinafter provided in the case of an applicant under tax title for land not subject to the reclamation act.

The following paragraphs have no application to lands withdrawn under reclamation laws:

ENTRIES UNDER SECTION 5

20. Public lands within an approved district which were unentered at the time any tax or assessment was levied against same shall not be sold for such tax or assessment, but same shall be and continue a lien upon such land, and not more than 160 acres of such land shall be entered by any one person, and when such land shall be applied for after the approval of the district by the Secretary of the Interior, under the homestead or desert-land laws, the applicant shall be required to present a certificate from the proper district or county officer showing that no unpaid district charges are due, or delinquent, against said land.

Any such application for lands of this character, if unaccompanied by the required certificate, will be suspended by you for 30 days to enable the applicant to present such certificate, and if not furnished, the application will be rejected, subject to the right of appeal.

TAX TITLES GENERALLY

21. No application to enter or purchase land within an approved irrigation district under tax-sale title will be allowed if the sale was for taxes or assessments levied prior to the approval of the district by the Secretary of the Interior.

ENTRY OF LAND RELINQUISHED (SEC 6 OF ACT)

22. In case where any tract of entered land within an approved district shall become vacant by relinquishment or cancellation for any cause, any subsequent applicant therefor shall, in addition to the qualifications and requirements otherwise provided, be required to furnish satisfactory proof by certificate from the proper district or county officer showing that he has paid all charges due to the district upon said land, and also that he has paid to the proper district or county officer for the holder, or holders, of any tax certificate, delin-

quency certificate, or other proper evidence of tax sale, the amount for which said land was sold at tax sale, together with the interest and penalties thereon provided by law.

Entries for such land will be limited to 160 acres, as such lands come within the general description of "unentered" lands.

It will be observed that as to such land the requirement as to payment of taxes, assessments, interest, and penalties applies to any subsequent applicant therefor and not solely to applicants under the homestead and desert land law as in the first instance. (Sec. 5 of act.)

If the application is not accompanied by this evidence you will suspend same for 30 days, and if the necessary proof of the required payments is not made within such time you will reject the application, subject to the right of appeal.

CASH ENTRIES (SEC. 6 OF ACT)

23. In case of entered lands within an approved irrigation district not subject to the reclamation act of June 17, 1902 (32 Stat. 388), the purchaser thereof at tax sale, or his assignee (no redemption having been made), may receive patent to the land upon the payment to the register of the local land office of the minimum price of $1.25 per acre, or such other price as may be fixed by law for such land, together with the usual fees and commissions charged in entries of like land under the homestead laws, and upon satisfactory showing that the irrigation works have been constructed and that water of the district is available for such land.

However, such purchaser or his assignee shall at the time of application for patent have the qualifications of either a homestead or desert-land entryman, and not more than 160 acres of such land shall be patented to any one purchaser.

If the purchaser at tax sale, or his assignee, shall not within 90 days after the time for redemption has expired pay to the proper register all fees and commissions and the purchase price to which the United States shall be entitled, as provided in this act, any person having the qualifications mentioned may pay to the proper register for not more than 160 acres of such land the unpaid purchase price, fees, and commissions to which the United States may be entitled, and upon satisfactory proof that he has paid to the purchaser at tax sale, or to his assignee, or to the proper officer of the district for such purchaser, or for the district, as the case may be, the sum for which the land was sold at sale for irrigation-district charges, or bid in by the district at such sale, and in addition thereto the interest and penalties on the amount bid at the rate allowed by law, shall be subrogated to the rights of such purchaser to receive patent for said land.

FORM OF APPLICATION TO PURCHASE

24. An application to purchase under this act shall be under oath and such application and all other proofs, affidavits, and oaths of any kind whatsoever required shall be executed before a proper officer as provided in section 2294, Revised Statutes, as amended. (See Circular No. 884, 49 L. D. 497.)

The application shall contain a description according to the approved plats of survey of the land sought to be purchased and shall give the serial number or numbers of the entry or entries in which the land is then included. The applicant shall also show by like evidence required in such cases that he has the qualifications of a homestead or desert-land entryman, furnishing the proof thereof, together with evidence required by Circular No. 1066 (51 L. D. 457).

He must show whether he is applying as purchaser at tax sale, as assignee of such purchaser, or is seeking to be subrogated to the right of such purchaser or assignee.

The application shall not embrace less than a legal subdivision or more than 160 acres, and shall not include land in more than one land district, and shall be accompanied by the usual fees and commissions provided in entries of like land under the homestead laws, together with the purchase price of the land, not less than $1.25 per acre, or such other price as may be fixed by law for such land.

As the laws governing the sale of lands for taxes are not the same in the several States affected by this act, and as in some instances more than one method of conducting sales is permitted, and as the period in which redemption may be made varies, it is not thought advisable to furmulate specific rules governing proof of tax titles. However, the following general rules must be observed:

If the tax title is based on court proceedings, a copy of the decree or order of the court under the seal of the clerk of the court must be furnished. The certificate of the clerk of court should make specific reference to the laws governing such sale and show that the period of redemption has expired without redemption having been made, citing the statute.

If the sale was made by the district or under other than court proceedings, the certificate of the officer conducting such sale, under the seal of his office, must be furnished. This certificate should show that all steps necessary to legalize such sale were taken, citing the statutes, and should show that the period of redemption has expired without redemption being made.

No application to purchase under this act will be accepted for lands included in more than one pending entry unless necessary in order to make the 160 acres maximum area to which the applicant

may be entitled, but in such event the land applied for must, if practicable, be contiguous, and, if not contiguous, as nearly so as the circumstances will permit.

On receipt of an application to purchase under this act you will serialize and note same on your records.

You will then examine the application as to its compliance with these provisions, especially as to the title of the applicant under the tax-sale provisions of the State law. If the application is not complete in substance, or based on an unredeemable tax title, you will hold same for rejection, subject to the usual right of appeal. If the application is found satisfactory and complete in all respects, you will notify the entryman or entrymen, of the land affected and alleged to have been sold at tax sale, of the filing of the application to purchase such land, and that because thereof the entry, or entries, are held for cancellation (to the extent affected by such sale), subject to the usual right of appeal.

If appeal is filed you will transmit the entire record to the General Land Office, and if no appeal is filed you will transmit the application, together with a copy of the notice served on the entryman or entrymen, of record, together with proof of service of such notice.

If the application is without objection and contains the evidence herein required and water has been made available for the land, appropriate instructions looking to the issuance of cash certificate will be issued by the General Land Office. If appeal is filed, the same will be considered and disposed of in the usual manner.

Pending the authorization of cash certificate, the purchase price of the land will be deposited to the credit of "unearned moneys."

If all be found regular and sufficient except that the irrigation works have not been constructed and water has not been made available, the cash certificate will be withheld pending proof of construction and of the availability of water.

When the application to purchase is approved by the General Land Office and, without regard to whether or not such purchaser shall then be entitled to certificate and patent (which will depend upon the question of construction of irrigation works and the availability of water), the conflicting entry, or entries, as the case may be, to the extent to which the land was sold for delinquent taxes or assessments, no appeal having been filed, will be canceled of record.

WILLIAM SPRY,
Commissioner.

Approved:

E. C. FINNEY,
First Assistant Secretary.

FORMS PRESCRIBED IN PARAGRAPH 9

FORM 1

I, _____, the duly elected, qualified, and acting _____ (designation of office) of the _____ irrigation district, duly organized under the laws of the State of _____ as found at page _____ of _____,[1] do hereby certify that the plan of irrigation and survey herewith is submitted under authority of the said district granted by resolution of the board of directors (or trustees) of said district, adopted on the _____ day of _____, 19__, a copy of which said resolution, duly verified by the secretary of said district, is submitted with, and by this reference made a part of, this certificate; and application is hereby made for the designation, under the act of August 11, 1916 (39 Stat. 506), of the tracts marked hereon "b" or "e"; that the said tracts are each and every one of such character as to be subject to the provisions of the homestead or desert land laws of the United States and that the majority acreage in the said irrigation district is not unentered land.

_____,
(Name)
_____,
(Official title)
Of the _____ *Irrigation District.*

Attest:
[SEAL] _____,
Secretary (or other title of recording officer).

FORM 2

STATE OF _____
County of _____, *ss:*

_____, being duly sworn, says that he is the chief engineer of the _____ irrigation district; that the tracts shown hereon to be designated under the act of August 11, 1916 (39 Stat. 506), are each and every one of such character as to be subject to the provisions of the homestead or desert land laws of the United States;[2] that he has personally examined the same; 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, nor, within such limits, any placer, nor cement, gravel, salt spring, or deposit of salt, nor any other valuable mineral deposit (if necessary insert: except mineral deposits within the purview of the acts of March 3, 1909 (35 Stat. 844), and June 22, 1910 (36 Stat. 583), or of the act of July 17, 1914 (38 Stat. 509), as the facts may warrant); 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 (exception as above if necessary); that none of the unentered lands contain springs or water holes (see withdrawal of April 17, 1926, also Circular No. 1066, approved May 25, 1926, 51 L. D. 457); that the plan of irrigation here-

[1] Give citation to act or acts under which the district is organized.

[2] If the chief engineer has not made a personal examination of the land sufficiently in detail to enable him to make that part of the affidavit bracketed, it should be omitted herefrom and a separate affidavit should be made on the map as to such facts by some person who has made such examination.

with submitted is accurately and fully represented in accordance with ascertained facts; that the system proposed is sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, as is shown in the accompanying report; that at least one-eighth of each smallest legal subdivision for which designation is sought is susceptible of reclamation from the irrigation system or (where less than one-eighth the irrigable portion of such tract) will be of more value when reclaimed than the entire tract in its native state; that the survey of said system of irrigation is accurately represented upon this map and the accompanying field notes; and that the limits of said irrigation district are correctly shown hereon.

_____

Subscribed and sworn to before me this _____ day of _____, 19__.

[SEAL.] _____,
Notary Public.

My commission expires _____.

ANNA M. DERDEN

Decided June 6, 1927

OIL AND GAS LANDS — PROSPECTING PERMIT — ASSIGNMENT — ASSIGNEE — DILIGENCE — EXTENSION OF TIME.

An assignment of an oil and gas prospecting permit, otherwise regular, will be approved if the permit be in good standing when the application for the approval of the assignment is filed, and the assignee may make such showings of diligence as will warrant an extension of time.

OIL AND GAS LANDS — PROSPECTING PERMIT — ASSIGNMENT — ASSIGNEE — DILIGENCE — EXTENSION OF TIME.

In the matter of extensions of time, the approval of an assignment of an oil and gas prospecting permit relates back to the date of application for approval, and the diligence shown must ordinarily be that of the permittee, if a default occurs prior to approval of the assignment, but diligence by the assignee may be given consideration where *bona fide* efforts to secure development have been made by him in an effort to protect his investment.

OIL AND GAS LANDS — PROSPECTING PERMIT — ASSIGNMENT — DEFAULT — RECORDS — EXTENSION OF TIME.

The approval of the assignment of an oil and gas prospecting permit will be denied where defaults stand uncured of record at the time approval of such assignment is sought, unless and until the permittee secures an extension of time for compliance with the terms of the permit.

FINNEY, *First Assistant Secretary:*

On September 28, 1926, there was issued to Sylvester Hall, of Salt Lake City, Utah, a permit pursuant to section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon unsurveyed lands which when surveyed probably will be sections 27, 28, 33, and 34, T. 33 S., R. 14 E., S. L. M., Salt Lake City land district, Utah. The permittee, on December 21, 1926, assigned an undivided one-half interest in this permit to Anna E. Derden, who, on January

14, 1927, filed an application for the approval of said assignment in the Salt Lake City land office.

Upon consideration of the application of the assignee, Anna E. Derden, the Commissioner of the General Land Office, by decision of February 15, 1927, found that the said assignee had shown herself qualified to receive an interest in the permit, but also ruled—

> But as the time for compliance with paragraph 2 of the permit is about to expire, before an assignment may be recommended for approval, it is incumbent upon the parties within fifteen days from notice hereof, to furnish a showing that the terms of the permit have been complied with, or file an allowable application for extension of time in accordance with Circulars Nos. 946 and 1041, inclosed, or to appeal herefrom.

Notice of the Commissioner's decision duly mailed to the address of record of the permittee, Hall, was returned unclaimed in due course.

An appeal has been filed by the assignee in which it is urged, in effect, that the application for approval of the assignment of an interest in this permit should have been adjudicated by the Commissioner, upon the facts existing on January 14, 1927, when said application for approval was filed. On that date, it is pointed out, the permittee had more than sufficient time yet remaining within which to comply with the requirements of his permit.

It is not alleged that actual compliance with the requirements of said permit has been made by the permittee, and it seems probable, from the facts of record, that said permittee has abandoned the permit. Before doing so he apparently secured some consideration, the amount of which is not disclosed, in return for the assignment to this appellant, and the real question at issue is whether appellant is entitled to recognition as an assignee of an interest in said permit, despite the apparent default of the permittee.

It has been the settled practice of the department, in cases where a permittee was in default at the time of attempted assignment, to require that defect to be cured by the procurement of an extension of time, as a condition precedent to approval of the assignment of any interest in such permit. In this case the permittee had not defaulted when approval of the assignment was sought.

The issuance of a permit under the act of February 25, 1920, is discretionary with the Secretary of the Interior (*Martin Wolfe*, 48 L. D. 625), yet the rule that conditions existing at the date of initiation of a claim under the public-land laws will govern action upon said claims, has been recognized as applicable to applications for oil and gas prospecting permits (Instructions of April 23, 1921, 48 L. D. 98; *A. W. Mason*, 48 L. D. 213), subject, however, to exceptions in certain instances. *Charles R. Haupt* (48 L. D. 355), and *Charles West* (50 L. D. 534).

The assignment of a prospecting permit does not create a new interest or right as against the United States (*Maurice M. Armstrong*, 48 L. D. 445, and *Branch* v. *Brittan et al.*, 50 L. D. 510), nevertheless, the approval of an assignment of a permit or of an interest therein is in many respects analogous to the issuance of a new prospecting permit, and the same rules should apply to applications for approvals of assignments as apply to applications for permits.

Specifically applying this principle, it is held that if a permit is in good standing when an application for the approval of an assignment is filed, such assignment, if otherwise regular, may be approved and the assignee may make such showings of diligence as will warrant an extension of time. The diligence shown ordinarily must be that of the permittee, if a default occurs prior to approval of the assignment, although diligence by an applicant for the approval of an assignment may be presented for consideration where *bona fide* efforts to secure development have been made by such applicant in an effort to protect his investment. In such cases approval of the assignment will be regarded as relating back to the date of application for approval of such assignment.

The department has declined to approve assignments of permits where defaults stand uncured of record at the time approval of such assignments is sought unless and until the permittee secures an extension of time for compliance with the terms of the permit. Nothing contained in this decision is intended to alter this practice, which is expressly confirmed.

It is held that the assignment to Anna E. Derden may be approved in the absence of objections not disclosed by the decision of the Commissioner, which is accordingly

Reversed.

CLIFTON W. McCOY (ON RECONSIDERATION)

Decided June 16, 1927

STOCK-RAISING HOMESTEAD—OIL AND GAS LANDS—WITHDRAWAL—WORDS AND PHRASES.

The clause "designated as valuable for oil or gas," as used in the instructions of March 12, 1925, Circular No. 983 (51 L. D. 65), refers only to areas which have been designated as within the limits of producing oil or gas fields, and has no application to lands which have been merely classified as mineral, valuable as a source of petroleum and nitrogen.

FINNEY, *First Assistant Secretary:*

By decision of June 8, 1926, the department affirmed a decision of the Commissioner of the General Land Office dated October 21, 1925,

holding for cancellation the entry made on July 13, 1925, by Clifton W. McCoy under section 1 of the stock-raising homestead act for SE. ¼ SE. ¼ Sec. 34, W. ½ W. ½, E. ½ SW. ¼ Sec. 35, T. 13 S., R. 22 E., S. L. M., lots 1 and 2, S. ½ NE. ¼, N. ½ SE. ¼, SW. ¼ SE. ¼, E. ½ SW. ¼ Sec. 3, T. 14 S., R. 22 E., S. L. M., Utah (636.93 acres). The decision was declared final on July 28, 1926, and the entry was canceled August 14, 1926.

The Commissioner held that the entry had been erroneously allowed, inasmuch as the tracts embraced therein had been classified by the Geological Survey on February 12, 1917, as mineral lands, valuable for petroleum and nitrogen.

The attention of the department has been directed to the matter, and the record has been reconsidered.

In the instructions (Circular No. 983) approved by the department on March 12, 1925 (51 L. D. 65), under section 12 of the act of February 7, 1925 (43 Stat. 809), validating existing entries allowed prior to April 1, 1924, under the stock-raising homestead act for land withdrawn as valuable for oil or gas, but not otherwise reserved or withdrawn, occurs the following:

> * * * 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.

The clause "designated as valuable for oil or gas" as used in the instructions quoted refers only to areas which have been designated as within the limits of producing oil or gas fields, and has no application to lands which have been merely classified as mineral, valuable as a source of petroleum and nitrogen.

Therefore, the departmental decision of June 8, 1926, is recalled and vacated, and the decision appealed from is reversed.

According to the records of the General Land Office, all the subdivisions entered by McCoy are vacant except the NW. ¼ NW. ¼ Sec. 35, T. 13 S., R. 22 E., S. L. M., which is embraced in a school-land indemnity selection (Vernal 010374) filed on September 2, 1926. Before calling on the State to show cause why the selection should not be rejected, the Commissioner of the General Land Office will notify McCoy that his entry will be reinstated in its entirety if he so desires, but that he may acquiesce in the cancellation of the entry and apply for repayment of the fee and commissions ($34) paid in connection therewith, or may elect to allow the indemnity selection to stand and accept the reinstatement of the entry as to the remainder of the land.

Reversed.

REDUCTION OF GOVERNMENT ROYALTY IN OIL AND GAS LEASES

INSTRUCTIONS

[Circular No. 1127]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 28, 1927.

REGISTERS, UNITED STATES LAND OFFICES;
SUPERVISORS OF OIL AND GAS OPERATIONS, GEOLOGICAL SURVEY:

In accordance with authority conferred upon the Secretary of the Interior by section 17 of the act of February 25, 1920 (41 Stat. 437), which provides that—

> Whenever the average daily production of any oil well shall not exceed ten barrels per day, the Secretary of the Interior is authorized to reduce the royalty on future production when in his judgment the wells can not be successfully operated upon the royalty fixed in the lease. The provisions of this paragraph shall apply to all oil and gas leases made under this act.

applications for reduction of royalty in oil and gas leases where the daily production per well per day is ten barrels or less averaged over the leasehold as a whole for a continuous period of at least three months next preceding the date of application for reduction will be handled in the following manner:

1. Applications for reduction of royalty 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 thereof to the Commissioner of the General Land Office by special letter and the duplicate to the supervisor of oil and gas operations of the Geological Survey having jurisdiction in the district.

2. Applications for reduction of royalty will be received for an entire leasehold or on any part of the area thereof segregated for computation of royalties by the terms of the lease, by advertisement, bidding, and award though included in the same lease with other lands, or by approved assignment. All holders of record of the tract must join in the application for reduction of royalty, and the supporting showing must be complete for the entire tract involved.

3. Upon receipt of the duplicate copy, the supervisor of oil and gas operations, Geological Survey, will make investigation of the matters set forth by the applicant and will make prompt report of his findings to the Director of the Geological Survey. The report of the supervisor shall cover particularly the productivity of the wells on the area involved and the extent of the efforts being made by the lessee toward economical and efficient operation; the ability of the lessee to operate the wells at a profit after paying reasonable

lifting costs, a reasonable interest on capital honestly and wisely invested, and the Government royalty; and shall include recommendations as to action to be taken in the public interest.

4. The application for reduction of royalty must contain the following information:

(*a*) Serial number of lease and land district.

(*b*) Name and address of each holder of the record or legal title.

(*c*) Name and address of operators or sublessees, if any.

(*d*) Description by legal subdivision of land for which application is filed.

(*e*) Plat showing location, field number, and status of each well that has been drilled.

(*f*) A tabulated statement showing for each month of a period of not less than six months next prior to the date of filing of application:

(1) The aggregate amount of oil subject to royalty in conformity with the provisions of section 3 of the operating regulations;

(2) The number of wells counted as producing in accordance with said section of the operating regulations; and

(3) The average production per well per day as determined from oil subject to royalty and count of producing wells.

(*g*) A detailed statement of expenses and costs of operating the wells and all facts tending to show whether the wells can be successfully operated upon the royalty fixed in the lease and whether the operator is in good faith doing everything that may be reasonably expected in economic operation. This statement should include full information as to whether, and if so what, royalties are paid to others than the United States, efforts made to reduce them, and agreement of the holders of the lease and of royalty holders to a permanent reduction of all other royalties from the leasehold to an aggregate not in excess of one-half the Government royalty.

WILLIAM SPRY,
Commissioner.

I concur:

GEO. OTIS SMITH,
Director, Geological Survey.

Approved:

E. C. FINNEY,
First Assistant Secretary.

AUFDENGARTEN v. BAY

Decided June 29, 1927

PRACTICE—CONTEST—DEMURRER—EVIDENCE—OFFICERS.

Rule 40 of Practice, which prescribes the procedure for the conduct of trials in contest cases in which demurrers to the sufficiency of evidence are entered, relates to proceedings before the local officers and is without applicability to the consideration of appeals in the General Land Office and the department.

PRACTICE—CONTEST—DEMURRER—EVIDENCE—ELECTION.

A contestee who submits testimony before an officer other than the register, after having demurred to the contestant's evidence, is deemed to have elected in advance not to stand upon his demurrer should it be overruled by the register.

PRACTICE—CONTEST—DEMURRER—EVIDENCE—PRESUMPTION.

Where no direct reference is made in the decision of the register to a demurrer of the contestee as to the contestant's evidence, the presumption will prevail that due consideration was given to the demurrer before a decision on the merits was rendered.

STOCK-RAISING HOMESTEAD—CONTEST—CONTESTANT—EVIDENCE—LAND DEPARTMENT—PREFERENCE RIGHT.

The Land Department does not have the power to cancel an entry upon evidence presented in contest proceedings against the entry and at the same time to deny to the contestant the preference right accorded him by the act of May 14, 1880.

FINNEY, *First Assistant Secretary:*

This case, which involves a contest by George B. Aufdengarten against the original stock-raising homestead entry, 028619, of Mamie E. Bay, for 520 acres in Secs. 14, 22, and 23, T. 29 N., R. 65 W., 6th P. M., in the Cheyenne, Wyoming, land district, is before the department on cross appeals by the contestant and the contestee from the decision of the Commissioner of the General Land Office, dated January 20, 1927.

The entry was allowed on April 4, 1921. Final proof was submitted on October 23, 1925, but final certificate was withheld pursuant to a protest by the division inspector. On June 9, 1926, George B. Aufdengarten filed a contest against the entry, and on June 14, 1926, he filed a supplemental contest in which he charged that the entrywoman had not lived upon the land more than 30 days each year and had placed less than $60 worth of improvements on the land prior to the time she made final proof. After answer by the entrywoman, testimony with respect to the charge was taken before a United States commissioner at Guernsey, Wyoming, on August 6, 1926. Both parties appeared and submitted testimony.

At the hearing the contestant produced five witnesses, including himself, for the purpose of showing insufficient residence and improvements on the part of the entrywoman. When these witnesses had testified, the contestant announced that he rested his case. Thereupon the attorney for the contestee moved for a dismissal of the contest "upon the ground that contestant has already failed to prove and establish the allegations set out in the supplemental application of contest by any positive evidence whatsoever." After this demurrer to the evidence was noted, the contestee proceeded to sub-

mit her testimony in defense—as she had a right to do under the second paragraph of rule 40 of the Rules of Practice.

When the case was submitted to the register of the district land office on final hearing, he rendered a decision in the contestant's favor, dated September 20, 1926, in which he found that the allegations of the affidavit of contest had been fully sustained, that the entry should be canceled, and that a preference right of entry should be awarded to the contestant. This decision made no reference to the contestee's motion to dismiss. The entrywoman appealed.

In his decision of January 20, 1927, the Commissioner found that the admissions made by the entrywoman, in her own testimony taken at the hearing before the United States commissioner, warranted a rejection of the final proof and the cancellation of the entry because they established a failure to comply with the law as to residence. The Commissioner found further, however, that the contestant had failed to make *prima facie* proof of the entrywoman's default before he rested his case, and before the entrywoman made her motion to dismiss the contest on that ground. The Commissioner stated that the contestee's motion should have been sustained, and for that reason he dismissed the contest, and by so doing denied the contestant a preference right of entry.

Aufdengarten has appealed from so much of the Commissioner's action as dismissed his contest, and thus denied him a preference right of entry. Miss Bay has appealed from the Commissioner's action rejecting her proof and holding her entry for cancellation.

The entrywoman's appeal may be disposed of by saying that the testimony amply sustains the Commissioner's action holding the entry for cancellation, as it shows that her so-called residence consisted of nothing more than visits to the land.

The department, however, is not in accord with the Commissioner's action dismissing Aufdengarten's contest. While the Commissioner does not state upon what theory his action with respect to Aufdengarten was based, it seems probable that his decision was made in accordance with his construction of Rule 40 of the Rules of Practice. (51 L. D. 547, 554.) That rule reads in part as follows:

> 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.

The meaning of this rule is plain. It is a method of procedure prescribed for the conduct of trials before the local officers and is without applicability to the consideration of appeals in the General Land Office and the department, where the entire record must be reviewed. Paragraph 1 is merely a statement of the established practice which prevails in the trial of cases at law, and which is adopted by the Land Department for the trial of contest cases before district land offices. It announces the familiar rule that when a defendant demurs to the sufficiency of the plaintiff's evidence the trial officer must pass upon the motion forthwith; that if the demurrer is overruled the defendant may, if he so elects, stand upon his demurrer; but that if he does so the case will be determined upon the record then made, and the defendant will be given no further opportunity to submit testimony in defense.

Paragraph 2 evidently was intended to remove any disadvantage which might attach to contestees in cases where testimony was taken before officers other than the register of the district land office growing out of the fact that such officers have no power to pass upon a demurrer to evidence. The rule provides, in effect, that where under such conditions the contestee demurs to the contestant's evidence, it is not necessary to stop the hearing and have the demurrer passed upon by the register before the contestee, without prejudice to himself, can take his own testimony, but that after noting the demurrer the contestee may proceed with his testimony if he desires to do so. As stated in the next paragraph of the rule, the testimony so taken is not open to consideration, nor can it be made the basis for adverse action until after the record has been submitted to the register and he has ruled upon the demurrer. In this way all contestees are placed upon a footing of equality, no matter where the testimony in a case may have been taken. They may all elect to stand upon a demurrer to the contestant's testimony in case of an adverse ruling thereon by the register, or they may abandon the demurrer and proceed to submit testimony in defense. In the one case the contestee proceeds to take testimony in defense before the register personally, while in the other case the contestee presents to the register testimony already taken, but previously withheld from his consideration.

Paragraph 3 provides that if a demurrer is sustained by the register he will not be required to examine the defendant's testimony. This provision merely is a logical development of the preceding paragraph. Needless to say, where testimony is taken before the register and he sustains the contestee's demurrer to the evidence, there is no testimony in defense to be examined. If, on the other hand, the testimony was taken before another officer, the register's action sustaining the demurrer terminates the final hearing before the defendant's side of the case is reached.

Paragraph 3 provides further that if the demurrer is overruled all the evidence will be considered and a decision rendered thereon. This provision also is merely a logical development of the preceding paragraph. A contestee who submits testimony before an officer other than the register, after having demurred to the contestant's evidence, is deemed to have elected in advance not to stand upon his demurrer in the event that it is overruled by the register. Accordingly, if the demurrer is overruled, the testimony contained in the contestee's depositions is as properly open to the consideration of the register as though the witnesses had testified in his presence.

The vice in the Commissioner's decision lies in the fact that in determining the case on appeal he considered a question which already had been finally and conclusively disposed of by the register. While in the instant case the register made no direct reference in his decision to the contestee's demurrer to the contestant's evidence, the presumption is that as a public official he properly discharged the duties of his office. Paragraph 2 of Rule 40 requires the register to rule upon a demurrer to evidence when the record of testimony taken elsewhere than before himself is presented for his consideration, and the presumption, therefore, is that the register gave due consideration to Miss Bay's demurrer before he rendered a decision against her on the merits. This being the case, the question raised by the demurrer to the evidence is no longer open to consideration. Had the testimony been taken before the register, no one conversant with legal procedure would contend that the question raised by the contestee's demurrer to the evidence, and adversely disposed of by the register, would be open to consideration on appeal after the contestee had proceeded with her own testimony. As already pointed out, the rule is not different where the testimony was taken elsewhere than before the register, as in such case the contestee's action in taking testimony after noting a demurrer to the contestant's evidence, gives implied permission to the register to consider such testimony in the event he overrules the demurrer and constitutes an election not to stand upon the demurrer in the face of an adverse ruling.

In the instant case the question whether the register disposed of Miss Bay's demurrer to the evidence properly or improperly is of no importance, as the demurrer to the evidence passed out of the case as soon as her testimony on the merits was reached for consideration in accordance with the third paragraph of Rule 40.

In adopting Rule 40, the Land Department did nothing more than bring itself into line with the established practice of the courts respecting demurrers to evidence. While the principles which govern in such cases are too well understood to admit of doubt, the language of Mr. Justice Brown, of the Supreme Court of the United States,

in the case of *Bogk* v. *Gassert* (149 U. S. 17), may be appropriately referred to because it states those principles so clearly.

Aside from all questions of trial practice, however, it must be remembered that Aufdengarten's claim to a preference right of entry is based upon a statute which is controlling upon the Land Department. The act of Congress of May 14, 1880 (21 Stat. 140), provides that in *all cases* where any person has contested, paid the land office fees, and procured the cancellation of any homestead entry, he shall be allowed 30 days from the date of notice of the cancellation of the entry in which to enter the land. Here the Commissioner proposes to cancel the entry because of facts made apparent by Aufdengarten's contest, and yet to deny him his preference right of entry. This can not be done.

The department finds, accordingly, that Aufdengarten's contest should be sustained, and that Aufdengarten should be granted a preference right of entry.

As thus modified, the decision appealed from is

Affirmed.

ROBERT E. L. MORRIS [1]

Decided June 30, 1927

HOMESTEAD ENTRY—CONFIRMATION—CHANGE OF ENTRY—ASSIGNMENT—STATUTORY CONSTRUCTION.

The primary and fundamental purpose of the remedial act of January 27, 1922, was to quiet title in the subsequent entryman who was permitted to enter land in a confirmed entry, erroneously canceled, by extending the exchange of entry provision of that act to the original entryman or his assignee, but it was not intended that its benefits should inure to such original entryman or his assignee who had acquired the legal title to the same land under some other public land law.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Emanuel Wallin* (49 L. D. 544), and *Lars B. Haralside* (51 L. D. 245), cited and applied.

FINNEY, *First Assistant Secretary:*

The application of Robert E. L. Morris filed March 7, 1927, 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 for consideration and appropriate action by the Secretary of the Interior. Said act was repealed by the act of May 21, 1926 (44 Stat. 591), saving, however, any claim, notice of which shall have been filed within 60 days, and application for relief presented within one year from date of the approval of the repealing act.

[1] See decision on motion for rehearing, p. 184.

Notice of Morris's claim was appropriately given and application thereon duly filed as provided in said act, hence his claim is entitled to consideration as of one made under the act of January 27, 1922, *supra*.

On the merits it appears that one William J. Kirkland made final commutation homestead entry for 160 acres of land in Oregon upon which the receiver's receipt issued January 14, 1903, the land being the E. ½ NW. ¼ and N. ½ NE. ¼ Sec. 24, T. 6 S., R. 21 E., W. M., Oregon. This entry was canceled March 25, 1911, upon proceedings initiated December 30, 1908, being more than two years after the issuance of said receipt. The entryman was, therefore, entitled to a patent for the land described. The *full equitable* [1] title had vested before these proceedings were begun and there remained only the ministerial duty of issuing a patent. See *Lane* v. *Hoglund* (244 U. S. 174), construing section 7 of the act of March 3, 1891 (26 Stat. 1095 1098). By mesne conveyances and mortgage foreclosure proceedings the said Robert E. L. Morris succeeded to that title to said land March 26, 1910. Thereafter the Commissioner of the General Land Office ordered this land in the market as an isolated tract under section 2455, Revised Statutes, as amended by the act of March 28, 1912 (37 Stat. 77), and on December 4, 1914, he purchased the same at public sale and pursuant thereto patent issued to him March 29, 1915.

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.

The case of Morris can not by any sound reasoning be brought within the four corners of this act. Admittedly this is a remedial statute and must be so construed as to afford all the relief within the will of Congress. But the most rational method to interpret the will of the legislature is to explore its intentions as evinced by the words employed, the context, the subject matter, the effect and consequences and the spirit and reason. Blackstone's Commentaries,

[1] Words in italics substituted in accordance with decision on motion for rehearing, p. 184.

volume 1, book 1, pages 59 to 62. One who invokes the benefits of the act must show himself to be not only a person within its descriptive terms but one exposed to the mischief that the legislation was designed to correct. Not until then is he entitled to liberality of construction in application of the remedy. In this case a final entry of the land above described has been canceled, but it was and is confirmed under the proviso to section 7 of the act of March 3, 1891, *supra*. The land has also been patented under other public land laws. Literally in such a case the act authorized the Secretary of the Interior "in his discretion" and "under rules to be prescribed by him" to change the original entry and transfer the payment to any other tract of public land subject to general disposition. But this was only on the express condition "that the entryman, his heirs, or assigns shall file a relinquishment of all right, title, and interest in and to the land originally entered."

Manifestly, the primary and fundamental scheme of this legislation was to permit the *equitable*[1] title holder under the original entry to relinquish all his right, title, and claim to the land to the end that a subsequent entryman or patentee would be left secure in his holdings. So, while the right to have the first entry transferred to another tract of land was a privilege accorded the original entryman the act was essentially and exclusively for the benefit of and to protect the second entryman. See administrative ruling of December 3, 1924 (50 L. D. 684). The original entryman needed no protection. His title was confirmed, fixed, and vested in him and in his heirs or assigns—in this case the assignee, the said Morris, who is the applicant here. He is vested with *equitable*[1] title under the original entry and there could be no purpose in allowing him to transfer that entry unless to give him a right of exchange by virtue of his purchase of the same land as an isolated tract. He bought nothing on the isolated tract sale that could disturb him in the possession of the land. 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); *Lars B. Haralside* (51 L. D. 245).

This applicant would not in any event be entitled to such an exchange on this record. He does not propose to relinquish any title that he may have by reason of the purchase under the isolated tract law. In terms his relinquishment purports to convey only such title as he could hold as assignee of the original entry, and specifically disclaims the relinquishment of any title to this land other than through that entry. While this emphasizes applicant's purpose it also illustrates the futility of these proceedings. He took nothing

[1] Word in italics substituted in accordance with decision on motion for rehearing, p. 184.

through his purchase under the isolated tract law. The title to this land, as has been seen, was already confirmed in the original entryman and his assignees. The United States did not own the land. It had nothing to sell and its patent to Morris in attempted confirmation of that sale was without validity to that end.

However, that patent was not void as to all persons and for all purposes. Notably the original entryman, his heirs or assignee, other than the purchaser at the isolated tract sale, could have successfully prosecuted a suit to declare a trust under the patent for his benefit. But the fact remains that the United States took money from Morris without giving consideration therefor. The land was conveyed to him "erroneously," and "such sale can not be confirmed." This being true, it would seem a measure of relief may be extended outside of the act invoked. If he will file an application for repayment under section 2362, Revised Statutes, or other appropriate law, it will be considered with a view to allowance. See *John C. Hollister* (28 L. D. 133). Such application should be accompanied by relinquishment of all his right, title, interest, and claim in the cash certificate which issued on his purchase under the isolated tract law. Thereupon in the absence of controlling objection not herein considered, patent will issue on the original entry as directed by section 7 of the act of March 3, 1891, *supra*, and repayment will be allowed on the second entry.

Application denied.

ROBERT E. L. MORRIS (ON REHEARING)

Decided August 10, 1927

FINNEY, *First Assistant Secretary:*

This is a motion filed on behalf of Robert E. L. Morris for rehearing in the above-styled cause wherein by departmental decision of June 30, 1927 (52 L. D. 181), his application was denied for change of entry under provisions of the act of January 27, 1922 (42 Stat. 359).

The motion raises no question either of law or fact not carefully considered in the decision complained of and nothing by way of argument which entitles him to further consideration on the merits of the case. It is accordingly denied.

It is noted, however, *aliunde* that on page 2, line 10, of said decision as promulgated, it was stated that "the legal title had vested," whereas it was intended to state in that same place that the *full equitable* title had vested; also at page 4, line 17, of said decision, reference was made to the "legal title holder under the original entry," whereas it was intended to say the *equitable* title holder

under the original entry; also at page 5, line 7, of said decision, further reference was made to the "legal title" under the original entry, whereas it was intended to refer to the *equitable* title.

The issues considered the aforesaid recitals which were made in said decision only by way of statement of the case were unnecessary, had no controlling pertinency, and did not influence the decision on the merits. They were, however, not only unnecessary and inadvertent, but technically erroneous and in the interest of orderly administration all words and phrases appearing in said decision which would seem to commit this department to an expression of opinion that the legal title to a tract of public land has or may pass solely by reason of the confirmatory provision of section 7 of the act of March 3, 1891 (26 Stat. 1095, 1098), as construed in *Lane* v. *Hoglund* (244 U. S. 174), are hereby modified to read "full equitable title" and "equitable title," as may appear appropriate.[1] See *Payne, Secretary of the Interior et al.* v. *United States ex rel. Newton* (255 U. S. 438, 444).

Motion denied.

WHITE v. MARTIN

Decided July 6, 1927

CONTEST—HOMESTEAD ENTRY—RESIDENCE.

Under section 2297, Revised Statutes, as amended by the act of June 6, 1912, an entry is subject to contest on the first day following the expiration of the six months' period, where the entryman fails to establish residence within six months after the date of the entry.

CONTEST—HOMESTEAD ENTRY—RESIDENCE—ABANDONMENT.

Where an entryman, after having timely established residence, abandons his entry for more than six months, his default commences from the date of abandonment, and a contest may be initiated under section 2297, Revised Statutes, as amended by the act of June 6, 1912, immediately after the expiration of six months and one day from the date of the abandonment.

DEPARTMENTAL DECISIONS DISTINGUISHED.

Cases of *Bolton* v. *Inman* (46 L. D. 234) and *Slette* v. *Hill* (47 L. D. 108), distinguished.

FINNEY, *First Assistant Secretary:*

This is an appeal by Harry Francis White from a decision of the Commissioner of the General Land Office dated February 12, 1927, directing the register of the local office to dismiss his contest against the entry under the enlarged homestead act made by William A. Martin on March 23, 1926, for S. ½ Sec. 29, T. 6 N., R. 16 W., G. & S. R. M., Arizona.

[1] Phraseology of decision of June 30, 1927, changed to comply with the modifications herein. See italicized words, 52 L. D., p. 182, line 11; p. 183, lines 17 and 27.—ED.

The application to contest was filed January 15, 1927, and charged that entryman—

> has abandoned the land and has not lived on the above-described land during the six months prior to the filing of this contest.

It appears that notice of the contest was served on entryman on January 27, 1927, and proof of service was filed February 1, 1927. According to a report by the register, no answer was filed by entryman.

In the decision appealed from the Commissioner held that as entryman was allowed six months within which to establish residence on the land, he could not properly be charged with abandonment until at least six months and one day subsequent to the last date on which the establishment of residence was due, citing *Bolton* v. *Inman* (46 L. D. 234) and *Slette* v. *Hill* (47 L. D. 108).

The department can not affirm the Commissioner's decision.

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

> If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty two hundred and ninety one, it is proved. after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government. * * *

It will be observed that under this section of the homestead law an entryman may incur forfeiture in one of two ways: He may fail to establish residence upon the land within six months after the date of entry, in which event the entry is subject to contest on the first day following the expiration of the six months' period; or he may establish his residence on the land, and at some time thereafter, during the period when residence is required, abandon the same by absenting himself therefrom for more than six months. If he establishes his residence within six months after entry and then abandons the land, his default commences from the date of the abandonment and not from the expiration of six months after the entry, and one who wishes to contest the entry is not forced to wait until the expiration of 12 months after the date of the entry before he can file a contest, but he may do so immediately after the expiration of six months and one day from the date of abandonment. The rule laid down by the Commissioner would protect every homestead entry for one year after its date from contest on a charge of abandonment, even though the entryman established residence on the date of the entry and abandoned the land directly thereafter.

The departmental decisions cited by the Commissioner do not support his conclusions. The decision in *Bolton* v. *Inman*, *supra*, declares that a homestead entry is not subject to contest upon a charge of abandonment until after the lapse of six months and one day from the date of the alleged abandonment. It does not hold, however, that such abandonment may not occur during six months and one day after entry.

The decision in *Slette* v. *Hill*, *supra*, relates only to the sufficiency of the testimony adduced at the hearing of a contest to support a charge of abandonment, and has nothing to do with the sufficiency of the charge pursuant to which the hearing was had.

Where a homestead entryman has established residence on the land and gives notice, pursuant to the first proviso to section 2291, Revised Statutes, as amended by the of June 6, 1912, *supra*, of his intention to be absent for five months or less, and fails to return on the date due, he can not be charged with abandonment until the expiration of six months and one day after such date. But that question is not present in this case, no notice having been filed by Martin.

In this case the contestant charged that the entryman had abandoned the land and had not lived upon the same for six months prior to the filing of the contest. The alleged default must have resulted from failure to establish residence on the land or because, having established residence, he had abandoned the same. The contestant's charge is broad enough to cover either case, and therefore is sufficient.

The decision appealed from is reversed and the case remanded with directions that the entry be canceled.

Reversed and remanded.

ELBE OIL LAND DEVELOPMENT COMPANY

Decided July 8, 1927

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—LIMITATIONS—ROYALTY—STATUTES.

The act of April 30, 1926, which amended section 27 of the act of February 25, 1920, removed the limitations of one permit or lease on a geologic structure, as well as three in a State, but it did not enlarge the reward for discovery or the area of the minimum royalty lease.

OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT—ASSIGNEE—LEASE—LIMITATIONS—DISCOVERY—ROYALTY.

Where assignments of more than one oil and gas prospecting permit on the same geologic structure are made to a single assignee, the permits will be treated as a consolidated permit and the limitation pertaining to the area of the minimum royalty lease as a reward for discovery will govern.

FINNEY, *First Assistant Secretary:*

The Commissioner of the General Land Office has submitted to the department for approval the assignments of four oil and gas prospecting permits covering lands in T. 28 S., R. 29 E., M. D. M., California, to the Elbe Oil Land Development Company, a California corporation, as follows:

Visalia 010673, granted on February 12, 1925, to A. J. Mathews, for the N. ½ and SE. ¼ Sec. 20, and all of Sec. 28. Extension of time to May 12, 1927, for complying with paragraph 2 of the permit was granted on July 15, 1926. Prior to February 1, 1927, the drilling of an oil well was commenced on the land, and this well had reached a depth of more than 2,000 feet on June 1, 1927.

Permit 010682, granted on October 30, 1924, to B. M. Tibbet, for the NE. ¼ Sec. 18.

Permit 010683, granted on October 27, 1924, to Harriet E. Douglas, for the NW. ¼ Sec. 18.

Permit 010685, granted on October 30, 1924, to Olive M. Lowry, for the SE. ¼ Sec. 18.

In connection with each of the last three permits the permittee executed a $5,000 drilling bond on April 27, 1927, and in connection with each permit it was alleged that actual drilling operations were commenced and a well was actually spudded in on the premises prior to April 27, 1927.

On April 19, 1927, there was filed an application for extension of time in each of said three cases, and in each case the permittee alleged that a drilling contractor had agreed "to begin drilling on some portion of said section 18 within 120 days from notice of extension." The Commissioner states that the assignee company has not furnished additional drilling bonds, "nor does the record disclose whether or not the drilling plans heretofore approved by the supervisor of oil and gas operations are to be followed."

It further appears that another similar permit (Visalia 010684), covering the SW. ¼, said Sec. 18, has been assigned to the company in question. The fifth assignment has not yet been submitted for approval on account of a protest alleging an earlier drilling agreement.

All the lands involved are undoubtedly on the same geologic structure. Unqualified approval of the assignments as recommended by the Commissioner would make it possible for the assignee company, in the event of discovery of oil or gas, to demand an aggregate of 760 acres at a royalty rate of five per cent, out of a total area of 1,600 acres. And assuming that the fifth assignment shall be submitted for approval the possible five per cent area will be increased to 920 acres out of a total of 1,760 acres. It would also make possible

the claim of one person, association, or corporation to a total of 2,560 acres of five per cent lease areas on the same geologic structure, as reward for discovery.

The department is of the opinion that no such possibilities, no such results were intended by Congress in the enactment of the leasing act of February 25, 1920 (41 Stat. 437), and in the amendment of section 27 thereof by the act of April 30, 1926 (44 Stat. 373).

Section 13 of the leasing act authorizes the Secretary of the Interior "to grant to any applicant qualified * * * *a prospecting permit* * * * to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land." [Italics supplied.] Section 14 provides that upon satisfactory showing of discovery "the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: *Provided*, That the permittee shall be granted a lease for as much as one hundred and sixty acres of said lands, if there be that number of acres within the permit. * * * Such leases shall be * * * upon a royalty of 5 per centum in amount or value of the production." Section 17 provides that unappropriated lands within a producing oil or gas field may be leased in areas not exceeding six hundred and forty acres. Sections 19 and 20 provide that the limitations of section 14 as to reward for discovery shall there be applicable.

Section 27 of the leasing act originally read in part, "no person, association, or corporation shall take or hold, at one time, * * * more than one lease within the geologic structure of the same producing oil or gas field." The department has construed this to mean permit, also. Section 27 as amended, *supra*, provides that "no person, association, or corporation shall take or hold at one time oil or gas leases or permits exceeding in the aggregate * * * two thousand five hundred and sixty acres within the geologic structure of the same producing oil or gas field."

It is clear that Congress amended said section 27 in order to remove the limitation of one permit or lease on a structure, as well as three in a State, but it is also clear when the amendment is considered in connection with the other sections of the act that Congress did not intend to enlarge the reward for discovery or the area of the minimum royalty leases.

Section 32 of the leasing act authorizes the Secretary of the Interior "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."

The case is remanded with instructions that the Director of the Geological Survey be called upon to report as to the lands involved with relation to structure. If all the lands are on the same structure

the assignee company will be called upon to show cause why it should not accept a consolidated permit. Naturally, in case of a consolidated permit there will be only the requirement for one permit area.

The Commissioner is also directed to prepare and submit for consideration and approval by the department regulations in conformity with the views herein expressed.

Remanded with instructions.

MINING CLAIMS—DATA FOR FIELD INVESTIGATIONS

INSTRUCTIONS

[Circular No. 1128]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 14, 1927.

REGISTERS, UNITED STATES LAND OFFICES;
DISTRICT CADASTRAL ENGINEERS, AND DIVISION INSPECTORS:

In order to facilitate examination in the field by inspectors of this department of mining claims for which applications for patents are filed, registers, where lode claims are sought to be patented, will require the applicants to furnish in duplicate the statement required by paragraph 41 of the mining regulations (49 L. D. 15), relative to the kind and character of the vein or lode; whether ore has been extracted therefrom; and if so, in what amount and value; and the precise place within the limits of each claim sought to be patented, where the vein or lode has been exposed or discovered and the width thereof. The duplicate copy is to be sent to the division inspector.

The procedure in this regard, in the case of placer claims sought to be patented, is contained in the instructions of November 4, 1925 (51 L. D. 265), to the register of the Glenwood Springs land office, which instructions are hereby extended to all district land offices.

District cadastral engineers will cause to be made a copy of the description of the improvements on mining claims as contained in the field notes of survey and transmit this copy to the division inspector.

THOS. C. HAVELL,
Acting Commissioner.

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

VICKSBURG, SHREVEPORT, AND PACIFIC RAILROAD COMPANY, QUAPAW LAND COMPANY, TRANSFEREE

Decided July 18, 1927

RAILROAD GRANT — INDEMNITY — SELECTION — EQUITABLE CLAIM — PREFERENCE RIGHT.

A grant to a railroad company to take indemnity lands in lieu of lands lost in place, constitutes such an equitable claim, where it is ascertained that the lands available for selection are insufficient to satisfy the losses, as to entitle the selector to be included within the preferred classes mentioned in the act of January 21, 1922.

EQUITABLE CLAIM—RESTORATIONS—SURVEY—PLAT—ACT OF JANUARY 21, 1922.

An equitable claim, subject to allowance and confirmation, covered by the act of January 21, 1922, should be presented within the 20-day period preceding the filing of the plat of the township within which the lands to be restored are situated, as specified by the regulations of May 1, 1922.

COURT DECISION CITED AND APPLIED.

Case of *United States* v. *Northern Pacific Railway Company* (256 U. S. 51), cited and applied.

FINNEY, *First Assistant Secretary:*

This is an appeal by the Quapaw Land Company, successor in interest of the Vicksburg, Shreveport and Pacific Railroad Company, from a decision of the Commissioner of the General Land Office, dated June 6, 1927, rejecting its list of indemnity selections on the ground that the selections were prematurely filed. Counsel for the company has been heard orally in the matter.

The selections in question embrace lots 1 and 2, Sec. 13, lots 1 and 2, Sec. 17, and lot 5, Sec. 21, T. 18 N., R. 15 W., Louisiana, containing 94.37 acres, and were made in lieu of lands lost within the primary limits of the grant. The list was presented under the provisions of the act of June 3, 1856 (11 Stat. 18). The estimated area of the grant to aid in the construction of the road, according to available data, was 699,220.90 acres, and it appears there is a deficiency in the grant, a statement compiled from the records of the General Land Office and published with the approval of the Secretary of the Interior in 1907 giving this deficiency as upward of 200,000 acres. For many years the grant has been considered as practically adjusted because there were no remaining lands subject to selection within the limits prescribed by the act of 1856, *supra.*

The plat of fractional T. 18 N., R. 15 W., showing the land between the old and erroneous meander of Cross Lake, was filed in the local land office June 16, 1926. The tracts selected are shown upon that plat. They were opened to entry, subject to the preference rights accorded to discharged soldiers and sailors for the period of 90 days by the act of January 21, 1922 (42 Stat. 358). The law

provides that the rights so conferred shall be subject to valid settlement rights, and preference rights under existing laws or equitable claims subject to allowance and confirmation. The regulations thereunder of May 1, 1922 (49 L. D. 1), and the notice with respect to the filing of the plat above referred to provide that soldiers, and other qualified applicants for the land, coming within the prescribed classes, might file their applications during the period of 20 days prior to the date of the filing of the township plat. The Quapaw Land Company, deeming itself a preference-right claimant, or as having an equitable claim subject to allowance and confirmation, filed its selection June 2, 1926, within the 20-day period prior to the filing of the plat, accorded by the regulations to the classes therein specified. In rejecting said application as prematurely filed, the Commissioner held in effect that the Quapaw Land Company was not within any of the preferred classes and could not apply for the lands prior to the period fixed for the presentation of applications by the general public.

It appears that the company has earned the right to receive the lands comprehended in the grant. The provision relating to indemnity lands was as much a part of the grant and contract as that relating to lands in place. "It was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits." *United States* v. *Northern Pacific Ry. Co.* (256 U. S. 51). Nothing remained to be done by the grantee or its successor in interest to fullfill the conditions of the grant, and it manifestly had earned the right to select the land in controversy and to receive it, in the absence of an adverse claim based upon a right initiated prior to the filing of its selection. It was the purpose of the regulations of May 1, 1922, *supra*, and of the notice with respect to the filing of the plat of survey, that all those asserting preference rights and equitable claims should present the same for the consideration of the Land Department within the 20 days prior to such filing, and the decision of the Commissioner of the General Land Office that the selection of the company was prematurely filed, was manifest error. A selection so tendered, predicated upon an earned right, certainly constituted an equitable claim, subject to allowance and confirmation, if not a preference right; and whether viewed as an equitable claim or preference right, it was superior to the preference right conferred by the act of January 21, 1922, *supra*, or any other right or claim not initiated prior to the filing of the selection. In the circumstances here disclosed the postponement of the company's claim, or its subordination to the preference right given to ex-service men, practically amounts to a denial of the right. The "substantial right" conferred by the granting act can not thus be cut down or extinguished.

In the judgment of the department the company in whose behalf this claim was asserted should be recognized as coming within the preferred classes mentioned in the act of January 21, 1922, *supra*, and entitled to exercise the privilege of presenting its application within the 20-day period preceding the filing of the plat of survey.

The decision of the Commissioner is accordingly

Reversed.

EXCHANGE OF LANDS ON FEDERAL RECLAMATION PROJECTS—REGULATIONS OF AUGUST 20, 1926 (51 L. D. 525), MODIFIED

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, D. C., July 19, 1927.

TO ALL FIELD OFFICERS:

The last paragraph on page 6 (51 L. D. 525, 531), of the interpretations affecting sections 41 to 45 of the act of May 25, 1926 (44 Stat. 636), announces a certain regulation quoted below, intended to equalize the conditions applicable to private landowners and to entrymen when claiming the benefits of section 44 of the act relating to the exchange of entries and private land. The regulation is as follows with certain portions italicized so as to more readily develop the purpose of this letter:

* * * *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.

Both the law and the regulations with respect to unpatented holdings authorize an exchange to any project when the original entry is either entirely eliminated from the project or is so reduced that the remaining area is insufficient to support a family, and with certain limitations it would appear to be equitable to give substantially the same consideration to the owners of private lands, since the act itself does not limit the selection to the same project in the case of lands in private ownership. Also, if permissible under the act, the same privilege given to entrymen should be allowed in relation to private land under the conditions hereafter noted. The regulations above quoted were drafted to prevent the filing of applications for recon-

veyance of private land when a small portion only is given up and the remainder is sufficient to support a family. It now develops from applications made that in many cases it would be advantageous alike to the projects and the landowners involved to have entire holdings of private land on one project surrendered and public land on another project taken in lieu where the conditions are suitable.

It so happens that on projects which contain large areas of permanently unproductive lands patents as a rule are of recent issuance, and in most cases title is still in the patentee and the holding is intact as to legal subdivisions. The land classifications were, of course, made without regard to land descriptions and more often than not the result is that on an 80-acre tract 60 acres in irregular and undefined areas will be classed as temporarily or permanently unproductive. The situation which this creates is that the area of productive land is not sufficient to support a family, and the expense of surveys to define the productive portion will be large and ought to be avoided if possible. The lines of demarcation between the unproductive and productive lands were not established by instrument survey when the classification was made, and neither the owner nor the Government is in a position to identify and describe the respective classes with any degree of exactness.

Several cases similar to the example given above have been presented to the office, and in each case the owner has submitted a warranty deed reconveying his entire original holding to the United States. Such tracts as a whole are insufficient to support a family, the majority of the acreage involved being classed as unproductive and the productive area being negligible; but if the law is to be strictly construed, the answer might be that the Government is authorized to accept title only to the exact acreage of the unproductive land, and to accomplish this an expensive resurvey must be undertaken.

When the owner of a tract such as described applies for new land, he must, under the existing regulations, convey the unproductive land to the United States, and his selected land must not exceed the area so conveyed. Since he acquired and is holding his present tract by legal subdivision, and since all public land is available only by legal subdivision, a resurvey would be necessary as to both the old and new tracts. Even if this be accomplished at considerable expense, funds for which are not always available to the Government, it would result in a disruption of the present farm unit system and occasion a very undesirable ownership by the Government of numerous and useless isolated tracts.

I do not believe it was the intention of Congress to require this procedure which would be prejudicial both to the water users and

to the Government. One of the moving considerations of the adjustment act, as I understand it, was directed towards getting the settlers from unsuitable lands to lands sufficient to support a family, and this will be largely defeated as to the privately owned land unless such cases are given the same consideration specifically provided for in the law as to the unpatented entries.

Section 44 of the act after providing that settlers on unpatented entries 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 select other public lands, sets forth the following with reference to the unpatented tracts:

> * * * 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 * * *. [Italics supplied.]

I believe that the words "so eliminated" may be fairly said to relate back to the provisions governing the unpatented entries where the right of exchange is conferred both when the entry as a whole is eliminated and when it is so reduced as to destroy its sufficiency. In other words, that a right of exchange is given the owner of patented land entirely eliminated or where so reduced that the remaining area is insufficient to support a family. In cases of this character, if the owner reconveys his entire tract, the transfer of title to the United States would in itself result in an elimination of the tract from the project, since it is the understanding of the office that the Secretary would not be authorized to again open to entry a tract found to be insufficient to support a family. This interpretation would permit the administration of the act in harmony with the existing farm unit system and would enable us to place the owner of a patented tract with unsuitable land upon a farm unit sufficient to support a family. Unless some such construction is given to this particular provision of the law, it will not be practicable nor even workable to give the desired relief to patentees if each acre of their holding is not classified as unproductive and it, therefore, will not be possible as to this feature to carry out the purpose of the act which, as stated in section 48 thereof, is "the rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis, and the Secretary of the Interior is directed to administer this act to those ends."

I recommend that the regulations be amended so as to authorize the bureau in case of patented holdings insufficient to support a family by reason of the small productive area to accept a reconveyance of the

entire tract and to permit the selection of a new unit sufficient to support a family. Each individual case will be considered upon its merits and the rule recommended will not be invoked unless the tract as patented has remained intact as to legal subdivision. If the amendment recommended is approved, the regulation would read as follows, the italicized portions being the new matter:

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 Federal reclamation project. *If such privately owned tract is so reduced by elimination that the remaining area is insufficient to support a family and title to the unit as originally established and fixed upon the farm unit plats is held in single ownership, the owner thereof may convey the entire holding to the United States and select a new farm unit* within the limits of any Federal reclamation project. If only a portion of such privately owned tract is so eliminated *and the remaining portion is sufficient to support a family* 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.

ELWOOD MEAD,
Commissioner.

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

LIMITATIONS OF HOLDINGS UNDER SECTION 27 OF THE LEASING ACT AS AMENDED—CIRCULAR NO. 1073 (51 L. D. 475), AMENDED

INSTRUCTIONS

[Circular No. 1129]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 1, 1927.

REGISTERS, UNITED STATES LAND OFFICES:

Circular No. 1073 (51 L. D. 475), approved June 18, 1926, concerning limitations of holdings under section 27 of the act of February 25, 1920 (41 Stat. 437), as amended by the act of April 30, 1926 (44 Stat. 373), is hereby amended by adding thereto the following paragraph:

While under section 27, as so amended, the limitations as to holdings under the act are governed by the number of acres and not by the number of permits which may be held by the same person, association or corporation, provided the combined area does not exceed the limitations fixed, there appears to have

been no purpose to change the area which may be acquired under lease at a royalty of five per cent in case of discovery. Accordingly, oil and gas permits will not be issued nor assignments of such permits approved to the same applicant where the result would be to enable such applicant to acquire under section 14 of the act a right to lease at five per cent royalty a larger area than he would be entitled to lease at such royalty had the areas of all the permits been embraced in a single permit and discovery made thereon.

THOS C. HAVELL,
Acting Commissioner.

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

JAMES W. BELL

Decided August 8, 1927

MINING CLAIM—MINERAL LANDS—OIL SHALE—HOMESTEAD ENTRY—VESTED RIGHTS—POSSESSION—PATENT—STATUTES.

Further than to protect certain classes of claimants from its harsh application, the act of July 17, 1914, did not change the long established rule that a location, otherwise lawful, of mineral land embraced in a subsisting, but uncompleted entry, constitutes a property right, good as against everyone, including the entryman and the Government, notwithstanding that the locator is not entitled to a patent or to maintain possession in the courts until such entry is canceled.

MINING CLAIM—MINERAL LANDS—OIL SHALE—HOMESTEAD ENTRY—VESTED RIGHTS—SURFACE RIGHTS—FORFEITURE—PATENT.

Issuance by the Government of a surface patent pursuant to the act of July 17, 1914, can not effect a forfeiture of the property right of a locator to the minerals in the land, where his location, otherwise lawful, was made subsequent to the date of that act and while the land was at the time of location within a subsisting unrestricted, but unperfected homestead entry.

MINING CLAIM—MINERAL LANDS—OIL SHALE—HOMESTEAD ENTRY—PATENT.

A locator of mineral land embraced in a subsisting unrestricted but uncompleted homestead entry, subsequently patented pursuant to the act of July 17, 1914, who has acquired the title of the surface entryman, may, everything being otherwise regular, execute a deed of reconveyance and, upon cancellation of the surface patent, receive a mineral patent.

FINNEY, *First Assistant Secretary:*

James W. Bell has appealed from the decision of the Commissioner of the General Land Office, dated March 26, 1927, holding for cancellation his mineral entry 026431, Glenwood Springs, Colorado, land office, embracing SE. ¼ Sec. 10, T. 6 S., R. 96 W., 6th P. M., upon the following facts:

On January 10, 1916, one Helm made enlarged homestead entry for said tract, which was, on June 29, 1916, classified as mineral, valuable as a source of petroleum and nitrogen.

On May 18, 1918, Helm, who had, on April 1, 1918, consented that his entry be subject to the act of July 17, 1914 (38 Stat. 509), submitted final proof upon which patent issued on January 8, 1920, with a reservation of oil and gas.

On November 14, 1925, Bell filed mineral application for said land, alleging the location thereof on August 15, 1917, as Glenwood Placer No. 4, the discovery of a valuable deposit of oil shale and continued possession and maintenance. With the application was an abstract of title showing the acquisition of the interests of other locators and of Helm's title under his restricted patent. In addition he tendered a warranty deed to the United States, conveying the title acquired by Helm, with request for the issuance to himself of mineral patent.

In the *Dobbs Placer Mine* (1 L. D. 565), decided on May 10, 1883, the department held (syllabus) that "a mineral entry is not invalid because at the time it was made the land was covered by a homestead entry."

In the *Manners Construction Co.* v. *Rees* (31 L. D. 408, 410), it was held that "the fact that when the alleged mining claim was located the homestead entry of Currence was still of record and uncanceled, did not, of itself, affect the validity of the location. No vested right to the land had attached under the entry, and until such right should attach the lands belong to the United States and, if mineral in character, are subject to location and purchase under the mining laws."

In *Adams et al.* v. *Polglase et al.*, on review (33 L. D. 30), the *Dobbs Placer Mine*, *supra*, was cited with approval, together with several departmental decisions to the same effect. In this case the distinction between a mineral entry, voidable when made because the land was covered by a subsisting entry, and one void because made of reserved land or land otherwise beyond the jurisdiction of the department, was clearly pointed out.

In its unreported decision of October 20, 1919, in *Pollock* v. *Blackledge et al.*, the department reversed the Commissioner of the General Land Office, who had held that because of a subsisting homestead entry certain mining claims were wholly void. In *Henry W. Pollock* (48 L. D. 5), reiterating its position in *Pollock* v. *Blackledge et al.*, *supra*, the department held that the placer location made for land embraced in Blackledge's subsisting homestead entry "was a good and subsisting mining claim" (the homestead entry having been canceled at the time of the decision) and vested in the locators "a substantial property right."

These cases, uniformly followed, so far as the department is aware, covering a period of more than forty years, constitute a rule of property, and, though the facts vary, are decisive of the principle

that a location, otherwise lawful, of mineral land embraced in a subsisting but uncompleted entry, constitutes a property right in the highest sense of that term, is good as against the world, including the entryman and the Government, notwithstanding the locator is not entitled to a patent or to maintain possession in the courts until such entry be canceled. Such a right should not be, if it could be, held forfeited except for cogent reasons, after due notice, in a proceeding directed to that end. The act of July 17, 1914 (38 Stat. 509), was not intended to and did not change the principle announced further than to protect certain classes of claimants from its harsh application.

Here the locator had notice, merely constructive, that Helm had applied for a patent for the surface of the land, not that a proceeding was pending that would destroy his property right. Had he actual notice he might have concluded that he did not object to the issuance of a surface patent that would reserve to the Government and its grantees the minerals and so much of the surface as might be necessary to extract the same. While under the law the department is without authority to issue to him a patent for the minerals alone, it does not necessarily follow that his right to them was forfeited by the issuance of a patent for the surface; or, in other words, that a lack of jurisdiction to do one thing does not necessarily confer authority upon the department to do something wholly different, namely, to declare forfeited a right lawfully acquired.

Under the circumstances, therefore, the department is of opinion that if the entry is otherwise regular, the deed of reconveyance should be accepted, the outstanding surface patent canceled, and a mineral patent issued in due course.

Reversed.

WALTER R. FREITAG

Decided August 12, 1927

HOMESTEAD ENTRY—SECOND ENTRY—OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—RELINQUISHMENT.

One who relinquishes a homestead entry, then covered by an application for an oil and gas prospecting permit, and applies to make a second entry for the same land under the act of September 5, 1914, has merely the status of a homestead applicant for land covered by a prior permit application, notwithstanding that the relinquishment and the second entry application were filed simultaneously.

FINNEY, *First Assistant Secretary:*

Walter R. Freitag has appealed from the decision of the Commissioner of the General Land Office dated February 12, 1927, requiring him, as a condition precedent to the allowance of his application, Salt

Lake City 043306, to make second homestead entry for the S. ½ SE. ¼ Sec. 24, and the NE. ¼, E. ½ NW. ¼ Sec. 25, T. 35 S., R. 24 E., S. L. M., Utah, to consent to take the land subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509), and also to file a waiver of right to compensation for the use of the land in accordance with the act of February 25, 1920 (41 Stat. 437).

It appears that Freitag first made homestead entry, 030114, for the land in question on February 11, 1922. On May 6, 1926, J. A. Young, jr., filed oil and gas application 041050, for a prospecting permit covering all of the land embraced in Freitag's entry. On November 8, 1926, Freitag relinquished his entry because of his inability to submit satisfactory final proof, and simultaneously therewith filed application 043306 to make a second homestead entry for the same land.

The Commissioner in his decision of February 12, 1927, found that the showing made with respect to the second entry was sufficient to satisfy the provisions of the act of September 5, 1914 (38 Stat. 712), but imposed the requirements which have just been stated as a condition to its allowance.

Freitag in his appeal to the department contends in substance that as his entry 030114 was outstanding at the time Young filed his application for the prospecting permit their respective rights should now be determined with reference to the conditions which existed at the date Young's application was filed. He also makes other objections to the Commissioner's ruling which need not be specifically noted although they have been given due consideration.

The department finds that the Commissioner's requirements were proper. Under the act of September 5, 1914, *supra*, an applicant who makes a second entry does so just as though his former entry had never been made. Freitag, therefore, now has the status of a homestead applicant for land already covered by a prior application for an oil and gas permit.

The decision appealed from is

Affirmed.

UNION OIL COMPANY OF CALIFORNIA

Decided August 24, 1927

OIL AND GAS LANDS—PROSPECTING PERMIT—EXECUTIVE ORDER INDIAN RESERVATION—EXPENDITURES.

One who is granted a permit under the remedial act of March 3, 1927, to prospect for oil and gas in lands embraced within an Executive order Indian reservation is entitled to credit for work in connection with drilling performed by him on the same land under a former permit prior to the passage of that act.

FINNEY, *First Assistant Secretary:*

On July 31, 1923, an oil and gas permit, under section 13 of the act of February 25, 1920 (41 Stat. 437), was issued to Mary Agnes Leonard, for lands in an Executive order Indian reservation in Utah. This permit was assigned to Union Oil Company of California and was surrendered by it in connection with its application under the act of March 3, 1927 (44 Stat. 1347), upon which a new permit was issued on June 29, 1927, for the same lands.

It appears from your [Messrs. Haggard, O'Mahoney, and Rattigan] letter of the 23d instant that, prior to July 23, 1924, the company had expended $9,891.34 under its original permit, of which $4,677.46 was used in drilling a well to the depth of 560 feet, and you inquire if work so done will satisfy the requirements of paragraphs 2 and 3 of the subsisting permit.

Under a rule of the mining law a party in possession of a mining claim embraced in a reservation, with the requisite marking, notice, and discovery, may, upon the termination of such reservation, relocate the claim and become entitled to adopt what had been done. *Noonan* v. *Caledonia Gold Mining Company* (121 U. S. 393); *Kendall* v. *San Juan Silver Mining Company* (144 U. S. 658). Applying this principle to the remedial act of March 3, 1927, *supra*, it is held that credit for the work already performed by the Union Oil Company may be applied under its present permit to the same extent as if done since June 29, 1927.

FREEMAN v. SUMMERS, UNITED STATES, INTERVENER (ON REHEARING)

STANDARD SHALES PRODUCTS COMPANY v. SUMMERS, UNITED STATES, INTERVENER (ON REHEARING)

Decided September 30, 1927

MINING CLAIM—MINERAL LANDS—OIL-SHALE LANDS—DISCOVERY.

The discovery of an isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery to validate a location under the mining laws, but it is sufficient if mineral is found in a mass so located that the vein or mineral-bearing body can be followed with reasonable hope and assurance that a paying mine can be ultimately developed.

MINING CLAIM—MINERAL LANDS—OIL-SHALE LANDS—DISCOVERY—EVIDENCE.

Where there has been an actual discovery of mineral either on the surface or in shallow workings within the limits of an asserted mining location, and the deposits of the region have been the subject of exploration and study for a number of years, evidence bearing upon the mineral value and the geological formation of the adjacent lands may be considered in determining whether the located lands are chiefly valuable for their mineral contents.

MINING CLAIM—MINERAL LANDS—OIL-SHALE LANDS—DISCOVERY—PATENT.

It is not necessary, in order to constitute a valid discovery under the general mining laws sufficient to support an application for patent, that the mineral in its present situation can be immediately disposed of at a profit.

OIL-SHALE LANDS—MINING CLAIM—MINERAL LANDS—DISCOVERY—GEOLOGICAL SURVEY—EVIDENCE.

The rule as to the 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, was not intended to be applied by the department as a yardstick 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 under the mining laws, but each case presented must be determined upon the facts there disclosed.

WORK, *Secretary:*

On May 10, 1920, George L. Summers made application 018825 for enlarged homestead entry covering S. ½ NW. ¼, N. ½ SW. ¼ Sec. 1, and S. ½ NE. ¼, N. ½ SE. ¼ Sec. 2, T. 5 S., R. 97 W., Glenwood Springs land district. On the same day he made application 018827 for additional stock-raising entry covering lots 3, 4, S. ½ NW. ¼ Sec. 2, and lots 1, 2, 3, SE. ¼ NE. ¼ Sec. 3, in the same township and range. Application 018825 was allowed May 17, 1920, with mineral reservation, and application 018827 on January 28, 1921. Combined final proof was submitted May 22, 1923. A protest against the enlarged entry was filed by the Standard Shales Products Company alleging a superior right to the tracts in Sec. 1 by virtue of the ownership and possession of the Triumph No. 22 and Triumph No. 23 placer mining claims initiated by location April 5, 1918. A like protest was filed against the entry of the remaining lands by J. D. Freeman based upon alleged ownership and possession of the F. D. No. 7 and J. D. Nos 1, 2, 3, and 5 placer mining claims initiated by location April 1, 1918, and covering the remaining tracts in Summer's entries. By decisions of December 20, 1924, these protests were dismissed and the mining claims held to be null upon the grounds that on February 25, 1920, the date of the approval of the leasing law, no discovery of a valuable deposit of oil shale had been made upon any of these claims as alleged, nor was there at that date diligent prosecution of work leading to discovery. These decisions were affirmed on motion for rehearing and retrial May 23, 1925.

The contestants thereafter filed a petition for the exercise of supervisory authority.

By decisions of July 29, 1925, the department favorably entertained the petitions and authorized further hearing at the local land office between the parties, the Government, represented by inspectors, being allowed to intervene. The record made at said hearing, with briefs and arguments of the parties, has been given extended consideration.

The contestants advance the proposition that the Green River formation, at least an area thereof bounded by Green River on the east, the Colorado River on the south, Brush Creek on the west, and Piceance Creek or White River Divide on the north, and within which boundaries these claims are located, is one massive homogeneous deposit of like mineral, easily identifiable by fossil insects; that it is one stratum, one bed, from its base to its topmost reaches, a vertical distance of from 2,700 to 2,800 feet; that all sections of a stratigraphic column of this formation contain either shale, sandy shale, shale sand, or sand that will yield oil upon destructive distallation; that in the light of latest information and engineering research and opinion the feasible method of mining will involve and dictate the mining of all the shale from the base of a rich bed, known as mahogany bed, to the exposures of shale upon the land; that the various deposits of sandstone upon the land in question are but thin partings, which have some oil content; that the whole body, therefore, will be commercially developed and is all valuable, and discovery of any oil shale upon the land, being a part of the integral mass that lies below it, is a sufficient discovery to satisfy the requirements of law.

Before proceeding with further discussion of the matter, reference is made to certain regulations of the Geological Survey relating to the classification of oil-shale land quoted in previous decisions of this department, to the effect that where 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 1 foot thick, yielding 15 gallons per ton, and within a reasonable depth below the surface. Second, that where the shale beds are sufficiently near the surface to be mined by open-cut methods, the lands must contain shale sufficient to yield 750 barrels of oil per acre in beds not less than 6 inches thick, and yield not less than 15 gallons per ton.

The impression appears to have become general that these regulations were to be used as a yardstick, with which the department would determine in all cases whether sufficient discovery to warrant the issuance of patent therefor under the mining laws had been made. An endeavor to correct this impression was made in a subsequent communication relative to the rehearing in this case, and later by a letter signed by the Secretary of the Interior, explaining that such was not the purpose of the department, and that each case presented must be determined upon the facts there disclosed.

Section 2320 of the United States Revised Statutes provides that—

> No location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located.

Section 2329, with reference to placer claims, in which category oil-shale beds fall, provides that placer claims shall be subject to entry and patent—

under like circumstances and conditions or upon similar proceedings as are provided for vein or lode claims.

It is a statutory requirement, therefore, that no location of a placer mining claim shall be made until the discovery of mineral within the limits of the claim located.

The general rule of the department as to what constitutes a sufficient discovery within the limits of a lode mining claim was laid down in the case of *Castle* v. *Womble* (19 L. D. 455, 457), and has since been followed.

* * * It is my opinion that where minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met.

In *Kern Oil Company* v. *Clotfelter* (30 L. D. 583, 587) the department held:

* * * The evidence bearing upon the mineral character of the land selected should not be restricted to mineral discoveries or developments upon these lands and to their geological formation, but may extend to the discovery and development of mineral on adjacent lands and to their geological formation.

See, also, in this connection *Jefferson-Montana Copper Mines Company* (41 L. D. 320).

In the *Oregon Basin Oil and Gas Company case* (50 L. D. 244; 258) the department denied an application for placer patent for lands alleged to contain valuable deposits of oil and gas, on the ground of failure to show sufficient discovery. Slight discoveries of gas or oil had been made in shallow wells in shale or sand near the surface, and it was contended that this warranted a prudent man in going further with a reasonable expectation of finding valuable oil deposits at depth. The department concluded in that case that the showing presented (p. 252)—

fails to satisfactorily establish that in either of the wells drilled on the claim there was encountered any formation carrying oil or other mineral in sufficient quantity to impress the land with any value on account thereof, while, on the other hand it is conclusively made to appear that the formations from which oil values are expected to be developed within the limits of the claim exist many hundred feet below, and are wholly unconnected with, the formations penetrated in said wells.

From the foregoing it follows that the law requires as a prerequisite to a valid location that mineral be discovered within the limits of the claim located; that the mineral indications shall be such as to warrant a prudent man in the further expenditure of time and money,

with a reasonable prospect of success. In order to warrant that proceeding, he must have discovered mineral in such situation and such formation that he can follow the vein or the deposit to depth, with a reasonable assurance that paying minerals will be found. In other words, the discovery of an isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery; but a mining locator is not expected to find at the surface or in a shallow working a body of mineral which can be immediately mined and reduced at a profit. It is sufficient, as already stated, if he finds mineral in a mass so located that he can follow the vein or the mineral-bearing body, with reasonable hope and assurance that he will ultimately develop a paying mine.

In this case it appears from the evidence submitted at the original hearing and rehearing that actual discoveries of mineral were made either on the surface or in shallow workings. The existence of oil shales in northwestern Colorado is a matter of common knowledge, and the deposits have been the subject of exploration and study for a number of years.

In 1923 the Geological Survey of this department published Bulletin No. 729, relative to the oil shales of the Rocky Mountain region. It was stated on page 21 of this bulletin—

> By far the most extensive and rich oil shales of the United States, and perhaps of the world belong to the Green River formation of Colorado, Utah, and Wyoming.

On page 36 it is stated—

> The youngest sedimentary rock in the Piceance Basin belongs to the Green River formation, which also carries most of the oil shales. * * * The Green River formation is the surface rock over the entire interior part of the Piceance Creek Basin. * * * Interbedded with the rich oil shale are beds of lean, and almost barren shale and sandstone of varying thickness.

On the same page it is stated—

> The presence or absence of rich oil yielding shales permits a division of the Green River formation into three members * * * The upper member is composed largely of soft shales with some sandstone, and includes but few beds of rich oil yielding shales. The middle member almost everywhere along its outcrop includes beds of rich oil shales which in some places have a great aggregate thickness, and which are everywhere extremely resistant and stand out in relief.

There have been filed with the department photographs and other exhibits, descriptive of this Green River formation, and which support the allegations of contestants as to its presence in the immediate area in which these particular claims are located.

The oil-shale deposits of the United States have, as heretofore stated, been well known for a number of years, and have been the subject of much exploration, study, and investigation. They have

been recognized by the department and by Congress as a very valuable natural mineral resource. They have been the subject of treatment in a large number of experimental reduction plants, one of which was provided for by Congress and is now in operation.

While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, there is no possible doubt of its value and of the fact that it constitutes an enormously valuable resource for future use by the American people.

It is not necessary, in order to constitute a valid discovery under the general mining laws sufficient to support an application for patent, that the mineral in its present situation can be immediately disposed of at a profit. As stated by the department in the case of *Narver* v. *Eastman* (34 L. D. 123, 125)—

> * * * It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced that it therefore has no commercial value. Take for example the farmer. In the course of husbandry it frequently happens that different crops raised by the farmer when put in market do not sell for enough to pay the costs of their production and transportation, but can it be truly said that said crops have no commercial value simply because after the same have been sold and all expenses incident to their production and shipment deducted, there is no clear gain to the farmer, and therefore, as a corollary, that the lands are not valuable for agricultural purposes? And the same may be said as to the entry under this act of land valuable "chiefly for stone." Could not the land be valuable chiefly for stone even though, because of its remoteness from market or other causes, the stone could not then be sold for a remunerative price?

The evidence in this case shows that in this particular area of Colorado the lands contain the Green River formation, and that this formation carries oil shales in large and valuable quantities; that while the beds vary in the richness of their content, the formation is one upon which the miner may rely as carrying oil shale which, while yielding at places comparatively small quantities of oil, in other places yields larger and richer quantities of this valuable mineral.

In other words, having made his initial discovery at or near the surface, he may with assurance follow the formation through the lean to the richer beds.

There can be no question whatever as to the greater value of the lands for their oil-shale deposits than for other purposes. Their agricultural value is negligible; their value for grazing purposes is nominal, and the real and principal value is the mineral deposit.

After careful consideration of the entire record the department has reached the conclusion that the locations are valid and, if otherwise regular, are entitled to pass to patent under the general mining laws. Prior departmental decisions in this case are accordingly

recalled and vacated, the decision of the Commissioner of the General Land Office affirmed, and the homestead entries 018825 and 018827 of George L. Summers held for cancellation, because made upon lands covered by prior valid mineral locations.

Motion sustained.

ROBERT LEE LOFTIN

Instructions, September 29, 1927

BOARD OF EQUITABLE ADJUDICATION—JURISDICTION—HOMESTEAD ENTRY—FINAL PROOF—NOTICE.

Where the law has been otherwise complied with, failure to submit final proof within ten days following the advertised date for the taking of proof, as authorized by the act of March 2, 1889, will not prevent, in the absence of an adverse claim, submission of a meritorious case to the Board of Equitable Adjudication, and republication will not be required.

FINNEY, *First Assistant Secretary:*

You [Commissioner of the General Land Office] have informally requested to be advised whether the final proof on the homestead entry serialized as Las Cruces 022062 can be accepted and submitted to the Board of Equitable Adjudication.

The entry was made on January 13, 1921, by Robert Lee Loftin for SE. ¼ Sec. 10, T. 3 S., R. 20 W., N. M. M. On August 27, 1925, the widow of entryman filed notice of intention to submit final proof before a United States Commissioner at Reserve, New Mexico, on October 14, 1925. Proof of publication was filed, and the notice was duly posted in the local office. The final proof was not submitted until October 28, 1925, and final certificate was withheld at the request of the division inspector, who, on August 30, 1927, approved a field report to the effect that the law had been fully complied with and recommending that the final proof be accepted.

The only objection to the acceptance of the final proof is the fact that it was not submitted on October 14, 1925, nor within ten days thereafter.

In an affidavit, corroborated by a physician's certificate, the widow of entryman states that the delay in the submission of the final proof was due to the fact that she was confined to her bed by illness, and that it was impossible for her to make the trip to Reserve at that time.

Rule 2 of "Rules to be observed in passing on final proof papers in preemption and commuted homestead cases," approved February 21, 1887 (5 L. D. 426), provided:

Where final proof or any part thereof is taken after the day advertised, require new advertisement and new proof, in whole or in part, as above provided.

unless on day advertised due notice had been given of postponement to a day certain by the officer taking the proof, and the proof be taken in accordance with said postponement.

After section 7 of the act of March 2, 1889 (25 Stat. 854), authorized the submission of final proofs within ten days following the day advertised, new rules were adopted on July 17, 1889 (9 L. D. 123), Rule 2 providing that—

> Where final proof or any part thereof has not been taken on the day advertised, or within ten days thereafter under the exception and as required by Rule 1, you will direct new advertisement to be made; and if no protest or objection is then filed, the proof theretofore submitted, if in compliance with the law in other respects, may be accepted.

The Rule 2 adopted on July 17, 1889, was continued in force in the rules adopted May 9, 1906 (34 L. D. 601).

The jurisdiction of the Board of Equitable Adjudication was defined on October 17, 1922 (49 L. D. 323), as covering the following:

> All classes of entries in connection with which the law has been substantially complied with and legal notice given, but the necessary citizenship status not acquired, sufficient proof not submitted, or full compliance with law not effected within the period authorized by law, or where the final proof testimony, or affidavits of the entryman or claimant were executed before an officer duly authorized to administer oaths but outside the county or land district in which the land is situated, and special cases deemed proper by the Commissioner of the General Land Office for submission to the Board, where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith, there being no lawful adverse claim.

It is the opinion of the department that the act of March 2, 1889, *supra*, does not forbid the submission to the Board of Equitable Adjudication of meritorious cases such as the one under consideration. That the law has been fully complied with has been clearly established, and to require the widow of the entryman to go to the expense of publishing a new notice would serve no good purpose.

You will therefore direct the issuance of final certificate, and upon its receipt the entry should be submitted to the board as a "special case."

EZRA LYTLE

Decided September 30, 1927

HOMESTEAD ENTRY—NATIONAL FORESTS—SURVEY—SELECTION.

National forest lands listed and opened to entry in units are enterable only according to the established units except as such units may be thereafter modified by administrative authority.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

Case of *John W. Hickcox* (42 L. D. 573), cited and distinguished.

FINNEY, *First Assistant Secretary:*

Ezra Lytle appealed from the action of the General Land Office requiring him to amend his forest homestead entry (Salt Lake City 042198) to embrace all of SE. ¼ Sec. 10, T. 38 S., R. 16 W., S. L. M., Utah, in harmony with list 4–2294 by which the said tract was restored to entry in its entirety as one unit under the forest homestead act of June 11, 1906 (34 Stat. 233). The said entry as made includes only the NW. ¼ SE. ¼ and S. ½ SE. ¼, said Sec. 10.

Owing to the limited areas or irregular shape of lands susceptible of cultivation in some portions of the national forests, it has been found desirable in many instances to segregate the agricultural lands in units suitable for homes and to permit entry thereof only in conformity with such units. That method was found advisable by the Forest Service for administrative reasons and was recognized by this department. It was first applied only in respect to tracts described by metes and bounds from surveys made by employees of the Forest Service. In letter of February 20, 1914, to the Secretary of Agriculture this department stated:

> * * * hereafter persons desiring to enter portions of metes and bounds tracts restored under the act of 1906 must first apply to the District Forester for a survey of the portion desired. It is realized that to do otherwise an entryman may so shape his claim as to take the valuable portion of two tracts, thereby rendering undesirable for entry the remainder thereof.

It was further stated in said letter that such cases would not be governed by the prior decision of this department in the case of *John W. Hickcox* (42 L. D. 573), which involved a survey made under the former law and regulations, prior to the passage of the act of March 4, 1913 (37 Stat. 828, 842).

The subject of listing lands for entry by units was again considered by this department in its letter of February 7, 1917, to the Secretary of Agriculture which, in part, reads as follows:

> While it has not heretofore been the practice to establish units of entry in the listing and restoration of lands under the said act of 1906 except those tracts which are described by metes and bounds it is believed that the expression "in tracts" referred to above is sufficient authority to restore lands under the said act in units where such method is desired and requested by your department.
>
> It is the present practice of the General Land Office, based upon authority contained in departmental letter of February 20, 1914, addressed to your department to refuse to allow homestead entries for a portion only of a tract restored by metes and bounds unless the sanction therefor and survey by the Forest Service be first procured.
>
> It is understood through informal conference that the practice of listing lands to be restored and entered in their entirety as units will be limited to those areas which can not be divided without prejudicing the interests and

the rights of the Government and of other intending settlers and entrymen; and that such action is based upon administrative reasons as well as upon the wording of said act of 1906, quoted above.

It will be observed from the above that the action taken in the instant case was in harmony with the established practice as applied to lands having the status of the area here involved at the time of the decision complained of. However, the entryman in his appeal alleged that the NE. ¼ SE. ¼ of the section is rough, rocky, ridge land entirely unfit for any agricultural use other than grazing, and that he had applied to the Forest Service for reclassification with a view to adding to his entry certain adjacent tracts in sections 11 and 14.

In view of the application for reclassification of the lands, this department called upon the Department of Agriculture for report as to any contemplated action on the application of Mr. Lytle, and under date of September 19, 1927, that department advised that the said list had been amended and that in lieu of the former description the following-described tracts should be substituted, viz, W. ½ W. ½ NE. ¼ SE. ¼, W. ½ SE. ¼, SE. ¼ SE. ¼ Sec. 10, and SW. ¼ SW. ¼ SW. ¼ Sec. 11 of said township, aggregating 140 acres, more or less. It was further stated that said department had no objection to allowance of the entryman's application to amend his entry to include also the N. ½ NW. ¼ NW. ¼ Sec. 14, which has been heretofore restored to entry.

In view of the reclassification of the lands, the decision appealed from is vacated and the record is returned for further appropriate action in harmony with present conditions.

Vacated and remanded.

NATIONAL CEMETERIES WITHIN INDIAN RESERVATIONS

Opinion, September 30, 1927

NATIONAL CEMETERIES—INDIAN LANDS—ALLOTMENT—PATENT—WITHDRAWAL—SECRETARY OF WAR—JURISDICTION.

Under authority of section 4870, Revised Statutes, the Secretary of War has the power to appropriate lands, allotted or unallotted, within an Indian reservation for national cemetery purposes, and any patent subsequently issued for lands thus appropriated is void.

PATTERSON, *Solicitor:*

You [Secretary of the Interior] have requested my opinion as to the title to certain lands in the Crow Indian Reservation in Montana under circumstances arising as follows:

The reservation for these Indians was established originally by treaty with the Crow Tribe dated May 7, 1868 (15 Stat. 649).

"Custer's Last Stand" (June, 1876) and the resultant massacre are matters of history needing no reiteration here. By Executive order dated December 7, 1886, based on a recommendation of the Secretary of War, concurred in by this department, the President withdrew the following-described lands within the Crow Reservation as a "National Cemetery of Custer's Battlefield," hereinafter referred to as the Cemetery Reserve:

Commencing at a point 1,200 feet north, 35° west of Custer's monument, and running thence north 35° east 1,200 feet; thence south 35° east 1 mile; thence south 55° west to the right bank of the Little Big Horn River; thence along said right bank to the prolongation of the western boundary; thence along said prolongation to the place of beginning. Area, 1 square mile.

Doubtless such action was had under section 4870, Revised Statutes, which reads:

SEC. 4870. The Secretary of War shall purchase from the owners thereof, at such price as may be mutually agreed upon between the Secretary and such owners, such real estate as in his judgment is suitable and necessary for the purpose of carrying into effect the provisions for national cemeteries, and obtain from such owners the title in fee simple for the same. And in case the Secretary of War is not able to agree with any owner upon the price to be paid for any real estate needed for such purpose, or to obtain from such owner title in fee simple for the same, the Secretary is hereby authorized to enter upon and appropriate any real estate which, in his judgment, is suitable and necessary for such purposes.

Thereafter allotments in severalty were made to the Indians of the Crow Tribe and among such allotments we find in part:

No. 423, White Goose, SE. ¼ Sec. 18, T. 3 S., R. 35 E., 40 acres.
No. 874, Plenty Wing, W. ½ NE. ¼ Sec. 19, T. 3 S., R. 35 E., 80 acres.
No. 875, Plain Shield, SE. ¼ NE. ¼ Sec. 19, T. 3 S., R. 35 E., 40 acres.

In this vicinity the Little Big Horn River is a very small but tortuous stream, traversing in a general southeasterly-northwesterly direction the E. ½ of Sec. 19 and the S. ½ of Sec. 18, T. 3 S., of R. 35 E., and from thence on to the Big Horn River. For the allotment first above mentioned our usual 25-year "trust patent" issued under date of May 23, 1905, and for the latter two allotments similar patents were issued November 9, 1907. White Goose, allottee No. 423, having died, subsequently the lands embraced in this allotment were sold and patent in fee simple therefor issued to the purchaser, S. G. Reynolds, under date of August 26, 1912. These allotments were made and said patents therefor (both trust and fee) were issued based on a survey of these lands made in 1883, the official plat of such survey having been approved January 6, 1884. This being some two years prior to creation of the Cemetary Reserve, such plat of survey, of course, does not show the reserve, nor, presumably due to its small size, the Little Big Horn River does not appear thereon as meandered.

The act of June 4, 1920 (41 Stat. 751), authorized additional allotments and a pro rata division, with certain exceptions not here material, of the remaining tribal lands in the Crow Indian Reservation among the members of that tribe whose names appear on a final roll prepared in accordance with the terms of that act (48 L. D. 479). Certain available lands in the subdivisions above referred to abutting the Cemetery Reserve and adjacent to the Little Big Horn River were included in such subsequent allotments. Accordingly a supplemental plat of these subdivisions was prepared and approved here on July 7, 1926. On such supplemental plat both the Cemetery Reserve and the Little Big Horn River were meandered and the abutting tracts of land given appropriate lot numbers. Presumably this was done for the purpose of avoiding any conflict between the lands allotted to the Indians under the act of June 4, 1920, and those embraced in the Cemetery Reserve, it being here observed that the right bank of the Little Big Horn River forms the southwest boundary of such reserve. In so far as these new or additional allotments to the Indians are concerned there is no conflict, but it now develops that the three earlier allotments above described overlap or conflict with the Cemetery Reserve to the extent of 34.39 acres, being 6.58 acres in the allotment to White Goose, 20.58 acres in the allotment to Plenty Wing, and 7.23 acres in the allotment to Plain Shield. As to the area so in conflict the question now here is whether the allotments to these Indians are superior to the Cemetery Reserve or whether the Cemetery withdrawal having first been made the allottees are now without title to the areas so in conflict.

The withdrawal for cemetery purposes, under appropriate statutory authority, being prior to the allotment of these lands in severalty to the Indians, such withdrawal, of course, takes precedence over the allotments. That is to say, as to the areas here in conflict the Indian allottees received no title and hence, to that extent, the patents heretofore issued for these lands are void. Necessarily this must be so, on the theory that whenever a tract of land has once lawfully been appropriated it is not thereafter subject to disposition by administrative officers of the Government. *Wilcox* v. *Jackson* (13 Pet. 498); *United States* v. *Morrison* (240 U. S. 193, 212). In fact, even if the allotments referred to had preceded the withdrawal for cemetery purposes, yet, under the section of the Revised Statutes reproduced above it would have been well within the power of the Secretary of War to appropriate such lands for the purpose stated.

In connection with this situation it may well be suggested that the subsequent action of this department in allotting and patenting

a small part of these reserved lands to members of the Crow Tribe was due wholly to inadvertence, as certainly this department would not knowingly have thus invaded the Cemetery Reserve. Further, it appears from the records now at hand that the lands in the Cemetery Reserve east of the Little Big Horn River rise rather abruptly, or "in bluff formation," and that only the high land has been used or cared for as a cemetery. In reporting on this matter under date of April 7, 1927, the superintendent of the Crow Indian Reservation advised the Commissioner of Indian Affairs in part:

> There is very little at issue and I do not think it is a subject that would cause any particular controversy. There are some little flats on that side of the river where there is timber and the question of cutting some posts or poles on that side for use on the land has come up.
>
> * * * * * * *
>
> Allowing these little corners as a part of the allotments would not affect the reserve in any material way as they are little bends in the river and corners down off the bluff and entirely away from the National Cemetery and the main part of the Battle-field.

On presenting this feature of the situation to the Secretary of War possibly that official would join in an appropriate recommendation to the President to so modify the original boundaries of the Cemetery Reserve as to remove the conflict with the lands allotted and patented to these Indians, forty acres of which, as previously observed, have since passed by fee simple patent into the hands of white owners.

It appears from the record now at hand that the Indians of the Crow Tribe have never been compensated for the lands within their reservation so appropriated for cemetery purposes, although in a letter from the Indian Bureau under date of April 20, 1912, addressed to the chief clerk of the General Land Office, it was stated that legislation was then pending looking to the appraisement of the lands within the Custer Battlefield and payment to the Indians therefor. Undoubtedly, section 4870, *et. seq.*, of the Revised Statutes, contemplate that the owners of lands appropriated for cemetery purposes will be compensated for any lands so taken, hence it is suggested that this feature of the matter be given further appropriate attention.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

ROY E. SCRIVNER

Decided September 30, 1927

HOMESTEAD ENTRY—FINAL PROOF—RESIDENCE—MILITARY SERVICE—STATUTES.

Section 2305, Revised Statutes, as extended by the act of February 25, 1919, grants credit, in lieu of residence, to a homestead entryman upon his submission of final proof, where he had been discharged from military service on account of wounds received or disability incurred in line of duty, to the extent of the term of his enlistment, without reference to the length of time he may have served.

DEPARTMENTAL INSTRUCTIONS MODIFIED.

Paragraph 6 of instructions of May 26, 1922, Circular No. 302 (49 L. D. 118), modified.

FINNEY, *First Assistant Secretary:*

This is an appeal by Roy E. Scrivner from a decision of the Commissioner of the General Land Office dated April 30, 1927, rejecting the final proof on his homestead entry embracing lots 1 and 2 (80.20 acres), Sec. 17, T. 16 S., R. 30 E., T. M., Florida.

The entry was allowed May 10, 1926. Final proof was submitted February 24, 1927, showing that entryman resided on the land from June, 1926, to date of final proof. He served in the United States Army from February 23, 1918, until March 29, 1918, when he was discharged by reason of physical disability. He is now drawing compensation under a classification by the Veterans' Bureau of "permanent total disability."

The register of the local office rejected the final proof on the ground that entryman could not be granted any credit for his military service, he having served less than 90 days. The decision appealed from affirmed the action of the register.

The concurring decisions below were based on paragraph 6 of the instructions (Circular No. 302) of May 26, 1922 (49 L. D. 118), which reads as follows:

> A person who served for less than 90 days in the Army or Navy of the United States during said wars is not entitled to have credit for military service on the required period of residence upon his homestead, although he may have been discharged for disability incurred in line of duty.

The foregoing followed the rule announced in the unreported departmental decision of September 21, 1909, in the case of *Jay U. Craft*, where it was held:

> As it appears from the record that claimant served less than 90 days during the Philippine insurrection, he is not entitled to have credit for military service upon the required period of residence upon his homestead, under the provisions of sections 2304 and 2305, Revised Statutes, which is the only question presented upon this appeal. The reason for his discharge from the service, which is stated in the report of the Navy Department as physical disability, is not im-

portant, as he had not been in the service for the required time. See cases of *George C. Hazelet* (32 L. D. 500) and *Herman Logan* (38 L. D. 148).

The case of *George C. Hazelet, supra*, involved an application to make a soldiers' additional entry under sections 2304 and 2306, Revised Statutes, and it was there held that to entitle a soldier to the benefit of those sections it is necessary that he should have served in the Army of the United States for at least 90 days from the date of his muster into the service.

In the case of *Herman Logan, supra*, the soldier had served three years, and the department held that he was entitled to credit under section 2305, Revised Statutes, for the full period of his service, although the Philippine insurrection closed less than five months after the date of his enlistment.

Neither of the cases cited in the *Craft case* supports the conclusion reached therein.

Section 2304, Revised Statutes, allows certain privileges to ex-service men who served 90 days during the wars mentioned therein, and who were honorably discharged.

The act of February 25, 1919 (40 Stat. 1161), provides that the provisions of sections 2304 and 2305, Revised Statutes, shall be applicable in all cases of military and naval service rendered in connection with the Mexican border operations or during the war with Germany and its allies.

Section 2305, Revised Statutes, provides:

> The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements. * * *

Upon reconsideration of the provisions of said section 2305 the department is unwilling to adhere to the interpretation thereof as set forth in the *Craft case*. Such interpretation ignores not only the clause, "without reference to the length of time he may have served," but the fact that the section is remedial and entitled to a liberal interpretation. It will therefore be assumed that Congress intended by the first sentence of section 2305 above quoted as extended by the act of February 25, 1919, *supra*, that the time which the homestead entryman has served in the Army, Navy, or Marine Corps during the war between the States, the war with Spain, the Philippine insurrection, the Mexican border trouble, or the war with Germany and her allies, shall be deducted from the time required to perfect title, provided he served at least 90 days and was honorably dis-

charged, but if discharged on account of wounds received or disability incurred in line of duty the term of enlistment shall be deducted from the time, without reference to the length of time he may have served.

The instructions of May 26, 1922, will be revised to conform to the views herein expressed.

The decision appealed from is reversed, and final certificate and patent will issue in the absence of objection not herein considered.

Reversed.

PAYMENT FOR COAL MINED PENDING APPLICATIONS FOR LEASE OR PERMIT—CIRCULAR NO. 953, SUPPLEMENTED

INSTRUCTIONS

[Circular No. 1135]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 1, 1927.

DIVISION INSPECTORS AND REGISTERS,
UNITED STATES LAND OFFICES:

Section 3 of Circular No. 953 "Instructions as to coal mined under pending applications for lease or permit," approved July 19, 1924,[1] provides as follows:

> 3. Where the applicant has no equities gained prior to the passage of the leasing act, but is awarded a lease as the successful bidder at the auction, coal mined by him from the date of filing of his application to the date of awarding of the lease at the auction must be settled for as a trespass, but at the rate of royalty fixed in the lease.

The division inspector is expected to procure settlement for any coal mined in trespass prior to the award of the lease. Payments for coal mined subsequent to the award should be collected by the register and applied as royalty.

The register will, upon award of the lease at the auction, at once notify the proper division inspector and also the district mining supervisor of the Geological Survey, of such award, in order that the division inspector may take prompt action looking toward collecting settlement for, and closing out, any trespass which may have been committed prior to the award and the district mining supervisor may take steps with a view to ascertaining the condition of the mine, if mining operations are being conducted, and submitting production reports of any coal mined subsequent to the award.

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[1] See instructions of May 23, 1924 (50 L. D. 501).—Ed.

If upon receipt of a lease for delivery the register has information that coal has been mined subsequent to the date of award and payment has not been made therefor he will take immediate steps to collect the amount due.

The register is further directed to see that all notices to permittees or lessees of the concellation of a permit or lease contain the following statement:

> Mining of coal from the land involved subsequent to receipt of this notice of cancellation is unauthorized and in violation of law. Such mining operations will render you liable to the penalties provided for. willful trespass upon Government lands.

The division inspector will upon receipt of notice of cancellation of a lease or permit take such steps as may be necessary to ascertain whether mining operations thereunder ceased upon receipt by permittee or lessee of the notice of cancellation. If not, he will collect payment for all coal so mined on the basis of a willful trespass and take such further action as may be necessary to prevent continuation of the mining operations.

WILLIAM SPRY,
Commissioner.

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

INTER-MOUNTAIN WATER AND POWER COMPANY

Decided October 24, 1927

OIL AND GAS LANDS—LEASE—WATER RIGHT—COURTS—LAND DEPARTMENT—JURISDICTION.

The right of a lessee under an oil and gas lease to engage in the business of transporting and selling water is a question for the courts, not for the department, to decide.

OIL AND GAS LANDS—LEASE—WATER RIGHT.

In the absence of proof that anyone is deprived of a water supply the department will not interfere with an oil and gas lessee who uses water from a well on public land within the leasehold elsewhere than on such leased premises.

FINNEY, *First Assistant Secretary:*

The Inter-Mountain Water and Power Company has appealed from a decision of April 5, 1927, dismissing its protest against use by the Midwest Refining Company of water from a well drilled on land embraced in oil and gas lease Cheyenne 036907(c) upon other leased lands operated by the latter company.

The facts in the case may, in the words of counsel for the appellant, briefly be stated as follows:

Appellant is a Wyoming corporation and the owner of a water well on patented land in Sec. 16, T. 41 N., R. 81 W., 6th P. M., Wyoming, known as the Tisdale Well, which is about 16 miles northwest of the Salt Creek Oil Field. It is a public service company authorized to deliver water as a common carrier by pipe line from said well to the said Salt Creek Field, the Teapot Dome Oil Field, and to the towns and communities nearby said fields having a population of approximately 10,000 people, said line having been constructed at a cost of approximately $850,000 by virtue of certain oral and written contracts secured from practically all of the oil operators, lessees, permittees, and the public generally, in and about the said Salt Creek Field. The principal inducement to appellant to build said pipe line, ranging from 20 inches down to four inches in diameter, for a total pipe-line distance of 35 miles, was the contract and inducements given it by the Midwest Refining Company assuring the purchase by it of a minimum of 5,000 barrels or a maximum of 40,000 barrels of water per day.

The total minimum commercial capacity of said Tisdale Well is 90,000 barrels per day, and the minimum estimated requirement of the entire Salt Creek Field, and the 10,000 inhabitants in the vicinity (without considering Teapot Dome, or possible larger future requirements) is approximately 27,000 barrels per day, a part of which is now obtained from the Platte River and Shannon Lake, said last two sources of supply being, however, more or less uncertain. From water well sources the minimum requirement is not less than 17,000 barrels per day, exclusive of Teapot Dome. Water from the Tisdale Well is pure and suitable for domestic purposes and its use is particularly important to the health of the oil field employees, their families and others in the community, without which oil operations would be severely handicapped.

Adequate, pure, dependable and permanent water supply for successful and economic operations has at all times been one of the most serious problems confronted by the oil industry in the State of Wyoming, and particularly in Salt Creek and Teapot Dome Fields.

Subsequent to the completion of said pipe line by the appellant by virtue of the aforesaid contracts, the Midwest Refining Company, appellee herein, while drilling for oil in the NE. ¼ SW. ¼, Sec. 25, T. 40 N., R. 79 W., brought in a water well from the Tensleep formation, hereinafter called the Tensleep Well. This well is located on a tract covered by oil and gas lease Cheyenne 036907(c), issued to the Wyoming Oil Fields Company which lease was and is being operated by the appellee, Midwest Refining Company. The capacity of this well under pressure is approximately 10,000 barrels daily, or 17,000 barrels less than the requirements, exclusive of Teapot Dome.

Upon discovering this Tensleep Well the appellee reduced its purchases from the appellant to the minimum permitted under the contract and began selling water to other leases in the field, which it also operated under contract. Said Midwest Refining Company now operates or controls 12,000 acres out of the 20,000 acres contained in the Salt Creek Field.

It is apparent that appellee will entirely discontinue its purchase from the appellant upon the termination of its contract on January 1, 1928, and rely on supplying the deficiency from the Platte River and Shannon Lake, which available supply it is conceded is not only undependable but insufficient even for Salt Creek, not to mention Teapot Dome.

On the other hand, allegations have been made on behalf of the appellee that more than sufficient water to supply the needs of all parties is available in the field without any from the Tisdale Well.

In the institution of this proceeding the appellant not only asked the department to take such steps as might be necessary or proper to prevent any use of water from the Tensleep Well elsewhere than on the tract where said well was located, but also applied "for the right and privilege of taking and using this water for the purpose of distributing same through its system as a part of its business."

Counsel for appellant contend that "the decision of the Commissioner of the General Land Office is in conflict with certain well established legal principles and policies as follows":

1. Waters underlying the owner's land are subject to ownership only upon being brought to the surface and reduced to possession; likewise, one entitled to enter public lands to drill for oil secures the ownership of only such water produced from the premises and reduced to his posession as may reasonably be necessary to conduct his operations for oil on said premises; but, in the absence of specific authority or license, the taking of more water than is necessary for such purpose places him in the same position as a mere trespasser, and such additional water so produced is not legally subject to his possession or ownership.

2. An oil and gas lease from the Government includes the right to use a reasonable amount of water that may be produced from the premises, but does not include the right to pipe the water off the premises for use in other operations, even though the lessee may be interested therein, particularly if the effect of such use is equivalent to a sale of the water.

3. A permittee or lessee for oil and gas may make reasonably free use of the natural resources contained within the leased lands, but such resources including water, can not be so appropriated and used by the lessee for his own benefit for the development of adjacent Government property where such use might tend to give an undue advantage to the lessee, to the detriment of other lessees within the same oil field, or to the detriment of the Government, and particularly where such advantage would result in a virtual monoply of the field.

4. The mere fact that an oil lease was granted by the Government covering public lands does not give the lessee any greater right to the use of the other natural resources underlying the premises than would be secured by virtue of a similar lease covering private property.

Counsel for the appellants have presented arguments and citations of some court decisions and some decisions of this department in support of their so-called well-established legal principles and policies, but the decisions are, for the most part, not apposite and the argument is far from convincing.

In each oil and gas lease there is granted to the lessee "the right to construct and maintain thereupon (the land leased) all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof."

In the case of the application of the Producers and Refiners Corporation (unpublished), pursuant to the provisions of the act of February 15, 1901 (31 Stat. 790), for permission to use the right of way for a pipe line for conveying water across public lands (Cheyenne 041204), the facts were stated as follows:

Some time ago Producers and Refiners Corporation drilled a well on Sec. 17, T. 26 N., R. 89 W., 6th P. M., which failed to produce oil, but which did produce a good quality and a large quantity of water. Sec. 17, T. 26 N., R. 89 W., is public land, under the control of the Government. Producers and Refiners Corporation drilled this well under an operating agreement with the original permittee.

Sec. 17, T. 26 N., R. 89 W., is contiguous to what is known as the Wertz Field in Carbon County, Wyoming. There is little or no water in this field for drilling or other purposes. Therefore, a good water well in this particular locality is almost as valuable for the development of the public lands as an oil well would be. Producers and Refiners Corporation is now using the water from this well for drilling operations and other development purposes in the Wertz Field. The original permittee and owner and holder of the oil and gas rights upon Sec. 17, T. 26 N., R. 89 W., has no objection to the use of water as aforesaid by our Company.

Under date of June 19, 1925, the Company submitted an application to the State Engineer for an appropriation of water from said well on Sec. 17, but after a careful consideration of the application the State Engineer has come to the conclusion that it is necessary to reject the same by reason of the fact that the water from a driven well does not come under the jurisdiction of the State Engineer.

Our State Engineer is of the opinion that water from a driven well would be a property right resting in the land upon which the well is located, and if his conclusion is correct the water in this instance belongs to the Government.

Producers and Refiners Corporation does not wish to be considered a trespasser in the use of this water. We have filed with the Government an application for a water right pipe line right of way, leading from the water well to the locations of our other operations.

Upon these facts the Commissioner of the General Land Office, in a letter of September 15, 1925, offered advice as follows:

In the case of *Kansas* v. *Colorado* (206 U. S. 46), one of the principal points decided was that the control of waters, except for navigation, is not subject to congressional action and that such legislation can not override the laws of the States on the subject. Concededly, then, the State has control of its waters for all purposes except navigation and can grant exclusive rights thereto so long as such waters are of a character to permit of appropriation under the State laws. This, I take it, applies alike to waters of all streams and other sources whether flowing above or under the ground.

* * * * * * *

Generally speaking, it is thought that a subsequent disposition of the land would not defeat a prior appropriation of water thereon.

Sec. 17, T. 26 N., R. 89 W., 6th P. M., is among the lands withdrawn by Executive order of September 5, 1916, as Petroleum Reserve No. 50, Wyoming No. 19. * * * Action by the Department granting right of way is, in effect, an expression of departmental consent to the taking and use of the water to be conveyed thereby even though the point of diversion be on withdrawn land.

Upon this record, as above set forth, the department approved the right-of-way map and application on November 20, 1925.

It is not apparent how the department could properly proceed to prevent the appellee from using the water from the well it has drilled.

Clearly, the department can not give any recognition to the appellant other than as an informer in the public interest. But it is equally clear that the reason for the protest was to have the department assist the appellant somehow to escape the results of an improvident contract and improvident business procedure.

The appellant has much to say about monopoly of water supply, but the difficulty here seems to be that too much water is available. No consumer of water has complained against the appellee, and the appellant's complaints are no more than rather indefinite surmises as to what may happen in the future if the appellant shall not be assisted to obtain a virtual monopoly of water supply.

Granting for the sake of argument that the water from the Tensleep Well belongs to the Government as the owner of the land, following the holding in *Hunt* v. *City of Laramie* (181 Pac. 137), cited and relied upon by the appellant, does that necessarily mean that the water can not properly and lawfully be used elsewhere than on the tract where the well is found? There is no act of Congress which provides for the sale or lease of such waters, and it will not do to make any attempt to deal with percolating and underground waters in the same way as coal, oil and gas, timber, and the like—natural resources as to the disposition of which there is specific Federal legislation.

It has been shown that the Government, through its officers of this department, has recommended the use of water from the Tensleep Well by the appellee. There has been no question whatever of exhaustion of water supply from either the appellee's or the appellant's well, which wells apparently reach the same water sands. If the appellant has the right to sell practically unlimited quantities of water many miles from its well on a privately owned tract of land, why should the Government refuse to allow the appellee to use a limited quantity of water on lands near the tract of its well? The appellant concedes that the appellee has the right to take water from the Tensleep Well for use on the tract where the well is found.

The appellant alleges that the appellee sells water, which is denied by the latter. The department is of the opinion that questions of sale of water by the appellee and its right to engage in such business are properly for the local courts and not for this department.

After mature consideration of the questions involved the department has come to the conclusion that no ground for interference in

the present case has been shown. The decision appealed from is accordingly

Affirmed.

THOMAS S. CADY

Decided November 4, 1927

HOMESTEAD ENTRY—RECLAMATION—IRRIGATION PROJECT—WITHDRAWAL—AMENDMENT.

One is not entitled to make entry for land in a Federal irrigation project until his qualifications have been passed upon and approved by an examining board, and it is too late to cure the defect in that respect after the land has been withdrawn.

HOMESTEAD ENTRY—RECLAMATION—IRRIGATION PROJECT—RELINQUISHMENT—EXCHANGE OF ENTRY.

Lands within a Federal irrigation project will not be allowed to remain subject to entry where they are found insufficient to support a family or, after relinquishment by a former entryman, while the latter's application for an exchange of entry under subsection M of the act of December 5, 1924, is being considered.

HOMESTEAD ENTRY—RECLAMATION—IRRIGATION PROJECT—RELINQUISHMENT—EXCHANGE OF ENTRY—APPLICATION.

Where an applicant for exchange of entry of lands within a Federal irrigation project has filed relinquishment prior to the determination of his application, another will not be permitted to enter the relinquished lands until his qualifications have been established by an examining board, and until he has filed a written statement that he has knowledge that the lands are classed as unproductive and insufficient to support a family after payment of water charges, a waiver of right to relief under the adjustment act of December 5, 1924, and consent to pay construction charges should the lands be subsequently embraced within a productive class.

FINNEY, *First Assistant Secretary:*

Thomas S. Cady has appealed from the decision of the Commissioner of the General Land Office dated May 14, 1927, rejecting his application, Alliance 020846, to make homestead entry for farm unit "A" containing 160 acres of land within the North Platte irrigation project, being the E. ½ NE. ¼ and E. ½ SE. ¼ Sec. 29, T. 24 N., R. 55 W., 6th P. M., Nebraska.

The land in question originally was withdrawn in connection with the North Platte irrigation project, under authority of the reclamation act of June 17, 1902 (32 Stat. 388). Farm unit "A" was made subject to entry by a departmental order of July 21, 1921. Later Fred Loibl made homestead entry 020110 for the same. On March 9, 1927, Loibl relinquished his entry, incident to an application for an exchange of entries under the provisions of subsection "M," of the act of December 5, 1924 (43 Stat. 672, 703), and on the same day

Cady filed application 020846 to enter the land. Cady's application was transmitted to the General Land Office for action.

Cady did not accompany his application to enter with a certificate of the project manager showing that a water-right application had been filed and that the proper water-right charges had been deposited by him, as was required by paragraph 5 of the general reclamation circular (45 L. D. 385), nor did he show compliance with the provisions of paragraph 2 of the regulations of September 12, 1925 (51 L. D. 204), with respect to subsection "C" of the act of December 5, 1924 (43 Stat. 672, 702), which required that an applicant seeking to make entry for public land within a Federal irrigation project should first establish his qualifications as an entryman to the satisfaction of the examining board.

Because of Cady's omissions in the respects stated, the Commissioner, in his decision of May 14, 1927, held that his application to make homestead entry was not in proper form and rejected the same for that reason, although he stated that the land was subject to entry. The Commissioner's statement as to the status of the land was, however, erroneous, as farm unit "A" had been canceled by a departmental order of April 14, 1927, the land therein remaining subject to the original withdrawal from entry. Cady's application no doubt would have been rejected by the Commissioner upon that ground also, except for the fact that a notation of the cancellation of farm unit "A" was not made upon the plat until after the Commissioner's decision was rendered.

In his appeal to the department Cady excuses his failure to accompany his application to enter with a certificate from the project superintendent by stating that the superintendent advised him that the land in question had been withdrawn and was then included in the Pathfinder irrigation district and that he therefore was unable to issue a water-right certificate with respect to the same. With reference to his failure to show his qualifications as an entryman, Cady states that the examining board advised him that it could not issue a report with regard to the land in question at the time of his application. He contends that, as he did all in his power to procure the certificates necessary to complete his application, he is entitled to have the same allowed.

The papers now before the department do not enable it to determine whether or not a certificate should have been furnished by the project superintendent, but granting for argument's sake that the facts are such that this certificate may be dispensed with, the applicant's default in establishing his qualifications as an entryman still remains. Until his qualifications in that respect have been passed upon and approved by an examining board he is not entitled to make entry for land in a Federal irrigation project, and, therefore,

the Commissioner's action in rejecting his application 020846 clearly was right. As the land in question is now withdrawn from entry, it is too late to cure the defects in the appellant's application to enter.

What has been said above disposes of the appeal. The record, however, presents a state of facts which requires additional comment. It appears that although the entryman Loibl relinquished his entry on March 9, 1927, as already stated, his application for an exchange of entries under the provisions of subsection "M" of the act of December 5, 1924, *supra*, was not disposed of until April 30, 1927. The result was that the land he relinquished was thrown open to entry on March 9, 1927, although the question whether or not farm unit "A" was sufficient to support a family and pay water charges was then pending before the department. Had Cady's application been complete when filed he undoubtedly would have been permitted to make entry for the land.

Lands found to be insufficient to support a family clearly should not remain open to entry, nor should they be subject to entry while a former entryman's application for an exchange of entries under subsection "M" of the act of December 5, 1924, *supra*, is being considered. In framing its regulations the department had contemplated that an entryman making an application for an exchange of entries would not file a relinquishment of his existing entry until his application for an exchange had been allowed, and its plan was to remove the relinquished tract from entry as soon as the application for exchange had been granted. There is, however, nothing in the law or regulations as they now stand to prevent such an entryman from filing a relinquishment of his existing entry whenever he wishes to do so, and if he does so prior to action upon his application for an exchange of entries there also is nothing to prevent a qualified applicant from immediately making entry for the relinquished land.

It is understood that there are a number of other cases similar to the one at hand in which applicants for an exchange of entries have filed relinquishments prior to the determination of their applications, and where applications to enter have been filed by persons who seek to acquire the same lands. In such a case no entry for the relinquished land should be permitted except by an applicant whose qualifications have been established by an examining board, and then only where the applicant files a written statement setting forth that he has knowledge of the fact that the land involved in his application to enter has been classed as temporarily unproductive, and has been found to be insufficient to support a family and pay water charges; that in the event his application to enter is allowed he agrees to file no application for relief by reason of the provisions of the adjustment act of December 5, 1924, *supra*, which

otherwise might be applicable; and that he understands that payment of construction charges will be required in the event he is successful in bringing the land embraced in his entry into a productive class. Applications to enter of the character just described which are pending in the General Land Office, where the qualifications of the applicants have not been established, should be returned to the proper district land offices with directions that the applicants present themselves before the examining boards for investigation as to their respective qualifications.

The decision appealed from is

Affirmed.

FRANK E. TURNER, ASSIGNEE OF HORACE W. STEELE

Decided November 5, 1927

DESERT LAND—APPLICATION—PAYMENT—ASSIGNMENT—RECLAMATION PROJECT—WITHDRAWAL.

Recognition of an assignment by a qualified entryman who filed a desert-land application for lands then subject thereto and made the initial payment required by law is not precluded by a suspension of the application pending determination as to whether the lands should be included within a reclamation project.

FINNEY, *First Assistant Secretary:*

This is an appeal by Frank E. Turner from decision of the Commissioner of the General Land Office dated June 20, 1927, refusing recognition of an assignment to him by Horace W. Steele of desert-land application embracing S. ½ NW. ¼, N. ½ SW. ¼ Sec. 12, T. 5 S., R. 8 E., G. and S. R. M., Arizona.

The assignment was by quitclaim deed dated January 12, 1926.

The action of the Commissioner was based upon the ground that Steele's application for the land had not been allowed or accepted, but had been suspended because the lands are within the possible limits of the San Carlos project, and that he had no immediate right or authority to take possession of and reclaim the tracts and could convey no such right or authority to his assignee.

It appears that Steele duly applied for the tracts December 5, 1923, and made the initial payment of 25 cents per acre required by law. An inspector examined the land and recommended allowance of the application. In the meantime, by order of June 18, 1924, the department suspended all desert-land and homestead entries within the exterior limits of the San Carlos project, as contemplated, and the lands were also included in Executive withdrawal of June 24, 1924, comprising upward of 100,000 acres, in connection with said project.

Supplementing the order of suspension above referred to, the department, under date of August 23, 1925, advised the Commissioner as follows:

> The effect of the suspension and withdrawal is to hold in *statu quo* all homestead and desert-land entries already existing in such tract pending determination as to whether the lands covered thereby can and will be reclaimed under the San Carlos project. Such suspension includes applications to make desert-land entry, even though they were filed prior to the suspension and withdrawal.

In the judgment of the department the fact that Steele's application has not been allowed does not preclude recognition of the assignment. He appears to be a qualified entryman, and by filing a desert-land application for lands then subject thereto and making the initial payment of 25 cents per acre required by law, he acquired an assignable interest or claim. By taking an assignment the assignee merely takes such right or interest as his assignor held. The allowance or acceptance of the application is subject to future contingencies, but if allowed the entry will inure to Turner's benefit, and he will be obliged to comply with the requirements of law within the statutory period as fixed by the date of the entry, not by the date of the assignment.

For the reasons stated the decision appealed from is

Reversed.

ERIC LYDERS (ON REHEARING)

Decided November 10, 1927

PUBLIC LANDS—JURISDICTION—CONGRESS—LAND DEPARTMENT.

> The power to dispose of the public domain is vested exclusively in Congress, and when it directs that a tract of public land shall be disposed of in a certain manner, its direction is in effect a repeal of all preexisting law with respect to its disposition and the Land Department is powerless to convey title except as thus specified.

FINNEY, *First Assistant Secretary:*

Eric Lyders has filed a motion for rehearing with respect to his application, Sacramento 017260, to locate Valentine scrip on an unsurveyed island, known as Whaler Island, situated in Crescent City Bay, Del Norte County, California. The application was rejected by the department in a decision dated October 3, 1927.

The application in question was filed in the district land office at Sacramento, California, on January 6, 1927. Notice of the selection was duly published, the date of the first publication being January 11, 1927. Within 30 days from that date the chairman of the Del

Norte County Harbor Commission, on behalf of the commission and the people of the county of Del Norte, filed a protest against the allowance of the selection. While this protest was pending the island was withdrawn from all forms of disposal, subject to any valid existing rights in or to the same, by Executive orders Nos. 4573 and 4582, dated January 28 and February 12, 1927, respectively. On March 4, 1927, Congress passed the following act (44 Stat. 1845), with respect to the island:

> That the Secretary of the Interior is hereby authorized to issue patent to the County of Del Norte, State of California, to Whaler Island, containing about three acres, in Crescent City Bay, Del Norte County, California, for purposes of a public wharf.
>
> SEC. 2. That the Secretary of the Interior is hereby directed to take such action as may be necessary to carry out the purposes of this Act.

Thereafter Lyders's application 017260 was rejected by both the Commissioner and the department. The department said, in its decision of October 3, 1927, that the act authorizing the issue of a patent to the county of Del Norte is mandatory and imperative, and does not vest any discretionary power in the Secretary of the Interior as to whether patent should or should not issue, or as to whether Lyders's location should or should not be allowed.

The motion for rehearing is based upon three contentions, which are in substance as follows:

First, that it is the duty of the Secretary to pass upon the validity of Lyders's selection; second, that in so doing nothing that happened subsequent to the date of his selection should be considered; and third, that the act of March 4, 1927, *supra*, does not grant Whaler Island to the county of Del Norte, and does not deprive the Secretary of his power nor relieve him of his duty to see that the island is disposed of in conformity with the proper public land laws, but merely confers upon him additional authority to dispose of the land in a manner not theretofore authorized by law.

While the petitioner's brief has been read with attention, and all the cases cited therein have been examined, it would serve no purpose to follow his argument in detail, by reason of the plain fact that the Department of the Interior now has no jurisdiction, power, or authority to allow his application to acquire title to Whaler Island.

The public domain is the property of the United States, and it can be disposed of only in accordance with the laws of Congress. The Department of the Interior, which was itself created by Congress, has no inherent powers with respect to public lands. It has authority to dispose of those lands only because Congress has vested such authority in it, and in diposing of them it must act in the manner and for the purpose specified by statute.

In the instant case Congress, by the act of March 4, 1927, *supra*, has given a mandatory direction to the Secretary of the Interior to take such action as may be necessary to insure the issuance of a patent to the county of Del Norte, California, to Whaler Island, for the purposes of a public wharf. Therefore, as the matter now stands, the land department has no power to dispose of Whaler Island in any other way.

The act of March 4, 1927, *supra*, was, with respect to Whaler Island, equivalent to a repeal of all of the then existing public land laws which otherwise might have controlled the disposition of the land it embraces, with the result that there is now no public land law under which Lyders can acquire title to that land.

These considerations are conclusive upon the Department of the Interior. The motion for rehearing accordingly is denied.

Motion denied.

RUST-OWEN LUMBER COMPANY

Decided November 19, 1927

RAILROAD GRANT—SURVEY—PLAT—AMENDMENT.

Where at the date of adjustment of a railroad grant pursuant to the act of March 3, 1887, sections within the primary limits of the grant were shown upon the plat of survey as fractional due to natural causes, the areas of the sections as then shown constitute the full measure of the grant, and a successor in interest to the rights of the railroad company has no basis for a claim to tracts subsequently surveyed which would have comprised the balance of those sections if originally surveyed.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *McKittrick Oil Company* v. *Southern Pacific Railroad Company* (37 L. D. 243), cited and applied.

FINNEY, *First Assistant Secretary:*

The Rust-Owen Lumber Company has appealed from a decision of the Commissioner of the General Land Office dated September 27, 1927, denying its request for a patent for lots 8, 9, and 10 of Sec. 11, lots 8, 9, and 10 of Sec. 13, lots 10, 11, 12, 13, 14, 15, and 16 of Sec. 15, T. 44 N., R. 7 W., 4th P. M., Wisconsin.

The said tracts are described in accordance with a supplemental plat of survey accepted February 28, 1927, and filed on July 1, 1927. The plat is based on a reestablishment of the lines defining the land in a portion of the township as shown upon the official plat approved January 11, 1859, and an extension survey including lands not shown upon said plat.

The Rust-Owen Lumber Company states in the application under consideration that it is now owner of said lots by virtue of being the owner by mesne conveyances of the land in said Secs. 11, 13, and

15 according to the plat of 1859. The company requested that, if its claim on this ground be disallowed, the application be considered as one to purchase the land under the provision of the act of March 3, 1887 (24 Stat. 556).

No evidence of the ownership of the lands in said sections shown on the plat of 1859 has been filed by the company.

On the plat of 1859 the lots shown on the supplemental plat of 1927 were indicated as a part of Lake Owen.

Said sections 11, 13, and 15 were certified by the Secretary of the Interior on July 6, 1863, to the State of Wisconsin under the act of June 3, 1856 (11 Stat. 20), as being within the primary limits of the grant to the State for aid in the construction of a railroad, the beneficiary being the Bayfield branch of the St. Croix and Lake Superior Railroad Company, whose successor in interest now is the Chicago, St. Paul, Minneapolis and Omaha Railway Company. In the clear list which was approved, as stated, on July 6, 1863, the land was described as the "whole" of the sections, the area of Sec. 11 being stated as 537.67 acres; of Sec. 13, 491.52 acres, and of Sec. 15, 401.24 acres. These were the areas shown on the plat of 1859.

The certification of the "whole" of said sections 11, 13, and 15 to the State of Wisconsin must be read in connection with the plat of survey on file on July 6, 1863. *McKittrick Oil Company* v. *Southern Pacific R. R. Co.* (37 L. D. 243). Thus read, it is at once apparent that only 537.67 of section 11, 491.52 acres of section 13, and 401.24 acres of section 15 were clear-listed, and the certification had no relation to the additional area shown on the supplemental plat of 1927.

Even were it held that the land shown on the supplemental plat of 1927 was affected by the grant of June 3, 1856, *supra*, the department would not be warranted in issuing a patent to the Rust-Owen Lumber Company on the basis of the pending application. To do so it would be necessary to determine questions not within the jurisdiction of the department, and to proceed contrary to the provisions of the granting act, under which all lands affected thereby are certified to the State for the benefit of the railroad company, which alone can thereafter convey the land.

Section 1 of the act of March 3, 1887, *supra*, provides—

> That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

Pursuant to the foregoing, the grant made by the act of June 3, 1856, *supra*, has been adjusted and closed. See 17 L. D. 437 and cases there cited. Therefore, although said sections 11, 13, and 15 are

within the primary limits of the Bayfield branch of the St. Croix and Lake Superior Railroad Company, the successor to said railroad company can assert, in this department, no claim to the tracts shown on the supplemental plat of 1927.

The department is unable to find in the act of March 3, 1887, *supra*, any provision under which the Rust-Owen Lumber Company could properly be granted the right to purchase the lands shown on the supplemental plat of 1927.

The decision appealed from is

Affirmed.

SUSPENSION OF FEDERAL EMPLOYEES

Opinion, December 10, 1927

OFFICERS—SUSPENSION OF EMPLOYEES—APPOINTMENT—JURISDICTION.

The power to suspend is incidental to the power to appoint, and may be legally exercised only by the official in whom that power is lodged.

OFFICERS—SUSPENSION OF EMPLOYEES—JURISDICTION.

A subordinate officer who does not have full appointing power does not have the authority to suspend, and any suspension made by him is merely tentative and without validity unless subsequently approved by the one holding the appointing power.

OFFICERS—SUSPENSION OF EMPLOYEES—JURISDICTION.

An employee is entitled to pay during the period of his suspension where he is suspended by a subordinate officer without authority and that action is not subsequently affirmed by the officer holding the appointing power, but he is not entitled to pay during such period if the suspension be confirmed or the charges sustained by the appointing authority.

OFFICERS—SECRETARY OF THE INTERIOR—ASSISTANT SECRETARY—FIRST ASSISTANT SECRETARY.

The authority of the Secretary under section 439, Revised Statutes, to prescribe the duties of the Assistant Secretary has like application with respect to the First Assistant Secretary.

OFFICERS—SECRETARY OF THE INTERIOR—ASSISTANT SECRETARY—FIRST ASSISTANT SECRETARY—JURISDICTION.

Where the statute authorizes an Assistant Secretary of an executive department to perform such duties as may be assigned to him by the Secretary, he acts with full power equal to that of the Secretary within the scope of his assignment, but has no power beyond that prescribed; when acting as Secretary he is authorized to perform the duties of the head of the department.

PATTERSON, *Solicitor:*

My opinion on the general subject of suspension of employees from duty and pay, and particularly in regard to the following specific questions, has been requested, viz:

1. Who has authority to suspend an employee, either Washington or field?

2. If employee is suspended by a bureau or field officer, must it be confirmed by the Secretary?

3. When answer to charges is made by the employee and action on the answer is taken by the Secretary, does that have the effect of confirming the suspension if the employee is dismissed?

4. If the employee is not dismissed but restored to duty by the Secretary on his answer to charges, does this action restore the pay of the suspended employee?

5. Does an Assistant Secretary have authority to suspend?

A basic rule on this subject was clearly stated by the Supreme Court in the case of *Burnap* v. *United States* (252 U. S. 512), and was formulated in the syllabi as follows:

> The power to remove from public office or employment is, in the absence of any statutory provision to the contrary, an incident of the power to appoint, and the power to suspend is an incident of the power of removal.

Therefore, in order to determine the source of the power to suspend it is necessary to consider the authority to appoint, for the one is determinative of the other.

Section 169 of the Revised Statutes (see unwarranted modification in section 43, Title 5, U. S. Code) provides:

> Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employes, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year.

Quoting again from *Burnap* v. *United States*, *supra*, the following language is pertinent to this inquiry:

> The term head of a Department means, in this connection, the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet. It does not include heads of bureaus or lesser divisions. *United States* v. *Germaine*, 99 U. S. 508, 510. Persons employed in a bureau or division of a department are as much employees in the department within the meaning of Par. 169 of the Revised Statutes as clerks or messengers rendering service under the immediate supervision of the Secretary.

It has been held that the power of appointment lodged in the head of a department must be exercised by him or some one authorized to perform his function in this regard and can not be delegated to subordinates except by specific statutory authority (21 Op. Atty. Gen. 355; 26 Comp. Dec. 444; 27 Comp. Dec. 656; 4 Comp. Gen. 675).

Congress has in numerous instances authorized officials below the grade of members of the Cabinet to appoint employees, and the courts have recognized no constitutional objection to such legislation. *United States* v. *Germaine* (99 U. S. 508); *Burnap* v. *United States* (252 U. S. 512; 10 Comp. Dec. 577); *Auffmordt* v. *Hedden* (137 U. S. 310).

Generally speaking, the appointing power in respect to positions in this department, exclusive of the presidential class, is lodged in the Secretary. In a few instances subordinate officers have been authorized to make appointments to certain positions under the jurisdiction of this department, subject to the approval of the Secretary. See section 471, Revised Statutes, and 23 Stat. 212, and the recent act of May 22, 1926 (44 Stat. 620), which provides—

> That the Secretary of the Interior may by appropriate regulation delegate to supervisory officers the power vested in him under section 169 of the Revised Statutes of the United States to make temporary or emergency appointments of persons for duty in the field, subject, however, to later confirmation thereof by the Secretary of the Interior.

Such appointment is not complete until approved by the Secretary. If subsequently approved it has validity from the date of the tentative appointment. The employee may be placed on duty but should not be paid until the appointment shall have become absolute by approval.

In the case of *United States* v. *Wickersham* (201 U. S. 390), the claimant was a clerk in the office of the United States Surveyor General in Boise, Idaho. He was suspended by the Surveyor General, and the court held that the suspension was without authority of law and that he was entitled to pay covering the period of his suspension. At page 399 the court said:

> Where an officer is wrongfully suspended by one having no authority to make such an order, he ought to be, and is, entitled to the compensation provided by law during such suspension. Throop on Public Officers, Par. 407; *Emmitt* v. *Mayor &c. of New York*, 128 N. Y. 117. This was the view entertained by the Court of Claims in deciding *Lellmann's* case, 37 C. Cl. 128, on the authority of which the case at bar was decided by that court. We think the ruling was correct.

The case reported in 26 Comp. Dec. 444 also involved an employee of this department. He was superintendent of an Indian school, who was suspended by the Commissioner of Indian Affairs. He was later restored, and the question was whether he was entitled to pay covering the period of suspension. The following is quoted from that decision:

> I am not aware of any existing law vesting authority in the Commissioner of Indian Affairs to suspend an employee or officer of the Indian Service. As a general rule, when it is sought to exercise any official power or function explicit authority must be found in the law. 25 Op. Atty. Gen., 98. The power to appoint and remove being discretionary in character by the head of a department, they can not be delegated. 21 *id.*, 356.
>
> Applying the same rule to the present case I do not think it was within the power of the Commissioner of Indian Affairs to suspend the superintendent in question to the extent of depriving him of compensation awarded him by virtue of his appointment to such position by the Secretary of the Interior.

In this connection it is noted that the Commissioner of Indian Affairs virtually directed the claimant a few days after his suspension to remain at his post of duty. In view of the foregoing and it appearing that the suspension of this employee from pay was never approved by the head of the department concerned, it is held that his status during the period pay was withheld was that of an employee on duty and that therefore he is entitled to pay as fixed in his appointment and increase of compensation as provided by law. The effect of revoking a suspension is to restore the incumbent to his former condition. 13 Op. Atty. Gen. 221.

A succinct statement of the law bearing upon these questions is contained in a recent decision by the Comptroller General (6 Comp. Gen. 534), wherein he said:

It is well settled that where the head of an executive department or independent office of the Government, as an incident to the power of appointment and removal, suspends an employee from duty pending the investigation of charges of official inefficiency or misconduct, there is no authority to make payment of salary for the period of suspension during which no service is rendered, unless the order of suspension specifically provides otherwise. 20 Comp. Dec. 505; 21 *id.* 478; 25 *id.* 996; 27 *id.* 657; *Burnap* v. *United States*, 252 U. S. 512.

The right of the employee to pay depends on his being in a duty status, that is, in actual performance of service or on authorized leave of absence with pay. He is in a nonpay status for the period of suspension where the order of suspension specifically states that it shall be without pay or is merely silent upon the question. 11 Comp. Dec. 661; 25 *id.* 996; 4 Comp. Gen. 849. If the suspension is made by a subordinate officer, and not confirmed by the head of the department or office, the suspension is illegal and would not cause a forfeiture of salary, 12 Comp. Dec. 653; 26 *id.* 444; 27 *id.* 656; 21 Op. Atty. Gen. 356; *United States* v. *Wickersham*, 201 U. S. 390, 399; *Burnap* v. *United States*, 252 U. S. 512. But in the present case the subordinate officer, viz, the medical officer of the hospital at Fort Bayard, did nothing more than recommend action and act upon authority of the Director of the Veterans' Bureau. The actual suspension or relief from duty in this case was by the Director of the Veterans' Bureau. 1 Comp. Gen. 42 and cases therein cited. The fact that the charges were disproved and the employee restored to duty does not authorize payment of salary during the period of suspension lawfully made. 20 Comp. Dec. 505; 21 *id.* 478.

In 12 Comp. Dec. 653, it was held (syllabus):

Where a quartermaster of the Army suspends a civilian employee from duty without pay and prefers charges against him, and the Secretary of War subsequently sustains the charges and determines that the suspension was justified, such employee is not entitled to pay during the period of his suspension.

Where a quartermaster of the Army suspends a civilian employee from duty without pay when he is able and willing to perform his duties and prefers charges against him, and the Secretary of War subsequently declines to sustain the charges and decides that his suspension was not justified, such employee is entitled to pay during the period of his suspension.

Applying the rules announced in these adjudications, the answers to questions 1 to 4, inclusive, may be summarized as follows:

The power to suspend is incidental to the power to appoint, and may be legally exercised only by the official in whom that power is lodged.

If the subordinate officer has not full appointing power he has not the authority to suspend, and any suspension made by him is only tentative and has no validity unless it be subsequently approved by the one holding the appointing power.

If such suspension be made by the subordinate officer without authority and that action be not approved or confirmed by the officer holding the appointing power, the employee is entitled to pay during the period of his suspension, but if the suspension be subsequently confirmed, or the charges sustained by the appointing authority the employee is not entitled to pay during the period of suspension.

There remains for consideration question 5. It is assumed that this inquiry contemplates the office of First Assistant Secretary as well as that of Assistant Secretary. In so far as the power of suspension is concerned they would appear to occupy the same status. Their powers are not defined by statute. It is noted that section 483, Title 5, U. S. Code, contains an error wherein it ascribes to the Assistant Secretary the power authorized to be conferred by the Secretary under the act of March 28, 1918 (40 Stat. 499), which had reference to a different officer, namely, "Assistant to the Secretary of the Interior."

Section 439, Revised Statutes, provides:

> The Assistant Secretary of the Interior shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary, or may be required by law.

The act of March 3, 1885 (23 Stat. 478, 497), provided for "an additional Assistant Secretary of the Interior who shall be known and designated as First Assistant Secretary of the Interior." There would appear to be no reason to doubt that the authority of the Secretary under section 439, Revised Statutes, to prescribe the duties of the Assistant Secretary has like application in respect to the First Assistant Secretary. This authority was exercised by the Secretary August 1, 1925, by his order No. 65. The activities of various bureaus and offices were thereby assigned to the First Assistant Secretary and the Assistant Secretary as designated therein. The division of appointments was retained for administration by the Secretary. According to that assignment of duties it does not appear that the appointing power has been delegated. Such being the case, neither the First Assistant Secretary nor the Assistant Secretary, as such, has authority to appoint or suspend an employee. They act within the scope of their respective assignments with full authority equal to that of the Secretary, but have none beyond that prescribed. When

either of them is Acting Secretary he is authorized to perform the duties of the head of the department. Section 177, Revised Statutes.

Whether the power of appointment and suspension could be included within the assignment of duties of First Assistant or Assistant Secretary is a closer question, but I am of the opinion that such delegation would be authorized under section 439, Revised Statutes, which "empowers the Secretary to make the Assistant, as it were, his deputy in all things." (18 Op. Atty. Gen. 432.) See also 29 Op. Atty. Gen. 273, holding that an appointment made by the chief clerk of this department, under the legislation and the circumstances therein considered, was legal.

Approved:

HUBERT WORK,
Secretary.

CENTRAL PACIFIC RAILWAY COMPANY (ON PETITION)

Decided December 13, 1927

SURVEY—RAILROAD GRANT—MINING CLAIM—PAYMENT.

Where a segregation survey of a mining claim is necessary to determine the quantity of land that must be excluded from a section granted to a railroad company in conflict therewith an equal division of the cost of the survey between the Government and the railroad company should constitute the rule to be applied.

COURT DECISION CITED AND APPLIED—DEPARTMENTAL INSTRUCTIONS MODIFIED.

Case of *Sante Fe Pacific Railroad Company* v. *Lane* (244 U. S. 492), cited and applied; departmental decision of April 20, 1927, in case of *United States* v. *Central Pacific Railway Company* (52 L. D. 81), and instructions of July 9, 1926, Circular No. 1077 (51 L. D. 487), modified.

FINNEY, *First Assistant Secretary:*

Pursuant to instructions in departmental decision of April 20, 1927 (52 L. D. 81), requiring that a demand be made upon the Central Pacific Railway Company to deposit a sum sufficient to meet the costs of segregating such portions of the Packard Nos. 4 and 5, lode mining claims, as intrude within the S. ½ NW. ¼ Sec. 33, T. 28 N., R. 34 E., M. D. M., Nevada, the department, by letter of September 15, 1927, made demand upon the company for $300, being the sum estimated by the local cadastral engineer to meet the expense of such survey.

The company has now filed a petition requesting the Secretary to exercise his supervisory power and modify the demand requiring the company to pay the entire cost of a survey segregating the claims in their entirety. The company contends that to do so is to require it to pay for the segregation of lands outside of its grant, and that as

only a portion of the claims intrude upon the odd-numbered section claimed under its grant, the company should pay only a proportionate part of the cost of survey.

The petition states, among other things: "It is necessary to commence the survey only from the exterior boundary of the odd-numbered subdivision which would otherwise have passed to the company as above, and to continue the survey along the exterior boundaries of the mineral locations so intruding upon the odd-numbered subdivisions, and stopping the running of the lines of the mineral locations where the same again intersect the exterior boundaries of the subdivision in question. To compel the segregation survey of the mineral locations would seem to be obviously duplication of effort, since the mineral claimant, when he seeks patent, must file a mineral survey, * * *."

In so far as the demand made by the Commissioner is attacked in the motion upon the ground that it is excessive, in that it contemplates surveying that is unnecessary in order to determine the boundary between the land of the railroad grantee and the public mineral land, the attack is based upon a mere opinion, as set forth above, that an accurate demarcation of such boundary can be determined by a piecemeal survey of the claim confined to the borders of the overlap. The sufficiency of such a survey is not apparent to the department from the data before it in this case, and it is not believed in segregations of this character that the boundaries between the railroad and the public land can be defined in the manner suggested in the motion. It is true that the sole object of this survey is to establish the border lines between the granted and the ungranted land, and the cost of establishing such line is the only cost that the railroad company can under the statutes be required to pay. But in establishing such lines it may be absolutely essential to identify monuments and markings that govern or affect the true location of the mining claims to be segregated, which monuments and markings may be situated elsewhere than along the boundary of the mining claims bordering the railroad land. Whatever survey work is necessary to accomplish that end can not be regarded as superfluous or otherwise than as essential work to determine such boundary. In the absence of a showing to the contrary it will be presumed that the estimate of the cadastral engineer does not include any expense for work not necessary to accomplish the purpose of the survey. If the estimate contemplates a survey of all the exterior boundaries of the Packard claims Nos. 4 and 5, it will be presumed that such survey is necessary to fix the boundary of the lands of the railroad company. There is no basis, therefore, for holding that the sum demanded exceeds what will be required to execute the necessary survey.

Substantial support, however, is found for the contention that the railroad company should be required to pay only a proportionate cost of the survey. It has been a practice of long standing in the department, based upon its construction of the act of July 31, 1876 (19 Stat. 102, 121), to divide the cost on an acreage basis of surveys between the granted and ungranted lands where townships within the primary limits of a railroad grant were surveyed and sectionized. This practice the Supreme Court in the case of *Santa Fe Pacific Railroad Co.* v. *Lane* (244 U. S. 492) held reasonable and equitable and to have received congressional sanction in the act of June 25, 1910 (36 Stat. 834), which act, the court stated, had the effect of incorporating the practice in that statute.

The method, however, of dividing the costs according to an acreage basis is not considered applicable in making surveys of the character herein contemplated, as it might, if applied, result in an inequitable apportionment of the cost to the advantage of the Government in some cases and in others to the advantage of the railroad. It is further open to the objection that there would be no reliable data for computing the acreage as a basis of estimate before the surveys are made. The only equitable and practicable rule, and one in keeping with the spirit of the law as construed by the court, appears to be to require the railroad company grantee to pay one-half of the cost of whatever surveys are necessary to establish the boundary between the mineral land and the land belonging to the railroad within the tracts claimed by the railroad under its grant. The demand should be made accordingly.

Circular No. 1077 of July 9, 1926 (51 L. D. 487), the department's decision above mentioned of April 20, 1927, and the decision appealed from are hereby modified to the extent that they prescribe or require that the railroad grantee pay the entire cost of the survey. The case is remanded with instructions that demand be made upon the company, for one-half of the estimated cost of the survey.

Motion denied.

EX PARTE E. P. WEAVER

Decided December 16, 1927

WITHDRAWAL—SCHOOL LAND—MINERAL LANDS—COAL LAND—CONTEST—OIL AND GAS LANDS—PROSPECTING PERMIT—PUBLIC LAND.

A withdrawal under the act of June 25, 1910, for the purpose of examination and classification as to coal values which embraces surveyed school sections is in effect a contest or Government proceeding against the State in aid of administration to ascertain whether the land was of the character which passed under the school grant, and, where it was determined that the land was not valuable for its coal contents, an intervening withdrawal for a different purpose will be ineffective to defeat the grant.

FINNEY, *First Assistant Secretary:*

This is the appeal of E. P. Weaver from a decision of the Commissioner of the General Land Office January 26, 1926, denying his application presented April 9, 1925, for a permit pursuant to section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon Sec. 32, T. 30 N., R. 8 W., N. M. P. M., New Mexico, for the stated reason that the land involved was *prima facie* granted to the State of New Mexico in aid of common schools, by the act of June 20, 1910 (36 Stat. 557).

Under the facts stated and the issues arising upon this record, the one controlling question is whether the land above described is or was at the date of Weaver's application "owned by the United States" within the meaning of said act of February 25, 1920. See sections 1 and 13 of that act.

To a conclusion on this question it is necessary to set out at some length the history of the grants to the Territory and future State of New Mexico of sections 16, 36, 2, and 32 found therein, as also certain governmental orders and the administrative procedure had with reference to the section 32 above described.

The act of June 20, 1910, entitled in part: "An Act to enable the people of New Mexico to form a constitution and State Government and be admitted into the Union" provided in section 6 "that in addition to sections sixteen and thirty-six, heretofore granted to the Territory of New Mexico, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools." It was further provided in that same section that "where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof are mineral or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress," other lands might be selected in lieu of the lands so lost in place, specifically extending thereto in this behalf, sections 2275 and 2276 of the Revised Statutes.

Section 10 of the same act declares "that all lands hereby granted, including those which have been heretofore granted to the said Territory are hereby expressly transferred and confirmed to the said State." New Mexico was admitted into the Union pursuant to this act by Executive proclamation of January 6, 1912 (37 Stat. 1723). Prior to this date, however, by Executive order of April 7, 1911, all of said township 30 was included in coal-land withdrawal, New Mexico No. 4. Thereafter, departmental order of December 14, 1915, purported and assumed to withdraw for "irrigation works" the section 32 here involved, pursuant to the act of June 17, 1902 (32 Stat. 388), in connection with the Turkey Reservoir of the Colorado River Storage project.

Administrative proceedings following the coal-land withdrawal of April 7, 1911, were in the nature of a governmental inquiry. The proclamation itself stated the purpose of the withdrawal and limited the inquiry to "examination and classification with respect to the coal values," at the same time forbidding "settlement" thereon and the "location, sale or entry thereof." In the course of the inquiry by general order of May 26, 1926, all pending proceedings against the State, where the question of mineral character of the land was involved, were suspended, and by instructions of June 16, 1926, a committee designated by the Secretary of the Interior gave consideration to "contests" of the character then before the department.

July 20, 1926, the Committee, after examination of all the evidence available, reported that said Sec. 32, T. 30 N., R. 8 W., lies within an interior zone of the San Juan Basin, a geologic structure in which the existence of coal was even now a matter of inference and conjecture, and that this section is not known to contain valuable coal deposits. August 28, 1926, the Secretary adopted the committee's findings and dismissed the contest with reference thereto.

The intent of Congress to further enlarge the grant made by the act of June 21, 1898 (30 Stat. 484), of sections 16 and 36, upon the admission of the State into the Union is expressly stated in section 7 of that act. By the act of June 20, 1910, *supra*, providing for such admission, Congress determined the amount of additional land to be granted for school purposes and specifically designated this as sections 2 and 32, the land being at the time surveyed, and title thereto was confirmed in the future State by words of present grant. Without deciding that this was a dedication by way of reservation of these sections to the school grant which operated to then remove them from the category of public land, it is clear the language of the statute should not be strained to defeat the attachment of the grant on the admission of the State, and no greater effect should be given to a withdrawal made prior to such admission than can fairly be construed as within the terms of the withdrawal. A reservation for classification in aid of adjustment and not to defeat it if made in good legal faith is a temporary fleeting determinate thing. Assuming without conceding that at any time between the date of the grant and the President's proclamation admitting the State, it might have been withdrawn for authorized uses of the Government, it remains to ascertain the purpose and legal effect of the withdrawal order of April 7, 1911, which was within such intervening time.

The general situation shows that vast areas of land in New Mexico were thought to contain valuable deposits of coal. To preserve these values from improper or inadvertent appropriation under agricultural land laws, they were withdrawn, not in detail, but by blanket orders for examination as to coal values. The section here in con-

troversy being a surveyed section, the withdrawal constituted as to it a contest or Government proceeding against the State, it being of the numbered sections prescribed in its grant and therefore *prima facie* its property. *George G. Frandsen* (50 L. D. 516). That contest was not an adversary one in the legal sense. It was an inquiry to determine whether such mineral values existed in the land as took it out of the State's grant and the State was assisting in that inquiry rather than defending its title. The State did not claim the land unless it was nonmineral and both parties to the inquiry were interested in a determination of that fact only.

There was no purpose, therefore, on the part of the Government to withdraw these lands except as an aid to administration and as to the tract in question to ascertain whether it was of the character granted to the State. Under these circumstances to say that there was another or ulterior purpose to reserve it for the use of the Government would be the equivalent of saying that a grant which would otherwise have attached at the date of the State's admission into the Union may legally be defeated by administrative steps taken to ascertain whether or not it did attach, and further, that while such inquiry is presumably being had, and before the ascertainment of the fact for which it was instituted, a valid withdrawal of the land may be made in behalf of the reclamation service for purposes wholly unrelated to the inquiry and in violation of the compact between the State and the United States binding the public faith "and dependent for execution upon the political authorities." *Cooper* v. *Roberts* (18 How. 173). This, too, in the face of the plain provision of section 3 of said act of June 17, 1902, that the Secretary of the Interior may withdraw lands required for irrigation works from public entry only. Whatever else may be true, these lands were already withdrawn from entry.

The withdrawal of April 7, 1911, was authorized by the act of June 25, 1910 (36 Stat. 847), and purports to have been made under that act. The authorization was to "temporarily" withdraw any of the public lands of the United States from settlement, location, sale, or entry, and reserve the same for public purposes to be specified in the order of withdrawal, and the public purpose here specified was, as has been seen "examination and classification" as to coal values. There is then no uncertainty of purpose. The facts considered, that purpose may be shortly stated as an intention to prevent the unauthorized appropriation of public lands of the United States valuable for coal, and to ascertain whether the section here involved was of the character granted to the State of New Mexico. This being so, there was not and could not have been a purpose to defeat a grant expressly provided for if the lands were not of the character which defeated its attachment.

In this view it will not be necessary to notice at length certain questions raised on this record, *aliunde*, particularly as to the right of the State to select indemnity for this tract, under the provisions of the act of February 28, 1891 (26 Stat. 796), amending said sections 2275 and 2276, Revised Statutes. This is an adventitious suggestion of no value on the merits of this case. It will be enough to say of it that at best the State never had more than an option to take indemnity or to await the extinguishment of the withdrawal of 1911 and come into the full enjoyment of the land in place. See *United States* v. *Thomas* (151 U. S. 577, 583–584), and *Territory of New Mexico* (29 L. D. 364; 34 L. D. 599). It has not at any time been requested nor has it shown any disposition to resort to its lieu land right, if it had one. Now the land has been determined to have been of the character granted, and the suspension has been removed, so that even if it desired to select indemnity therefor it could not be permitted to do so under any law. *Joseph C. Bringhurst* (50 L. D. 628). The title of the United States to the land involved at the time of the purported withdrawal for reclamation purposes was not such as will support that withdrawal.

The decision appealed from is

Affirmed.

PROCEDURE UPON NONMINERAL APPLICATIONS FILED SUBSEQUENT TO APPLICATIONS FOR PROSPECTING PERMITS AND LEASES—CIRCULAR NO. 1021 (51 L. D. 167), MODIFIED

INSTRUCTIONS

[Circular No. 1136]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 20, 1927.

REGISTERS, UNITED STATES LAND OFFICES:

Paragraph 5 of instructions of July 21, 1925, Circular No. 1021 (51 L. D. 167), which reads as follows:

> 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

is hereby modified as to the desert-land applications in conflict with applications for prospecting permits or permits granted. In the case of such applications, you will proceed in accordance with the instructions preceding paragraph 5 of said Circular No. 1021, and if all requirements shall have been satisfactorily complied with, you

will refer the applications to the division inspector as directed by section 13 of the desert-land regulations, Circular No. 474 (50 L. D. 443, 450).

Paragraph 6 of said Circular No. 1021 is hereby amended to read as follows:

(*a*) Homestead applications in which priority is claimed by reason of prior settlement and desert-land applications where preference rights are claimed under the act of March 28, 1908 (35 Stat. 52) over mineral claimants having prior applications for the land, and

(*b*) Homestead applications (except stock-raising applications) and desert-land applications, which conflict in part only with prior applications for oil and gas prospecting permits, or permits granted.

WILLIAM SPRY,
Commissioner.

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

JEAN ALLING

Decided December 27, 1927

OIL AND GAS LANDS—PROSPECTING PERMIT—CITIZENSHIP—MINORS.

Persons under 21 years of age are not qualified to take oil and gas prospecting permits under the act of February 25, 1920, notwithstanding that they are native-born citizens of the United States.

FINNEY, *First Assistant Secretary:*

This is an appeal by Jean Alling from a decision by the Commissioner of the General Land Office, dated August 27, 1927, rejecting her oil and gas prospecting permit application for certain land in the State of California for the reason that she was only 17 years and 10 months of age at the time of filing and was therefore held not to be a qualified applicant.

The appellant's attorney says:

The Congress of the United States has by its legislative enactments long recognized the rights of minors to initiate claims and acquire title to public lands, and the right to develop and hold lands known or believed to be more valuable for the minerals therein contained than for other purposes. In the laws passed by that body for the disposition of the public lands it has been specific in fixing the minimum age limit of applicants when believed to be necessary, has in certain cases modified such requirement in the interest of justice, and has recognized the right of minors to develop and acquire mineral lands.

The attorney cites a decision by the Supreme Court of the State of California to the effect that minors are qualified to locate mining claims and states that the general leasing act of February 25, 1920,

is, and was intended to be, the legitimate successor of the placer mining law as to some minerals, including oil and gas.

By the fourteenth amendment to the Constitution of the United States—

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

In the first section of the leasing act provision is made that certain mineral deposits shall be subject to disposition in the form and manner provided by said act "to citizens of the United States." Does that mean that permits and leases must be granted to native-born citizens of the United States regardless of age?

The act of March 3, 1877 (19 Stat. 377), provides "that it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who had filed his declaration to become such'" to make a desert-land entry. This is not affected by any supplemental or amendatory legislation.

In a decision (unreported) of March 31, 1905, in the case of Lena M. Lewis the Commissioner of the General Land Office held that a native-born citizen under 21 years of age was not qualified to make a desert-land entry. That decision became final.

In its regulations of November 30, 1908 (37 L. D. 312), under the desert-land laws this department prescribed that—

> Any citizen of the United States, twenty-one years of age, or any person of that age who has declared his intention of becoming a citizen of the United States, * * *, can make a desert-land entry.

This has remained unchanged. (Circular No. 474; 45 L. D. 345, 346; 50 L. D. 443, 444.)

The timber and stone act of June 3, 1878 (20 Stat. 89), provides that certain public lands, valuable chiefly for timber, "may be sold to citizens of the United States, or persons who have declared their intention to become such."

On January 12, 1883, the Commissioner of the General Land Office instructed the register and receiver at Olympia, Washington, to reject all timber and stone applications by minors. *Luther Mann* (2 L. D. 332).

The following is found in the timber and stone regulations of November 30, 1908 (37 L. D. 289):

> One timber and stone entry may be made for not more than 160 acres by any person who is a citizen of the United States, or who has declared his intention to become such citizen, if he is not under 21 years of age, * * *.

See also Circular No. 851 (49 L. D. 288; 51 L. D. 365).

The department is of the opinion that an oil and gas prospecting permit may properly be considered a contract between the Govern-

ment and the permittee. However that may be, it is clear that an oil and gas lease is a contract between the Government and the lessee. And permits are merely preliminary to leases.

Under section 25 of the Civil Code of California "minors are: 1. Males under twenty-one years of age; 2. Females under eighteen years of age." This has been amended, effective July 29, 1927, so that "minors are all persons under twenty-one years of age." Statutes and Amendments to the Codes, California, 1927. Ch. 661, p. 1119.

Section 33 of the Civil Code of California reads as follows:

> A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control. Civil Code of California, Deering, 1915.

> In short the modern doctrine is to the effect that, except as to a narrowly limited class of contracts which are valid and binding upon him, an infant's contracts are voidable, but not void. * * * In accordance with the general principle just stated, a deed of land executed by an infant grantor is voidable only, and operates to transfer title which continues in the grantee or those who take title under him until divested by some act of the grantor. 14 R. C. L. 223, 225.

The department is of the opinion that native-born citizens of the United States under 21 years of age are not qualified to take oil and gas prospecting permits, for the reason that they are not capable of entering into binding contracts generally, and for the further reason that some qualification as to age is necessary. It would be absurd to believe that it was the intention of Congress that permits and leases should be issued to children of tender years. The constructions given to the desert-land and timber and stone acts by this department have remained unchallenged for many years and it must be assumed that Congress was well aware thereof when the general leasing act was passed.

It is true that a contrary construction has been given to the mining law. In section 2319, Revised Statutes, it is provided that "all valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase * * * by citizens of the United States and those who have declared their intention to become such."

In an early California case, *Thompson* v. *Spray* (72 Cal. 531, 14 Pac. 182), which has been cited by the appellant's attorney, it was held that minors who were citizens of the United States could make mining locations. On this subject Lindley says:

> Minors born in the United States are citizens, and may locate mining claims. There is no requirement in the general mining laws that the citizen shall be of any particular age. To say that minors are not qualified is to say that they are not citizens. The conclusion is strengthened by the circumstance that in some instances the statutes expressly require that the citizen shall be of a

particular age before he may acquire certain classes of public lands. Thus, in reference to coal lands, the provision is, that every person above the age of twenty-one years who is a citizen of the United States may enter such lands. A similar provision exists as to homesteads under the federal laws. The expression of a requirement as to age in some instances, and the omission of it in others, is significant. It is quite true that minors may not transmit title during infancy with the same freedom as adults. During this minority they are incapacitated from entering into binding contracts, except for necessaries, and, generally speaking, may act only through guardians, under the supervision of the courts. But this circumstance does not prevent them from acquiring property. Lindley on Mines, third ed., sec. 225.

But there is a wide difference between the mining laws on one hand and the desert-land, timber and stone, and general leasing laws on the other. Under the mining laws a person is not limited as to the number of claims he may locate, and he can make locations in the names of his minor children. In the California case cited a father had made some of his minor children colocators with himself. But under the desert-land act and the timber and stone act a person is limited to one entry. And under the leasing law there is a definite limitation as to the total area which may be held by one person under permits and leases. If minors should be considered qualified to take permits or leases they would probably in most cases appear through their parents as guardians. In the present case, the appellant has had her father appointed guardian of her person and estate. It was a case of a drawing under Circular No. 929 (50 L. D. 387) and the indications are that the appellant's father and mother were also applicants for the land involved.

The decision appealed from is

Affirmed.

LEASING OF LANDS IN ALASKA FOR GRAZING LIVESTOCK

REGULATIONS

[Circular No. 1138]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 7, 1928.

REGISTER AND DIVISION INSPECTOR, ANCHORAGE, ALASKA;
REGISTERS AND RECEIVERS, NOME AND FAIRBANKS, ALASKA;
DISTRICT SUPERINTENDENTS, BUREAU OF EDUCATION:

The following instructions are issued under the act of Congress approved March 4, 1927 (44 Stat. 1452), entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon."

1. The Secretary of the Interior is authorized, on application or otherwise, to create grazing districts upon any public lands in Alaska, surveyed or unsurveyed, outside of the Aleutian Islands Reservation, national forests, and other reservations administered by the Secretary of Agriculture and outside of national parks and monuments, and to lease the grazing privileges therein.

(a) Leases will not be granted for areas which embrace the natural grazing grounds or routes of migration of wild animals, such as caribou and moose, it being the policy to retain such areas intact for the benefit of wild life and for the natives to subsist thereon, and to prevent the interbreeding of reindeer with wild animals.

(b) Any grazing district may be enlarged or diminished, for any sufficient reason, subject to existing rights of any lessee.

2. Notice of intention to establish a grazing district will be published once a week for six consecutive weeks in a newspaper of general circulation in the judicial division in which the proposed district is to be established. The notice will describe the boundaries of the proposed district and give the date on which the district will be established. On or prior to the date announced in the published notice, any person may file objections to the proposed action.

3. After the establishment of a grazing district, applications for leasing the same may be filed, in triplicate, in the proper district land office.

(a) Applications for leases for reindeer grazing areas by natives or associations of natives may be filed through a district superintendent of schools, a supervisor of reindeer, or other responsible official of the Bureau of Education.

(b) After a serial number has been assigned by the register to an application for lease, one copy will be forwarded to the Commissioner of the General Land Office and one to the division inspector at Anchorage, Alaska, each copy to be accompanied by a status report. If the application is for reindeer grazing, a copy should be filed in the office of the district superintendent.

(c) Applications for leases must conform substantially to the appended form (4–469).[1]

4. When a copy of an application for lease is received by the division inspector, he will cause an investigation to be made, except where such investigation has already been made by a representative of the Bureau of Education, and report to the Commissioner of the General Land Office as to the livestock to be grazed on the land; as to the improvements, if any, existing thereon; as to their use and occupancy; and as to the feasibility of granting a lease.

(a) Every application for the leasing of a reindeer grazing area, when transmitted by the register of the district land office to the

[1] Form (4–469) omitted.

division inspector, will be accompanied by a report or concurrence in a prior report, in duplicate, by an official of the Bureau of Education designated by the Commissioner of Education.

5. The Secretary of the Interior may temporarily close portions of a leased area to grazing whenever, because of incorrect handling of the stock, over grazing, fire, or other cause such action is necessary to restore the range to its normal condition. This temporary closing will not operate to exclude such lands from the boundaries of a lease.

6. The Secretary may prescribe the maximum number of stock which may be grazed on a particular area, this maximum number to be fixed on the condition of the range and its accessibility to summer and winter feeding, with the right to reduce the maximum number of stock grazed whenever permanent damage to the range is liable to result, and to increase the number whenever it is possible to do so without injury to the range.

7. The Secretary may reduce the leased area if it is excessive for the number of stock owned by the lessee.

8. The Secretary may exclude stock from a specified area whenever it is determined that such area is required for the protection of camping places, sources furnishing drinking water to communities, roads and trails, town sites, mining claims, and for feeding grounds near villages for the use of draft animals or near the slaughtering or shipping points for use of stock to be marketed, and for reasonable native berrying grounds.

9. "Natives" as mentioned in section 6 of the act is defined as meaning members of the aboriginal races inhabiting Alaska, of whole or mixed blood.

(a) "Other occupants of the range" is defined as meaning persons occupying the range on March 4, 1927, and the area regarded as occupied by this class will be limited in the case of homesteaders or other claimants under public land laws to the area actually used or occupied on that date.

(b) "Settlers" will be regarded as those persons who have established and maintained a bona fide residence within or adjacent to a grazing district either before or after March 4, 1927.

10. Preference will not be granted according to the classes listed under section 6 of the act where to do so would oust others who have been grazing the land applied for, if it is determined that such other persons should be protected.

11. Any person claiming a preference right to a lease must fully state the facts, by affidavit duly corroborated, on which such claim is made.

12. If an application for a lease is filed in the name of a corporation, the applicant must be prepared to furnish such evidence of the creation of the corporation as the Secretary may require.

13. If the land for which a lease is desired is surveyed, it must be described by legal subdivision. If the land is unsurveyed, it may be shown by a map drawn to appropriate scale, showing the land in relation to rivers, creeks, mountains, mountain peaks, towns, islands, or other prominent topographic features or natural objects, with the approximate latitude and longitude of at least one point on the boundary.

14. Leases will be granted for grazing on a definite area, except where local conditions or the administration of the grazing privileges makes more practicable a lease based on the number of stock to be grazed.

15. Unless otherwise provided, each lessee shall pay to the proper district land office such annual rental, per head or per acre, as may be determined is a fair compensation to be charged for the grazing of livestock on the leased land, the compensation to be fixed with due regard to the general economic value of the grazing privilege. The date for making the annual payment will be specified in the lease.

(a) If the rental is to be paid according to the number of animals grazed, no charge will be made for animals under one year of age at the time of entering on the leased area, provided they are the natural increase of the stock upon which fees are paid.

16. Proposed assignments, in whole or in part, of a lease must be submitted to the Secretary for approval, and must be accompanied by the same showing as is required of applicants for a lease.

17. When it appears necessary for stock to regularly cross any portion of an established grazing district, and undue injury to other interests will not result, suitable driveways may be established. Such driveways will be as short and as easy of passage and access as the character of the country and the protection of other interests will permit. They will be established with care for the interests of lessees using adjoining ranges. Where driveways are reserved along well-defined routes which must be traveled, all grazing on these areas will be prohibited except by stock in transit.

(a) It is absolutely essential that persons driving or transporting stock from one point to another comply with the quarantine regulations prescribed by the territorial or other proper authorities, and unless they do so the privilege may be denied them. The condition of the stock as to contagious or infectious diseases will be determined by the proper Federal or territorial authorities.

18. Crossing permits will ordinarily not be required when the period for crossing is short, when the stock will be driven along a public highway and will not be grazed upon the leased land, or when such crossing will not interfere with the grazing district administration or other related interests.

(a) Free crossing permits will be issued by the division inspector when good grazing administration or the protection of other related interests do not make the issuance of such permits objectionable. Applicants for crossing privileges must make their applications to the division inspector, or such other officer as he may designate, sufficiently in advance of the date when such privilege is to begin to enable the proper officer to handle the details of the business and to give such sufficient notice of the proposed drive to the lessee that he will be able to remove his animals from the line of the drive if he so desires. The application must show the number of stock to be driven, the date of starting, and the approximate period required for crossing.

(b) Applications for crossing permits may be made either in person or by letter, and permits may be issued to either the owner or persons in charge of the stock.

(c) If the land to be crossed is uninclosed and the lessee does not desire to waive the right to its exclusive use, the stock must be so handled that the animals will not intrude upon the adjoining grazing areas.

(d) If a shipping point within a grazing district is the only one reasonably accessible to persons grazing stock outside that grazing district, crossing privileges may be allowed under such restrictions as are necessary to protect the interests of the lessee.

19. Any person, including prospectors and miners, may graze, free of charge, not more than 10 animals upon any land included within any grazing district upon applying to the division inspector, in person or by letter, stating the number and kind of stock to be thus grazed and the approximate time such grazing will be continued.

20. Any Eskimo or other native or half-breed, or association thereof, may apply for a grazing allotment on unallotted public lands, and the same lease shall be issued to him or them as to other persons, except that no annual rental will be charged for such lease. Such applicant must show by a corroborated statement that the applicant is an Eskimo or other native or half-breed, or an association thereof, and entitled to such lease without charge.

21. When such Eskimo, native, or half-breed grazes his livestock, through cooperative agreement, on an allotment held by other lessees or permittees, any grazing fee charged for said land on the basis of acreage will be reduced in proportion to the relative number of such native-owned livestock to the total number on said allotment.

22. Whenever any livestock association, whose membership includes a majority of the lessees or permittees owning any class of livestock using a range district unit or allotment, shall select a committee, an agreement on the part of which shall be binding on the

association, such committee, upon application to the Secretary, may be recognized as an advisory board for the association. Such advisory board shall then be entitled to receive notice of proposed action and have an opportunity to be heard by the local representative of the Secretary in reference to increase or decrease in the number of stock to be allowed for any year, the division of the range between owners, or the adoption of rules to meet local conditions.

(a) When an association represents only a minority of the lessees or permittees owning any class of livestock, but its members own 75 per cent of that class of livestock using the range, its advisory board may be recognized upon petition of a sufficient number of other owners to constitute a majority of all the grazing lessees or permittees affected.

(b) Upon request form, and with the approval of, an officially recognized advisory board, the Secretary may adopt special rules to regulate the use and occupancy of the range and to prevent damage to the range areas, under rules to be binding upon and observed by all lessees or permittees grazing stock within the range involved. Such conditions as may be necessary may be imposed upon the handling of permitted stock, the employment of herders to confine the stock to the allotted ranges, the distribution of salt, the enforcement of territorial livestock laws, and the construction of permanent improvements to protect the range or facilitate the handling of stock.

23. All conditions contained in the prescribed form (4–470)[1] of lease, but not otherwise mentioned in these regulations, will be considered as a part hereof.

THOS. C. HAVELL,
Acting Commissioner.

I concur:
JNO. J. TIGERT,
Commissioner of Education.

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

An Act To provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon.

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

DECLARATION OF POLICY

SECTION 1. It is hereby declared to be the policy of Congress in promoting the conservation of the natural resources of Alaska to provide for the protection and development of forage plants and for the beneficial utilization thereof for

[1] Form (4–470) omitted.

grazing by livestock under such regulations as may be considered necessary and consistent with the purposes and provisions of this Act. In effectuating this policy the use of these lands for grazing shall be subordinated (a) to the development of their mineral resources, (b) to the protection, development, and utilization of their forests, (c) to the protection, development, and utilization of their water resources, (d) to their use for agriculture, and (e) to the protection, development, and utilization of such other resources as may be of greater benefit to the public.

DEFINITIONS

SEC. 2. As used in this Act—

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "district" means any grazing district established under the provisions of this Act.

(3) The term "Secretary" means the Secretary of the Interior.

(4) The term "lessee" means the holder of any lease.

GRAZING DISTRICTS

SEC. 3. (a) The Secretary may establish grazing districts upon any public lands outside of the Aleutian Islands Reservation, national forests, and other reservations administered by the Secretary of Agriculture and outside of national parks and monuments which, in his opinion, are valuable for the grazing of livestock. Such districts may include such areas of surveyed and unsurveyed lands as he determines may be conveniently administered as a unit, even if such areas are neither contiguous nor adjacent.

(b) The Secretary, after the establishment of a district, is authorized to lease the grazing privileges therein in accordance with the provisions of this title.

ALTERATION OF GRAZING DISTRICTS

SEC. 4. After any district is established the area embraced therein may be altered in any of the following ways:

(1) The Secretary may add to such districts any public lands which, in his opinion, should be made a part of the district.

(2) The Secretary, subject to existing rights of any lessee, may exclude from such district any lands which he determines are no longer valuable for grazing purposes or are more valuable for other purposes.

(3) The Secretary may enter into cooperative agreement with any person, in respect of the administration, as a part of a district, of lands owned by such person which are contiguous or adjacent to such district or any part thereof.

NOTICE OF ESTABLISHMENT OF GRAZING DISTRICT

SEC. 5. Before establishing a district the Secretary shall publish once a week for a period of six consecutive weeks in a newspaper of general circulation in each judicial division in which the proposed district is to be established, a notice describing the boundaries of the proposed district and announcing the date on which he proposes to establish the district.

PREFERENCES

SEC. 6. In considering applications to lease grazing privileges the Secretary shall, as far as is consistent with the efficient administration of the grazing

district, prefer (1) natives, (2) other occupants of the range, and (3) settlers over all other applicants.

TERMS AND CONDITIONS OF LEASES

SEC. 7. (a) All leases shall be made by the Secretary for a term of 20 years except where the Secretary determines the land may be required for other than grazing purposes within the period of 10 years; or where the applicant desires a shorter term, and in such cases leases may be made for a shorter term.

(b) Leases shall be made for grazing on a definite area except where local conditions or the administration of grazing privileges makes more practicable a lease based on the number of stock to be grazed.

(c) Each lease shall provide that the lessee may surrender his lease, and, if he has complied with the terms and conditions for the lease to the time of surrender, may avoid further liability for fees thereunder by giving written notice to the Secretary of such surrender. The lease shall specify the length of time of notice, which shall not exceed one year.

GRAZING FEES

SEC. 8. (a) The Secretary shall determine for each lease the grazing fee to be paid. Such fee shall—

(1) Be fixed on the basis of the area leased or on the basis of the number and kind of stock permitted to be grazed;

(2) Be fixed, for the period of the lease, as a seasonal or annual fee, payable annually or semiannually on the dates specified in the lease;

(3) Be fixed with due regard to the general economic value of the grazing privileges, and in no case shall exceed such value; and

(4) Be moderate.

(b) If the Secretary determines such action to be for the public interest by reason of (1) depletion or destruction of the range by any cause beyond the control of the lessee, or (2) calamity or disease causing wholesale destruction of or injury to livestock, he may grant an extension of time for making payment of any grazing fee under any lease, reduce the amount of any such payment, or release or discharge the lessee from making such payment.

DISPOSITIONS OF RECEIPTS

SEC. 9. All moneys received during any fiscal year on account of such fees in excess of the actual cost of administration of this Act shall be paid at the end thereof by the Secretary of the Treasury to the Territory of Alaska, to be expended in such manner as the Legislature of the Territory may direct for the benefit of public education and roads.

ASSIGNMENT OF LEASES

SEC. 10. The lessee may, with the approval of the Secretary, assign in whole or in part any lease, and to the extent of such assignment be relieved from any liability in respect of such lease, accruing subsequent to the effective date of such assignment.

IMPROVEMENTS

SEC. 11. (a) The Secretary may authorize a lessee to construct and/or maintain and utilize upon any area included within the provisions of his lease any

fence, building, corral, reservoir, well, or other improvements needed for the exercise of the grazing privileges of the lessee within such area; but any such fence shall be constructed as to permit the ingress and egress of miners, prospectors for minerals, and other persons entitled to enter such area for lawful purposes.

(b) The lessee shall be given ninety days from the date of termination of his lease for any cause to remove from the area included within the provisions of his lease any fence, building, corral, or other removable range improvement owned or controlled by him.

(c) If such lessee notifies the Secretary on or before the termination of his lease of his determination to leave on the land any improvements the construction or maintenance of which has been authorized by the Secretary, no other person shall use or occupy under any grazing lease, or entry under any public land law, the land on which any such improvements are located until there has been paid to the person entitled thereto the value of such improvements as determined by the Secretary.

PENALTIES

SEC. 12. Within one year from the date of the establishment of any district the Secretary shall give notice by publication in one or more newspapers of general circulation in each judicial division in which such district or any part thereof is located that after the date specified in such notice it shall be unlawful for any person to graze any class of livestock on lands in such district except under authority of a lease made or permission granted by the Secretary; and any person who willfuly grazes livestock on such lands after such date and without such authority shall, upon conviction, be punished by a fine of not more than $500.

STOCK DRIVEWAYS AND FREE GRAZING

SEC. 13. (a) The Secretary may establish and maintain, and regulate the use of, stock driveways in districts and may charge a fee for or permit the free use of such driveways.

(b) The Secretary may permit any person, including prospectors and miners, to graze free of charge a small number of livestock upon any land included within any grazing district.

(c) The Secretary may in his discretion grant a permit or lease for a grazing allotment without charge on unallotted public lands to any Eskimo or other native or half-breed. Whenever such native or half-breed grazes his livestock through cooperative agreement on allotment held by other lessee or permittee, any grazing fees charged for said allotment shall be reduced in proportion to the relative number of such native owned livestock to the total number on said allotment.

HEARING AND APPEALS

SEC. 14. Any lessee of or applicant for grazing privileges, including any person described in subdivision (c) of section 13, may procure a review of any action or decision of any officer or employee of the Interior Department in respect of such privileges, by filing with the register of the local land office an application for a hearing, stating the nature of the action or decision complained of and the grounds of complaint. Upon the filing of any such application the register of such land office shall proceed to review such action or decision as nearly as may be in accordance with the rules of practice then applicable to applications to contest entries under the public land law. Subject to such rules of practice,

appeals may be taken by any party in interest from the decision of the register to the Commissioner of the General Land Office, and from the decision of the Commissioner of the General Land Office to the Secretary.

ADMINISTRATION

SEC. 15. (a) The Secretary shall promulgate all rules and regulations necessary to the administration of this title, shall execute its provisions, and may (1) in accordance with the civil service laws appoint such employees and in accordance with the Classification Act of 1923 fix their compensation, and (2) make such expenditures (including expenditures for personal service and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary efficiently to execute the provisions of this title.

(b) The Secretary of Agriculture is authorized to continue investigations, experiments, and demonstrations for the welfare, improvement, and increase of the reindeer industry in Alaska, and upon the request of the Secretary of the Interior to cooperate in matters pertaining to the care of plant and animal life, including reindeer.

LAWS APPLICABLE

SEC. 16. Laws now applicable to lands or resources in the Territory of Alaska shall continue in force and effect to the same extent and in the same manner after the enactment of this Act as before, and nothing in this Act shall preclude or prevent ingress or egress upon the lands in districts for any purpose authorized by any such law, including prospecting for and extraction of minerals.

Approved, March 4, 1927 (44 Stat. 1452).

RIGHT OF LAND-GRANT RAILROAD COMPANIES TO LIST LESS THAN A LEGAL SUBDIVISION—CIRCULAR NO. 1077 (51 L. D. 487), SUPPLEMENTED

INSTRUCTIONS

[Circular No. 1139]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 9, 1928.

REGISTERS, UNITED STATES LAND OFFICES;
DIVISION INSPECTORS, INTERIOR DEPARTMENT:

As supplemental to Circular No. 1077 of July 9, 1926 (51 L. D. 487), the following instructions will be followed in making examination in the field and in connection with hearings as to railroad lands, within primary limits:

In examining in the field, the smallest subdivision or unit that should be recognized is that aliquot part of a quarter-quarter (40-acre subdivision) having an area of 10 acres, or multiple thereof. A quarter-quarter, say NE. ¼ NE. ¼ should be divided as follows:

NE. ¼ NE. ¼ NE. ¼, NW. ¼ NE. ¼ NE. ¼, SE. ¼ NE. ¼ NE. ¼, SW. ¼ NE. ¼ NE. ¼, or any combination of such minor subdivisions, for instance N. ½ NE. ¼ NE. ¼, but not of parts thereof, this because of the amount of survey work that will be required of the inspector to secure the identification of the lands involved as a prerequisite to their classification. This same method should govern the register or other official when ordering a hearing to determine the character of land listed by the railroad. In serving notice of mineral charges the company should be advised in the manner heretofore followed and, in addition, should be informed that it may deny or admit the character of the entire unit (quarter-quarter-quarter) or multiples, or that in the event it should desire to deny or admit the charge as to a part only of such a unit, such fact should be set out in its answer, accompanied by a request for a survey of the area in dispute, one-half of the cost of such survey to be borne by the company (departmental decision of December 13, 1927, *Central Pacific Railway Company*, 52 L. D. 235. In case of a denial in part, this office should be advised and action should then be suspended awaiting such survey and further instructions as to proceeding with the case. If the denial goes to the whole unit, the case may be proceeded with in the manner heretofore followed.

The same rule will apply when a division of a lot or fractional subdivision is involved, i. e., the rectangular system of public land surveys may be extended a step further into such lot or fractional subdivision, so as to break it up into its component parts, under such system of survey; but if the area, the character of which is denied by the company, is of a form other than that consequent upon the usual subdivision by platting into quarter-quarter-quarter sections, or corresponding fractional units, then a survey by metes and bounds will be necessary, the same to be paid for in accordance with departmental decision of December 13, 1927, heretofore referred to.

In making investigations, the inspector should bear in mind the possibility of a segregation survey being requested and in reporting give detailed information as to the location or place where the mineral is, etc., as far as practicable without extra trouble or expense.

As to indemnity lands, there is no occasion to modify Circular No. 1077 of July 9, 1926 (51 L. D. 487).

These instructions are issued with a view to determining the mineral character of the lands with a minimum of trouble and expense to all parties.

THOS. C. HAVELL,
Acting Commissioner.

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

RULE FOR MONUMENTING CORNERS OF TRACTS INCLUDED WITHIN OIL AND GAS PROSPECTING PERMITS

Opinion, January 18, 1928

OIL AND GAS LANDS—PROSPECTING PERMIT—SURVEY—BOUNDARIES.

Survey monuments that are plainly visible on the ground may be adopted by an oil and gas prospecting permittee as the "substantial monuments" at the corners of his permitted lands in fulfillment of the requirement in section 13 of the leasing act, but if any survey monument be missing or if his corner or corners shall be at points which are not corners for survey monuments, he must place a substantial monument at each corner where no survey monument is found.

OIL AND GAS LANDS—PROSPECTING PERMIT—BOUNDARIES—NOTICE.

Where an oil and gas prospecting permit is for incontiguous tracts, each corner of each tract must be monumented, and in addition a notice as required by section 13 of the leasing act must be posted on each incontiguous tract.

OIL AND GAS LANDS—PROSPECTING PERMIT—BOUNDARIES—NOTICE.

Section 13 of the leasing act does not specifically provide that the monuments to be placed at the corners of permitted lands shall bear any inscription or mark of identification which could lead to other monuments, or to the posted notice, and the department has not by rules or regulations prescribed what shall be considered "substantial monuments."

FINNEY, *First Assistant Secretary:*

I have your [Messrs. Consaul and Heltman] letter of January 11, 1928, in which you ask

> * * * Whether under the practice of the Interior Department, a reasonable construction of Section 13 of the act of February 25, 1920 (41 Stat. 437), and paragraph 1 of the prospecting permits issued under said section, require that a permittee stake or monument the corners of lands covered by his permit when such lands are surveyed lands included in the public subdivisional surveys.

You refer to two opinions of the department, hereinafter cited and construed, regarding the monumenting of and posting notices upon incontiguous tracts embraced in permits and permit applications, and suggest that "where an oil or gas permit describes the land embraced therein by legal subdivisions of the public survey and one or more of the survey monuments are 'plainly visible on the ground' no further marking is necessary within the reasonable meaning of the statute."

It is provided in section 13 of the leasing act—

> The applicant shall, within 90 days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby.

This requirement is applicable to every permit, so that it does not make any distinction between permits for surveyed lands and those for unsurveyed lands.

In an unpublished letter opinion dated August 19, 1924 (M. 13441), the department said—

> I note your inquiry whether a permittee whose permit covers ten incontiguous tracts is required to mark the corners of each tract or may by erecting monuments at the four corners which constitute the most remote points of the group of tracts, meet the requirement of section 1 of the permit.
>
> The requirement that a permittee mark the boundaries of his permit and post notice that a permit has been granted for such an area is made in section 13 of the leasing act, and its evident object is to insure that persons seeking areas suitable for prospecting may be notified of the appropriation of the land. The department has construed the act as authorizing the issuance of permits for incontiguous tracts within a general area of six miles square. It is clear that four monuments placed at the outermost corners of a group of tracts scattered over such an enlarged area, or one much smaller, would be wholly inadequate to serve as notice to all persons viewing the lands of their prior disposal. The act and the permits are worded to deal with single tracts, but the department must require such monumenting and marking of boundaries of incontiguous tracts as will accomplish the plain purpose of the act in that respect. In cases where the lands are surveyed and survey monuments are plainly visible on the ground, the erection of notices upon each tract, with a description of the land, will meet the requirements of the act and the permit. In other cases notices must be posted and the corners of each tract must be marked.

In the case of *Chilcote and Smith* (50 L. D. 690), the department held (syllabus):

> Where a single application for an oil and gas prospecting permit is for incontiguous tracts, the erection of a notice upon each tract with a description of the land is required to fulfill the provision of section 13 of the act of February 25, 1920, if the lands be surveyed, but, if unsurveyed, the corners of each tract must be monumented.

This syllabus is not an accurate statement of the rule laid down in said case. What the department held was, in substance this: Where a single application for an oil and gas prospecting permit is for incontiguous tracts, the erection of a notice upon each tract, with a description of the land, is required to fulfill the provision of section 13 of the act of February 25, 1920, if the land be surveyed *and survey monuments are plainly visible on the ground;* but, if unsurveyed, the corners of each tract must be monumented, *in addition to the notice required by said section 13 to be erected upon each tract.*

It is probable that the requirement in question was taken from the mining laws. Section 2324 of the Revised Statutes provides that a lode mining claim "must be distinctly marked on the ground so that its boundaries can be readily traced." Section 2329, Revised Statutes, provides that placer claims—

shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

In the case of *Reins* v. *Murray* (22 L. D. 409, 411), the department expressed itself as follows:

> The "like circumstances and conditions" referred to in this section (2329, *supra*) clearly apply only to discovery, location, and, where the location is made on unsurveyed lands, marking the boundaries of the same as of a lode claim, and for the same purpose, as defined above. It does not, in my judgment, mean that when the placer is located on surveyed lands, it is necessary to mark the boundaries. There is no purpose that can be subserved by so doing. The public surveys are as permanent and fixed as anything can be in that line, and any fractional part of a section can be readily found and its boundaries ascertained by that method for all time to come, and is necessarily more stable and enduring than marking it by perishable or destructible stakes or monuments.
>
> By section 2330 "legal subdivisions of forty acres may be subdivided into ten acre tracts," and section 2331 provides that, where the placer claims "conform to legal subdivisions, no further survey or plat shall be required." It seems to me, therefore, that it is clearly the intention of the statute that the location of placer claims by legal subdivisions makes the marking of the boundaries an idle ceremony that is not contemplated by the law.

It must be assumed that Congress was fully aware of this opinion by the department, as well as of the fact that most of the public lands in the different States have been surveyed. Nevertheless, as we have noted, the statutory requirement under discussion can not be construed as being applicable only to unsurveyed lands.

It will be noted that it is not specifically provided in section 13 of the leasing act, or elsewhere, that the monuments to be placed at the corners of permitted lands shall bear any inscription or mark of identification which could lead to other monuments, or the posted notice, or which would contain full information in itself. And the department has not, by regulation or ruling, prescribed what shall be considered "substantial monuments."

Under these conditions a person on the ground seeking areas suitable for prospecting does not obtain more definite information from finding a permittee's stake or monument than from finding a Government survey monument. He can not determine from the monument what land is permitted, nor where to look for other monuments or any posted notice. He needs to know from the posted notice, or notices, or from the records of the land office, what lands are permitted, and then he should be able to trace the boundaries of the permitted lands by means of the monuments found at the corners thereof. In this view a survey monument is a notice as effective and sufficient as a permittee's monument.

The department is of the opinion that a permittee may adopt survey monuments plainly visible on the ground as the "substantial

monuments" required at the corners of his permitted Lands. But he must have a monument at each corner. If there are incontiguous tracts in a permit, each corner of each tract must be monumented, and in addition a notice as required must be posted on each incontiguous tract.

Survey monuments are placed at the corners of sections, and at the quarter corners on the outer lines thereof. It may thus happen that a permittee will merely be required to ascertain that survey monuments are on the ground, without necessity of placing any monument of his own. But if any survey monument shall be missing or if his corner or corners shall be at points which are not corners for survey monuments, he will be required to place a substantial monument at each corner where no survey monument is found.

To illustrate: A permit is granted for the S. ½ Sec. 1, S. ½ Sec. 2, all of Secs. 11 and 12, N. ½ Sec. 13, and N. ½ Sec. 14, in a surveyed township. If all the survey monuments are on the ground as set by the surveyors, at the corners of the tract described, the permittee will not be under obligation to place a monument at any corner. Another permit is granted for the SW. ¼ Sec. 3, S. ½ Sec. 4, SE. ¼ Sec. 5, E. ½ Sec. 8, all of Sec. 9, W. ½ Sec. 10, NW. ¼ Sec. 15, N. ½ Sec. 16, NE. ¼ Sec. 17 of the same township. Although every survey monument is found where it belongs within and surrounding this tract, no corner is one of a survey monument, and the permittee will be required to place a monument at each corner of his permit area.

MATTERS TO BE CONSIDERED BY THE EX-OFFICIO COMMISSIONER FOR THE DEPARTMENT OF THE INTERIOR IN ALASKA

INSTRUCTIONS

[Circular No. 1140]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 20, 1928.

TO ALL OFFICERS AND EMPLOYEES OF THE DEPARTMENT OF THE INTERIOR IN ALASKA:

Pursuant to authority conferred by the act of February 10, 1927 (44 Stat., part 2, 1068), Hon. George A. Parks, Governor of Alaska, has been designated as the ex-officio Commissioner for this department in Alaska and in connection with his appointment the following recommendations have been approved:

1. That the ex-officio Commissioner for the Interior Department in Alaska shall have presented to him for consideration and ap-

proval all budgetary matters and the proposed scope and allocation of all work to be done in the Territory by the General Land Office, before being approved by the Commissioner.

2. That the ex-officio Commissioner for the Interior Department in Alaska shall have authority to coordinate and supervise all work involving adjudication of claims in that Territory for the General Land Office, preserving to claimants the right of appeal first to the Commissioner of the General Land Office and then to the Secretary of the Interior. The district land offices, after preliminary action upon claims and contests, shall transmit all papers directly to a designated and adjudicating officer in Alaska for review and appropriate action.

3. That the official plats of Alaskan mineral surveys and such other Alaskan surveys as may be deemed advisable shall be immediately released upon their approval by the Supervisor of Surveys in Alaska under such regulations as may be prescribed by the Commissioner of the General Land Office and the ex-officio Commissioner.

In order that the foregoing recommendations may be carried into effect the following instructions are issued:

1. The ex-officio Commissioner will have authority to coordinate and supervise the work of the several activities of the General Land Office in Alaska.

2. All officers and employees of the General Land Office in Alaska having for consideration any budgetary matter or matter involving the proposed scope and allocation of work to be done in Alaska should take the same up with the said ex-officio Commissioner, who will transmit the same with appropriate recommendation to this office.

3. All applications, petitions, etc., involving claims in Alaska arising under the public land laws will be presented to and acted upon by the proper register and receiver in Alaska in the future in like manner as heretofore. The register and receiver, however, instead of transmitting the returns of such applications, petitions, etc., semimonthly to the General Land Office, will forward the returns semimonthly to the ex-officio Commissioner, or some one duly authorized to represent him in Alaska, who will examine the papers in each case as soon as possible for possible defects in form, execution, or otherwise, and for possible errors by the register and receiver in their actions or decisions.

If any defect or error is found in any particular case or cases included in the semimonthly returns and such defects or errors may be cured either by the applicant or the register and receiver, such cases shall be taken from the semimonthly returns and forwarded to the register and receiver with whatever suggestions or instructions the

ex-officio Commissioner or his representative deems proper. A note opposite the serial number or numbers of the cases so forwarded should be made on the schedule of returns and it, with the balance of the cases, to which no objection is found, should be forwarded immediately by the ex-officio Commissioner or his representative to the Commissioner of the General Land Office.

Should there be any case or cases in which the defect or error can not be cured or corrected, the ex-officio Commissioner or his representative will make such recommendation as he may deem advisable and transmit the same with the semimonthly returns in which they are listed, to the Commissioner of the General Land Office.

4. Hereafter plats of Alaskan mineral surveys will be released immediately upon their approval by the cadastral engineer in charge of the public survey office at Juneau, Alaska, and, in order to enable the claimants to proceed with their applications for patents without delay, two copies of each plat will be reproduced in the public survey office, by photostat, blue print, or in such other manner as may be made available and furnished to the claimant or to his agent or attorney, for immediate use, one for posting on the land and one for filing with the application.

The original copy of the field notes will be kept by and filed in the public survey office; the duplicate copy will be sent to the claimant or to his agent or attorney for filing with the application.

The original copy of the plat will be transmitted to the General Land Office for photolithographing, and that copy and the photolithographic copies will be disposed of as follows:

(*a*) The original copy will be returned to the public survey office for filing.

(*b*) One copy on drawing paper will be kept by and filed in the General Land Office.

(*c*) One copy on drawing paper will be transmitted to the proper district land office for use in that office.

(*d*) One copy will be furnished to the division inspector for Alaska for use in his office.

(*e*) Such copies as may be deemed necessary will be made for the purpose of sale at the rate of 50 cents each.

THOS. C. HAVELL,
Acting Commissioner.

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

FUR FARMING IN ALASKA—CIRCULAR NO. 1108 (52 L. D. 27), AMENDED

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 30, 1928.

REGISTER AND DIVISION INSPECTOR, ANCHORAGE, ALASKA;
REGISTERS AND RECEIVERS, FAIRBANKS AND NOME, ALASKA:

Circular No. 1108 (52 L. D. 27), approved January 22, 1927, is hereby amended by inserting after "The following rules and regulations will govern the issuance of leases under said act" the following:

Leases under this act may cover an entire island where such island contains an area of not more than 30 square miles, if the inspector reports that such island is subject to lease for fur farming, and that the entire area is needed and can be properly used therefor.

Any islands subject to lease under this act having an area of more than 30 square miles will be treated as mainland, and leases for lands within same shall not be awarded for an area in excess of 640 acres.

Where islands are so close together that animals can cross from one to the other, and the combined area does not exceed 30 square miles, more than one island may be included in a single lease.

THOS. C. HAVELL,
Acting Commissioner.

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

AMOS D. RUHL (ON REHEARING)

Decided January 30, 1928

PATENT—HOMESTEAD ENTRY—SWAMP LANDS — OFFICERS — JURISDICTION — PRESUMPTION.

A patent for public lands carries with it an implied affirmation or finding of every fact made a prerequisite to its issue, and no executive officer of the Government is authorized to reconsider the facts on which it was issued or to recall or rescind it.

SWAMP LANDS—PATENT—ARKANSAS—RESTORATIONS.

The so-called compromise act of April 29, 1898, did not restore to the public domain any lands which prior thereto had been patented to the State of Arkansas under the swamp-land grants.

FINNEY, *First Assistant Secretary:*

By decision dated September 20, 1927, the department affirmed the action of the Commissioner of the General Land Office, rejecting the homestead application of Amos D. Ruhl for NE. ¼ Sec. 26, T. 12 N., R. 7 E., 5th P. M., Arkansas, because the lands were patented to the State September 27, 1858, under the swamp grant of September 28, 1850 (9 Stat. 519).

Motion for rehearing has been filed contending in substance that the land is subject to homestead entry and that Ruhl's application should be allowed (1) because the patent to the State was erroneously issued, the lands not being of the character contemplated by the act of September 28, 1850, *supra*, and (2) because the title to lands patented to the State under the swamp-land grant revested in the United States by the compromise and settlement of 1895, approved by the State legislature in 1897 and by Congress in 1898 (30 Stat. 367).

Counsel representing Ruhl and numerous other homestead applicants, similarly situated, have been heard orally in the matter, and while it is clear, as held in the prior decisions in these cases, that entries can not be allowed under any of these applications, it is deemed appropriate, in view of the earnestness with which the claims of the applicants are being asserted, to elaborate the views heretofore expressed.

The fact is indisputable that the land is included in a patent issued in 1858, which, as shown by the records of the Land Department, is regular in every respect. It contains ample recitals and is *prima facie* valid. It must be taken as containing a finding that the land was of the character contemplated by the swamp grant. This is so because every patent for public lands carries with it an implied affirmation or finding of every fact made a prerequisite to its issue. *Polk's Lessee* v. *Wendell* (9 Cranch 87); *Steel* v. *Smelting Co.* (106 U. S. 447). No executive officer of the Government is authorized to reconsider the facts on which it was issued, and to recall or rescind it, or to issue one to another party for the same tract. *Moore* v. *Robbins* (6 Otto, 96 U. S. 530). Conceding, for the sake of the argument, that the patent erroneously issued for lands not in fact of the character contemplated by the grant, the title is, nevertheless, after the lapse of so many years, clothed with the highest sanction and confirmed against any claim on the part of the United States. *United States* v. *Winona and St. Peter Railroad Company* (165 U. S. 463); *United States* v. *Chandler-Dunbar Water Power Company* (209 U. S. 447).

In view of these settled principles Ruhl's assertion that the patent issued to the State was without effect is clearly untenable.

The proposition that title to the land must be considered as being in the United States because of the compromise act of April 29, 1898,

supra, is, on the face of the act, devoid of merit. By the agreement and compromise settlement entered into between the United States and the State of Arkansas (House Report No. 1634, 54th Congress, First Session), it was agreed between the parties, with certain exceptions not here material, "that the land now patented, approved, or confirmed to the State of Arkansas under the acts of September 28, 1850, March 2, 1855, and March 3, 1857, shall constitute the full measure due the State under the said swamp-land acts."

In addition to the above the third section of the act approving the agreement provided—

> That the title of all persons who have purchased from the State of Arkansas any unconfirmed swamp land and hold deeds for the same, be, and the same is hereby, confirmed and made valid as against any claim of right of the United States, and without the payment by said persons, their heirs or assigns, of any sum whatever to the United States or to the State of Arkansas.

In the fourth section of the act the title to all lands patented to the State and which the United States afterwards sold or allowed to be entered, comprising some 105,000 acres, was perfected in the patentees, or entrymen, under the public-land laws, when entitled to a patent, through the release, quitclaim or relinquishment to the United States by the State of all her right, title, and interest in and to such lands.

From this it will be seen that the title to the lands here involved was not disturbed by the terms of the compromise act of April 29, 1898, *supra*. The only confirmed, certified, or patented land which the State relinquished was land of that status or class which had been entered or purchased by individuals under the public-land laws, or which had theretofore been granted, certified, or patented by the United States under other acts, in which case the title was confirmed in such grantees, their heirs, successors, or assigns.

It was stated in the oral argument, and in the brief filed, that all lands within the so-called sunk-land area, and other areas erroneously returned as "lake" by the original surveys, were declared by the department and the courts to be public lands of the United States, and that the lands here applied for fall in that category. As authority for this claim counsel cites volume 37, Land Decisions, pages 345 and 462; volume 44, Land Decisions, page 207; *Little* v. *Williams* (231 U. S. 335); *Chapman and Dewey Lumber Co.* v. *St. Francis Levee District* (232 U. S. 186); *Lee Wilson and Co.* v. *United States* (245 U. S. 24).

It is apparent, however, that counsel misapprehends the tenor of the decisions referred to. The situation with respect to these lands was succinctly stated in departmental circular of June 16, 1914 (43 L. D. 275), from which the following excerpt is taken:

It is not to be implied from the foregoing description that the whole of each of the above-enumerated townships was declared to be Government land. On the contrary, only those portions of the several townships which were left unsurveyed at the dates of the original surveys thereof were involved in the above-mentioned decisions. The lands which were originally surveyed were patented years ago to the State of Arkansas under the provisions of the swamp-land grant of September 28, 1850 (9 Stat. 519), and the State has in turn conveyed her interests therein, so that the title is now within private ownership. The areas which were originally left unsurveyed and which the Government now claims have, however, also been claimed or are now being claimed by private interests, which allege title through purchase from the State or from the St. Francis levee board or from riparian owners.

* * * * * * *

The above referred to court decisions do not in any wise disturb the title to any lands which were surveyed at the dates of the original surveys of the townships within which they are situated and which were patented to the State of Arkansas, and the Government is not laying any claim to the same.

As stated in the decisions cited there were mistakes in the original surveys. In a number of townships, embracing lands in the basin of the St. Francis River, the surveys made between 1845 and 1849 were found to be grossly inaccurate or misleading. Large areas were returned as covered by water when in fact much of the land was not so covered, in some instances the banks of the so-called lakes being a mile or more from the surveyed meander line. The plats of those townships, based upon the original surveys, show them to be fractional, varying in amount of land returned thereunder from a little less than one-third of a normal township to nearly a full or complete township, as usually surveyed. The lands within the surveyed lines of these townships were practically all swamp in character, and were selected at an early date by the governor of the State under the swamp-land grant of September 28, 1850, *supra*. The department held in the decisions referred to that the Government was not bound by these incorrect surveys; that the patents to the State conveyed nothing beyond the exterior lines as shown upon those plats; that the title to the omitted areas was in the United States, and that the Government had the right to correct the surveys and dispose of said omitted areas as other public lands of the United States. The position thus taken by the department was sustained by the courts. In *Little* v. *Williams* (113 S. W. 340), the Supreme Court of the State of Arkansas stated:

A conveyance of the township "according to plat of surveys" does not include lands which do not appear on the plat of the surveys. We do not mean to hold that unsurveyed lands could not have been selected as swamp lands and patented to the State by the use of proper descriptive terms in the patent, but this was not accomplished by reference to township sections or parts thereof according to the plat of the surveys when the unsurveyed land did not appear on the plats at all. The plats showed it to be water and not land.

The right of the Government to survey the omitted areas in question was likewise upheld in the case of *Lee Wilson and Co.* v. *United States*, *supra*, where the court said (syllabus):

If, in the making of a survey of public lands, an area is through fraud or mistake meandered as a body of water or lake where no such body of water exists, riparian rights do not accrue to the surrounding lands, and the land department, upon discovering the error, has power to deal with the meandered area, to cause it to be surveyed and lawfully to dispose of it.

The lands here involved are shown on plats of survey made before the swamp-land act was passed, and do not come within the same category as the areas referred to in the decisions above mentioned. From this it will be seen, and the fact recognized, that said lands do not belong to the Government and are not subject to disposal under the public-land laws.

The motion is accordingly denied.

Motion denied.

MANGAN AND SIMPSON v. STATE OF ARIZONA

Decided January 31, 1928

SCHOOL LAND—MINERAL LANDS—MINING CLAIM—SURVEY—NEW MEXICO—STATUTES.

Title to lands within a numbered school section that were mineral and known to be such at the date of the acceptance of the survey, April 1, 1919, did not vest in the State of New Mexico under its original school-land grant, and a valid mining claim located upon such lands prior to the act of January 25, 1927, which extended the grant to include mineral lands, excepts them from the operation of that act, unless or until such claim is relinquished or canceled.

SCHOOL LAND—MINING CLAIM—SURVEY.

The location of a mining claim prior to the passage of the act of January 25, 1927, upon lands within a numbered school section does not defeat the title of a State to the lands under its original grant, if the lands were not known to be mineral at the time they were identified by the survey, or at the date of the grant where the survey preceded it.

FINNEY, *First Assistant Secretary:*

This is an appeal on behalf of John Mangan and W. A. Simpson from a decision of the Commissioner of the General Land Office dated September 29, 1927, rejecting their application to contest the claim of the State of Arizona to Sec. 2, T. 2 N., R. 18 W., G. & S. R. M.

The application to contest, filed September 7, 1927, alleged that—

said land is mineral in character; that affiants had made a valid location of mining claims on said land prior to January 25, 1927; that affiants were in possession of a portion of said section prior to January 25, 1927; and that all of said section contains valuable deposits of lead and gold.

By section 24 of the enabling act approved June 20, 1910 (36 Stat. 557, 572), sections 2, 16, 32, and 36 in every township in the proposed

State, if not otherwise appropriated, were granted to the State for the support of common schools. Provision was made for indemnity selections where the said sections, or any parts thereof, are mineral or had been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert land entry had been made prior to the survey thereof in the field.

The first paragraph of section 1 of the act approved January 25, 1927 (44 Stat. 1026), reads as follows:

> That, subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

Subsection (c) of said section 1 provides—

> That any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceedings in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such application, claim, or right is relinquished or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this Act.

No withdrawals affect said section 2. The plat of survey of the township was accepted by the General Land Office on April 1, 1919. No applications or claims affecting the section are pending.

Based on the report of an inspector, the Commissioner of the General Land Office on March 3, 1926, classified the S. ½ and S. ½ N. ½ said Sec. 2, as nonmineral. On the same date, the Commissioner instituted proceedings as to the N. ½ N. ½ said Sec. 2 on the charge that the land contains valuable deposits of gold, copper, and tungsten, and that the occurrence thereof was known prior to the date the rights of the State would have attached. After due notice, the State failed to deny the charges and apply for a hearing. The record was considered by a departmental committee appointed by the Secretary of the Interior to pass upon the question of the mineral and nonmineral character of school sections. In a report submitted to the Secretary of the Interior on November 5, 1926, the committee reported that in its opinion the proceedings were warranted, and, in view of the default of the State, it was recommended that the land be classified as mineral and was so known at the date of the acceptance of the survey. The recommendation of the committee was approved by the Secretary on November 10, 1926.

By decision dated May 28, 1927, the Commissioner of the General Land Office, considering the effect of the act of January 25, 1927, *supra*, held:

> The State having failed to take action after due notice of the charges as to the mineral character of the above school section, this would be taken as an admission of the truth of the charges. However, if the title to the State did not vest under its original grant, title to the section is now vested in the State by virtue of the additional grant made by the act of January 25, 1927, *supra*, there being no reservations within the meaning of the act, and no pending application, claim, or right under any of the existing laws of the United States. The State's title vested under the act of January 25, 1927, is restricted by certain conditions, but the land is no longer public land of the United States, subject to the jurisdiction of the Interior Department. Compliance with the conditions of said act is left to the judgment and good faith of the proper State officials, subject to forfeiture proceedings to be instituted by the Attorney General of the United States if those conditions are violated.

The quoted holding is not correct in all respects.

It having been found and held, as the result of proceedings conducted in accordance with existing regulations, that the N. ½ N. ½ said Sec. 2 was mineral and was so known at the date of the acceptance of the survey, the title of the State did not vest under its original grant, and if any portion of the N. ½ N. ½ is embraced in a valid mining claim located prior to January 25, 1927, that portion was excepted from the grant made by the act approved on the latter date, unless or until such claim is relinquished or canceled.

The location of the claim of Mangan and Simpson is not disclosed, aside from its being somewhere within the limits of said Sec. 2. If the claim is within the limits of the N. ½ N. ½, is valid, and was located prior to January 25, 1927, the area of the claim is excepted from the force and effect of the grant of the latter date, and the area is still public land of the United States, subject to an application for mineral entry. If the mining claim is not within the limits of the N. ½ N. ½, then the mere fact that it was located prior to January 25, 1927, would not defeat the State's title, it being well settled that the States acquire a vested right in all school sections in place which are not otherwise appropriated, and not known to be mineral, at the time they are identified by the survey—or at the date of the grant where the survey precedes it—regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or effected by a subsequent mineral discovery. *California* v. *Poley* (4 C. L. O. 18), *Abraham L. Miner* (9 L. D. 408), *Rice* v. *California* (24 L. D. 14), *United States* v. *Morrison* (240 U. S. 192, 207), *United States* v. *Sweet* (245 U. S. 563, 572).

If the mining claim is within the S. ½ or S. ½ N. ½ said Sec. 2, the contest affidavit does not state a cause of action, it not being alleged that the location was made prior to the acceptance of the

plat of survey, nor that the land was known to be mineral on that date.

Under the provisions of subsection (c), heretofore quoted, if Mangan and Simpson had located one or more valid mining claims on the N. ½ N. ½ said Sec. 2 prior to January 25, 1927, the same can be held and perfected in accordance with the mining laws. If and when an application to make mineral entry is filed the State will have an opportunity to proceed against the entry if of opinion that the claim is not based on a valid discovery made prior to January 25, 1927; or if the mineral claimants continue in possession of the claim or claims, the State may institute proceedings to declare the claims invalid; but a contest against the State by the mineral claimants at this time is unnecessary, and will not be entertained.

For the reason aforesaid, the rejection of the application to contest is *Affirmed.*

ARCHÆOLOGICAL RUINS

Opinion, February 1, 1928

ARCHÆOLOGICAL RUINS—HOMESTEAD ENTRY—VESTED RIGHTS—JURISDICTION—PERMIT—LICENSE.

Archæological ruins and other objects within the purview of the act of June 8, 1906, which may be located on lands occupied by a homesteader continue to be property of the United States until the vesting of equitable title in the entryman, and until then the Government has authority under that act to issue permits or licenses for the examination, excavation, and recovery thereof.

ARCHÆOLOGICAL RUINS—PATENT—RESERVATION—STATUTES.

The act of June 8, 1906, did not authorize any reservation or exception in patents for lands embracing ruins or archæological sites, and upon the issuance of a patent for lands containing such ruins governmental authority thereover ceases.

ARCHÆOLOGICAL RUINS—PERMIT—LICENSE—OIL AND GAS LANDS—PROSPECTING PERMIT—STATUTES.

Permits and licenses for the examination, excavation, and recovery of archæological ruins may be issued pursuant to the act of June 8, 1906, embracing lands for which oil and gas prospecting permits have been issued under the act of February 25, 1920.

PATTERSON, *Solicitor:*

Certain questions discussed in a letter dated January 14, 1928, from Jesse L. Nusbaum, department archæologist, concerning jurisdiction of this department over ruins, archælogical sites, and objects covered by the act of June 8, 1906 (34 Stat. 225), have been referred to me for consideration.

Mr. Nusbaum states that an expedition in charge of Mr. Paul Martin, State archæologist, is to be sent out this coming summer by the State Historical Society of Colorado, to make explorations and gather such objects of antiquity as may be located on Sec. 2, T. 38 N., R. 19 W., and Sec. 35, T. 39 N., R. 19 W., in the Ruin Canyon country near Spargo, Colorado, and in that connection the following questions are propounded:

1. The particular ground on which Mr. Martin desires to begin work has quite recently been filed on, so he understands, by a homesteader and he wishes to know if, under the law, this filing is subject to the reserved rights of the department to issue archæological permits thereon, or if they deal both with the Government and the homesteader, or the homesteader alone.

2. Does "under the jurisdiction of the departments (Interior, Agriculture, and War)" of section 3 of the act for the preservation of American antiquities imply that the Secretaries of the three departments can issue archæological permits covering examinations and investigations on unperfected entries or on lands patented since the act was passed in 1906?

3. Would it be possible under the law to retain within the various departments, *permanent jurisdiction* over the archæological remains included in present unperfected claims and future entries?

4. If a permit to prospect for oil and gas is outstanding on these designated sections, will that in any way prevent the issuance of an archæological permit thereon, or in any way hamper the work that the State Historical Society hopes to undertake on these sites?

The act of June 8, 1906, *supra*, entitled "An Act for the preservation of American antiquities" authorizes the President to declare by public proclamation such objects situated on lands owned or controlled by the Government to be national monuments and to reserve parcels of land for their protection and management. The act provides in its first section that it shall be a criminal offense to appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument situated on lands owned or controlled by the United States "without the permission of the Secretary of the department of the Government having jurisdiction over the lands on which said antiquities are situated."

Section 3 provides for the issuing of permits for the examination of ruins, the excavation of archæological sites, *et cetera*, by the Secretaries of the Interior, Agriculture, and War "upon the lands under their respective jurisdiction." Section 4 authorizes the Secretaries of the respective departments to make uniform rules and regulations for carrying out the provisions of the act. In accordance with the authority granted, uniform rules and regulations were pre-

scribed by the three Secretaries under date of December 28, 1906, jurisdiction thereunder to be exercised by the Secretary of Agriculture over lands within the exterior limits of national forests, by the Secretary of War over lands within the exterior limits of military reservations, by the Secretary of the Interior over all other lands owned or controlled by the Government of the United States, and provided for cooperative action in appropriate cases.

The statute applies to lands *owned or controlled* by the United States. Obviously, the phrase "lands owned or controlled by the United States" includes lands the title to which is in process of acquisition by entrymen. The jurisdiction of the land department over public lands continues so long as the legal title remains in the United States. A homestead entry, although it gives the party entering certain rights of occupation, does not so convey title or divest the United States of property in it as to change its character as lands of the United States. From the time of the entry the homesteader has the right of possession as against trespassers, and all others except the United States. He may treat the lands as his own, so far, and so far only, as is necessary to carry out the purposes of the act. He has an inchoate title, subject to be defeated only by failure on his part to comply with the requirements of the homestead law. As between the United States and the settler the land is to be deemed the property of the former, so far as it is necessary to protect it from waste. The law contemplates the possibility of his abandoning it, and he may not in the meantime despoil it, or perform any act upon it which impairs its value. *United States* v. *Williams et al.* (18 Fed. 475); *United States* v. *Taylor* (35 Fed. 484); *Petty* v. *Desmond* (129 Fed. 1); *Shiver* v. *United States* (159 U. S. 491); *United States* v. *Buchanan* (232 U. S. 72); *Union Naval Stores Company* v. *United States* (240 U. S. 284).

Clearly, therefore, under the law, ruins and other objects within the purview of the act of 1906, *supra*, which may be located on lands occupied by a homesteader belong to the United States—the owner of the fee—at least until the entryman has earned the equitable title to the land, and are subject to the right of the Government to issue permits or licenses for the examination, excavation, and recovery thereof, as contemplated by the act of 1906, *supra*. By the legislation referred to Congress reserved the right to say who shall go upon its lands to search for such objects, and to impose conditions on their disposition, and, in my opinion, the duly authorized agents of the Government can go upon lands included in the unperfected claim of a homesteader for the purpose of exploring and excavating the lands, without violation or infraction of the homesteader's right of possession, which is held subject to the will of Congress. Congress, if it saw fit, could dispose of the lands to other parties, and if

Congress has the power of disposition, it must follow that it could authorize others to go upon the land for the purpose of making investigations, explorations, and the gathering of objects of scientific interest.

This sufficiently answers the first question and that part of the second question pertaining to examinations and investigations on unperfected entries.

Permits may not be issued, however, for excavations and investigations on patented lands. As stated above, the statute applies to lands *owned or controlled* by the United States. It is fundamental that the jurisdiction of the land department terminates with the issuance of patent. The act of June 8, 1906, *supra*, authorized no reservation or exception in patents for lands embracing ruins or archæological sites. Only such exceptions can be included in patents to public lands as are specifically prescribed by existing law, and the inclusion of any others therein would be wholly without effect. *Burke* v. *Southern Pacific Railroad Company* (234 U. S. 669). It follows that an entryman of public lands embracing ruins and archæological sites, upon showing compliance with statutory conditions, is entitled to an unrestricted patent.

This answers that branch of question 2 concerning jurisdiction over patented entries, and also covers question 3.

In my opinion, the fact that lands desired to be explored are embraced in an outstanding oil and gas prospecting permit under the act of February 25, 1920 (41 Stat. 437), would not prevent the granting of a permit for examinations and explorations under the act of June 8, 1906, *supra*. The holder of a permit under section 13 of the act aforesaid has merely an exclusive right to prospect for oil and gas within the area covered by his permit, and to use and occupy so much of the surface as may be necessary to his operations. The department has determined that it has authority to grant permits for concurrent operations for different mineral deposits or materials which may occur on or in the lands. See paragraph 3, Oil and Gas Regulations of March 11, 1920 (47 L. D. 437; 50 L. D. 276; Ibid. 640; 51 L. D. 180; Ibid. 622).

There would seem to be no reason, therefore, why the Government should not have permittees under the acts of 1906 and 1920 on the same land at the same time.

I believe the foregoing fully covers the questions submitted by Mr. Nusbaum.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

CONSTRUCTION OF THE ACT OF JANUARY 25, 1927, WITH RESPECT TO ASSIGNMENT OF MINERAL SCHOOL SECTION LANDS AS BASE FOR INDEMNITY SELECTIONS

Instructions, February 1, 1928

SCHOOL LAND—MINERAL LANDS—STATUTES.

The act of January 25, 1927, was a supplemental grant of numbered school sections, mineral in character, the purpose of which was to simplify administration of the State's school grant and to effect a final adjustment and settlement of questions of title arising thereunder.

SCHOOL LAND—MINERAL LANDS—SELECTION—INDEMNITY—STATUTES.

The grant of January 25, 1927, was a grant *in praesenti* which operated to vest title in the States to all unappropriated, unreserved mineral school sections in place, for which indemnity had not been taken, and such lands can not thereafter be assigned as base for indemnity selections by reason only of their mineral character.

SCHOOL LAND—MINERAL LANDS—INDEMNITY—STATUTES.

One purpose of the act of February 28, 1891, was to provide means whereby the United States could reacquire title to lands which, although acquired by the States, were of such character or of such status as the grants contemplated should be withheld from the States.

SCHOOL LAND—MINERAL LANDS—INDEMNITY—STATUTES.

Section 2 of the act of January 25, 1927, specifically provides that mineral lands shall not be taken as indemnity or in lieu of school lands surrendered or lost in place, and continues in full force and effect only laws governing lieu selections and exchanges to satisfy losses.

SCHOOL LAND—MINERAL LANDS—SELECTION—INDEMNITY—STATUTES.

The provision in section 2 of the act of January 25, 1927, "that all existing laws governing lieu selections and exchanges are hereby continued in full force and effect," neither added to nor took away from the States any rights that they had under the act of February 28, 1891.

SCHOOL LAND—SELECTION—INDEMNITY—STATUTES.

Section 2 of the act of January 25, 1927, saved to a State the right to have indemnity selections perfected where the offer to make the exchange was prior to the date of that act, but, as to offers proffered after that date, indemnity is authorized only for numbered school sections lost to the State.

SCHOOL LAND—SELECTION—INDEMNITY—LAND DEPARTMENT—STATUTES.

Surrender by a State of a school section of a class contemplated by the act of February 28, 1891, followed by a formally correct lieu selection, is an exercise of an option given the State by Congress, recognition of which is mandatory as to the Land Department.

FINNEY, *First Assistant Secretary:*

On May 12, 1927, you [Commissioner of the General Land Office] requested instructions (*a*) as to whether, since the approval of the act of January 25, 1927 (44 Stat. 1026), a State may "assign school section lands as base for indemnity selections by reason only of the

mineral character of such school section lands," and (*b*) whether the provisions of the act of January 25, 1927, "supersede the provision of the act of February 28, 1891 (26 Stat. 796), authorizing the selection of lands in lieu of school section lands mineral in character, so as to inhibit selection by and conveyance to the States of lands in lieu of school section lands granted by the later act."

The act of January 25, 1927, provided that, subject to certain exceptions "the several grants to the States, of numbered sections in place for the support or in aid of public schools be, and the same are hereby, extended to embrace numbered school sections, mineral in character * * *." Mineral lands of this character for which indemnity had been sought or received by the several States were excepted from the provisions of said act as were lands withdrawn or otherwise appropriated.

By subsection (*b*) of section 1 of the act of January 25, 1927, a specific method to be used in disposing of mineral lands granted thereunder was imposed as a condition subsequent to the grant, with a provision for forfeiture proceedings in cases of breach of this condition.

Section 2 of the act of January 25, 1927, is as follows:

> That nothing herein contained is intended or shall be held or construed to increase, diminish, or affect the rights of States under grants other than for the support of common or public schools by numbered school sections in place, and this Act shall not apply to indemnity or lieu selections or exchanges or the right hereafter to select indemnity for numbered school sections in place lost to the State under the provisions of this or other Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect.

The grant made by the act of January 25, 1927, was a grant *in praesenti* and, since section 1 of this act vested title in the State to all unappropriated, unreserved mineral school sections in place, for which a State had not been indemnified, and since the States were limited, under section 2 of said act, to indemnity for mineral lands only where "lost to the State under this or other acts" it seems clear that a State may not, since the date of said act, assign school section lands as base for indemnity selections by reason only of the mineral character of such school section lands. They acquired title by virtue of the grant of January 25, 1927, and have no loss for which they may be indemnified. This disposes of your first inquiry.

The act of February 28, 1891, *supra*, extended to the States a right (which they were at liberty to exercise or forego) to surrender lands to which they had acquired title, where sections in place "are mineral lands or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States." The States making such surrenders were entitled to select and receive

title to other lands of equal acreage in lieu thereof, each lieu selection to be a waiver of right to the base lands.

Examination of the school-land grants made prior to February 28, 1891, and thereafter, disclose that exceptions from those grants were made wherever sections in place were "mineral land" or were "included within any Indian, military, or other reservation," or were "otherwise disposed of by the United States." It is apparent, therefore, that the purpose of the act of February 28, 1891, was to provide means whereby the United States could *reacquire* title to lands which, although acquired by the States, were of such kind or of such status as the grants contemplated should be withheld from said States.

It is provided in section 2 of the act of January 25, 1927, that "this act shall not apply to indemnity or lieu selections, or exchanges." This means that mineral lands may not be taken as indemnity or in lieu of surrendered or lost place lands. Said section further provides that "all existing laws governing lieu selections and exchanges are hereby continued in full force and effect."

The obvious purpose of this last provision is that the States shall not be deprived of any rights which they had under the preceding acts. It is equally clear that no added rights were intended to be conferred. It is also clear that the broad purpose of the act of January 25, 1927, when ascertained from all its provisions, was to vest in the several States, finally and irrevocably, full title to school sections *in place* wherever mineral values, known or potential, constituted the only bars to the operations of the previous grants made to said States. The reports, debates, and legislative history of said act support this view.

Prior to the act of January 25, 1927, a State could exchange mineral lands in school sections in place for other lands pursuant to the act of 1891, only in the comparatively small number of cases where mineral values became known *after* the effective date of the school land grants. Lands in place known to be mineral prior to such dates never became the properties of the States, *United States* v. *Morrison* (240 U. S. 192); *United States* v. *Sweet* (245 U. S. 563), and hence formed no bases for exchanges. On the other hand, the courts have held that a surrender by a State of a school section of a class contemplated by the act of February 28, 1891, followed by a formally correct lieu selection, was an exercise of an option given the State by the Congress, recognition of which was mandatory as to the land department. *California* v. *Deseret Water, etc. Co.* (243 U. S. 415); *Payne* v. *New Mexico* (255 U. S. 367); *Wyoming* v. *United States* (255 U. S. 489).

It will readily be seen that, if every section of mineral land to which a State acquired title, by virtue of the act of January 25,

1927, may be used as base for an exchange under the act of 1891, that the latter act has vastly enlarged the scope of the former, and that a State may elect to retain title to such mineral sections as it sees fit, and as to the remainder, may make exchanges which this department must accept upon formally correct selection.

Under this view a State could seek exchanges for every acre acquired under the act of 1927, and instead of a simplification of the States' grants, and a speedy and final settlement of the question of States' titles to school sections in place, intended to be secured by the act of January 25, 1927, the adjudication of States' rights would be further projected into the future, and this purpose completely evaded.

The view that a State may exchange, under the act of 1891, mineral lands acquired under the act of 1927 is so plainly contrary to the intent and purposes of both acts as to be untenable, and in answer to your second inquiry I have to inform you that: A State may not make such a lieu selection, where mineral lands acquired by virtue of the act of January 25, 1927, are offered as the basis for the exchange.

It remains to consider the purpose and legal effect of the provision in section 2 of the act of January 25, 1927. "That existing laws governing lieu selections and exchanges are hereby continued in full force and effect" with relation to the prior rights of the State to make selections in lieu of numbered sections prescribed in the grant found in place which, since the date of attachment of the grant, have been found to be mineral in character but which were not known to be mineral at that date. As to such sections the State's title attached as of agricultural lands, but the first proviso to section 2275, Revised Statutes, as amended in 1891, authorized the State to waive its right to such sections and to select other lands in lieu thereof. See *California* v. *Deseret Water Company*, *supra*. But while this right of selection was accorded it was in the nature of an optional privilege in so far as the State was concerned and additional to anything found in the granting act. However phrased it was in the interest of the United States and to the end that a reinvestment of title might be effected with respect to lands which were not of the character *intended* to be granted. The land department had no authority to rule the State to an exercise of the option but was bound to honor it if an exchange otherwise regular was proffered by the State. Hence, it follows that, in all cases where the State had made such proffer, the act of January 25, 1927, saves to it the right to have its selection completed. However, as to such selections as may have been proffered since the passage of said act, or which may hereafter be proffered, the case is different. No vested rights attach under a

conditional privilege until such time as it is exercised, and until that time it may be taken away by competent authority. Hence, the question recurs as to the bearing and effect of the act of January 25, 1927, on this question. As has been already seen, the primary purpose of said act was to simplify administration of the State's school grant and to effect a final adjustment and settlement of questions of title arising thereunder. To this end a supplemental grant was made of mineral lands. Except by way of confirmation and further assurance of title, that act had no relation to and did not include mineral land so situated for the conclusive reason that these sections did not belong to the United States. The State's title thereto had attached under prior laws. On the other hand, and in view of the policy of the act, the United States had no further interest in mineral lands that already belonged to the State. Congress so enlarged the grant as to include all mineral lands, and to now hold that the State may continue to release mineral lands belonging to it under a prior grant as bases for further selection imputes to the act of Congress an utterly absurd result. Further, as a matter of statutory construction based on the language employed in said section 2 of the act, it is noted that while it "shall not apply to indemnity lieu selections or exchanges" yet the only right of indemnity saved to the State is limited to "the right hereafter to select indemnity," for numbered school sections "lost to the State," and it follows that the further provision under consideration in that same section continues in full force and effect only laws governing "lieu selections and exchanges" to satisfy *losses*.

It should be remembered that lands subject to or included in any valid application, claim, or right, initiated or held under any of the existing laws of the United States are excluded from the provisions of said act of 1927 and the State may in proper cases have indemnity therefor. Of such would be a valid mineral location on lands of the sections originally granted known to be mineral at the date the grant would have otherwise attached. This because to that extent the location represents a loss to the State for which it is entitled to indemnity. But mineral lands, the title to which passed to the State under any law, are not lost and no indemnity or lieu-land right remains to be satisfied. A contrary holding would permit the State to make selections in lieu of mineral lands granted to it by the act of 1927, which would reopen the whole question of the known mineral character of lands at date of that act and the attachment of rights thereunder.

ELIZABETH CLARK

Decided February 2, 1928

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—MINERAL LANDS—SURVEY—SCHOOL LANDS—STATUTES.

A pending oil and gas prospecting permit application for land known to be of mineral character at the date of the acceptance of the survey is such a valid application within the purview of subsection (c) of section 1 of the act of January 25, 1927, as to prevent the operation of that act in making a grant of certain mineral school sections to the States.

FINNEY, *First Assistant Secretary:*

By decision of May 14, 1927, the Commissioner of the General Land Office rejected the oil and gas prospecting permit application of Elizabeth Clark, which was filed on December 6, 1926, for all of Sec. 16, T. 24 N., R. 13 W., N. M. P. M., New Mexico, for the stated reason:

> This land is also included in coal land withdrawal New Mexico No. 1, Executive order of July 9, 1910.
>
> The plat of township 24 N., R. 13 W., N. M. P. M., was approved July 19, 1915, and the title to said section presumably vested in the State of New Mexico, under its school land grant. It is therefore not subject to appropriation under the leasing act unless it be shown that the land was known mineral in character at date of acceptance of the survey.

The applicant appealed, stating that the State of New Mexico "had relinquished its claim." She further stated that it was incomprehensible how the section could be public land as far as the State was concerned but State land in the view of the Government.

In response to the appeal, the State of New Mexico, by its Commissioner of Public Lands, has filed a protest against allowance of the appellant's application, contending that if title to the land did not vest in the State by virtue of the acts of June 21, 1898 (30 Stat. 484), and June 20, 1910 (36 Stat. 557), such title did become vested in the State under the act of January 25, 1927 (44 Stat. 1026).

In a decision dated August 28, 1926, the Secretary of the Interior held that the section involved was known coal land at the time of acceptance of survey. Title to the land had therefore not passed to the State of New Mexico.

When the appellant filed her application this section was public land subject to such filing. In subsection (c) of section 1 of the act of January 25, 1927, *supra*, making a grant of certain mineral school sections to the States, it is provided—

> That any lands * * * subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such application, claim, or right is relinquished or canceled, * * * are excluded from the provisions of this Act.

It is clear that on account of the pendency of the appellant's application the act of January 25, 1927, did not affect the section involved.

The decision appealed from is reversed. If this decision becomes final a prospecting permit will be granted to the appellant.

Reversed.

EVELYN C. MULLER

Decided February 2, 1928

AMENDMENT—STOCK-RAISING HOMESTEAD—PATENT—TRANSFEREE.

While the location of a patented entry may be changed through amendment, its extent can not be enlarged because of the entryman's mistaken understanding with respect to its location; and those who claim through the entryman are in no better position than the entryman himself.

AMENDMENT—STOCK-RAISING HOMESTEAD—STATUTES.

Section 2372, Revised Statutes, as reenacted by the act of February 24, 1909, is applicable to the amendment of an entry made under mistaken understanding with respect to its location on the ground.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Harris Miller* (51 L. D. 281), cited and applied.

FINNEY, *First Assistant Secretary:*

Evelyn C. Muller, on February 5, 1927, filed application 026744, to make original stock-raising homestead entry for 640 acres, embracing the NW. ¼ SE. ¼ Sec. 20, as well as other lands in that section and in Secs. 21, 28, and 30, T. 58 N., R. 82 W., 6th P. M., within the Buffalo, Wyoming, land district.

On June 1, 1927, Walter T. Evans and Joseph J. Evans filed a protest with the Commissioner of the General Land Office against the allowance of Miss Muller's application to the extent that it embraced the said NW. ¼ SE. ¼ Sec. 20. The protestants stated that prior to August 8, 1907, their mother, Mary Evans, made desert-land entry for certain lands which included the S. ½ SE. ¼ of the said Sec. 20, and that the entry was patented to her; that thereafter the protestants acquired the patented land from their mother and that they were its legal owners and were in possession of the same; that at or about the time of the issuance of the patent to Mrs. Evans, and prior thereto, she placed improvements of various kinds, having a total value of about $2,750, on what she then believed to be land embraced within her entry and that the protestants afterwards added a rock garage valued at $600; that a survey made at the time Miss Muller filed her stock-raising application showed, however, that the improvements in question were not upon the entry of Mrs. Evans

but were located north of her north line and were within the said NW. ¼ SE. ¼ of Sec. 20; and that these improvements were inclosed in and fenced with other lands belonging to the protestants, and that Miss Muller had personal knowledge of that fact. The protestants stated further that they were in a position to make homestead entry for the tract in question, and they asked that Miss Muller be required to show cause why the said tract should not be excluded from her application, to the end that one of the protestants might be enabled to make homestead entry for the same.

The protest was corroborated by the joint affidavit of Caleb A. Evans and Mary Evans, the father and mother of the protestants.

In a decision dated August 19, 1927, the Commissioner, after reviewing the facts in the case as disclosed by the Evans brothers' protest, held Miss Muller's application 026744 for rejection as to the said NW. ¼ SE. ¼ Sec. 20, subject to her right to appeal or to show cause why her application should not be rejected as to that tract. So far as the record discloses, Miss Muller had no notice of the protest prior to the Commissioner's decision.

Thereafter, within the time limited, Miss Muller filed a lengthy answer to the protest, in which she made statements tending to show that while the improvements mentioned therein actually were upon the tract in dispute, they had deteriorated to such an extent as to be worthless. She also stated, in effect, that the protestants had abandoned any right which they may have had to the improvements for more than nine years, and in support of that statement she referred to the original stock-raising homestead enry, Buffalo 010526, erroneously described as 010527, of Samuel Evans, a kinsman of the protestants, which embraced the tract in question, together with other lands, and which was allowed, according to the respondent's statement, in June, 1917, and which remained intact with the full knowledge of the protestants until October, 1926.

Miss Muller's answer, together with the original papers relating to the entry, Buffalo 010526, of Samuel Evans, have been forwarded for the consideration of the department.

The department finds that the respondent's answer does not meet the case made by the protest. The fact that Mrs. Evans placed numerous and substantial improvements upon the land lying just north of her desert-land entry establishes to the satisfaction of the department that she did so in the belief that the land upon which the improvements were placed was within the limits of her entry, and that it was not a part of the NW. ¼ SE. ¼ of the said Sec. 20. Under such conditions the fact that the entry of Samuel Evans, which included the NW. ¼ SE. ¼ Sec. 20, was permitted to stand unchallenged by Mrs. Evans and her successors in interest raises no pre-

sumption against her or them, especially as there is no allegation that Samuel Evans ever laid claim to the improvements.

Miss Muller makes no denial of the allegations that the improvements were inclosed and fenced with lands belonging to the protestants, and that the fact that they were not located upon the patented land of Mrs. Evans was first disclosed by a survey made at the time she, Miss Muller, filed her application to enter. As already stated, she bases her defense upon the protestants' apparent abandonment of right, as evidenced by the deteriorated and worthless condition of the improvements themselves, and by the protestants' silence during the intervening years when the NW. ¼ SE. ¼ of Sec. 20 was covered by the entry of Samuel Evans.

The point with respect to Samuel Evans's entry has been answered already. With respect to abandonment, it is only necessary to say that abandonment is not an issue in the case. If Mrs. Evans and her sons believed that the improvements were on her land, the fact that they were permitted to fall into decay and ruin is immaterial, as the owner of land is not bound to maintain improvements upon it unless he wishes to do so.

While the department is convinced that the protest is well founded, it still is of the opinion that it should not be sustained unconditionally.

Here the protestants base their protest upon rights acquired from their mother. The case is not one where a claim of superior right to a part of the public domain is asserted by reason of settlement and improvement thereon, although that seems to be the theory of the protestants, but the claim rests upon an alleged mistake as to the boundaries of patented land. It appears that Mrs. Evans's patented entry embraced 320 acres, but that it did not include the NW. ¼ SE. ¼ Sec. 20, although she believed that the land within that subdivision was part of her entry, and placed improvements upon it in that belief. While the location of a patented entry may be changed through amendment, its extent can not be enlarged because of the entryman's mistaken understanding with respect to its location. Mrs. Evans could not acquire a legal title by patent to the 320 acres described in her entry, and at the same time acquire an equitable title to 40 acres additional because she was mistaken as to the location of her boundary and placed improvements upon the 40 acres in question instead of on the described land, and in this respect those who claim under her are in no better position than herself.

The proper procedure to be taken in this case is outlined in the circular of April 22, 1909 (37 L. D. 655), having reference to amendments under section 2372 of the Revised Statutes, as reenacted by the act of February 24, 1909 (35 Stat. 645). See also the departmental decision in the case of *Harris Miller* (51 L. D. 281).

The case accordingly is remanded with directions to defer final action upon the application of Miss Muller with respect to the said NW. ¼ SE. ¼ Sec. 20 for 30 days from notice to the protestants of this decision, in order that they may be enabled, if they so desire, to file an application for the amendment of their mother's patented desert-land entry in accordance with the provisions of the said circular of April 22, 1909, and to comply with the various requirements of that circular. Should no action to that end be taken by the protestants within the time limited, their protest should be dismissed and Miss Muller's application should be allowed for the tract in controversy in default of other objections.

Remanded.

EMIL L. KRUSHNIC [1]

Decided October 3, 1927

MINING CLAIM—OIL-SHALE LANDS—IMPROVEMENTS—ASSESSMENT WORK—FORFEITURE.

A valid mining location, unperfected at the date of the leasing act of February 25, 1920, by a certificate of entry, is forfeited upon failure to fulfill the statutory requirement as to annual labor and improvements, and the land therein becomes subject to disposition only under that act.

OIL-SHALE LANDS—MINERAL LANDS—MINING CLAIM—WITHDRAWAL—STATUTES.

Section 37 of the leasing act of February 25, 1920, was in effect a withdrawal of lands containing the minerals specified therein from location and entry under the general mining laws, and was for a public purpose.

OIL-SHALE LANDS—MINERAL LANDS—MINING CLAIM—NOTICE—STATUTES.

Section 37 of the act of February 25, 1920, affords notice to all persons interested in mineral locations containing minerals mentioned therein of the conditions under which they may maintain their claims and protect the deposits claimed from the operation of the act.

MINING CLAIM—OIL-SHALE LANDS—WITHDRAWAL—RELOCATION—RESUMPTION OF ASSESSMENT WORK—STATUTES.

The provision in section 2324, Revised Statutes, relating to the resumption of work is a restriction imposed upon the right of relocation, and it has no application to lands no longer subject to relocation, or to the operation of the general mining laws, but withdrawn from such operation and subject to other disposition for a public purpose.

MINING CLAIM—OIL-SHALE LANDS—PATENT—LAND DEPARTMENT—JURISDICTION.

The Land Department has jurisdiction to determine whether mining claims for which no patent has been sought are valid or invalid, and so declare.

MINING CLAIM—OIL-SHALE LANDS—IMPROVEMENTS—ASSESSMENT WORK—GROUP DEVELOPMENT—EVIDENCE—BURDEN OF PROOF.

Where a mining locator, in defense of a charge that the annual assessment work and improvement prescribed by section 2324, Revised Statutes, had not been performed upon the claim under attack, relies upon the labor and

[1] See decision on motion for rehearing, page 295.

improvements made upon certain claims comprising part of the group, as intended to aid in the development of the others, the burden is upon him to establish that the work done, or improvements made, tend to the development of the property as a whole, and that such work is a part of a general scheme of improvement.

MINING CLAIM—OIL-SHALE LANDS—GROUP DEVELOPMENT—IMPROVEMENTS—ASSESSMENT WORK.

Work, regardless of its value otherwise, can not be said to be done in the development of a group of mining claims, if it does not constitute a part of a general plan having in view the development of the group, so that the ore may be more readily extracted, and has no reasonable adaptation to that end.

MINING CLAIM—OIL-SHALE LANDS—IMPROVEMENTS—ASSESSMENT WORK—EXPENDITURES.

The value of shafts upon a placer claim, apparently not sunk to actually extract mineral but to secure data upon which to base later development work, and of a drill hole placed upon a claim for the purpose of prospecting it, is properly creditable in meeting the expenditures required as a condition precedent to entry and patent under section 2325, Revised Statutes.

MINING CLAIM—OIL-SHALE LANDS—IMPROVEMENTS—WORDS AND PHRASES—STATUTES.

The definition of the word "improvement" as used in section 2324, Revised Statutes, is "such an artificial change of the physical conditions of the earth in, upon, or so reasonably near a mining claim as to evidence a design to discover mineral therein or to facilitate its extraction, and in all cases the alteration must be reasonably permanent in character."

MINING CLAIM—OIL-SHALE LANDS—IMPROVEMENTS—ASSESSMENT WORK—EVIDENCE.

Work or improvement sought to be credited under section 2324, Revised Statutes, must have a direct relation to the claim, or be in reasonable proximity to it, and it must be shown that it was intended at the time as annual assessment work for that particular claim.

MINING CLAIM—OIL-SHALE LANDS—GROUP DEVELOPMENT—IMPROVEMENTS—ASSESSMENT WORK—EVIDENCE.

The fact that an assessment hole might be utilized as a portal for a tunnel or in the construction of an air shaft under some later plan of development is insufficient to credit its value as a group improvement.

MINING CLAIM—OIL-SHALE LANDS—RULE OF PROPERTY—EVIDENCE—COURTS—JURISDICTION.

The rule to the effect that it is not within the province of the courts to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another, will not be applied for the benefit of a mining claimant if the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose being insufficient, even though good faith in its pursuit be conceded.

FINNEY, *First Assistant Secretary:*

This is an appeal by Emil L. Krushnic from a decision of the Commissioner of the General Land Office of October 5, 1926, ad-

judging the Spad No. 3 oil shale placer claim, covering the N. ½ N. ½ Sec. 12, T. 5 S., R. 96 W., 6th P. M., Glenwood Springs land district, Colorado, null and void, and holding his application 022364 for patent to the same for rejection. On December 15, 1923, adverse proceedings were directed against the location upon three charges. Charges 1 and 2, in effect, allege that the location was fraudulent and made in bad faith, in that Krushnic and Chris C. Dere made the location for their sole benefit by resorting to the device of using the names of six persons in the location of the claim who were without interest therein for the purpose of obtaining more land than could be embraced in a location made by two locators. Charge 3 alleged that the claimants were not, on February 25, 1920, in diligent prosecution of work looking to discovery of mineral. It appears from the record that subsequently the attention of the Commissioner was invited to the first report made upon the claim by a field inspector containing a recommendation that a charge be preferred that no annual assessment work for 1920 had been performed upon the claim, whereupon, on February 6, 1925, the charges were amended to include charge 4, which reads: "That for the year 1920, as extended by the act of December 31, 1920 (41 Stat. 1084), to July 1, 1921, neither the applicant nor his predecessors in interest performed any assessment work to the value of at least $100, tending to develop the claims."

The applicant denied the charges and upon issues joined a hearing was duly had between the parties, resulting in a record of proceedings of some 900 pages.

This record appears to require the comment that it is unduly burdened with unnecessary arguments upon the materiality of testimony, and with other discussions, and with much testimony so inconsequential or so remotely relating to the issues that it could properly have been suppressed by the register under Rule 38 of Practice as obviously irrelevant.

At the close of the Government's case the register sustained the demurrers of the defendants to the sufficiency of the evidence to sustain charges 1, 2, and 3, and overruled his demurrer to charge 4. Charges 1 and 2 were not only not proven but refuted by the testimony of the locators of the claims. Charge 3 in the absence of an averment of lack of discovery of mineral and made where discovery was not questioned, was clearly inapplicable and invalid. Furthermore, no evidence was offered to support it. The Government discharged the initial burden upon it by establishing *prima facie* that no annual assessment work was performed upon the claim for 1920 within the period required and went further in anticipation of the defense and offered evidence tending to show that the work outside the claim declared to have been done for its benefit as one of a group,

was not done for that purpose or had a tendency to benefit the claim as one of a group. The action upon the demurrers was correct.

The defendant assails the sufficiency of charge 4 as a valid charge in his brief and oral argument before the department, and contends that the Government is not by the leasing act (act of February 25, 1920) invested with the character of an adverse claimant; that no annual assessment work has been required to maintain claims theretofore initiated and existent at the date of the passage of said act; that the claim does not become *ipso facto* void upon default in the performance of assessment work, but it would be necessary, to effect such a forfeiture, to assert and establish the same in an independent tribunal. The defendant points to the familiar provision of the mining law that as to land subject to relocation by another upon default of the prior locator in the performance of annual assessment work the forfeiture is not consummated until some one else enters with the intent to appropriate the property under the mining laws.

From this it is argued that it is the entry by another that gives notice to a defaulting claimant that he will have to defend against forfeiture, and from this it is contended, in effect, that some physical reentry or affirmative action against the claim must be taken by the Government to terminate a defaulting claimant's rights, and if prior thereto, he resumes his work on the claim, he cures the default. The argument proceeds to state:

> Even if the effect of the leasing act could be said to be to invest with the character of public land withdrawn from entry any claims existing at the time of the passage of the act and thereafter *abandoned*, surely it can not be claimed that the effect of the act is such as to work the forfeiture *ipso facto* of a claim for which assessment work has been done in any year after the passage of the leasing act which assessment work might in the opinion of some field inspector of the Government be insufficient to meet the $100 requirement of the statute and, *ipso facto*, without any overt act on its part whatsoever, to constitute a fictional entry upon the claim by the Government. If such could be the case, the original claimant, never having intended to abandon, would have no notice that there had been a claimed forfeiture as he would in the case of the required actual entry upon the claim by any true adverse claimant. He might continue to do his assessment work in good faith year after year and expend hundreds of dollars upon his claim, as was done in this case. The moment when he would first be apprised that there had been a claimed forfeiture in a prior year based upon the alleged insufficiency of the assessment work done in that year would be at the time of his application for patent.

The contention is not supported by any authority in point nor can the reasoning be accepted as sound.

Charge 4 is founded upon the doctrine that in view of the provisions of section 2324, Revised Statutes, requiring the performance of annual assessment work, and the excepting clause in section 37 of the leasing act, a valid mining location made for any of the minerals

specified in said act and unperfected at the date thereof by a certificate of entry can not be perfected, but is forfeited upon failure to fulfill the statutory requirement as to annual labor and improvements, and the land therein becomes subject to disposition under the leasing act. *Cronberg* v. *Hazlett* (51 L. D. 101); *Interstate Oil Corporaton and Frank O. Chittenden* (50 L. D. 262). Section 37 of the leasing act was in effect a withdrawal of lands containing oil shale and the other minerals specified therein from location and entry under the general mining laws, and for a public purpose. It forbids the perfection of any such location or entry except valid claims existent at the date of its passage and thereafter maintained in compliance with the laws under which initiated, and prescribes that the deposits named therein shall be disposed of only in the manner provided in the act, except claims existing and maintained as above stated. The act had for one of its objects the raising of additional public revenue, evidenced by changing the method of disposition of such deposits from a free grant thereof under valid possessory rights or by the conveyance for a nominal sum of absolute title to the ground claimed, a system of leasing in which rents and royalties are exacted from the lessee. In a recent decision (*United States* v. *Lewis G. Norton*[1]), decided by the Court of Appeals for the fifth circuit, June 9, 1927, the court said of a withdrawal of a tract under section 2380 for the purpose of survey and sale as town lots: "It is quite apparent that a statute providing for so changing the existing methods of disposing of public lands as to effect an increase of the Government's revenue is one for a public purpose, and the public land reserved pursuant to such a statute is reserved for a public purpose."

Section 37 of the leasing act affords notice to all persons interested in mineral locations containing the minerals mentioned therein of the conditions under which they may maintain their claims and protect the deposits claimed from its operation. There is no warrant for reading into its saving clauses the statutory provision as to resumption of work of the original locator before hostile entry by another. This seems clear when such provision is considered in connection with its context. Section 2324, Revised Statutes, after prescribing the requirement of annual assesment work, provides:

> * * * and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

It is plain that the provision relating to the resumption of work is a restriction imposed upon the right of relocation. It applies only to

[1] See 19 Fed. (2nd) 836.

claims that could be relocated but for the resumption of work. It has no application to lands no longer subject to relocation, or to the operation of the general mining laws, but withdrawn from such operation and subject to other disposition for a public purpose. The defaulting claimant can not restore a lost estate in such lands by resuming annual labor and improvements at a later time.

There is no question as to the jurisdiction of the department to determine whether mining claims for which no patent has been sought are valid or invalid, and so declare. That has been so held in a number of decisions by the department, which have received the sanction of the Supreme Court. (*Clipper Mining Co.* v. *Eli Mining Co.*, 194 U. S. 220, 223, 234; *Cameron* v. *United States*, 252 U. S. 450, 463.)

It follows from what has been said that if the mineral claimants of this location failed to perform the annual work and improvement prescribed by section 2324, upon the claim, their rights under the location upon such failure terminated.

The Government's evidence that no work was done or improvements made for the year 1920 within the boundaries of the Spad No. 3 is not controverted by the defendant, but he relies upon the labor and improvements made in that year upon Spad claims 4, 5, and 6, composing part of a group of six contiguous claims named Spads 1 to 6, as expenditure intended to aid in the development, and redounding to the benefit of Spad 3 claim and others of the group. In this situation, the Government is discharged from its original burden of proving the default, and it becomes incumbent upon the defendant to establish that the work done, or improvements made, do, as a matter of fact, tend to the development of the property as a whole, and that such work is a part of a general scheme of improvement. *Dolles* v. *Hamberg Consolidated Mines Co.* (23 L. D. 267, 274); *Copper Glance Lode* (29 L. D. 542, 549); *Hall* v. *Kearney* (Colo.) (33 Pac. 373); *Copper Mountain Mining and Smelting Co.* v. *Butte and Corbin Consolidated Copper and Silver Mining Co.* (Mont.) (104 Pac. 540, 542); Lindley on Mines (Sec. 631).

The record shows that Chris C. Dere located for himself and associates the Spad Group 1 to 6 in 1919. These claims constitute one contiguous group in the form of a rectangle, covering all of Sec. 12 and the S. ½ of Sec. 1, each claim a quarter mile wide and a mile long, running in their numerical order from north to south on the slope of a mountain.

Spad 6 is the lowest stratigraphically and topographically, and upon its eastern portion, in a V-shaped escarpment with its apex pointing northwesterly, the Mahogany series of oil shales, considered the thickest and richest of the Green River formation, outcrop ex-

tensively and are believed by geologists to underlie the other claims of the group. Davis Gulch, a tributary of Parachute Creek, traverses the claims in a southeasterly direction. The dip of the shale beds, variously stated to be from 2 to 4 degrees, is in the direction of the drainage. In the fall of 1920 three cuts were made, the first in the Mahogany oil shale in the escarpment facing southerly about 200 feet west of the east boundary of, and upon Spad 6, and about 2,900 feet from the south line of Spad 3 claim; the second in a fair grade of oil shale west of the center and near the north boundary of Spad 5, and on the west side of Davis Gulch, about 1,500 feet from Spad 3; and the third, a hole in broken sandstone, about 750 feet from Spad 3, and on east side of Davis Gulch, and the easterly portion of Spad 4, which defendant's witnesses state exposes in the left-hand corner of the hole a bed of oil shale a few inches in thickness. It appears that Spad 5 covers identically the same ground as Hoffman 3 placer, and Spad 6 is similarly covered by Hoffman 2 placer; that the Hoffmans are the earlier locations; and the Spads 5 and 6 were located in ignorance of such prior locations; and that thereafter the Columbia Oil Shale and Refining Company, which is a party in interest in the claim here in controversy, acquired title to the said Hoffman claims and obtained patent to both on the earlier title, without claiming credit for the improvements here in question. The issues presented by the testimony are, first, whether these three cuts outside the Spad 3 were made for, and tend to develop, that claim and others of this group, and, second, if the first question is resolved in the affirmative, whether the reasonable value of such cuts collectively is sufficient when prorated among the six claims of the group to satisfy the requirement of $100 worth of work for the Spad 3 claim. If the work is not a part of a general plan having in view the general development of the group, so that the ore may be more readily extracted, and the work has no reasonable adaptation to that end, then no matter what the value of it is, it can not be said to be done in the development of the group. *Copper Mountain Mining and Smelting Co.* v. *Butte and Corbin Consolidated Copper and Silver Mining Co., supra.*

The cut in the Mahogany ledge on Spad 6 is described as an irregular, wedge-shaped hole, admittedly difficult to measure and ascertain the size, having but three faces and made by blasting the face of the cliff. Inspector Kintz, who measured it, estimated the cubic yardage of rock removed as between 30 and 60, and Mr. Goodale, engineer for the claimants, who likewise measured it, placed it at 88 cubic yards. Inspectors Berry and Stull, witnesses for the Government, from observing it, estimated it at 45 and 50 cubic yards, respectively. The hole is placed at the sandstone marker at

the top of the Mahogany shales, and Kintz, who is the only witness who testified as to this matter, stated it was about 200 feet to a safe landing place below. The men who dug this cut both testified, Dere for the defendant and C. E. Pratt for the Government. Their testimony can not be reconciled, and the testimony of both betrays many inconsistencies and inaccuracies developed on cross-examination, but they agree that they took advantage of a crack in the rock parallel with the cliff to place a charge of powder, Pratt saying that it took 1½ cans and Dere 6 cans of black powder, and the hole was blown out with a single blast. According to Dere, further work followed, squaring up the hole and mucking, consuming in all, according to Pratt, 5 to 8 days, and, according to Dere, 10 days. As to the purpose of this hole, Dere testified: "Well, I figured that I was doing the work generally as has been done in that country, making open cuts and tunnels to benefit these claims to develop them at a later date"; that Mr. Pratt and he started opening up a tunnel on Spad 6; that the work consisted "of an open cut and getting ready for a tunnel for the benefit of the Spad claims—the group." * * * "I wanted to open up this rich Mahogany with a tunnel, and I figured the next year, that I would keep working for the benefit of these claims, tunnelling it, because it was about on the face of Spad 6 claim, and it was a good place to dump the shale for retorting and operating." He was asked, "What did you know about tunnels?" He answered, "Well, in 1919, I seen some tunnels built up at the head of east Middle Creek made by Joe Bellis." Question: Had those been built for groups of claims up there? Answer. Yes, sir.

On cross-examination Dere stated that he is not an engineer, and in reply to further question as to his intent, stated: "Well, I was figuring on driving the tunnel on Spad 6 for the development of all of them, because it was the most practical claim to work from, and it was down below the cliff, and I didn't have to move the retort up on top of the hill to work those other claims." He further stated that he had dug over 500 assessment holes, any one of which could have been turned into tunnels by open cut, but he did not think that there were any (turned into tunnels).

Goodale, the engineer in charge of the assessment work from 1921 on, testified that he first knew of the hole on Spad 6 in 1922; that Dere had talked with him about tunnels, but he had no recollection of Dere mentioning this hole as intended for a tunnel until "lately"; that Dere mentioned the hole to him as one made for the Spad group, but it did not interest him, and he did not go to look at it at the time, because it was a difficult place to get to and his company had title then to the Hoffman location; that it was not represented as an improvement in the application for patent to the Hoffman 2 claim. Pratt's

testimony is silent as to whether such was the intent in excavating this hole.

As to the hole on Spad 5, it appears there is a cabin on that claim. Fred Dere's testimony is to the effect that he was told by his brother Chris to go up and dig a certain sized hole 500 feet from this cabin and to stay up there a couple of weeks; that he dug a hole in black shale about 500 feet from the cabin, 10 by 12 by 18 feet, but did not know in what direction it was from the cabin. He identified a check for $320 issued October 11, 1920, by Chris Dere to their father, as one covering full payment for his labor for 14 days at the rate of $6.00 a day, not including board and lodging. It appears from the testimony of Chris Dere that he did not know where this hole was located, and inquired for the information from his brother Fred in the following year, in order to point it out to Mr. Goodale. Two engineers for the defendant and one inspector for the Government agree that the size of the hole is 38 cubic yards.

As to the hole on Spad 4, Pratt insists that he spotted the place for this hole and dug it alone. Dere states it was dug by them jointly and under his direction; that all the holes were dug for the benefit of the group; that snow was on the ground when he dug this hole, and he could not see when he got into it, but that he thought he was getting into good shale, but it appeared to be a sandstone formation. Pratt stated he worked 8 or 9 days on this hole. Dere states that it took them about 10 days to complete it. Inspectors Kintz and Stull, who measured this hole, state the cubic yardage is 43 and 49.4, respectively. Engineers Savage and Goodale, who also measured it, got results of 53 and 56 cubic yards, respectively.

There is a large volume of opinion evidence in the record upon both sides relative to probable methods of mining shale from these claims, and whether these cuts could or would be used in any general system adopted for mining the shale as a group, and also whether they actually serve any purpose in prospecting or developing the Spad 3 claim. These opinions can not be reconciled. There appears to be a prevailing opinion, however, among those who testified that there is no agreement among engineers as to what mining method will be adopted. Several of the engineers who testified for defendant were of the opinion that the cut on Spad 6 in the mahogany shale might be used as the portal of a tunnel, and the cut on 4 in the sinking of an air shaft to intersect the tunnel, and the cut on 5 as an air shaft to intersect a crosscut or drift from the tunnel, or that each cut might or could be used as the portal of a tunnel to mine the shales above it.

Engineer Hurlburt, who so testified, admitted that he would not consider an open cut as a tunnel, and would not lay out an air shaft before he started his tunnel, but would wait until the necessity for the

same arose, and would want the tunnel to be some distance in; that he would not consider the cut on Spad 4 for an air shaft at the present time; that he meant "at this stage of the oil shale game he would not formulate any plan to operate oil shale mines"; that the cuts on 4 and 5 would supply information as to same strata of shale for a considerable distance on adjoining ground. Engineer Savage, who testified to the same effect, on cross-examination, stated that he did not know whether he would give any consideration to a 1920 cut as an air shaft until after his tunnel construction was under way. When asked whether he would tunnel northerly from a point close to the east line of the Hoffman 2, replied that one system of laying out a mining proposition is probably just as good as another; that it is entirely a matter of opinion; that he would not consider the location of an air shaft before he started to drive a tunnel, and if he were doing it himself, he would probably do it quite differently.

Engineer Carroll was of the opinion that the cuts could be used as level spaces for core drilling which he thought necessary in development; that he did not know whether the cuts would fit in with a scheme of mining that he would design; that the hole on Spad 6 might be the logical place for a tunnel, and it might not be, but he would not consider the use of this work unsound engineering from "information we have at this time"; that the scheme of development that he had recommended would involve a cost of $27,000 per acre, and the small value of a particular open cut would not have any effect on the utilization of it in such an expenditure. Goodale's testimony was to the effect that it was possible, and not impracticable, to use the cut on Spad 6 as a tunnel, and the other cuts as air shafts, but stated that it would be necessary to go down on it to widen it for a portal; that considerations of haulage and drainage and space for dumping and retorting purposes favored the location of a tunnel at this point; that the cuts were valuable in group development work for the reason that that afforded information as to the stratum in which they were dug away from the weathering; that the sandstone cut with the thin seam of shale in one corner, which from tracing the outcrop satisfied him was a solid body, furnished "negative information"; that 15 feet above the cut on Spad 5 there is a bluish shale 3 to 6 inches wide which he traced to Spad 1 and sampled and retorted, obtaining in a 14-inch cut 29 gallons of oil per ton, and that this cut could be used as a portal of a tunnel to drive under shale strata lying above it, which may be mined, though "I am not saying that it will be mined, but it may be by that method"; that he did not think Dere had ever discussed with him any plan for using the cuts as an air shaft. It was his opinion that it is always possible to use any open cut as the portal of a tunnel, if placed in such a position

as to develop the ground above it, and would benefit the property in which it is put, and he had that intent with every cut he put in, except one on top where it would have to be a shaft.

The inspectors who testified for the Government admit that it is possible to drive a tunnel from the cut on Spad 6 in such a direction as to intersect shafts driven from the other two cuts, but were of the opinion that it is impracticable. Among the criticisms they made to such a scheme of mining were that a tunnel following a northerly course with Davis Gulch would leave no room for chambers on the west side of it; that the floor of the cut is 14 feet above the bottom of the mahogany shale, and if run to conform to dip of the strata and provide for drainage, would run out and above the mahogany shale; that if air shafts were needed they could be placed at lower elevation than at the sites of the other cuts so as to eliminate 150 feet of shafting; that the sandstone cut on Spad 4 furnishes no additional information as to the same strata on Spad 3, as it is naturally exposed for about 200 feet closer to Spad 3; that the same is true of the cuts in shale on Spads 5 and 6, as shale is naturally exposed by erosion on those claims.

"Under the decisions of the courts and the Land Department labor or improvements to be so credited must actually promote or directly tend to promote the extraction of mineral from the land or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the mining works thereon, or pertaining thereto." *Highland Marie and Manilla Lode Mining Claims*, and cases there cited (31 L. D. 37, 38). Under this rule, the department has held that the value of the shafts upon a placer claim, apparently not sunk to actually extract mineral but to secure data upon which to base later development work, which in that case consisted of a long tunnel finally reaching pay gravel (*Kirk et al.* v. *Clark et al.*, 17 L. D. 190), and a drill hole placed upon a claim for the purpose of prospecting it, and to secure data as a basis for further development (*C. K. McCornick et al.*, 40 L. D. 498, 500), were properly creditable in meeting the expenditure required of $500, as a condition precedent to entry and patent under section 2325, Revised Statutes. And whatever may be credited as labor and improvements to satisfy the requirements as to annual labor under section 2324 may also be credited under section 2325, and the decisions of the courts construing or interpreting such provisions under section 2324, may be resorted to in determining what expenditure in labor and improvements may be credited under section 2325, or *vice versa*. *Zephyr and Other Lode Mining Claims* (30 L. D. 510, 513).

And such labor and improvements may be in fact outside the claims, or claims in common, or on only one of the several claims in

common, provided the claims for which the credit is sought are contiguous, and held in common and intended to aid in the development of the claim, or claims in common, as the case may be, and the improvements are of such a character as to redound to the benefit of all. *Copper Glance Lode* (29 L. D. 549), and cases there cited. But the fact that such work has been done, and its relation to the claim for which patent is sought, must be clearly shown (*Clark's Pocket Quartz Mine*, 27 L. D. 351). The claimants of such improvement must show that such work was intended at the time as annual assessment work for the particular claims (*Duncan* v. *Eagle Rock Gold Mining and Reduction Co.*, 48 Colo. 569; 111 Pac. 585). The labor or improvement so sought to be credited must have a direct relation to the claim, or be in reasonable proximity to it (*McGarrity* v. *Byington*, 12 Cal. 426).

In *Fredricks* v. *Klauser* (96 Pac. 679, 680) the Supreme Court of Oregon defined the word improvement as used in section 2324 as "such an artificial change of the physical conditions of the earth in, upon, or so reasonably near a mining claim as to *evidence a design* to discover mineral therein or to facilitate its extraction, and in all cases the alteration must be reasonably permanent in character." (Italics supplied.) Applying these rules to the facts as disclosed in the record, the department is unable to find that these three cuts were part of one general scheme of development for the benefit of the six Spad claims or any number of them or that they are of such a character as to redound to the benefit of all. These facts stand out clearly; there is no tunnel, or portal of a tunnel, and no air shafts; there is nothing in the character of these cuts, as described by any of the witnesses, that evidences that they were designed for such purposes; there is no evidence even upon the part of Dere that the cuts on Spad 4 and 5 were intended by him as the beginnings of air shafts for his tunnel. Indeed, his testimony leads to the opposite inference, inasmuch as he stated that he started the cut on Spad 4 with the thought that he was getting into good shale, and found he was in sandstone, and the locus of the cut on Spad 5 was selected by a 17-year old boy who was instructed to dig a cut of certain dimensions 500 feet from a cabin. It would seem unnecessary to observe that air shafts for such a vast and expensive improvement are not planned in that haphazard way. There is only the evidence of the mining engineers who testified for the defendant to the effect that the cuts on Spad 4 and 5 might fit into a practicable scheme of attack upon the oil shale by tunneling from the cut on Spad 6, if upon further study of the ground and a determination of the best methods of mining the deposit, such a method were adopted. Although it may be true that a shallow assessment hole in a stratum

of shale may furnish some information as to the character and value of the stratum disclosed and does furnish definite information as to the nature and condition of the stratum away from the effects of weather, and information as to local dips, there is no specific evidence in this record pointing out how the cut, practically in barren sandstone on Spad 4, and the cuts on Spad 5 and 6 where the oil shale strata were exposed by erosion, would be of service as information as a basis for future development of Spad 3 or any other claim of the group other than the claim upon which the cut was made. The fact that such an assessment hole might be utilized as a portal for a tunnel or in the construction of an air shaft under some later plan of development is insufficient to credit its value as a group improvement. The fact that claims cover a continuous deposit covering one ore mass does not relieve the claimants of the improvements thereon from the requirement of showing that they will aid in the extraction of the mineral or will tend to promote the development of such claims. *Lawson Butte Consolidated Copper Mine* (34 L. D. 655). The cut on Spad 6 does not reveal or suggest in itself any design to drive a tunnel from that point. The only testimony is the naked, uncorroborated assertion of Dere that such was his purpose in digging it, which the appellant contends is sufficient. Even if this statement were accepted as sufficient, and allowing the utmost credit claimed by the defendant as the value thereof, to wit, $287.75, based upon the data as to costs supplied by this witness, the amount is insufficient when distributed *pro rata* among the six claims that it is alleged it was intended to benefit, to satisfy the requirement as to assessment labor on Spad 3.

Counsel for the defendant relies upon the rule that "it is not within the province of the courts to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another." (Lindley on Mines, Vol. 2, Third Ed., section 631.) This rule has been followed by the department in controversies as to whether a certain improvement *that had been made* would aid in the development of a group of claims (*Hughes et al.* v. *Ochsner et al.*, 27 L. D. 396), or where it is a question of whether some better method could have been pursued than that actually pursued (*C. K. McCornick et al.*, 40 L. D. 498). The answer of the court in *Copper Mountain Mining and Smelting Co.* v. *Butte and Corbin Consolidated Copper and Silver Mining Co.*, *supra*, to the same contention made in that case, seems apposite here. The court said, in deciding that a certain tunnel did not tend to benefit the claims in question:

> Counsel for plaintiff contends that it appears that the work was done by the plaintiff on the M. L. in good faith for the purpose of developing the group of claims, and that the court should not be permitted to substitute its own

judgment as to the wisdom or expediency of the method employed by the owner in adopting the plan pursued. As an abstract proposition we think counsel states the correct rule. *Mann* v. *Budlong*, 129 Cal. 577, 62 Pac. 120; *Gear* v. *Ford*, 4 Cal. App. 556, 88 Pac. 600. Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which it bears to the claim itself. If the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded.

See also *Dolles* v. *Hamberg Consolidated Mines Co.* (23 L. D. 267, 274).

The conclusions of the department are that the three open cuts, or any one of them, have not been shown as having a tendency in anywise to develop the claims as a group; nor has it been shown that they were made in furtherance, or are a part, of a general scheme to develop the claims as a group. For these reasons the Commissioner's decision is

Affirmed.

EMIL L. KRUSHNIC (ON REHEARING)

Decided February 8, 1928

OIL-SHALE LANDS—MINING CLAIM—GROUP DEVELOPMENT—EVIDENCE.

Mere statements of intent that certain work was intended as group development work without regard to evidence as to the character of the work and its relation to the claim as having a tendency to benefit it is insufficient to establish that the work is of such character.

OIL-SHALE LANDS—MINING CLAIM—GROUP DEVELOPMENT—IMPROVEMENTS—ASSESSMENT WORK—CUSTOM—EVIDENCE.

The question of the applicability of work alleged as common improvement must be determined from the particular facts and circumstances of each case, and the fact that a custom existed in the shale regions to perform work on oil-shale claims according to a certain method will not suffice where the rules of law relating to group assessment work are not fulfilled.

OIL-SHALE LANDS—MINING CLAIM—ASSESSMENT WORK—PATENT.

Fulfillment of the annual assessment work requirement of section 2324, Revised Statutes, is a prerequisite to continuing ownership as against the Government until patent issues.

OIL-SHALE LANDS—MINING CLAIM—ASSESSMENT WORK—FORFEITURE—RELOCATION.

As between the Government and a mining claimant the test of the validity of the latter's oil-shale claim is found in the provisions of section 37 of the leasing act, and not in that part of section 2324, Revised Statutes, which defines his rights with respect to some stranger who seeks to relocate the claim.

OIL-SHALE LANDS—MINING CLAIM—ASSESSMENT WORK—FORFEITURE—TRESPASS.

Where, subsequent to the passage of the leasing act, a claimant of an oil-shale location fails to perform the annual assessment work within the period prescribed by law, all his rights against the Government in and to the location are extinguished, and entry and performance thereafter by him or his successors of work on the claim constitute a trespass and neither revive nor initiate any rights.

OIL-SHALE LANDS—MINING CLAIM—DISCOVERY—STATUTES.

The concluding words of section 37 of the leasing act, "which claims may be perfected under such laws, including discovery," do not indicate that mining claims having imperfections other than lack of discovery are excepted from the operation of the act.

OIL-SHALE LANDS—WITHDRAWAL—FORFEITURE—JURISDICTION—STATUTES.

The leasing act repealed as to oil-shale deposits the general provisions of the mining law and withdrew them from location and disposition thereunder, and was a legislative assertion of control and ownership thereof by the United States, except as specifically provided in section 37 of the act; no affirmative action, such as physical reentry or the institution of proceedings, is necessary in order to terminate the rights of a defaulting mining claimant.

OIL-SHALE LANDS—MINING CLAIM—FORFEITURE—RESUMPTION OF ASSESSMENT WORK—ESTOPPEL.

Mineral deposits that are within the purview of the leasing act, in lands covered by mining locations, become, upon default in maintenance of such claims, subject to disposition under that act, and subsequent resumption of work thereon does not serve to divest the Government of its proprietary title, nor does the fact that work is resumed prior to the initiation of adverse proceedings to determine the validity of a claim operate as an estoppel against the Government.

OIL-SHALE LANDS — MINING CLAIM — POSSESSION — ADVERSE CLAIM — WITHDRAWAL—COURTS—LAND DEPARTMENT—JURISDICTION.

Questions concerning the respective rights of adverse claimants to possession of mineral lands, under locations thereof, are to be determined by the courts, but for administrative purposes the Land Department has jurisdiction to determine whether at the date of a withdrawal a valid right had attached to any tract within the limits of the withdrawal.

WORK, *Secretary:*

Emil L. Krushnic has filed a motion for rehearing in the matter of his application, Glenwood Springs 022364, for patent to the Spad No. 3 oil shale placer claim covering the N. ½ N. ½ Sec. 12, T. 5 S., R. 96 W., 6th P. M., Colorado. By decision dated October 3, 1927 (52 L. D. 282), the department affirmed the decision of the Commissioner of the General Land Office rejecting the application and held the claim to be null and void. The grounds for the department's decision were, that under the provisions of section 37 of the act of February 25, 1920 (41 Stat. 437), known as the "Leasing Act," the shale deposits within this claim were subject only to disposition in the form and manner provided by that act and that the claim was not within the saving clause of section 37 which excepts from the opera-

tion of the act, "valid claims existent at the date of the 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"; that to maintain a claim in compliance with the laws under which initiated means, among other things, the performance of $100 worth of annual labor and improvement prescribed by section 2324, Revised Statutes, and failure to fulfill this statutory requirement as to a claim unperfected by a certificate of entry, terminates by the force and effect of section 37 all rights of the claimant under the general mining laws; and the shale deposits thereon became subject to disposition only under the leasing act.

The Spad No. 3 claim is one of a group of six claims located in 1919. The sufficiency of the exposures of oil shale on the claim to constitute a valid discovery is not questioned. The claim appears to have been a valid claim existent on February 25, 1920, the date upon which the act became effective, but it is admitted by claimant that no work or improvement as required by section 2324 was performed *on* the claim on or before July 1, 1921, to which date Congress by the act of December 31, 1920 (41 Stat. 1084), extended the time for doing the annual assessment work for the calendar year 1920. Subsequently the present claimant acquired the title of the other locators of this claim and annual assessment work was performed for 1921, 1922, and to the time of the institution of this inquiry, which work exceeds in value the sum of $500 required by law to be done as a prerequisite to the grant of a patent. The claimant sought to have accredited as assessment work for 1920 the aggregate value of three holes made in 1920 on other claims of the Spad group as common improvement for the benefit of the claims as a group, which work after due notice and hearing was held not to have any tendency to in anywise develop the claims as a group, nor was it shown that they were made in furtherance or a part of a general scheme to develop the claims as a group.

The motion challenges the correctness of the application of the rules as to group development to the three holes made in 1920, and in addition it is contended that, irrespective of whether or not the work was performed in the year 1920, the department, under rules established in a number of its decisions and decisions of the courts, has no concern with the performance of annual assessment work on oil-shale placer claims; that whether it can enter upon this inquiry or not, by the resumption of work upon the claim prior to any acts of physical reentry or the institution of proceedings of ouster or to determine the validity of the claim, a forfeiture was prevented and the location is therefore a "valid claim" within the meaning of section 37 of the leasing act, and to hold otherwise is an attempt to

destroy a vested right; that even upon the assumption that the language in section 37 declares unequivocally that upon failure to do the assessment work the possessory title to an oil-shale claim would be forfeited to the United States, the United States in its proprietary capacity is now equitably estopped from claiming a forfeiture; that the rule of property prevents an automatic forfeiture.

Able and elaborate arguments in connection with the rehearing have been presented orally before the Secretary and in briefs filed by claimant's counsel and counsel for other oil-shale claimants who were allowed to appear as *amicus curiæ*. The department fully appreciates the importance of the question in its effect upon the validity of a large number of oil shale and other locations made for minerals subject to disposition under the leasing act. It also has lively apprehension of the far-reaching results if the decision assailed is overturned upon the public interest in abridging the operation, or greatly diminishing the possibilities of the operation of the leasing act, which secures to the Government some measure of control over the development and production of such mineral resources named therein for which there is present demand, and which reserves the title in the United States to other minerals for which there is no immediate economic need, and which provides in cases of both present and future utilization a substantial source of public revenue in rents and royalties. In efforts to minimize the effect of sustaining the contention of claimants in this case, it is stated in the brief that but ten per cent of oil-shale land was covered by oil-shale locations made prior to the leasing act. The department has no certain and complete data available, but is in receipt of official information to the effect that of the approximately 1,000,000 acres of oil-shale lands in the Green River formation, Colorado, from 600,000 to 750,000 acres are blanketed with oil-shale location notices of record antedating the leasing act and that those cover what is considered the richest and most commercially valuable shale.

With respect to the contention renewed on rehearing that mere statements of intent that certain work was intended as group development work without regard to evidence as to the character of the work and its relation to the claim as having a tendency to benefit it suffices, it is needful only to say that this contention was given full consideration when the decision was rendered, and it is not considered to be law nor in harmony with the decisions of the department or the courts. The department found that these cuts were not made with any intent that they were to be a part of a general scheme of development of the claims as a group, and sees no reason to disturb that finding. The question of the applicability of the work as common improvement must be determined from the

particular facts and circumstances in each case. The supplemental affidavit filed on rehearing, to the general effect that a custom existed in the shale regions to perform such work by putting in open cuts on one or more of the claims of a group at an expense equal to $100 for each claim when prorated, is immaterial. No such custom, should it exist, will be permitted to override the requirements of law. Putting this so-called group work out of view as of no avail, attention will be given to the larger questions raised in the brief.

As stated in the previous decision and admitted in one or more briefs filed, the leasing act is in effect a withdrawal of the mineral lands therein described. It is likewise a repeal of the mining laws in so far as they relate to such lands, except those lands embraced in claims that are excepted from the operation of the leasing act, by section 37 thereof. The claimant is seeking title under the general mining laws to lands containing oil shale. It is incumbent for him to show that his claim falls within the exception mentioned in section 37, and it is the duty of the department as guardian of the public domain charged with the administration and disposal of public lands to inquire whether his claim meets the requirements of that section. The excepting clause in that section declares in plain and specific language that the claim must be maintained after the passage of the act in compliance with the laws under which initiated. Section 2324, Revised Statutes, being one of the laws under which the claim was initiated, declares "that on each claim located after the tenth day of March, eighteen hundred and seventy-two, and until patent has issued therefor, not less than one hundred dollars' worth of labor shall be performed, or improvements made by the tenth of June, eighteen hundred and seventy-four, and each year thereafter." There follows in the same section a provision that "upon failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure and before such location."

The provision for the performance of $100 worth of labor or improvement is mandatory. The well-settled construction of these provisions of the section is that the necessity of doing the work is imperative in order to maintain the claim (*Chambers* v. *Harrington*, 111 U. S. 350, 353, and other cases cited in note 231, section 30, U. S. C. A.). It has been repeatedly held that development work is the condition of the miner's continued possession (*O'Reilly* v. *Campbell*, 116 U. S. 418, 423; *Jennison* v. *Kirk*, 98 U. S. 453; *Jackson* v. *Roby*, 109 U. S. 440), which can only be maintained by annual expenditure thereon of the work required by law. As stated in *El*

Paso Brick Co. v. *McKnight* (233 U. S. 250, 256), "Locaters of mining claims have the exclusive right of possession of the surface included within the exterior limits of their claims *so long* as they make the improvements or do the annual assessment work required by the Revised Statutes, section 2324." (Italics supplied.) Development by working is a condition to continued ownership until patent issues (*Erhardt* v. *Boaro*, 113 U. S. 527, 535). To keep up and maintain a valid location one hundred dollars' worth of work and labor must be done or improvements made during each year until patent issues therefor (*Gwillim* v. *Donnellan*, 115 U. S. 45). Every person who continued in possession of such property without performing annually the labor that has been specified, violates the conditions of the grant from the Government (*Honaker* v. *Martin*, 11 Mont. 91; 27 Pac. 397, 398). In view of these well-settled constructions of the mining laws, which Congress may be presumed to have known when the leasing act was passed, there would seem to be no doubt that to maintain a claim in compliance with the laws under which initiated necessarily meant the performance of the requirements of annual labor, and that there was no other intent or purpose in the use of such words than to protect and preserve only claims where the possessory rights had been maintained. As between the Government and the claimant the test of the validity of the latter's claim is found in the provisions of section 37, and not that part of section 2324, Revised Statutes, which defines his rights with respect to some stranger who seeks to relocate the claim. The language of the court in *The Yosemite Valley Case* (15 Wall. 77, 93), with certain interpolation of words to agree with the facts here, sharply brings into view what is believed to be the fallacy in the argument as to the right of resumption of work. The court said—

> * * * The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition (retention) by the settler (mining claimant) of a *legal right to the land* occupied by him as against the owner, the United States; and the acquisition (retention) by him of a *legal right as against other parties to be preferred in its purchase*, when the United States have determined to sell.

When the original locators failed to maintain the claim by doing the annual assessment work within the period prescribed by law, all their rights against the Government in and to this location upon oil shale lands were extinguished and this claimant who acquired the outstanding interest of the other locators and proceeded thereafter to reenter and perform work on the land that was no longer subject to the general mining laws was no more than a trespasser and could neither revive nor initiate any rights to the land thereby. The foregoing view finds strong support in a recent decision of the Circuit

Court of Appeals for the 8th Circuit in the case of *Hodgson* v. *Midwest Oil Company* (17 Fed. (2d) 71), where it was held that the failure to do the assessment work for 1921 upon an oil placer claim located in 1887 on lands included in a petroleum withdrawal made in 1909, terminated all possessory rights thereto. The court said (page 77)—

> Ordinarily, and in the absence of any withdrawal, the locator would have the right to relocate, equally only, however, to any other person qualified to locate.

Nothing is perceived in the language employed by *Belk* v. *Meagher* (104 U. S. 279), and the many decisions of the courts and department, relied upon by claimant and *amicus curiæ* applying the doctrine of that case, which dealt with the possessory rights of rival mining claimants based upon the construction solely of the general mining laws, that conflict with this conclusion. Much emphasis is placed on this passage in the opinion in the *Belk* v. *Meagher case* (p. 282)—

> For all the purposes of this case the law stands as it would have stood had the original act of 1872 provided that the first annual expenditure on claims then in existence might be made at any time before Jan. 1, 1875, and annually thereafter until a patent issued. If it was not made by that time the claim would be open to relocation, provided work was not resumed upon it by the original locators or those claiming under them, before a new location was made. Such being the law, it seems to us clear that if work is renewed on a claim *after it has once been open to relocation*, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that, if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until Jan. 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law. His rights *after* resumption were precisely what they would have been if no default had occurred. The act of 1874 is in form an amendment of that of 1872, and all the provisions of the old law remain in full force, except so far as they are modified by the new. [Italics supplied.]

There is no doubt that the doctrine above quoted continues to be the law as to mineral lands that continue to be subject to location and purchase under the general mining law, but it is not the law as to mineral lands affected by the leasing act. Section 37 thereof at one blow destroyed the right of relocation of such minerals and with it fell the right of resumption. It is contrary to the declared purpose and object of the act to assume that in doing away with the system of a free grant of the minerals and the grant of a fee title it was intended to preserve all the rights of a mining locator and at the same time relieve him of his duties, for that is the consequence if neither

the Government nor an individual can now take advantage of his default. The fair and obvious meaning of section 37 is that if the annual work is not done, all the rights of the claimant *are* gone. When the law on a particular subject is radically changed by statute, decisions under the old law become of little value as authority (*Lemp* v. *Hastings*, 4 Greene (Ia.), 448). The courts may properly refuse to follow precedents where the reasons upon which such precedents are based no longer exist (*Jennings* v. *State*, 13 Kan. 80; *Brennan* v. *New York*, 1 Hun. 315, 47 How. Prac. 178).

In the interpretation of the text of the excepting clause in section 37, it is contended in some of the briefs that it was recognized that a claim might be valid though imperfect. Emphasis is placed upon the concluding words "which claims may be perfected under such laws, including discovery." It is argued that by providing that a discovery might be included in the process of perfecting a claim, Congress necessarily indicated that claims having other imperfections are within its meaning. As persuasive of this view, attention is invited to the discussion of this section (then 36 of the Senate bill) in the Senate, reported in Vol. 58, Part 5, pages 4577–4585 of the Congressional Record, which resulted in the addition of the words "including discovery."

In view of the plain requirements of the statute that the claim must be maintained in accordance with the mining laws under which initiated, it is not considered that resort to extrinsic sources is necessary to ascertain its meaning with respect to the requirement of maintenance. Nevertheless, after careful reading of the discussion to which attention is invited, the conclusion is believed unescapable that the addition of the words "including discovery" was to place claims upon which there were *bona fide* claimants at the date of the passage of the act diligently engaged in prosecution of work looking to discovery, and who continued in such work to discovery, upon the same footing as those mining claimants similarly engaged on oil and gas-bearing lands within their claims whose rights were preserved from the operation of withdrawals under the Pickett Act (act of June 25, 1910, 36 Stat. 847). Long before the passage of the leasing act the courts in their decisions had recognized that a locator in actual possession of his claim and diligently and in good faith engaged in the prosecution of work to discover mineral thereon by license if not by invitation of the Government and who had made large expenditures thereon, had a substantial interest in the claim, and that his possession was entitled to protection against those who had no better right. The Pickett Act and the leasing act recognized such rights as worthy of protection from withdrawals. There is no warrant for the inference that the leasing act intended to protect

the negligent or those who had not manifested their good faith by doing the annual labor and had done nothing with the intent of actual development. There is nothing in the terms of section 37 that warrants the construction that if one particular specified imperfection is excused, another imperfection or any number of imperfections may likewise be overlooked. Such a construction is repugnant to the spirit and purpose of the act and would render it practically ineffective and nugatory, as to any lands covered by a location which some one claimed.

The decision assailed did not question, and no other case has questioned, the rule laid down in numerous departmental decisions that controversies between rival claimants or adverse claims to the same mining location belonged in, and should be settled in, the courts. Such controversies involve disputes between citizens to the possessory rights to a given tract of mineral land. The question of assessment work in those cases, as has been frequently announced, goes to the right of possession between contending parties. The Federal Government is interested only in having a particular tract developed and disposing of it in accordance with law. It is immaterial in such cases whether A or B has the better claim, or whether one or the other performs the assessment work and secures patent assuming both qualified. The situation here is entirely different. The leasing act, as stated, repealed as to shale deposits the general provisions of the mining law and withdrew them from location and disposition thereunder and was a legislative assertion of control and ownership thereof by the United States, except as specifically provided in section 37 of the act. It is the duty of the department to scrutinize claims that are asserted to be within the exceptions and ascertain whether the Government or the individual has the better right. The question is one of validity, and under section 37 maintenance is an essential element of validity. Only controversies between adverse claimants under conflicting mining locations of the same land, and which relate solely to the right of possession are committed exclusively to the courts (*Bunker Hill, etc., Co.* v. *Shoshone Min. Co.*, 33 L. D. 142, 147). The opinions relied upon in the briefs in cases of *Yosemite National Park* (25 L. D. 48) and *Navajo Indian Reservation* (30 L. D. 515), where under the particular wording of those reservations mining claims were excluded and remained excluded irrespective of compliance with the mining laws, do not conflict with the views here expressed. The claimants here seek to invoke a rule to a situation where the reason for the rule does not exist.

The contention that the Federal Government must act the part of an adverse claimant in this and similar cases and be alert and vigilant and take some affirmative action to terminate the rights of a defaulting claimant before he resumes work, such as by physical

reentry, or institution of adverse proceedings in the department or by bringing an ouster suit in the courts, is untenable. Prior to default in assessment work, the claimants had neither the legal nor full equitable title. All they had was a possessory title, i. e., a mere right of possession and enjoyment of the profits without purchase and upon condition which may be defeated at any time by the failure of the party to comply with the condition, viz, to perform or make the annual improvement required by the statute (*Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 430). The fee was and now is in the United States.

There is no attempt herein to gainsay the doctrine that so long as claimants complied with the condition, by doing the annual work, they had a vested property right protected by constitutional guarantee, but it is a far and unwarranted step to contend from that doctrine that by virtue of the provisions of section 2324 as to resumption of labor, after breach of condition, all rights of the claimant as against the Government were as before, and the estate was preserved, in the face of the provisions of the leasing act withdrawing the lands and providing for a radically different mode of disposition of the minerals. In *Donnelly* v. *United States* (228 U. S. 243), where the defendant sought to establish a want of Federal jurisdiction over a crime by showing that the crime was committed on a mining claim within the limits of the Hoopa Valley Indian Reservation, the court said: "The prime requisites for the validity of a mining claim are discovery of a valuable mineral deposit, an actual taking possession thereof, and the performance of the requisite amount of development work; where the record does not disclose facts showing the existence of these elements *a finding can not be supported that valid rights against the Government existed.*" (Italics supplied.)

No plausible ground is made out for applying the doctrine of estoppel against the Government based upon the fact that work was performed on the claim before adverse action was taken by the Land Department. It is manifest the assumed parity or analogy between the status of a mining claim after default in maintenance, and a vested estate in fee under a railroad or other grant which is subject to forfeiture for breach of condition subsequent, does not exist. The rule is well settled that a legislative act, directing the possession and appropriation of lands, is equivalent to office found; that any public assertion by legislative act of the ownership of the State, after default of the grantee—such as an act resuming the control of them and *appropriating them to particular uses*—will be equally effective and operative (*United States* v. *Repentigny's Heirs*, 5 Wall. 211; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Farnsworth* v. *Minnesota and Pacific Railroad Company*, 92 U. S. 49; *McMicken* v. *United States*,

97 U. S. 204, 217, 218). The land within the claim having become subject to the full force and effect of the withdrawal, as between the Government and the claimant, all subsequent efforts by them could not serve to divest the Government of its proprietary title therein (*United States* v. *McCutchen*, 234 Fed. 702, 711). Irrespective of the true intent and meaning of the statute, the doctrine of the rule of property presents no substantial defense in this case. The cases cited in the briefs on this point did not involve a construction of the law here in question, nor any statute or withdrawal order of like import, nor do they sustain the proposition that the department has disclaimed jurisdiction or declared it to be its policy not to inquire into the doing of annual assessment work and labor, where there is a question whether a mining claim was excepted from a withdrawal for a public purpose. As heretofore shown, those cases between rival and conflicting claimants to a particular tract are inapposite. Likewise the decisions in *South Dakota* v. *Thomas* (35 L. D. 171), *Wilson* v. *State of New Mexico* (45 L. D. 582), *Lizzie Trask* (39 L. D. 279), *James Morris* (47 L. D. 326), and others of similar nature holding, in effect, that the rights of a *bona fide* settler on public land, who was overtaken by a withdrawal which saved from its operation only those who had complied with the law under which the settlement was made, were not affected by the statutory requirement that entry should be made in the local office within three months, "otherwise his claim shall be forfeited," do not clash with these views. Those cases simply followed the construction of the act in *Johnson* v. *Towsley* (13 Wall. 72), to the effect that the filing requirement was a rule to be applied solely between conflicting settlers on the same land.

Contrary to the contentions made in the briefs, there are a number of decisions by the department that declare its right to determine whether valid rights exist in mining claims within the scope and limits of the terms of a withdrawal and make clear the distinction in such cases and cases between rival claimants. In *Navajo Indian Reservation*, *supra*, it was said (p. 517)—

> Questions concerning the respective rights of adverse claimants to possession of mineral lands, under locations thereof, are to be determined by the courts (Barklage v. Russell, 29 L. D. 401) but for administrative purposes it is proper and necessary, in a case like the one here presented, for this Department to determine whether, at the date of said executive order, a valid right had attached to any tract within the limits described in said order.

The opinion rendered in that case, as stated in *E. C. Kinney* (44 L. D. 580), that the withdrawal did not attach upon the default of the mineral claimant, was predicated upon the particular language employed in making the reservation. It was plainly indicated that

the reservation might have been worded in such a way that the withdrawal would have attached upon default of an existing claim so as to prevent relocation. Other reservations were referred to which were made in such form as to save existing claims so long as the requirements of the law were complied with but which caused the withdrawal to attach and reserve the lands and prevent their disposal in case of default of the claimants who held the land at the time of the reservation.

The effect of a withdrawal under the reclamation act for irrigation works was considered in 32 L. D. 387, and it was there stated that an unperfected mining claim is merely a possessory right which is liable to be divested for failure to perform the necessary yearly labor. Also, that the department has jurisdiction to determine whether such right was divested so as to restore the land to the control of the Government. Following the above-stated views, it was held in the *Kinney case* that "A mining claim as to which the claimant was in default in the performance of annual assessment work at the date of a withdrawal for the construction of irrigation works under the reclamation act does not except the land from the force and effect of the withdrawal." The conclusions in *Interstate Oil Corporation and Frank O. Chittenden* (50 L. D. 262) and *Cronberg et al.* v. *Hazlett* (51 L. D. 101) are in harmony with the *Kinney case* and previous decisions there cited; the case of *Cronberg et al.* v. *Hazlett* being the first involving the construction of section 37 in its bearing on defaults in the performance of assessment work upon mining claims located upon mineral lands within the purview of the leasing act.

The above review of the authorities sufficiently demonstrates that there has been no change or shift in departmental policy or in its rules of construction and that there was no decision upon the faith of which the claimant could be justified in assuming that his rights under the provisions of the leasing act would be preserved by the performance of annual labor after default. And no rights could arise by virtue of such acts done in defiance or disregard of the provisions of the act, or even done in moral good faith based on a construction placed upon it by reputable legal advisers. The decision assailed follows and applies the construction of the act in the *Cronberg case*. The fact that there were adverse claimants under the leasing act in that case and the *Chittenden case* is immaterial. The fallacy of this attempted distinction is immediately apparent, because if the land had not revested in the United States by the force of the act, no rights could arise or claim be recognized under it.

Finally, some observations will be made upon the results, if the contentions of the claimant and *amicus curiæ* in this case were adopted. They would lead to the absurd and unwarranted situation that claim-

ants could for years maintain a paper possession of portions of the public domain, not performing a stroke of work or spending a dollar in money. Inaction and failure to comply with the law would be rewarded and such claimant would be protected to the same extent and in the same manner as another claimant who had in every respect complied with the provisions of the general mining laws and with section 37 of the leasing act. Not only shale lands in the public domain would be subject to these paper claims, but lands specifically withdrawn for governmental use, as naval reserves or otherwise, would be subject to the assertion of these paper claims at any time in the future years, unless and until the Government ran down each paper location recorded in the various county offices in the western States, and instituted a formal proceeding to cancel something which had lapsed and been abandoned through the failure of the claimants to carry out the specific requirements of the law.

When the decision in this case was prepared, the department was fully impressed with its importance on account of its involving principles which will become precedents in cases of similar nature now pending or later arising. It was therefore given a most careful examination, and this petition has had the same attentive consideration. The result is that the department sees no reason to depart from its previous conclusions. The motion is therefore denied.

Motion denied.

STATE OF MISSOURI EX REL. HEMPHILL LUMBER COMPANY (ON REHEARING)

Decided February 8, 1928

SURVEY—MEANDER LINE—PLAT—RIPARIAN RIGHTS—JURISDICTION—NAVIGABLE WATERS—NONNAVIGABLE WATERS.

Where in a Government survey a body of water, navigable or nonnavigable, was meandered with a fair degree of accuracy and the abutting lands subsequently disposed of according to the plat, title to lands that thereafter appear beyond the meander line is dependent upon the laws of the State within which they are situated.

SWAMP LAND—SURVEY—MEANDER LINE—PLAT—PATENT—RIPARIAN RIGHTS.

Where swamp lands abutting upon a meander line are patented to a State in accordance with the plat of survey, the State does not acquire title under the swamp land grant to lands beyond the meander line, subsequently uncovered by the recession of the waters, but it takes such riparian rights by virtue of its patent as are recognized by local law.

COURT DECISION CITED AND APPLIED.

Case of *Lee Wilson and Company* v. *United States* (245 U. S. 24), cited and applied.

FINNEY, *First Assistant Secretary:*

By decision of January 9, 1928, the department affirmed the decision of the Commissioner of the General Land Office dated September 13, 1927, rejecting the application of the Hemphill Lumber Company for the survey of certain areas embraced in the application of the State of Missouri for selection under its swamp grant and alleged to have been omitted from the original Government survey of public lands in T. 17 N., R. 7 E., 5th P. M., Missouri.

A communication from the attorney for the applicant has been received in the nature of a motion for rehearing or for revision of the former decision to include a more detailed description of the lands affected thereby and more particular statement of the facts bearing upon the status of the lands. It is explained that such revised decision is needed for authoritative reference in connection with pending litigation in the local courts.

The application to select was transmitted by the Secretary of State of the State of Missouri by letter of February 19, 1925, and the application for survey pursuant thereto was made by the Hemphill Lumber Company as claimant through the State of Missouri. The identity of the lands is given in the selection as follows:

'The unsurveyed portion of section 12, Township 17 North, Range 7 East, lying between the meander line as established on the east side of the St. Francis River and the water's edge of the St. Francis River, containing 103 acres.

The unsurveyed portion of section 13, lying between the meander line and Gum Island in section 13, containing 96.60 acres. The unsurveyed land, lying between the meander line and Gum Island in section 14, containing 182.15 acres. The unsurveyed part of section 23, lying between the meander line and Gum Island, containing 72.81 acres. The unsurveyed part of section 15, lying adjacent to Gum Island in the southeast corner of the section, approximating 5 acres. The unsurveyed part of section 22, lying between Gum Island and the meander line in the southeast part of the section, containing 195 acres. The unsurveyed part of section 21, lying between the St. Francis River, Gum Island and Indian Hill Island, containing 41.2 acres. The unsurveyed part of sections 27 and 28, lying between the meander line and Indian Hill Island containing 300.95 acres. The unsurveyed part of section 33, lying between the meander line and the water's edge of the St. Francis River, containing 47.75 acres.

Prior to decision in the case the department caused examination of the area involved to be made by experts especially qualified for investigations of that character. Rejection of the application was predicated on the findings of facts reported as a result of the field examination. The said examination was made by Earl G. Harrington, United States cadastral engineer, assisted by Willis W. Bandy, United States surveyor, from October 25 to November 12, 1926, inclusive. The report was made by Harrington and is in part as follows:

The examination was directed to an ascertainment of whether there were any considerable tracts of land, which were in existence and above the ordinary high water elevation of the St. Francis River in the year 1821, when Missouri was admitted into the Union, and in 1848, when the township was surveyed, which were not included in the original survey of the township.

The alleged unsurveyed area included in this examination is that area lying between and to the east of Indian Hill and Gum Slough Islands and the alleged left bank of the St. Francis River, according to the plat approved February 19, 1849.

An elaborate drainage system has been built through southeastern Missouri and it is a very difficult problem to determine the actual conditions as they existed at the date of the original survey.

A levee and levee ditch has been built very close to the position for the record left bank of the St. Francis River. The area below or to the west of the levee is lower than the land east of the levee. The levee follows very close to the dividing line between high and low land. Gum Slough and Indian Hill Islands can be identified and occupy the positions as shown upon the plat of the original survey. Corners of the original survey and numerous recognized corner positions were identified.

During the examination the position for the record left bank of the St. Francis River was traversed. The channels shown upon the diagram as the St. Francis, Indian Hill and Gum Slough were actually determined on the ground.

THE ST. FRANCIS RIVER

On the diagram the present boat channel is shown. There are numerous channels or cut-offs. Generally the area lying between the cut-offs and the main boat channel is low and flat covered with willow of rather a young growth. In other places the areas between the channels are covered with large gum and cypress timber. The areas below the position for the record meander line are practically at the level of the river and a very slight change in the water level will cause the entire area to be flooded. A rise of approximately 36 inches occurred while I was making this examination and practically the entire area lying below the positions for the record meander lines was covered with water. In most cases the present boat channel follows fairly close to the position for the record meander line. Some of the cut-offs along the river are as large or larger than the present boat channel. It was necessary to employ a man who knew the channel in order to follow it. There are numerous large gum and cypress trees growing in the main boat channel and in the cut-offs. I also found stumps of high land timber thus showing that the present channel of the St. Francis was formed during the "Sunk Land Period" in 1812. The average width of the main boat channel is approximately 3.00 chains. In some places the channel is considerably wider while in other places it (is) not over a chain in width. The river should be classed as a navigable stream. Generally the banks of the channel are very low and not well defined.

GUM SLOUGH CHANNEL

Gum Slough Channel is not well defined at the present time. There is no definite escarpment nor cut bank designating the limits of the channel. Parts of the channel at the present time are no more than openings, now covered with a younger growth of timber, through the larger and older timber. In many places the center of the channel is still open and can be easily identified. From the timber growth I am convinced that at the time of the original survey

in 1848 that there was a fairly well defined open channel between Gum Island and the record left bank of the St. Francis River. I find numerous large areas now covered with willow timber which appear to have been part of the open channel in 1848. The same conditions exist in this channel as in the main boat channel of the St. Francis River. That is, I find some large gum and cypress trees and stumps of high land timber in the channel. Cut-offs and bayous also extended from the channel. This is apparent from the young growth of timber that can be found in many places. At the present time Gum Slough Channel goes completely dry. Was told by certain old settlers that prior to building the levees that they could only remember of one time when Gum Slough Channel went completely dry and at that time the St. Francis River was practically dry. At the present time the large ditch along the levee carries water that formerly went down the St. Francis and Gum Slough Channel. I am also firmly convinced that the area known as Gum Slough is gradually filling up. This is apparent for the reason that when this channel goes dry, as it does now, sediment is deposited. The growth of willow and vegetation growing in the channel tends to stop the water and hold the sediment. Based upon the timber growth it appears that the open channel in certain places was at least 5.00 chains wide. In other places it was very narrow and not over a chain or two in width. From the testimony of old settlers it is apparent that boats used to be used along this channel. At the present time where Gum Slough Channel and the main boat channel of the St. Francis separate, just north of Gum Island, the channel down the slough is better defined and even wider than the main boat channel of the St. Francis. From the evidence on the ground and from the testimony of old settlers it appears that an open channel existed at the date of the original survey. Although this channel does not now nor did not at the date of the original survey cover the entire area shown as the east branch of the St. Francis River on the plat of the original survey, riparian rights of the owners of the lots abutting on the area should be recognized and the Government should not at this time claim the long narrow strips of land lying on either side of the channel. The area is low and flat, covered with gum, willow, and cypress timber.

INDIAN HILL CHANNEL

Indian Hill Channel and the areas adjacent to it are similar in many respects to Gum Slough Channel. Indian Hill Channel is better defined than Gum Slough Channel and at the time this examination was made there appeared to be nearly as much water in the channel as there was in the main channel of the St. Francis River. A person not familiar with river can see no difference between the channels at the points where Indian Hill Channel leaves the St. Francis and where it enters the main boat channel below the island. The channel is from two to three chains wide. Boats can go up and down this channel at the present time and from information obtained from old settlers it appears that boats always have been able to go up and down the channel. The area adjacent to the channel is low and flat, covered with a dense growth of timber consisting of gum, cypress, and willow. Some of the timber in this area and in that area adjacent to Gum Slough Channel is very old and was in place in 1821 when Missouri was admitted into the Union and in 1848 when the original survey was made. The age of the timber was determined by counting the annual rings of growth on some of the large stumps.

The examiners reached the conclusion that the meander lines were fairly consistent with the general course of these channels and that the original survey was well executed and represented with a fair

degree of accuracy the actual conditions on the ground at that date, and that no extension survey should be made.

According to the original survey of this township made in 1848, the plat of which was approved February 19, 1849, the area in question was shown as water, being a part of St. Francis River. From the evidence in the case, the department is convinced that there was no material error in the original survey and that the said area was properly omitted from the survey because it was below mean high water. The department has considered in this connection the decision of the Supreme Court of the State of Missouri in *Hemphill Lumber Company* v. *Parker* (254 S. W. 698), which involved a part of the area here in question.

It appears that the whole of the said fractional township as surveyed was patented to the State as swamp land. In holding that only the surveyed land passed under the patent, the court appears to have relied upon the cited decisions in the cases of *Chapman and Dewey Lumber Company* v. *St. Francis Levee District* (232 U. S. 186), and *Little* v. *Williams* (231 U. S. 335), but those cases are not deemed applicable to the situation here presented because in the cases mentioned it was found that there was error in the original surveys wherein the areas shown as water were, in fact, not bodies of water but swamp lands at the time of survey. Those cases would be authority in this if the survey involved here had been found materially in error, but as it meandered with approximate exactness the shore of an apparently permanent body of water, no supplemental survey is warranted.

In applications of this character the department is governed by the facts shown in respect to each particular case. The distinction to be observed is indicated by the rules of law so clearly and concisely stated by Chief Justice White in the case of *Lee Wilson & Company* v. *United States* (245 U. S. 24), as follows:

> As a means of putting out of view questions which are not debatable we at once state two legal propositions which are indisputable because conclusively settled by previous decisions.
>
> *First.* Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several States. *Hardin* v. *Jordan*, 140 U. S. 371; *Kean* v. *Calumet Canal Co.*, 190 U. S. 452, 459; *Hardin* v. *Shedd*, 190 U. S. 508, 519.
>
> *Second.* But where upon the assumption of the existence of a body of water or lake a meander line is through fraud or error mistakenly run because there is no such body of water, riparian rights do not attach because in the nature of things the condition upon which they depend does not exist and upon the discovery of the mistake it is within the power of the Land Department of the United States to deal with the area which was excluded from the survey, to

cause it to be surveyed and to lawfully dispose of it. *Niles* v. *Cedar Point Club*, 175 U. S. 300; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47; *Security Land & Exploration Co.* v. *Burns*, 193 U. S. 167; *Chapman and Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186.

Upon careful consideration of the reported facts in the instant case, the department is of opinion that it is governed by rule one rather than rule two as stated in the decision next above referred to. The State of Missouri did not acquire title to this area as unsurveyed land under the swamp grant, but, by virtue of its patent to the surveyed tracts, it obtained such riparian rights as are recognized by local law in individual proprietors in like case. If, as indicated by the report, this area was covered by the waters of a navigable stream, the General Government did not own it even before patent, as it inured to the State under its sovereign rights upon admission to the Union. But whatever the fact may have been as to its navigability, the United States had no further claim after issuance of patent for the surveyed tracts.

In the case of *Hemphill Lumber Company* v. *Parker*, *supra*, the court recited that in the year 1906 the county court of Dunklin County ordered the land in Indian Hill and Gum Sloughs to be surveyed; that a survey was accordingly made and approved by the court as showing "an area of land in excess of that shown on the Government plat book heretofore used in the office of the clerk of this court, which excess has been formed by the recession and abandoment of the waters of what is known as Indian Hill and Gum Sloughs"; that thereafter the county court ordered this area to be sold as swamp lands; that this was accordingly done, and the deed was made by the county of Dunklin to the Hemphill Lumber Company, who had paid taxes on the land for ten years before the said suit was commenced in 1919. The court held that the said area did not vest in the State of Missouri under the swamp grant, it not having been listed and selected as swamp land; that the patent from the State to Dunklin County conveyed only the surveyed areas, as shown by the official survey and plat.

The purport of that holding is that the United States still retains title to the said area. Under the facts as now more particularly developed and in the light of the authorities above cited, the department is unable to find that the United States has title to the area in dispute. Whether the title is in the riparian owners of the surveyed tracts or in the purchaser of the area from the county, under color of title and adverse possession or otherwise, involves questions of local law not within the province of this department to decide.

Rejection of the application for survey and selection is accordingly adhered to.

Motion denied.

UNITED STATES v. RUDDOCK

METSON v. O'CONNELL ET AL., UNITED STATES, INTERVENER

Decided April 18, 1927

MINING CLAIM—ADVERSE CLAIM—HOMESTEAD ENTRY—PROSPECTING PERMIT—EVIDENCE—BURDEN OF PROOF.

Where adverse charges are preferred by the Government against a mining location conflicting with certain homestead entries or oil and gas permit applications and the opposing claimants, upon due notice, fail to assert their rights, the burden of proof to establish the charges is upon the Government.

MINING CLAIM—ADVERSE CLAIM—HOMESTEAD ENTRY—EVIDENCE—BURDEN OF PROOF.

Where a mining claimant protests against surface entries made before the filing of his patent application, alleging superior right by virtue of prior placer locations, the burden of proof rests upon the protestant.

MINING CLAIM—OIL AND GAS LANDS—WITHDRAWAL—DEVELOPMENT WORK—DISCOVERY—DILIGENCE.

Under the act of June 25, 1910, an occupant or claimant of oil and gas lands under the placer mining laws is entitled to protection, if, at the time of the withdrawal of the lands, he was making reasonable effort, indicating a *bona fide* intention to discover oil and gas on the claim with all practical expedition, as by the doing of physical acts tending to facilitate the exploration for, and discovery of, oil or gas thereon, and it is not necessary that actual drilling was being prosecuted at that date.

MINING CLAIM—OIL AND GAS LANDS—DISCOVERY—ABANDONMENT—HOMESTEAD ENTRY—EVIDENCE.

The fact that a mining claimant, after diligent prosecution of work looking to discovery of oil and gas on his claim, discovers small quantities of oil, and thereafter abandons further development, permits the improvements to go to ruin or be sold and the property to lie idle, and possession to be taken under the agricultural land laws, is very persuasive that he did not regard the showings of oil sufficient to warrant further expenditure and development.

OIL AND GAS LANDS—ENTRY—MINING CLAIM—STATUTES.

The act of February 11, 1897, which authorizes entry under the mining laws of lands "chiefly valuable" for petroleum or other mineral oils, differs from section 2319, Revised Statutes, in that under the former the value of the land is the criterion, while under the latter it is the value of the "deposits."

MINING CLAIM—DEVELOPMENT WORK—IMPROVEMENT—COURTS.

The principle that the courts will not substitute their judgments as to the wisdom or expediency of the methods employed in the development of mining claims does not apply to improvements that have no direct relation to mining operations.

MINING CLAIM—OIL AND GAS LANDS—DEVELOPMENT WORK—EXPENDITURES—ABANDONMENT.

Expenditures on an oil and gas placer mining claim for the services of a watchman merely to look after the property after all operations had been abandoned and the equipment removed, and with no evidence of a con-

templated resumption of mining operations, can not be accepted as satisfying the requirements of section 2324, Revised Statutes, pertaining to annual expenditures.

WITHDRAWAL—MINING CLAIM—ABANDONMENT—PATENT—HOMESTEAD ENTRY.

A withdrawal under the act of June 25, 1910, is a continuing withdrawal, although not effective as to land so long as it remains in a valid claim, and where upon a mining claim, at one time valid, operations had been abandoned and no effort made to maintain the claim as required by the mining laws, or to seek patent until almost ten years after operations had ceased, the land lapsed into the withdrawal and became subject to disposition under applicable public land laws.

FINNEY, *First Assistant Secretary:*

August 25, 1920, George T. Ruddock filed application, Los Angeles 033397, for patent to the Medusa oil placer location, covering W. ½ SE. ¼ Sec. 23, T. 11 N., R. 23 E., S. B. M., alleged to have been made February 16, 1909. This application conflicts with a prior application made by William B. Rader, February 24, 1920, and with oil and gas prospecting permit application 032743, made March 4, 1920, by the Seaboard Petroleum Company.

William H. Metson, on August 25, 1920, filed like patent application 033397 for all of section 24 of the same township and range covering the Atlas (NE. ¼), Argus (NW. ¼), Cadmus (SE. ¼), Boreas (SW. ¼) oil placer locations alleged to have been made February 16, 1909. On the same day Metson filed a protest against the following-named existing homestead entries made with mineral reservations, together covering Sec. 24, to wit, 028653, Martin B. O'Connell (S. ½), made November 10, 1916; 030121, Robert T. Connell (NE. ¼, E. ½ NW. ¼), made May 25, 1917; 032269, Stewart T. Irwin (W. ½ NW. ¼), made March 10, 1920, alleging a superior right by virtue of the prior aforementioned placer locations. All the lands are included in petroleum withdrawal by Executive order of September 27, 1909, and were placed in petroleum reserve No. 2, July 2, 1910.

A consolidated hearing was ordered March 29, 1923, involving the lands in Sec. 24, between all parties concerned and the Government as intervener, and, on September 4, 1923, adverse proceedings were ordered against the application of Ruddock. Hearings ensued and therein by stipulation testimony offered in one case was made to apply in the other. Under the charges, Metson was required to establish, as to each claim in Sec. 24, a valid discovery of oil prior to the withdrawal aforesaid, or that on that date the mineral claimants were in diligent prosecution of work on each of the claims, which work was pursued continuously to discovery and thereafter the annual assessment work required by law has been performed. In the proceedings against the claim of Ruddock the Government had the burden of establishing the negative of the above charges, and, in addition, charges to the effect that the Medusa location was made by

Ruddock with fraudulent intent for his sole use and benefit and in evasion of the mining laws by employing the convenient device of making use of dummies as locators in acquiring title to more mineral land than the law would give him under one location.

The register held in favor of the mineral claimants upon the issues of sufficient discovery, diligent prosecution of work at the date of withdrawal, and the continued maintenance of the claims by the performance of annual labor. With regard to the charges of fraud in connection with the location of the Medusa claim, he held in effect that the names of four locators were used for the benefit of Ruddock, but that there was no evidence of want of *bona fides* as to the other four, and as the claim embraced only 80 acres it could stand as to the interest of those four.

The Commissioner reviewed the evidence at length, concurred in the register's conclusion that the Government had failed to establish that the Medusa claim was not *bona fide* as to four of the locators thereof, and presumably agreed with the register that the mineral claimants were in diligent prosecution of work at the date of withdrawal as the decision is silent on that issue, but nevertheless held the mineral applications for rejection and all of the mining locations to be null and void. The Commissioner stated:

> The mineral claimants have failed to show that a sufficient discovery has been made within the limits of any of the claims involved to validate the claims under the mining laws. The alleged discoveries were nothing more than indications that some of the sands penetrated were oil stained or contained such small quantities of oil that commercial production was out of the question. No sands containing sufficient oil deposits to render them valuable were shown to be encountered.

He held that the claims had not been maintained by the doing of the annual assessment work required by law.

From this action the mineral claimants have appealed. No appeals were filed by the agricultural claimants from the register's decision, thus leaving the matters in issue solely between the mineral claimants and the Government. Before consideration of the merits, mention will be made of certain minor issues. The mineral claimants contend that the allegations in the patent application *prima facie* establish the facts therein alleged, and the burden of proof in both cases is upon the Government. This is true as to the Medusa claim. Opposing claimants whose filings were prior to the patent application failed to appear and sustain their answers at the hearing. The burden is therefore upon the Government to sustain its charges. As to the protest filed by Metson the case is different. It is an attack upon prior existing entries. It is well settled by numerous departmental decisions that the burden rests with the party attacking an entry. The cases cited in the mineral claimants' original

brief, *Hammer* v. *Garfield Mining Company* (130 U. S. 291, 300), *Walton* v. *Wild Goose etc. Co.* (123 Fed. 209, 218), present a different situation and are inapposite.

The mineral claimants adduced certain expert opinions from W. S. Ochsner, a geologist, wherein he correlated certain oil-producing sands on near-by lands with those encountered in the wells on the land in question; opinions being based in part upon comparison of information he alleged had been furnished him as to the logs of the wells without the claims with the logs and testimony as to the wells within the claims. The Government objected because the logs were not produced and moved for further continuance of the hearing, to enable Mr. Ochsner to produce the data upon which his opinion was based. The register refused the motion. The mineral claimants have now supplied certain purported logs of certain of the surrounding wells mentioned by Mr. Ochsner, *ex parte*, containing statements as to results of drilling, character of oil sands encountered, and estimates of yield and like matters, and ask that these logs be considered. This data should have been submitted for scrutiny and cross-examination at the hearing. It is entirely hearsay and incompetent and must be disregarded, and opinions based thereon, on facts obtained from others and not in evidence, are incompetent. *Lee* v. *Kansas City Southern Railway Co.* (206 Fed 765), *Delaware etc. Railway Co.* v. *Roalefs* (70 Fed. 21), *United States* v. *Faulkner* (35 Fed. 730). No fraudulent purpose or agreement was shown on the part of four locators of the Medusa claim, nor anything to show that they were other than *bona fide* locators. The validity of the Medusa claim of 80 acres, therefore, is not affected by the unlawful acts of the remaining locators. *McKittrick Oil Company* (44 L. D. 340), *Centerville Mine and Milling Company* (49 L. D. 508).

The abstract of title shows that Ruddock acquired the interests of seven of the locators of the Medusa claim on May 26, 1910, and the remaining locators' interest on August 17, 1920, and that he likewise acquired the interests of all the locators of the claims in Sec. 24 on October 29, 1912, and transferred them to Metson on March 29, 1920.

The evidence as to explorations and development of the claims for oil offered by the mineral claimants and practically uncontradicted is as follows:

Ruddock negotiated an agreement with Metson shortly after the locations were made to advance the money to develop the claims, and Ruddock was employed as superintendent, continuing in that capacity until the middle of January, 1910.

Beginning in February, 1909, lumber for houses and derricks, tools, machinery, and other equipment for drilling, fuel and water tanks were ordered, and cabins were constructed upon each claim for the

accommodation of workmen. The lumber came right away and the cabins and a central camp on Sec. 24 were constructed, cellars for wells, sump holes to receive the rejects from the wells, emplacements for derricks were built on each claim and a force of 12 or 15 men employed. The drilling equipment ordered at the beginning was delayed in delivery but arrived some two months later and was entirely set up and equipped by August, 1909. It appears that prior to September 27, 1909, roads from the claim were built to the roads to Maricopa, Bakersfield, and 2½ miles to a spring, to facilitate transportation. Water was first hauled in tank wagons, then a dam to impound run-off water in Santiago Creek was constructed on Sec. 24. Water pipe lines were laid from the water tank to the various claims, and later connected with the Western Mineral Company's supply a short distance to the south. Drilling commenced first on the SW. ¼ Sec. 24, with a standard rig in September, 1909. A portable, secondhand rig was purchased, put in order, and installed on the SE. ¼ some months or weeks "prior to the opening work." On the NE. ¼ men were at work and a cellar dug, emplacement for derrick and fills at the tanks made, and water and fuel tanks installed. Contemporaneous work went on upon the NW. ¼. The cookhouse, men's housing, stable, and storehouse were placed on that quarter and excavations for a well on the NE. ¼. Three standard rigs had been purchased and one each installed on the NW. ¼, NE. ¼, SW. ¼, and a portable rig on the SE. ¼. The testimony is somewhat meager as to what was done prior to the withdrawal upon the W. ½ SE. ¼ Sec. 23, but it appears that a cabin had been erected. One well was drilled, however, upon each claim, the last being on W. ½ SE. ¼ Sec. 23, and spudded in March 15, 1910. Ellis succeeded Ruddock as superintendent, and Rapp as driller, in January, 1910, and continued drilling ensued upon all the claims in Sec. 24 until it ceased in 1910, some work being done after he left on the well in Sec. 23.

The log of the well drilled on SW. ¼ Sec. 24 shows entries from September 19 to October 19, 1909, and that the well was drilled to the depth of 510 feet. The following entries appear among others:

Sept. 27, 27 feet, total 312, "struck water at 275 feet, water rises 25 feet in the well smells very strong like sulper."

Sept. 30, 24, total 360, "got good show of oil at 360 and change of rock."

Oct. 5, 18 ft., total 396, "got moor oil at 390 feet in sand rock."

Oct. 6, 27 feet, total 423, "moor oil between 410 and 420 I think we have a 1000 barrel well on other 400 feet."

Oct. 11, 23 feet, total 493 feet, "moor oil 486 feet."

Oct. 12, 17 feet, total 510 feet, "well caving very much—cavet in 25 feet will have to put 12 inch casing in the hole."

Oct. 13, "getting ready to put 12 inch casing in well. Got plenty good show of oil in the hole."

Oct. 14, got orders from head office to stop drilling and wait for further orders—all the men doing road work. The remaining entries refer to water coming is, on Oct. 16 "water came in 40 feet in one hour," and on Oct. 17, well filled with water "53 feet in 2 hours."

Ruddock testified in substance that between September 20 and 31, during the progress of the work, he measured the oil in the sump that was bailed for about a week with a gallon can, putting some of it in the fuel tank, and recovered 35 barrels, or an average of 5 barrels a day, and that it was about 18 or 19 degrees gravity; that this oil was skimmed off the water in the sump; that because they had to pay as much as 10 and later 5 cents a gallon for water, the well was converted into a water well and used to prosecute drilling on the other claims. Metson testified that this well penetrated 3 oil sands, and estimated production at from 5 to 15 barrels a day. Brower, a workman, testified he knew that oil was found there and "they figured they had struck five barrels a day."

The log of the well on the SE. ¼ shows drilling from December 18, 1909, to February 1, 1910, to the depth of 460 feet; that water was struck at 256 feet and oil sand and shale between 430 and 460 feet. Ellis, who did the drilling and kept the log, testified that on January 12, 1910, he found an 80-foot well there, continued the drilling from 70 feet, and discovered oil at 430 feet; that he bailed out probably 10 to 20 barrels of oil all told, but took no measurements; that it was a lighter oil than the rest of them. Ruddock testified that he saw oil removed from the bailer at this well; that there was quite a quantity of water in the bailer; that there were colors of oil or scum of oil on the bailer and on the tools and cables. Witnesses Metson and Bernard testified that oil was found in the well.

The log of the well on the W. ½ SE. ¼ Sec. 23 shows drilling in progress between March 15 and April 9, 1910, to the depth of 425 feet; that oil-bearing shale was encountered between 255 and 278 feet, and oil sand between 320 and 328 feet. Ellis testified that the well was continued to 500 feet but there was no oil sand between 425 and 500 feet; that the amount of oil taken out of the two sands was probably 10 to 15 barrels and the time expended in extracting it was probably 2 to 4 hours; that the discoveries were on April 4 and 6, 1910; that after reaching 500 feet he stopped and left the rig there; that no water was encountered in this well.

Ruddock testified that he saw oil taken from this well and it was afterwards continued to a final depth of 1,000 feet. Bernard and Metson corroborate these witnesses that oil was taken from the well.

The log of the well on the NE. ¼ shows drilling to the depth of 895 feet between February 12 and May 4, 1910. The sole showing

of oil mentioned is on the latter date. The entry is "10′—885 to 895 struck oil sand ar 890-oil. Pulled 8″ Casg up into 10″."

Ellis testified that he extracted probably 5 to 10 barrels of oil from that well in a bailer in several hours; that he would let it rest for an hour or two and bail again. Ruddock, Metson, and Bernard testified to having seen oil taken out of bailer from this well.

The log of the well on the NW. ¼ shows drilling to the depth of 1,000 feet between April 27 and June 8, 1910, and oil sand encountered from 800 to 802 feet. Ellis testified that he found oil at the depth mentioned and took 5 or 6 barrels of oil out of that well. Bernard stated "I pumped oil from the well on the NW. ¼ with a pump"; that "we had nothing to do one day so we started the bailer going and got a stream coming out." Metson stated he saw oil on the bailer. Ellis testified upon cross-examination that to bring in a well it is necessary to shut off the water before finishing; that there was nothing but formation shut-offs at these wells; that "you can't tell much about formation till you shut off the water; that he did not think anybody would drill for those sized wells but they are evidence that good producing wells are apt to be found in lower sands; that he did not think that the sands found would be payable except the well on SE. ¼ which had a good showing and lighter oil than the rest in 30 feet of sand; that if he had found payable sand he would have shut off the work and put it on production. As to his estimates as to quantity production, he previously stated, "Well, I don't know, pretty hard to tell on any of them. I made a discovery which I thought was sufficient to constitute a discovery, enough to warrant a person to go on and look for deeper sands; in other words, none of these wells a person would not drill for the amount of oil you get out of them; five, ten or 15 barrel wells."

There was no attempt to pump oil from any of the wells for commercial production. The Government adduced expert opinion from witness Palmer, a mineral inspector, illustrated by graphs he had prepared in support of a conclusion that the wells drilled upon the claims did not reach productive oil sands. The conclusions were not based upon personal study of structural conditions in the immediate field, nor upon complete data as to the results in drilling wells on surrounding lands, but upon data contained in professional papers 116 of the United States Geological Survey admitted to have been prepared in 1914 entitled "Sunset and Midway Oil Fields, California," and upon assumptions that the location of the oil-bearing horizons in the undeveloped portion of the field, which locations are stated in the bulletin to be merely tentative, would probably occur at the stratigraphic positions depicted on witness's graphs and below formations penetrated by the wells under consideration. The opinions of Ochsner were to the contrary, and the latter supplied photo-

graps supporting his testimony tending to show evidences of oil saturation of the material about the wells drilled. The conclusions of both witnesses are largely conjectural as to correlation of the productive sands of the field with those reached by the drills on the lands in question and are of practically no aid in determining the issue as to a valid discovery.

Development activities appear to have ceased in 1910. Bernard and two men were left in charge of the property in 1911, repairing bridges, cabins, and derricks damaged by windstorms, but after bridges went out "there was no more attempt to fool with them." Bernard was succeeded by O'Connell as watchman in January or February, 1912. The latter testified that he received $100 per month the first year, $150 the second, and $6 a day thereafter, remaining until 1921. A storm demolished the derricks, cabins, and other structures in 1915, except the house O'Connell lived in, which was stayed by guy ropes; and a grass fire in 1916 completed the destruction of the buildings. Engines and pumps and other equipment were sold for junk in 1917. Metson testified to expenditure of about $50,000 while drilling operations were in progress, and about $25,000 thereafter in the development of the claims, and to paying out, after activities ceased, sums for assessment work considerably more than is required under the law to be expended for such purpose on or for the benefit of the claims; and there is some testimony, vague, fragmentary, and disconnected in character, relative to the reconstruction of a bridge or bridges that were washed out over shallow draws on the land and work on roads, performed by O'Connell, leading from the property and in the care of buildings on the land, and credit is sought for the salary paid him during the period of his occupation. Aside from the testimony relative to work and improvements before the destruction and sale of the mining works, and $750 worth of road grading done by Metson in 1923 on Sec. 24, it is manifest from the testimony of homesteaders and near-by residents, adduced by the Government, and O'Connell's testimony as well, that improvements and repairs to roads, buildings, bridges, pipe lines, made after the facilities were gone, were none other than for O'Connell's personal accommodation and convenience as a homesteader while living upon the land.

It appears that the Nevada Pacific Company, the name of the organization that prosecuted the oil operations, were notified by O'Connell that he had made homestead entry, and he was told to go ahead but it would do him no good. Irwin, another entryman, was notified, upon taking possession, to vacate by O'Connell, but he and other homestead entrymen appear to have been allowed to maintain possession, make the required residence, improvements, and cultivation without interference on the part of the mineral claimants.

Section 2 of the act of June 25, 1910 (36 Stat. 847), provides that—

> The rights of any person, who, at the date of the withdrawal * * * is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work.

The purpose of the act was to protect *bona fide* occupants of public oil and gas lands who in good faith were at the date of the withdrawal engaged in work leading to discovery, by giving them the right to continue their work to discovery and thereafter to extract and market the oil and to acquire title notwithstanding the withdrawal. *United States* v. *Rock Oil Co.* (257 Fed. 331, 333).

Whether an occupant or claimant of oil or gas bearing lands at the date of the withdrawal order was at the time engaged in diligent prosecution of work leading to discovery is a question of fact, and no hard and fast rule applicable to all cases can be laid down by which it can be determined, as each case must depend upon its own facts and circumstances. It may be stated generally, however, that the occupant or claimant is entitled to protection if, at the time of the withdrawal order, he was making reasonable effort, indicating a *bona fide* intention to discover oil and gas on the claim with all practical expedition (*United States* v. *Thirty Two Oil Co.*, 242 Fed. 730, 735; *United States* v. *Standard Oil Co.*, 265 Fed. 751; *United States* v. *Dominion Oil Co.*, 264 Fed. 955; *United States* v. *North American Oil Co., Con.*, 242 Fed. 723, affirmed, 264 Fed. 336; *United States* v. *McCutchen*, 234 Fed. 702), as by doing of physical acts which had a direct tendency to facilitate the exploration for, and discovery of, oil or gas thereon. (*United States* v. *North American Oil Co., supra.*) If he were making such effort, it is not necessary that he was engaged in actual drilling for oil or gas on that date. (*United States* v. *Grass Creek Oil etc.*, 236 Fed. 481; *United States* v. *Standard Oil Co., supra; United States* v. *North American Oil Co., supra; Honolulu Consolidated Oil Company*, 48 L. D. 303, 308.)

The uncontradicted evidence shows sufficiently that the mineral claimants had prior to the date of the withdrawal actively begun oil explorations upon the claims in question, with the intent to develop them as one unit. They had assembled material, employed drillers, installed oil drilling outfits, and the necessary adjuncts to carry on the work, upon one or more of the claims. At the date of the withdrawal they were actually engaged in the drilling on the SW. ¼ and had installed necessary facilities of one character or the other to pursue the explorations thereafter following on each of the claims involved. They are entitled to the finding that they were in diligent

prosecution of work upon the date of the withdrawal as to each of the claims.

The next question is whether the explorations were continued to discovery of oil upon each of the claims.

It is strenuously contended by the mineral claimants "that oil in *measured* quantities ranging from 5 to 20 barrels and more was actually discovered and taken from each of the five wells—some of which was used in prosecuting drilling operations." The evidence does not justify this statement as a finding of fact. Except as to the well on the SW. ¼ where the oil was skimmed from the water in the sump and measured, the evidence as to quantity of oil produced from other wells are estimates, and the witness who made them stated that the oil was not measured and further admitted that the production was pretty hard to tell on any of them, and as to those wells showing mixture of water and oil that you can not tell much about production till you shut off the water. This witness regarded the showings as only inducements to seek deeper sands and that the oil sands encountered were not of themselves sufficiently valuable to warrant the drilling of wells to reach them. Certainly the subsequent acts of the mineral claimants, in abandoning all further development, permitting the improvements to go to ruin or to be sold, the property to lie idle, the possession to be taken under the agricultural land laws, and in never resuming development work, are very persuasive that they entertained the same view as their superintendent as to the inadvisability of attempting to produce oil from the strata of oil sands reached in any of the wells. The department is cognizant of the fact that valuable mining properties, because of economic conditions or other adequate cause, sometimes lie idle for a long time, but in this case there is no explanation of the neglect of the claimants to profit, by their labors, if they indeed found valuable deposits of oil on the claims.

Mineral claimants cite and rely upon *Raven Oil and Refining Co.* (50 L. D. 386), and the unreported case, *United States* v. *Dudley Oil Co.*, Visalia 02258, decided October 3, 1918, and affirmed on rehearing March 3, 1919, wherein the question of the sufficiency of oil discoveries was considered. In the first the department held a yield of 57 barrels of oil a day from three wells, the fourth being nonproductive, drilled under a permit granted under section 13 of the leasing act, at depths ranging from 577 to 600 feet, was a sufficient discovery to warrant an oil and gas lease. The facts in that case involved no question of dubious estimates, had reference to daily capacity, and had no history of abandonment of operations such as exist in the case at bar.

It is true the *Dudley Oil Co. case* presented actual showings of quantity production no better than the case at bar and analogous

conditions of oil on top of the water, but, as will be seen from the analysis of this case in *Oregon Basin Oil and Gas Company* (50 L. D. 244, 251), that the determination that the discovery was sufficient did not pivot upon the actual quantity of oil found in the well. Unlike the cases at bar, it there appeared that an oil-bearing sand shown in a near-by well to be about 30 feet in thickness had been penetrated by the well on the land in question; that oil from such sand had been shown by actual demonstration to have been extracted in quantities expressed in barrel lots; that oil taken apparently from the same deposits or geologic horizon had actually been sold at a well in the immediate vicinity of the land for a dollar a barrel; and from others of such wells in the same vicinity from 5 to 8 barrels of oil per day had been produced, while the well on the land there in question was estimated to be one capable of producing 15 barrels per day.

Section 2319 of the Revised Statutes provides that "all valuable mineral deposits" are open to exploration and purchase. The act of February 11, 1897 (29 Stat. 526), authorizes entry under the mining laws of lands "chiefly valuable" for petroleum or other mineral oils. In *United States* v. *McCutchen* (238 Fed. 575, 583) it is stated that this difference in language was not without significance. Elaborating this view the court said:

> In other words, as I sense, the difference between the two statutes, as to lodes and placers the right is given to explore and purchase "valuable mineral deposits" and "the lands in which they are found"; but with respect to petroleum the right is given only to enter and obtain patent to lands which not only contain petroleum, but which are "chiefly valuable therefor." In a word, in one case the value of the "deposits" is the criterion, and in the other it is the value of the land. I believe this should not be lost sight of in defining what will suffice for a "discovery" under the oil statute.

The showings of oil in the cases at bar certainly did not supply an inducement for further progress in the work; they furnish but a dubious basis for holding them to be valuable for their oil and gas deposits. The question, however, as to discovery is not controlling under the facts in this case. Even if the showing as to discovery could be deemed sufficient upon one or more of the claims, it is clear that the claims were not maintained by the performance of annual work and labor as required by section 2324, Revised Statutes. As stated by the Commissioner, the record does not show that any affidavits of annual work and labor were filed, and it is shown that for a number of years before this controversy arose, such expenditures as were made were not for improvements that would meet the requirements of the statute as construed by the courts and the department. The correctness of the principle expressed in numer-

ous citations in the brief of the mineral claimants to the effect that the court will not substitute its judgment as to the wisdom or expediency of the method employed in adopting the plan pursued is not questioned, but this principle does not apply to improvements that have no direct relation to mining operations. *Champion Copper Co.* v. *Peyer* (228 Pac. 606); *Jackson* v. *Roby* (109 U. S. 440); *Stork etc. Placer* (7 L. D. 359). The expenditures claimed in this case for bridge and road work, for the upkeep of horses or automobiles at the service of the watchman, after all operations had been abandoned and the equipment removed, and with no evidence of a contemplated resumption of drilling operations, can not be accepted as tending to benefit the claims. It is true, the department held as acceptable expenditures compensations paid one who guards and cares for mining works, machinery and buildings, while operations are temporarily suspended. *Tripp et al.* v. *Dunphy* (28 L. D. 14). And such is the view of the courts; but such service will not be regarded where there is no machinery or plant on the premises, or where there has been more than a temporary suspension of mining operations and the watchman is employed merely to look after the property. (See cases cited, Mines and Minerals, 40 C. J., section 269, page 830.) Certainly this doctrine applies where in this case the improvements and expenditures on the claim appear to have served no other purpose than to meet the necessities of O'Connell as both watchman and homestead entryman during has occupation of the land.

The operations being abandoned and no effort being made to maintain the claims as the mining laws require, or to seek patent until almost 10 years after operations ceased, the claims, if at one time valid, lapsed into the withdrawal and the lands became subject to disposition under applicable public land laws. *E. C. Kinney* (44 L. D. 580); *Interstate Oil Corporation and Frank O. Chittenden* (50 L. D. 262). In the last-cited case, the department had occasion to consider an application for patent for an oil placer claim in section 2 in the same township and range as these lands and embraced within the same petroleum withdrawal. A discovery of petroleum had been made long prior to a withdrawal, four wells were drilled and pumped for four years; subsequently, operations were abandoned and the annual assessment work was neglected. It was held that the withdrawal was of a continuing nature and attached immediately upon default of any person having at the time of its inception a then subsisting and valid claim. The rule announced in that case governs here; the Commissioner's decision is therefore

Affirmed.

UNITED STATES v. RUDDOCK

METSON v. O'CONNELL ET AL., UNITED STATES, INTERVENER

Motion for rehearing of departmental decision of April 18, 1927 (52 L. D. 313), denied by First Assistant Secretary Finney, February 16, 1928.

CONSTRUCTION OF THE ACT OF FEBRUARY 26, 1927, RELATING TO CANCELLATION OF ERRONEOUSLY ISSUED INDIAN FEE PATENTS

Opinion, February 24, 1928

PATENT—MORTGAGE—LIENS—INDIAN LANDS.

A mortgagor who makes use of a title to secure a benefit, such as a loan, is presumed to consent to the issuance and acceptance of the fee simple patent, and his interest in the land becomes subject to any liens created by way of judgments or levy of taxes which can not be defeated by an attempted cancellation of the patent by the Secretary of the Interior.

PATENT—INDIAN LANDS—SECRETARY OF THE INTERIOR—JURISDICTION—STATUTES.

The act of February 26, 1927, confers no authority upon the Secretary of the Interior to cancel an unapplied for patent in fee issued to an Indian during the trust period if the patentee consented to its acceptance, and such consent need not have preceded the actual issuance of the patent or have been simultaneous with it.

PATENT—INDIAN LANDS—MORTGAGE—SECRETARY OF THE INTERIOR—COURTS—JURISDICTION—STATUTES.

The limitation in the act of February 26, 1927, withholding the power of the Secretary of the Interior to cancel an unapplied for patent in fee issued to an Indian during the trust period where the patentee has "mortgaged or sold any part of the land," left the jurisdiction in such cases to the courts, and that jurisdiction is not lost by a subsequent revesting of the unencumbered title in the patentee or his heirs.

PATTERSON, *Solicitor:*

At the request of the Commissioner of Indian Affairs, my opinion is asked on a question arising under the act of February 26, 1927 (44 Stat. 1247, part 2), which provides—

That the Secretary of the Interior is hereby authorized in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

The specific question submitted for opinion reads as follows:

> Where an Indian has mortgaged land covered by an unapplied for patent in fee issued during the trust period, and such mortgage has been paid and satisfaction recorded and no part of the land sold, may the Secretary of the Interior cancel such patent under authority of the Act of February 26, 1927 (44 Stat. 1247), which authorizes cancellation
>
> "*Provided* that the patentee has not mortgaged or sold any part of the land described in such patent."

With the request is transmitted a concrete case of an Indian allottee to whom a fee simple patent was issued, without application made therefor, which patent is dated April 13, 1918, and was filed for record in the office where such instruments are recorded July 15, 1918. The patent was transmitted to the Commissioner of Indian Affairs, with recommendation of the Indian superintendent dated April 18, 1927, that it be canceled. It is assumed this is in accord with the request of the patentee. There also accompanies the report a notation of the register of deeds of the county where the land is located and patent recorded, as follows:

> There is nothing on record against this land. The mortgage which was of record was satisfied.

I am of opinion that upon the record furnished with the concrete case you would not be warranted in attempting to cancel this particular patent. The patent has been outstanding for nearly ten years and has been of record in the county where the land lies for nearly as long. It does not appear when the mortgage was given nor the length of time the debt secured remained unpaid. The information furnished by the register of deeds relates only to liens filed and appearing of record in that office. Judgment liens are not there recorded. The lien of unpaid taxes would not be disclosed by any of the records there. Certainly the giving of a mortgage on the land was an acceptance of the fee title essential to its validity and to give it effect as security, and was an acceptance of the patent, from that time at least. Acceptance depends upon consent and a mortgagor who makes use of a title to secure a benefit, such as a loan, will not be heard to deny the giving of the consent upon which the validity of the mortgage given to secure the loan depends. It follows that from the time of the giving of the mortgage the presumption of consent to the issuance and acceptance of the fee simple patent is conclusive. The title in the patentee becoming then unrestricted, his interest in the land would, in my opinion, be subject to any liens created by way of judgments or levy of taxes; and such liens could not be defeated by an attempted cancellation of the patent. The object of the cancellation of the patent is to restore the land to "the same status as though such fee patent had never been issued."

Obviously this end can not be attained if valid liens have attached which remain unsatisfied, and until the record before him is sufficient to show that the title is free of all liens the Secretary of the Interior would not be warranted in attempting to cancel the patent in the case presented as a concrete one.

Prior to the passage of the act of February 26, 1927, *supra*, fee simple patents had been issued to Indians, without an application made therefor by the patentee and without his consent. In some cases the Indian had refused to accept delivery of the patent and in others delivery had been accepted under conditions showing that consent to its issuance had not in fact been given, and the courts had held that unless the patent had been issued at the request of the Indian or, if issued without such request, consent to the action had been given, it was of no effect, so far as changing the status of the land was concerned and the Indian owner still held it under the terms and conditions guaranteed by his trust patent. *United States* v. *Benewah County* (290 Fed. 628). But such unauthorized fee patents evidenced the passing of the full legal title and amounted to a cloud which, under the circumstances, it was proper to have removed for the protection of the interest of the Indian, and as well as those who might rely upon the validity of the apparent title. It was the purpose of the act to conform the apparent to the actual status of such lands by authorizing cancellation of the unauthorized fee patent. The language of that part of the act authorizing cancellation reads as follows:

> When such patent was issued without the consent or application therefor by the allottee or by his heirs.

The act confers no authority to cancel any patents not so issued. Whether the allottee made request or formal application for fee patent is not material if he consented to its issuance. And this consent need not have preceded the actual issuance of the patent or have been simultaneous with it. If after it was issued without an application by him he gave consent thereto, the patent thereupon became as valid as one issued on his formal application, and the Secretary of the Interior has no more authority under the language of the statute to cancel such patent than he would have to cancel one issued on application. Even though no application was made for issuance of the patent, consent given thereto is a waiver of the irregularity, and its effect is to give it validity and vest in the patentee an unrestricted fee simple title. After such title has vested the Secretary of the Interior is without authority to cancel it.

The act places a limitation on the authority given by the act, by withholding the power conferred in all cases where the patentee has "mortgaged or sold any part of the land." While this limitation

is not intended to give validity to patents not legally issued, it does prevent any consideration of such question by the Secretary of the Interior and very properly leaves jurisdiction in such cases in the courts. Manifestly no other course could have been taken where a purchaser or mortgagee of the land was a party in interest, unless the Secretary of the Interior was vested with the authority of a court to adjudicate their claims. Such persons are indispensable parties to any proceeding looking to the cancellation of the source of the title upon which their interests depend. An attempted cancellation of the patent without an opportunity to participate in the proceedings would accomplish nothing so far as they were concerned, and Congress by the plain language used has withheld from the Secretary of the Interior the right to bring them into any proceeding where their rights are associated with the fee simple patent, however erroneous may have been the act of issuing it. The limitation upon the power of the Secretary of the Interior to take any action that would deprive parties in interest of any rights of property is imposed by the guaranty of the fifth amendment to the Constitution, and the limiting proviso of the act is but a recognition by Congress of the principle and a declaration that in the administration of the act no proceedings should be taken which would have the appearance of an invasion of the constitutional guaranty against the deprivation of property without due process of law. While the proviso extends only to cases where there has been a sale of all or a part or a mortgage of the land, the effect of the constitutional guaranty is to protect all other valid property rights, such as judgments or other liens, and an attempted cancellation of the patent would not *ipso facto* destroy these, as the right to still assert them in the courts would be undisturbed unless Congress by the act of February 26, 1927, *supra*, intended to invest the Secretary of the Interior with judicial power to decide the rights of the holders of outstanding liens, and only then where by due process they are brought into the proceeding and given their day in court. In my opinion Congress did not intend to confer such authority, and unless an intention to do so is clearly expressed the Secretary should hesitate to assume it. Such matters are more properly for the courts, and in all cases where applications are made by the holder of the fee simple patent for cancellation of it the applicant should first be required to show that the title, real or apparent, was free of all liens attaching subsequent to its issuance, and where such liens appear, action looking to cancellation should at least be deferred until some court of competent jurisdiction has adjudged them invalid. Where the showing made to the Secretary is sufficient to convince him that the record liens are void or voidable, he would be warranted in causing proper action to be taken, in the name of the United States as guardian of the Indian, to have them

removed. If in such suits the invalidity of the liens is established and the question of whether the fee simple patent sought to be canceled on the application made to the Secretary of the Interior was or was not regularly issued is not one of the issues considered or decided, the application could then be by him properly considered and disposed of under the act in question. If in such suit the validity of the patent becomes an issue and the decision of the court is against its validity because issued "without the consent or an application therefor" by the patentee, the cancellation of such patent will follow as a matter of course.

The question remains as to the authority of the Secretary of the Interior to cancel such patents in those cases where the patentee after receipt of the patent has sold or mortgaged the land and the unencumbered title has subsequently revested in the patentee or his heirs.

In my opinion the revesting of title to land conveyed or the release of a mortgage given thereon by the patentee in no way enlarges the jurisdiction of the Secretary under the statute. While it may be possible that cases of this kind will arise where the evidence offered tends to establish that the patent was originally issued without application therefor and that no valid consent to its issuance was later given, the proceedings looking to its cancellation should be confined to the courts, and the evidence presented to you used as the basis of a recommendation to the Attorney General to institute a suit looking to a judicial declaration that the patent was invalid. It follows the question submitted must be answered in the negative.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

SMALLHORN OIL SHALE REFINING COMPANY AND FREDERICK J. CRAMPTON

Decided March 2, 1928

OIL-SHALE LANDS—OIL AND GAS LANDS—PATENT—RESERVATIONS—WORDS AND PHRASES—STATUTES.

The word "oil" as used in the act of July 17, 1914, includes oil shale, and a recital in a patent issued pursuant to that act, reserving to the United States all the oil and gas in the lands patented, is sufficient to reserve the oil shale deposits.

OIL AND GAS LANDS—OIL-SHALE LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—SURFACE RIGHTS—PREFERENCE RIGHT—STATUTES.

Section 20 of the act of February 25, 1920, which grants a preference right to a surface entryman in the award of a permit to prospect for oil and gas in the entered lands relates to oil and gas deposits to be obtained by means of drilling wells and it has no application to oil shale deposits.

FINNEY, *First Assistant Secretary:*

The Commissioner of the General Land Office has submitted to the department for instructions a case in which the facts and legal questions are briefly as follows:

On October 19, 1920, Frederick J. Crampton made homestead entry, under section 2289, Revised Statutes, for the SW. ¼ NW. ¼ Sec. 14, E. ½ NE. ¼ Sec. 15, T. 9 S., R. 9 W., M. M., Montana. It was shown that he established residence on the land in October, 1917.

On April 17, 1922, the Smallhorn Oil Shale Refining Company filed application for an oil shale lease, under section 21 of the act of February 25, 1920 (41 Stat. 437), for 2,560 acres in said T. 9 S., R. 9 W., including the SW. ¼ NW. ¼ Sec. 14. On September 8, 1926, the Director of the Geological Survey reported to the Commissioner that the land embraced in Crampton's homestead entry appeared to be without value for coal or other minerals, "with the possible exception of phosphatic oil shale," which was known to occur in the immediate vicinity. By decision of September 18, 1926, the Commissioner called upon the homestead claimant "to file his consent that his said entry be made in accordance with and subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509), which act reserves the oil and gas content of the land to the United States." It was further stated:

> Should the entryman file the consent to the reservation required, it appears he would then be entitled to an oil and gas prospecting permit on the land under section 20 of the leasing act.

Crampton made final proof on his homestead entry on October 2, 1924, which was suspended for field investigation. On October 4, 1926, he filed consent to the amendment of his entry "so as to reserve to the United States all the phosphate, nitrate, potash, oil, gas, or asphaltic mineral deposits in the land embraced in said application (entry), pursuant to the provisions, conditions, reservations, and limitations of the act of July 17, 1914 (38 Stat. 509)." On October 9, 1926, he filed application for an oil shale lease for 680 acres in said T. 9 S., R. 9 W., including the land embraced in his homestead entry. He alleged that the land was valuable for its oil shale contents. The Geological Survey recommended on November 28, 1927, that the land thus applied for be segregated as an oil shale leasing unit and offered for lease subject to specified terms and conditions.

Final certificate was issued on Crampton's entry on November 26, 1926, with a reservation of oil and gas. Patent was issued on January 21, 1927, with a reservation as follows:

> Excepting and reserving also to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to

prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509).

Under these circumstances the Commissioner asks whether the reservation in Crampton's patent is such that the Government has retained title to the oil shale in the land, and if so, whether Crampton is entitled to preference right to an oil-shale lease under section 20 of the leasing act.

Oil shale has been defined by one writer as—

* * * a compact laminated rock of sedimentary origin, yielding over 33 per cent of ash and containing organic matter that yields oil when distilled but not appreciably when extracted with the ordinary solvents for petroleum. (Oil Shale, by Martin J. Gavin, Bulletin 210, Bureau of Mines, 1924.)

In regard to the oil shales of Montana the same writer says that they—

* * * lie at two distinct geologic horizons, one in the Phosphoria formation, probably of Permian age, and the other in Tertiary beds. The Phospnoria shales of western Montana are characterized by a rather high percentage of phosphates.

Near Dillon there are beds three feet or more thick that will probably yield up to 30 gallons of oil to the ton. The phosphate beds, associated with the shales, are possibly of future importance as a commercial source of phosphates.

The Phosphoria shales of this region are dark brown or black or give a brownish streak, and the richer portions are frequently oolitic (in rounded form or pebbles). On weathered surfaces the shales exhibit a great variety of colors, a bluish-white usually predominating. On fractured surfaces the shales are often slickensided. When freshly broken or rubbed they give off an odor of petroleum and will burn rather freely when placed in a fire. They carry a little pyrite disseminated in very small grains.

The richest of the shales in this locality will probably not yield more than 30 gallons of oil to the ton, and apparently no beds of workable thickness are as rich as this. However, seams of workable thickness will yield up to 20 gallons and contain as high as 0.77 per cent nitrogen (equivalent to 71 pounds of ammonium sulphate per ton) and about 2.0 per cent of phosphorus calculated phosphoric pentoxide (P_2O_5). Beds associated with the oil shale contain as high as 24 per cent of P_2O_5. There is no known method of treating the shales for both their oil and phosphate content at the same time.

The act of July 17, 1914, *supra*, affects public lands which are withdrawn, classified, or reported as being valuable for "phosphate, nitrate, potash, oil, gas, or asphaltic minerals." It will be noted that the words "oil shale" are not found in said act. But the department has long held that lands classified as valuable for oil shale as a source of petroleum and nitrogen were prior to the passage of the leasing act open to mineral entry under the mining laws of the United States and are open "to nonmineral entry in accordance with the provisions of the act of July 17, 1914." Instructions of May 10, 1920 (47 L. D. 548).

On February 2, 1918, the Commissioner of the General Land Office issued an order to the chiefs of divisions of his office as follows:

> You are instructed that mineral reservations under the Act of July 17, 1914 (38 Stat. 509), for lands classified as mineral lands valuable as a source of petroleum and nitrogen should read:
>
> "Excepting and reserving, however, to the United States all oil and gas and all shale or other rock valuable as a source of petroleum and nitrogen in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509)."

In all probability Congress did not, at the time of the passage of the act of July 17, 1914, have its attention called to the value of oil shale as a source of petroleum, and nitrogen, and phosphate. Presumably the question whether lands containing oil shale could be located and patented under the mining laws had not then been raised. At any rate, oil shale as such was not included in the list of minerals in said act. But, as we have seen, the Land Department has construed the act to include oil shale, and under such construction surface entries of oil shale lands have been allowed and patented.

The authority for reservation of oil shale in entries and patents must be found in the act of July 17, 1914. Officers of the Land Department have no authority to insert in patents reservations not contemplated by law. In this connection see *Burke* v. *Southern Pacific R. R. Co.* (234 U. S. 669).

It has been noted that the main product of oil shale is oil. The department is of the opinion that the word "oil" as used in the act of July 17, 1914, may properly be construed to include oil shale, and under such construction the reservation in Crampton's patent is sufficient to reserve to the United States the oil shale deposits in the patented land.

The department is not unmindful of its opinion of November 12, 1927 (52 L. D. 333), wherein the phrase "oil lands" occurring in the act of February 12, 1903 (32 Stat. 825), was construed not to apply to oil shale. But it was there necessary to construe a particular statute which had been given a restrictive construction by the Supreme Court of the United States. See *Union Oil Company of California* v. *Smith* (249 U. S. 337), in which the committee report upon the bill which became the act of February 12, 1903, *supra*, was quoted as showing that Congress had in mind oil lands as to which the boring of wells for the discovery of oil was necessary.

Although Crampton initiated his claim to the land in question prior to the passage of the leasing act and thereafter waived his right to oil shale, he has no preference right to an oil shale lease against the prior application of the Smallhorn Oil Shale Refining Company

for such lease. In the act of February 25, 1920, *supra*, distinct provisions are made regarding oil-shale deposits, and these are separated from those made for oil and gas deposits to be obtained by means of drilling wells. Section 20 of that act has no application to oil shale.

The records are returned to the General Land Office for appropriate action in accordance with the views herein expressed.

ASSESSMENT WORK ON OIL-SHALE CLAIMS [1]

Instructions, November 12, 1927

OIL-SHALE LANDS—MINING CLAIM—DISCOVERY—ASSESSMENT WORK—STATUTES.

The rules of the general mining laws as to discovery and assessment work are applicable to oil-shale claims unaffected by the act of February 12, 1903.

OIL AND GAS LANDS—OIL-SHALE LANDS—WORDS AND PHRASES.

The term "oil lands" in the act of February 12, 1903, does not comprehend oil-shale lands.

PRIOR DEPARTMENTAL INSTRUCTIONS MODIFIED.

Instructions of May 10, 1920 (47 L. D. 548), modified.

FINNEY, *First Assistant Secretary:*

Since your [Division Inspector J. Arthur Moore, Salt Lake City, Utah] informal inquiry in the matter, I have given careful consideration to the question whether the so-called five claims act, i. e., the act of February 12, 1903 (32 Stat. 825), applies to placer locations made on account of, and upon, lands valuable for oil shale deposits.

Taking into account the object and purpose of the act, the circumstances that led up to its enactment, the preexisting rules as to placer locations under the general mining laws, and the act of February 11, 1897 (29 Stat. 526), relating to the location under the placer mining laws of lands valuable for petroleum and other mineral oils, the character, form, and mode of occurrence of oil shale, the proposed methods of developing and mining oil shale, and extracting shale oil therefrom, and contrasting oil shale in these respects with fluid oil occurring as such in its natural state and the methods of discovering and developing it, I am of the opinion that Congress did not intend the act to apply to oil shale, and that oil shale is not comprehended in the phrase "oil lands" occurring in the act.

My view is that the act of 1903 was intended to relate to oil placer claims where discovery and development were through wells of greater or less depth, drilled to reach oil and gas bearing sands. Oil shales are not found in this way, and are more in the nature of blanket ore deposits or perhaps more nearly like certain forms of mineral taken under the general placer mining laws. Conse-

[1] See instructions of March 10, 1928, page 334.

quently it is my view that the rules of the general mining laws as to discovery and assessment work are applicable to oil shale claims unaffected by the act of 1903. In so far then as the penultimate paragraph of the instructions of May 10, 1920 (47 L. D. 548, 551), is not in harmony with the views here expressed, it is overruled.

ASSESSMENT WORK ON OIL-SHALE CLAIMS

Instructions, March 10, 1928

OIL-SHALE LANDS—MINING CLAIM—ASSESSMENT WORK—STATUTES.

The applicability of assessment work on oil-shale claims is to be adjudicated under the rules of the general mining laws unaffected by the act of February 12, 1903.

OIL-SHALE LANDS—MINING CLAIM—GROUP DEVELOPMENT—ASSESSMENT WORK—STATUTES.

Oil-shale claimants who performed assessment work upon the theory that the act of February 12, 1903, applied to such claims, are not prejudiced thereby, inasmuch as under the liberal construction heretofore expressed in numerous departmental decisions, any group assessment work that will meet the requirements of that act will satisfy the requirements of section 2324, Revised Statutes.

OIL-SHALE LANDS — MINING CLAIM — GROUP DEVELOPMENT — EXPENDITURES — PATENT—ASSESSMENT WORK—EVIDENCE—BURDEN OF PROOF.

Work of strictly an exploratory nature, performed on a group of oil-shale claims such as work that is shown to have value in determining the oil-bearing character of the shale on a contiguous group of claims, is acceptable as expenditure required as a basis for patent, other essentials of the rules of group development being established; and work of similar character may also be credited as annual assessment work where an antecedent discovery is shown; but the burden of proof is upon the claimant both under the act of February 12, 1903, and under section 2324, Revised Statutes.

PRIOR DEPARTMENTAL INSTRUCTIONS AMPLIFIED.

Instructions of November 12, 1927 (52 L. D. 333), amplified.

FINNEY, *First Assistant Secretary:*

I have considered your [Commissioner of the General Land Office] letter of March 3, 1928, requesting instructions with respect to the inquiries in the accompanying letter of Division Inspector Ralph S. Kelley, who desires to be further advised as to the rules applicable to group assessment work on oil-shale claims to aid him in the prosecution of future field investigations of such claims.

It is believed that the letter of November 12, 1927, to Division Inspector Moore (52 L. D. 333), to which reference is made in Mr. Kelley's letter, is sufficiently explicit in stating the department's view that such work is to be adjudicated under the rules of the general mining laws unaffected by the act of February 12, 1903 (32 Stat.

825). The letter to Mr. Moore did not change the rule of law; it simply declared the department's view of what the law is and always has been and overruled the instructions of May 10, 1920 (47 L. D. 548), so far as not in harmony with such view. Hence, no different law is to be applied as to group assessment work on such claims done before the promulgation of the letter of November 12, 1927.

Mr. Kelley's letter states that certain owners of oil-shale claims have expressed considerable concern because of the letter to Mr. Moore, asserting that in the doing of assessment and patent work they had relied upon the instructions of May 10, 1920, and did their work to meet the requirements of the act of 1903; that such instructions created a rule of property, the benefits of which they can not now be deprived by applying the rules established under the requirements of section 2324, Revised Statutes.

The department's answer to this contention is, that any group assessment work that will meet the requirements of the act of 1903 will, under the department's liberal construction heretofore expressed in numerous departmental decisions, meet the requirements of section 2324, *supra*. The act of 1903 did not dispense with the requirement under the general mining laws that the work claimed as group development work must be shown to be of general benefit to the group (*Union Oil Company of California* v. *Smith*, 249 U. S. 337, 353). It is suggested by Mr. Kelley that the concluding paragraph in the act of 1903, reading " or to determine the oil-bearing character of such contiguous claim " is broader in scope than the rule under the general mining law so that work of a certain character that would not be available under section 2324 would be available under the act of 1903. The department in numerous decisions, notably in *Kirk et al.* v. *Clark et al.* (17 L. D. 190), in *C. K. McCornick et al.* (40 L. D. 498) where the decisions of the courts and departments were elaborately reviewed, and in *East Tintic Consolidated Mining Company* (43 L. D. 79), has held acceptable as a basis for patent, the value of work on shafts and drill holes, sunk for the purpose of prospecting and securing data upon which further development could be based. And where work of strictly an exploratory nature, which accomplishes a like purpose, is performed on a group of oil-shale claims such as work that is shown to have value in determining the oil-bearing character of the shale on the contiguous group of claims, there is no legal impediment to its acceptance, other essentials meeting the rules of group development work being established. Work of similar character would be also available as annual assessment work, an antecedent discovery being shown. The burden of showing this, both under the act of 1903 and under section 2324, Revised Statutes, is upon the mineral claimants.

Under this view the benefits that an oil-shale claimant would have under the act of 1903, if applicable, that he would not have under section 2324, Revised Statutes, is not perceived. The only different effect, if any, of applying the act of 1903 would be to impose restrictions on the mining claimant as to the place where the work must be done and the number of claims to which it must be applied. Mr. Lindley (section 630, Lindley on Mines), after quoting the act of 1903, makes this comment:

> To what extent this relieves the situation or establishes a rule different from the general law applicable to group work generally is difficult to point out.

The department experiences the same difficulty in perceiving any additional benefits a mining claimant acquires by reliance upon the act of 1903.

RALPH T. RICHARDS

Decided March 10, 1928

WITHDRAWAL—MINERAL LANDS—COAL LANDS—ASPHALTUM—MINING CLAIMS—STATUTES.

The Act of June 25, 1910, permitted mining locations upon land withdrawn thereunder containing minerals "other than coal, oil, gas or phosphate," and locations upon lands withdrawn pursuant to that act were not restricted solely to metalliferous minerals prior to the passage of the amendatory act of August 24, 1912.

ASPHALTUM—OIL AND GAS LANDS—WORDS AND PHRASES—STATUTES—WITHDRAWAL.

A deposit of sand asphalt on sandstone heavily saturated with asphaltic minerals in hard solid formation is not "oil" within the meaning of the act of June 25, 1910.

COAL LANDS—WITHDRAWAL.

A coal-land withdrawal continues to be effective so long as it remains unrevoked, notwithstanding that the withdrawn lands had been classified as noncoal prior to the withdrawal.

STATUTORY CONSTRUCTION—EVIDENCE—PRESUMPTION.

Under the general rule of law a statute is in force and operation during the entire day of its approval, subject to the privilege of any person having a substantial right that may be affected thereby to prove that a claim filed on that day was actually initiated before the exact time of the approval of the act.

FINNEY, *First Assistant Secretary:*

Ralph T. Richards has appealed from a decision of the Commissioner of the General Land Office, holding for cancellation his applications, Salt Lake City 040083, 040084, 040085, for patent to certain placer mining claims located on account of deposits of asphalt, upon which final certificates issued July 1, 1926.

Application 040083 is based on the Sunnyside locations, numbers 4 to 7 inclusive, located in 1911, and which together cover SW. ¼ Sec. 3, NW. ¼ and E. ½ Sec. 10, T. 14 S., R. 14 E., S. L. M.

Application 040084 covers the following named and described locations in T. 13 S., R. 13 E., S. L. M.:

Asphalt No. 6, S. ½ SE. ¼, SE. ¼ SW. ¼ Sec. 13, located September 20, 1912.

Asphalt No. 4, E. ½ E. ½ Sec. 24, located August 27, 1912.

Mabel No. 3, E. ½ NW. ¼ Sec. 24, located August 16, 1913.

Ridge No. 3, SW. ¼ SW. ¼ Sec. 13, SE. ¼ SE. ¼ Sec. 14, lot 1, Sec. 23, lot 1, Sec. 24, located August 24, 1912.

Ridge No. 1, W. ½ E. ½ Sec. 24, located July 6, 1912.

Application 040085 is based upon the Asphalt No. 1, located March 17, 1912, and covers S. ½ NE. ¼, SE. ¼ NW. ¼, NE ¼ SW. ¼ Sec. 30, T. 13 S., R. 14 E., S. L. M.

The tracts above described in T. 14 S., R. 14 E., were included in coal withdrawal, Utah No. 1, made July 7, 1910, and the other tracts above described were included in coal withdrawal Utah No. 9, made May 11, 1911. Subsequently Sec. 3, T. 14 S., R. 14 E., was classified as coal land at $20 per acre and restored to entry by Executive order of June 15, 1914. Later Sec. 10 was classified as coal land, no price being set, and similarly restored August 15, 1921. Sec. 30, T. 13 S., R. 14 E., was classified as coal land June 27, 1914, and restored August 15, 1921. Lot 1, Sec. 23, T. 13 S., R. 13 E., is part of the township classified as coal land July 3, 1907; the remaining lands applied for in 040084 were classified on the last-mentioned date as noncoal. Lot 1, Sec. 24, covered by Ridge 3, and the SW. ¼ SE. ¼ Sec. 24, covered by Ridge 1, were selected by the State May 1, 1905, and the selection approved October 10, 1927. The purchaser from the State of these tracts, among others, conveyed the asphaltic and certain other minerals to the United States by deed dated July 16, 1915.

The grounds for the Commissioner's action was that under the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), mining locations, other than for metalliferous minerals, are prohibited on land withdrawn pursuant to those acts, and lands classified and valuable for coal are not subject to location under the general mining laws. These propositions are sound, but do not admit of such sweeping application when applied to the facts in this case. It will be observed that the locations embraced in applications 040083, 040085, and the Ridge No. 1 location in 040084, were made prior to the act of August 24, 1912, which restricted the right to locate mining claims on withdrawn lands solely to metalliferous minerals. The act of 1910 permitted mining locations upon land

withdrawn thereunder containing minerals "other than coal, oil, gas or phosphate." It appears from the report of a mineral inspector that the deposits for which these locations are made consist of sand asphalt on sandstone heavily saturated with asphaltic minerals in hard solid formation. The deposit can not be considered within the category of "oil" within the meaning of the act of 1910. The withdrawal, therefore, was no bar to the location, acquisition and purchase of lands based upon locations made prior to the act of 1912.

With respect to application 040084, Asphalt Nos. 4 and 6, and Mabel 3, located subsequent to the act of 1912, they are of no effect. The fact that the land had been classified as noncoal prior to such withdrawal is immaterial. The lands were, and still continue, under the spell of the withdrawal when located and so long as it remained unrevoked, the land was reserved from disposition under any form of location not specifically authorized by the act, subject to the provisions under which such withdrawals are made. *William E. Moses* (44 L. D. 483); *George B. Pratt et al.* (38 L. D. 146); instructions (40 L. D. 415); *Jackson Hole Irrigation Co.* (48 L. D. 278); instructions (41 L. D. 345). The Ridge No. 3 was located on the date of the approval of the amended act, which became effective on that date. Under the general rule applicable to such a case, the act was in force and operation during the entire day, subject to the privilege of any person having a substantial right that may be affected by the general rule to prove if he can that his location was made before the exact time the act was approved on that day. *United States* v. *Stoddard et al.* (89 Fed. 699); regulations (47 L. D. 437, 472). But even if appellant furnishes such proof, the cancellation of lot 1, Sec. 23, must be affirmed because the land at the time of location was classified, and so far as anything to the contrary appears, is valuable for coal, and the cancellation of lot 1, Sec. 24, and SW. ¼ SE. ¼ must be also affirmed, as title thereto was in the State at the time of location and the surface title, if not the full legal title, still resides in the State.

The appellant's offer to take patent subject to the reservation of the coal can not be entertained. No authority exists for the insertion of such a reservation in a patent for a placer mining claim. *Joseph E. McClory* (50 L. D. 623); *Mary Pexton* (51 L. D. 336); *Empire Gas and Fuel Company* (51 L. D. 424). Applying the above-stated rules, the decision is affirmed as to Asphalt Nos. 4 and 6, and Mabel 3, Ridge 1 as to SW. ¼ SE. ¼ Sec. 24, Ridge No. 3 as to lot 1, Sec. 23, and lot 1, Sec. 24, and as to the whole of Ridge 3, subject to the right of appellant to show satisfactorily that the acts of location thereof took place before the act of August 24, 1912, was signed by the President, and the decision is reversed as to applica-

tions 040083, 040085, and Ridge 1 as to W. ½, NE. ¼, NW. ¼, SE. ¼ Sec. 24, and the case remanded for appropriate action in accordance with these views.

Affirmed in part and reversed in part and remanded.

BENIGNO MURILLO

Decided April 4, 1928

CULTIVATION—ENLARGED HOMESTEAD—STOCK-RAISING HOMESTEAD—RULES AND REGULATIONS.

A departmental ruling abrogating the privilege under the enlarged homestead act of reducing the area of cultivation, based on the physical condition of the land, if, at the date of the application to enter, the land was designated and subject to entry under the stock-raising homestead act, will not be applied retroactively to affect adversely the rights of a homesteader who made entry prior thereto.

DEPARTMENTAL DECISION OVERRULED—DEPARTMENTAL INSTRUCTIONS CONSTRUED.

Case of *Lelia May Spruill* (50 L. D. 549), overruled; instructions of February 1, 1924 (50 L. D. 260), construed.

FINNEY, *First Assistant Secretary*:

This is an appeal by Benigno Murillo from a decision of the Commissioner of the General Land Office dated January 23, 1928, rejecting the final proof submitted September 27, 1927, on his entry under the enlarged homestead act, made October 9, 1922, for W. ½ Sec. 14, T. 5 N., R. 23 E., N. M. M., New Mexico, and holding the entry for cancellation.

According to the final-proof testimony, entryman and his family had resided continuously on the land for almost five years. The improvements were valued at about $500, including a house valued at $375. Two horses and 20 head of cattle had been grazed on the land, none of which had been cultivated.

With the final proof was filed an application for the reduction of the required area of cultivation, in which it was alleged that the soil is gravelly and the surface rolling, with only a few acres of level land; that the average annual rainfall is less than 12 inches; that the land is valuable only for grazing, and that to attempt to cultivate it would only ruin the grazing.

In the decision appealed from the application for reduction of cultivation was denied on the ground that the land had been designated under the stock-raising homestead act prior to the date of the application to make the entry in question. The entryman was accorded the privilege of changing the entry to one under section 1 of the stock-raising homestead act and later showing that the required improvements had been made.

By order (Circular No. 912) of February 1, 1924 (50 L. D. 260), paragraph 27(b) of Circular No. 541 (48 L. D. 389, 398), was amended by adding:

> Nor will a reduction in the area of cultivation, based on the physical condition of the land, be permitted if, at the date of the application to enter, the land was designated and subject to entry under the stock-raising act. * * *

In denying Murillo's application, the Commissioner cited the case of *Lelia May Spruill* (50 L. D. 549), in which the entry was made October 15, 1920, and in which it was contended that the entrywoman had relied on the practice in vogue prior to the date of the order of February 1, 1924, *supra*, of accepting grazing in lieu of cultivation where it was shown that the land was chiefly valuable for such use. The department denied the appellant's plea of *stare decisis*.

After mature consideration the department is of opinion that those persons who made homestead entries prior to February 1, 1924, were warranted in relying on prior rulings that grazing of the land would be accepted in lieu of cultivation if it was made to appear that the land was chiefly valuable for grazing. Accordingly, the order of February 1, 1924, will not be held applicable to entries which were applied for prior to that date, the decision in the *Spruill case* being overruled.

The decision appealed from is accordingly

Reversed.

OFFERINGS AT PUBLIC SALE—SECTION 2455, REVISED STATUTES, AS AMENDED

REGULATIONS

[Circular No. 684]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 7, 1928.

REGISTERS, UNITED STATES LAND OFFICES:

The sale of isolated tracts of unreserved public land and tracts not isolated, but which are mountainous or too rough for cultivation, is authorized by section 2455 of the Revised Statutes (section 1171, title 43, United States Code), as amended by the acts of June 27, 1906 (34 Stat. 517), March 28, 1912 (37 Stat. 77), and March 9, 1928 (45 Stat. 253). 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 February 25, 1926 (51 L. D. 357).

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 Alabama, Kansas, Louisiana, Illinois, Indiana, Iowa, Michigan, Mississippi, Missouri, Ohio, Oklahoma, 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, Wasington, 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 amendments thereto, isolated tracts, the area of which when added to the area applied for will exceed approximately 320 acres; and that he is a citizen of the United States or has declared his intention to become such. Also a duly corroborated affidavit showing that no spring or water hole exists, if it be a fact, upon any legal subdivision of the land applied for; or 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. 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 320 acres.

(*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 320 acres in area will be ordered into the market. An application may include several incontiguous tracts provided their aggregate area does not exceed 320 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 which may be found sufficient 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. Adverse action by the Commissioner will be subject to appeal to the Secretary of the Interior.

(*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 or 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 nearest to the land described in the notice. The notice will be sent to the applicant with instructions that he must publish the same at his expense in the newspaper designated by the register. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the register he must issue receipt therefor and immediately return the money to the applicant by his official check, with instructions to arrange for the publication of the notice as hereinbefore provided.

If 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 cash 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 9, 1928, 45 STAT. 253

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2455 of the Revised Statutes of the United States (section 1171, title 43, United States Code), as amended, be, and is hereby, amended to read as follows:

"SEC. 2455 (section 1171, title 43, United States Code). It shall be lawful for the Secretary of the Interior 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 $1.25 an acre, any isolated or disconnected tract or parcel of the public domain not exceeding three hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: *Provided,* That any legal subdivisions of the public land, not exceeding one hundred and sixty acres, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of the said Secretary, be ordered into the market and sold pursuant to this section upon the application of any person who owns land 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 section: *Provided further*, That this section shall not defeat any valid right which has already attached under any pending entry or location."

REGULATIONS UNDER FIRST PROVISO TO ACT OF MARCH 9, 1928

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 under the first proviso will be rejected in all cases where the applicant has purchased under section 2455, or the amendments thereto, an area which, when added to the area applied for, shall exceed approximately 160 acres.

In 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.

THOS. C. HAVELL,
Acting 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 pur-

chased public lands sold as isolated tracts, the area of which when added to the area herein applied for will exceed approximately 320 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 newspapers 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? Is 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 Statutes, pursuant to the application of _____, Serial No. _____, I 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 register 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.

EXTENSION OF RELIEF TO INDIANS ON RAILROAD GRANT LANDS IN ARIZONA, CALIFORNIA, AND NEW MEXICO—ACT OF MARCH 10, 1928—CIRCULAR NO. 987 (51 L. D. 79), REVOKED

INSTRUCTIONS

[Circular No. 1144]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 12, 1928.

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

The act of Congress approved March 4, 1913 (37 Stat. 1007), provides—

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 (43 Stat. 795), Congress again extended the period to March 4, 1927.

March 10, 1928, an act of Congress was approved (45 Stat. 299), 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, 1931: *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.

You will give to this matter, without expense to the Government, the widest possible range of publicity.

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, dated March 12, 1917 (46 L. D. 44), will be followed. These instructions will supersede those contained in Circular No. 987 of March 26, 1925 (51 L. D. 79), said Circular No. 987 being hereby revoked and recalled.

WILLIAM SPRY,
Commissioner.

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

CHEYENNE RIVER AND STANDING ROCK INDIAN LANDS—TIME OF PAYMENT EXTENDED

INSTRUCTIONS

[Circular No. 1146]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 23, 1928.

REGISTERS, UNITED STATES LAND OFFICES,
PIERRE, SOUTH DAKOTA, and BISMARCK, NORTH DAKOTA:

The act of March 31, 1928 (45 Stat. 400), provides—

> That any homestead entryman or purchaser of Government lands within the former Cheyenne River and Standing Rock Indian Reservations in North Dakota and South Dakota who is unable to make payment of purchase money due under his entry or contract of purchase as required by existing law or regulations, on application duly verified showing that he is unable to make payment as required, shall be granted an extension of time for payment of one-fourth the amount, including principal and interest, due and unpaid on his entry or purchase until the 1st day of December, 1928; the remainder to be paid in three equal annual installments falling due on December 1, 1929, December 1, 1930, and December 1, 1931; all such amounts to bear interest at the rate of 5 per centum per annum until the payment dates: *Provided*, That upon failure to make complete payment of any installment the entry shall be canceled and the money paid forfeited.

1. The act is construed to require the payment of interest on the principal which was due and unpaid on March 31, 1928, at the rate of five per cent per annum from the maturity of the unpaid amounts and for the period of extension and to require the payment of interest on the interest which was due and unpaid on said date at the same rate from the date of the passage of the act and for the period of the extension.

2. Any entryman who is unable to make the payment as required by previous laws and who files a satisfactory corroborated affidavit setting out such inability and the reasons therefor may pay one-fourth of the principal which was due and unpaid on March 31, 1928, on or before December 1, 1928, and have the balance divided into three annual installments falling due on December 1, 1929, December 1, 1930, and December 1, 1931, with interest on each installment as indicated in paragraph 1, hereof.

3. 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 31, 1928, and the amount of interest required will be prepared in this office and sent to you for service by registered letter. A copy of a 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 him at the post office nearest the land. This office will

use the utmost care in preparing these notices in order that they may clearly show the amounts due but before final certificate is issued you will check the amounts shown in the notice with your records in order to verify the figures given.

4. The provision in the act that upon the failure of an entryman to complete his payments as required the entry shall be canceled and the money paid forfeited will be strictly observed and entries for which payments are not made as required will be canceled without notice to the entrymen other than the notice advising them of the amounts due.

5. Upon payment being made you will report to this office and if payment is not made you will report as soon as possible after December 1, 1928. You will make similar reports immediately after December 1, 1929, December 1, 1930, and December 1, 1931.

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

7. The act is supplemental to the acts of April 13, 1912 (37 Stat. 84), May 28, 1914 (38 Stat. 383, 384), March 4, 1921 (41 Stat. 1446), April 25, 1922 (42 Stat. 499), and March 3, 1925 (43 Stat. 1184). Payments maturing after March 31, 1928, must be paid as indicated in Circulars Nos. 106 and 751 (41 L. D. 12; 48 L. D. 80).

8. 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.

PROCEDURE FOR ABANDONMENT OF WELLS ON OIL AND GAS PROSPECTING PERMITS—OPERATING REGULATIONS OF JULY 1, 1926 (52 L. D. 1), SUPPLEMENTED

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR.
Washington, D. C., April 23, 1928.

THE DIRECTOR OF THE GEOLOGICAL SURVEY,
THE COMMISSIONER OF THE GENERAL LAND OFFICE:

The following procedure for abandonment of wells on oil and gas prospecting permits is approved and you will govern yourselves accordingly.

1. Whenever, in the opinion of the supervisor of oil and gas operations, any well on a prospecting permit should be plugged and abandoned, he shall call upon the permittee to perform the necessary work. (See Operating Regulations, section 1(*a*) and (*e*), 52 L. D. 1.) If steps to perform the required work are not taken with reasonable promptness, the supervisor shall report to the Geological Survey stating the conditions that exist, the efforts made by him to have them corrected and the results thereof, and the approximate cost of abandoning properly each well involved, and shall make specific recommendation as to the action to be required of the permittee.

2. The Geological Survey will promptly notify the General Land Office, specifying the abandonment work necessary by the permittee.

3. The General Land Office will immediately serve notice by registered mail on the permittee at his record address, through the register of the local land office, allowing fifteen days from receipt of notice within which to initiate proceedings looking to the abandonment in accordance with the operating regulations.

4. The General Land Office will transmit by registered mail to the home office of the surety company, bonding the permittee, a copy of such notice, advising the surety company that unless its principal takes steps to comply with the order within the time allowed the Government will protect its interest through appropriate proceedings and will thereafter look to the surety company for reimbursement under the bond.

5. The General Land Office will send two copies of such notices to the Geological Survey, one copy of each notice to be forwarded to the appropriate supervisor of oil and gas operations, Geological Survey.

6. At the expiration of the time allowed the register will report to the General Land Office with evidence of service, at the same time sending a copy of his report to the supervisor of oil and gas operations.

7. Upon receipt of such information from the local land office the supervisor will, if the facts then before his office warrant, confirm the register's report by a report to the Geological Survey.

8. Upon receipt of such report from the supervisor the Geological Survey will immediately notify the General Land Office, reporting all facts in detail, including the estimated cost of abandoning each well involved.

9. Upon receipt of such reports from the register and from the Geological Survey the General Land Office will call on the home

office of the surety company, furnishing an estimate of the cost of the necessary work and allowing the company fifteen days to elect to make the abandonment of its own motion under the supervision of the oil and gas supervisor, Geological Survey, or to indicate what action, if any, it desires to take if and when the work is undertaken by the Government.

10. The General Land Office will notify the Geological Survey of the action taken by the surety company.

11. The Geological Survey will notify the supervisor and if the surety company does not elect to perform the work on its own motion will, pursuant to the fiscal regulations of that office, authorize the supervisor to proceed with the necessary work of abandonment.

12. On receipt of such authorization from the Geological Survey as may be necessary in a particular case, the supervisor will proceed with the work, keeping a detailed account by well and job of all expenditures. Vouchers submitted by the supervisor for payment should be separated from other expenditures and should be marked to indicate the job to which they relate by serial number of the case record, the name of the permittee, and name of the surety company.

13. The supervisor will upon completion of the work submit to the Geological Survey an itemized detailed account with appropriate references to vouchers, contracts, etc.; this account will be made the basis for procedure to obtain reimbursement.

14. The Geological Survey will submit to the General Land Office a complete report, in duplicate, of the cost incurred in the work of abandonment.

15. The General Land Office will call on the home office of the surety company to make settlement for the amount due, submitting to the company an itemized statement and all related facts, and giving notice that unless the surety company makes settlement within thirty days from notice the entire matter will then be referred to the Department of Justice with recommendation that suit be instituted to recover the amount of expenditure made plus costs.

16. When the expenditure made in the matter of the abandonment is in excess of the bond obligation the supervisor of oil and gas operations will report specifically to the Geological Survey as to the advisability of bringing suit against the permittee to obtain judgment and execution for the full amount expended.

17. The procedure above outlined shall apply where applicable to other defaults by permittees or lessees.

E. C. FINNEY,
First Assistant Secretary.

CRATER LAKE NATIONAL PARK COMPANY

Opinion, April 24, 1928

NATIONAL PARKS—LEASE—BONDS—SECRETARY OF THE INTERIOR—JURISDICTION—STATUTES.

The amendment in the appropriation act of March 7, 1928, to section 3 of the act of August 25, 1916, governs contracts made prior thereto as well as those made thereafter, and an operator in a national park wishing to issue bonds or increase his capitalization and sell additional stock must submit his proposal to the Secretary of the Interior for approval, notwithstanding that the contract makes no mention of such requirement.

PATTERSON, *Solicitor:*

The Acting Director of the National Park Service has submitted the question as to whether the Crater Lake National Park Company, or Kiser's Inc., operators in Crater Lake National Park under contract with the department, need prior authority from the Secretary of the Interior in order to issue bonds and also whether they need such authority in order to increase their capitalization and sell additional stock whether common or preferred. The matter has been referred to me by the Assistant Secretary for consideration and opinion.

Section 3 of the act of August 25, 1916 (39 Stat. 535), among other things, provides that the Secretary of the Interior "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 20 years."

Said section 3 was amended by a provision carried in the appropriation act of March 7, 1928 (45 Stat. 200, 235), which, among other things, contained the following:

And provided further, That the Secretary may, in his discretion, authorize such grantees, permitees, or licensees to execute mortgages and issue bonds, shares of stock, and other evidences of interest in or indebtedness upon their rights, properties, and franchises, for the purposes of installing, enlarging, or improving plant and equipment and extending facilities for the accommodation of the public within such national parks and monuments.

The contract with the Crater Lake National Park Company was made December 7, 1922, and the contract with Kaiser's Inc., July 22, 1920.

As stated in the memorandum submitted, there appears to be some doubt as to the interpretation of this amendatory law with respect to prior existing contracts. No limitations or conditions respecting this matter were incorporated in the contracts, and information is desired as to what requirements, if any, are imposed upon these operators respecting bond issues or increase of capitalization and sale

of additional stock by reason of the provisions carried in the act of March 7, 1928, *supra*.

In an opinion of this office dated October 19, 1927 (unpublished), the view was expressed that under the broad powers conferred by the act of August 25, 1916, *supra*, the Secretary had authority to authorize a contractor providing accommodations for visitors in a national park to mortgage its property and franchise for the purpose of securing a bond issue designed to finance the project. The matter was held to be discretionary with the Secretary and subject to regulation.

This view was upheld substantially by the Attorney General in an opinion dated December 21, 1927 (35 Ops. A. G. 373), wherein, among other things, it was said:

> We find nothing in these statutes, or in any other provision of the law, which forbids the Secretary of the Interior from consenting to a transfer or assignment of the property and interest of a lessee, and there seems to be no restriction on the power of the Secretary to consent to an encumbrance which may ultimately result in such a transfer. My attention has not been called to any general regulation adopted by the Secretary of the Interior forbidding such transfers or which would have to be modified in order to permit the giving of the consent in this particular case. Unless otherwise limited, the giving of general consent to the execution of encumbrances allows the transfer of the property and interest of the lessee to pass to any person who may become the purchaser by foreclosure sale; but if there is any reason to restrict this it is a matter which may be provided for by the Secretary of the Interior. The fact that Congress has expressly granted such permission in the legislation relating to the Yellowstone National Park and the Yosemite National Park does not raise an inference that it intended to forbid such encumbrances with respect to lessees in the Mt. Rainier National Park. That legislation indicates that Congress has no object on on principle to the mortgaging of such property and franchises, and that, although it dealt with the matter specifically in these two instances, it has left the matter to the discretion of the Secretary of the Interior as far as Mt. Rainier National Park is concerned.
>
> It is proper for the Secretary of the Interior, in the exercise of his control over the park, to prescribe the conditions under which encumbrances by lessees will be permitted, and it is desirable both from the standpoint of the United States and that of the lessee to have this consent and its limitation incorporated in the lease or contract under which the property and franchise are acquired.

The following comment appears in the memorandum of the National Park Service:

> Under the provisions of the existing contracts there appears to be no doubt as to the propriety of reading the above mentioned provisions of law into the contracts. However, there appears to be some doubt, as to the interpretation of his amendatory law with respect to such existing contracts. In the event the last proviso of the amendment is merely declaratory of the authority of the Secretary of the Interior in these matters, it would appear that no obligation is thereby imposed on operators under existing contracts unless specific restrictions with reference to these matters have been incorporated in their contracts.

In the light of the views expressed in the opinions above referred to, it appears that even though the contracts referred to are silent on the subject, the Secretary, upon proper showing, and under such restrictions as deemed necessary, may authorize an encumbrance of the properties by supplemental contract or otherwise.

It appears that these contractors have not heretofore obtained such authorization, and even though the proviso in the act of 1928 should be regarded as declaratory of the authority of the Secretary of the Interior under the preexisting law, it does not appear that the contractors would thereby be relieved from the necessity of submitting such proposals for the consideration of the department under its regulatory powers. Clearly, the application of the amendatory legislation would not be derogatory to any rights which the contractors theretofore possessed.

The issuance of bonds or increase of capital stock by a contractor are of interest to the United States in so far as they involve an encumbrance of the property and franchise of the contractor within the park, or affect its ability to furnish adequate accommodations for the pubic, which is the primary purpose of the contract, and are clearly within the regulatory power of the Secretary of the Interior.

Black on Interpretation of Laws at page 613 says—

> It is said that while it is not within the competency of the legislative power to deprive a person of a vested right by means of a declaratory act, yet where no right has been secured under the former act or its judicial interpretation, the legislature may declare its meaning by a subsequent law, and this will have the effect of giving to the former act the same meaning and effect as if the declaratory statute had been embodied in the original act at the time of its enactment.

Regardless, therefore, of the fact that the contracts were made prior to the amendatory legislation, in the event the contractors propose to issue bonds or increase their capitalization and sell additional stock, such proposals should be presented for the consideration of the department, after which such further steps may be authorized as the public interest may require.

It is also to be noted, as pointed out in the memorandum, that the contracts contain a provision which expressly subjects the operations thereunder to all laws of Congress governing the park and the rules and regulations promulgated thereunder whether then in force or thereafter enacted or provided.

In answer to the question submitted it is, therefore, my opinion that any proposal to increase capital stock or issue bonds should be regarded as within the amendatory proviso regardless of the time the contract for the furnishing of accommodations was made.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

CONSTRUCTION OF SECTION 27 OF THE LEASING ACT, AS AMENDED, WITH RESPECT TO OPERATING AGREEMENTS

Opinion, April 25, 1928

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—OPERATING AGREEMENT—LIMITATION AS TO ACREAGE—DISCOVERY—STATUTES.

Section 27 of the leasing act, as amended by the act of April 30, 1926, does not prohibit a contractor from contracting with any number of permittees, regardless of the acreage involved, but, when discoveries are made and leases are sought, he will be limited in holdings to interests which will not exceed 2,560 acres on a structure, or 7,680 acres in a State.

OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT—OPERATING AGREEMENT—DISCOVERY.

An operating agreement, notwithstanding that it may amount to an assignment of an oil and gas prospecting permit, need not be submitted to the department for approval prior to discovery.

OIL AND GAS LANDS—PROSPECTING PERMIT—OPERATING AGREEMENT—DISCOVERY—LIMITATION AS TO ACREAGE.

Operating contracts in excess of 2,560 acres on a structure, or 7,680 acres in a State, may be disposed of prior to discovery.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—OPERATING AGREEMENT—LIMITATION AS TO ACREAGE—CONSPIRACY—STATUTES.

The restriction in the third proviso to the act of April 30, 1926, which amended section 27 of the leasing act, against combinations in restraint of trade, has reference only to leases, and an operating contract, even though it may include more than 2,560 acres on a structure, or 7,680 acres in a State, is not in violation of the laws of the United States.

FINNEY, *First Assistant Secretary:*

I have before me your [Long, Chamberlain, and Nyce] letter of April 2, asking how section 27 of the leasing act of February 25, 1920 (41 Stat. 437), as amended by the act of April 30, 1926 (44 Stat. 373), is to be construed in certain particulars. You inclose a form of an operating agreement and request that a construction be placed on said agreement in the following respects:

(*a*) Does the form of operating agreement inclosed amount to an assignment of permit so as to require approval of the Department of the Interior prior to discovery?

(*b*) Can one person hold 2,560 acres or less on the same structure and 7,680 acres or less in any one State under an operating agreement, such as the form inclosed, without submitting such contract or contracts for approval?

(*c*) Can one person hold acreage under an operating agreement on a form such as the one inclosed, in excess of 2,560 acres on the same structure and in excess of 7,680 acres in any one State?

(*d*) If operating contracts of this character are entered into with a number of permittees, granting to such operators acreage in excess of 2,560 acres on one structure or 7,680 acres in one State, when discovery is made, or any time prior thereto or thereafter, can such operator divest himself of the excess acreage

either by release or sale and secure a maximum holding of 2,560 acres on one structure or 7,680 acres in any one State?

(e) Assuming that operating agreements substantially in the form of the one inclosed amount to equitable assignments of permits or leases, or interests therein, if there be a limit as to the amount of acreage which can be held thereunder, will the holding of excess acreage under such operating agreements amount to a conspiracy to defraud the United States of its public lands within the provisions of the Criminal Statutes of the United States?

From the beginning the department has recognized that a drilling or operating agreement with a permit holder may in effect be an assignment of the permit, or of an interest therein. In its regulations of March 11, 1920, under the leasing act (Circular No. 672, 47 L. D. 437, 471), it is stated:

A drilling contract carrying with it a right in the proceeds, or in the land itself, will be considered an interest in the lease, and when it comes time to grant a lease such drilling contractor will have to show himself qualified to take a lease. In all cases where the drilling is performed under contract the nature and terms of the contract must be disclosed before lease is granted.

In this connection see also the opinions of October 21, 1925 (51 L. D. 241), and December 15, 1925 (51 L. D. 308).

Under the form of operating agreement submitted the operator is given full control of the permit and there is merely a reservation of an unspecified royalty interest to the permittee. If such an agreement were submitted to the department for approval it would in all probability be considered an assignment of the permit involved. But even though a drilling agreement may be such as to amount to an assignment of the permit, that does not mean that the operator must be charged with the acreage of the permit. In the regulations referred to (47 L. D. 437, 471), it is further stated:

If a contractor desires to be recognized by the department in connection with a permit, it will be necessary for him to file his contract for approval; but if he so desires he may explore the land under contract with the permittee and bring his contract to the attention of the department only when and if he wishes to be recognized as being interested in such lease as may be applied for.

Almost similar language is used in Circular No. 1073 (51 L. D. 475, 477), cited by you.

In an unreported opinion dated October 14, 1924, referred to in the opinion of December 15, 1925, the department said:

Where one contracts with respect to a prospecting permit, the department does not take cognizance of the agreement or regard the contractor as having any interest in the permit. A contractor may, therefore, contract with any number of permittees, regardless of the acreage involved; but, when discoveries are made and leases are sought, will only be entitled to one lease in its own name upon a geologic structure, and will only be allowed indirect interests, i. e. as joint lessees, or the holders of royalty interests, in not to exceed 2,560 acres on a structure, or 7,680 acres in a State.

It was further stated in said opinion that the company in whose behalf the opinion was sought might contract with any number of permittees for lands on the same structure but would be limited in holdings on the structure when a lease should be applied for to interests which, together with its direct interests, in terms of acres, did not exceed 2,560 acres.

Taking into consideration the amendment of said section 27 so that permits and leases are now granted upon the basis of acreage rather than upon any number of permits or leases, the foregoing represents the views of the department at the present time.

And there is good, sound reason for these views and for the distinction which is made between approved and unapproved contracts. When a permit is granted or an assignment of a permit approved, the permittee or assignee becomes entitled, in the event of discovery of oil or gas, to a lease. Under the original section 27 of the leasing act, as it was construed by the department, and under said section 27 as amended, the right to hold oil and gas leases is coextensive with the right to hold oil and gas prospecting permits.

The questions submitted by you are specifically answered as follows:

(*a*) Even though the form of operating agreement under discussion may amount to an assignment of permit it is not necessary to submit such agreement to the department for approval prior to discovery.

(*b*) Yes.

(*c*) Yes.

(*d*) The operator may undoubtedly dispose of operating contracts in excess of 2,560 acres on one structure and 7,680 acres in any one State prior to discovery, but the department does not wish to be understood as expressing the opinion that operating contracts may be held and may be sold when opportunity offers at any time after discovery.

(*e*) In view of the stand which the department has taken with regard to operating contracts it must be clear that it is of the opinion that such contracts, even though they may include more than 2,560 acres on one structure or 7,680 acres in one State, are not in violation of the laws of the United States. It will be noted that the third proviso to amended section 27 has reference only to leases, because it was clearly intended to prevent monopoly of any of the mineral resources governed by the leasing act. The department has more direct control over permits and has authority to cancel them. Prior to discovery of the mineral for the prospecting for which it is granted the permit has merely a value for the prospective discovery and production of mineral.

EXTENSIONS OF TIME FOR DRILLING UNDER OIL AND GAS PERMITS—ACTS OF JANUARY 11, 1922, APRIL 5, 1926, AND MARCH 9, 1928—CIRCULARS NOS. 801, 946, 1041, AND 1063, SUPERSEDED

INSTRUCTIONS

[Circular No. 1147]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 2, 1928.

REGISTERS, UNITED STATES LAND OFFICES:

The act of Congress approved January 11, 1922 (42 Stat. 356), provides that the Secretary of the Interior may—

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

The act of April 5, 1926 (44 Stat., part 2, 236), authorizes the Secretary of the Interior to grant extensions 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.

By act approved March 9, 1928 (45 Stat. 252), the Secretary is given authority to extend for an additional period of two years any oil or gas prospecting permit issued under the act of February 25, 1920, or extended under the act of January 11, 1922, or as further extended under the act of April 5, 1926—

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.

Accordingly, the owner of an oil and gas prospecting permit may secure an extension of time thereon for beginning or completing drilling operations, by filing an application therefor showing that he is entitled to such extension under the provisions of one of said acts.

The application may be filed in the district land office having jurisdiction over the land involved or in the General Land Office, and must be under oath or accompanied by the affidavit of the permittee, or his attorney in fact, where such attorney has been given full control of operations under the permit, and corroborated by the affidavit of at least one disinterested person having knowledge of the facts. The applicant must show:

(1) That the corners of the claim have been marked with substantial monuments, and that a notice has been posted as required by paragraph 1 of the permit, as there is no provision of law under which the time may be extended for compliance with that requirement.

(2) What efforts, if any, have been made to comply with the terms of the permit, the reasons for delay in the full compliance therewith, and when he expects to commence or resume operations and any arrangements made to drill the permit lands; if the permittee has entered into a contract to drill the land, the application must be supported by the affidavit of the drilling contractor as to the terms of the contract, the means at his command for carrying out the same, and the time when he expects to begin drilling operations thereunder.

(3) The drilling activities on the geologic structure on which the permit land is located, or within ten miles thereof, and the location of any oil or gas well being drilled by section, township, and range, with full information as to when the well was begun, its approximate depth, and the prospects for discovery of oil or gas.

Contribution development programs proposing a joint test by a group of permittees 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 acts granting extensions, drilling on their own permits will be excused.

If the application for extension of time is based on contribution made by the permittee toward sinking of a test well upon the structure, the location of the well, full disclosure of the amount and nature of such contributions and the conditions under which the same were made must be shown, which showing must be corroborated by the affidavit of one or more of the parties under whose authority the well is being drilled. Every application of this nature will be submitted to the Geological Survey for report, and if the report is unfavorable the application will be rejected 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, any portion of whose permit areas which could be lawfully drilled lies 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.

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 toward 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 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.

Any extension of time to perform one of the acts required by the permit necessarily extends for the same period the time for the performance of all subsequent requirements. Where a permit bond has been filed which does not by its terms cover extension of the permit, the consent of the surety company to an extension of its bond concurrent with the life of the permit as extended will be required, (*a*) where the surface rights are embraced in a prior valid homestead entry, (*b*) where a reclamation project is involved, and (*c*) where drilling has been done on the permit land. In the latter case the bond

must be kept in force until a $5,000 drilling bond is furnished by the permittee, or his contractor, at the time the notice of intention to drill is filed with the supervisor of oil and gas operations, Geological Survey, for the district in which the land is located, which bond and drilling plan must be approved by the supervisor before drilling is commenced, as provided by Circular No. 1111 (52 L. D. 40).

This circular will supersede Circulars Nos. 801, 946, 1041, and 1063 (49 L. D. 403; 50 L. D. 567; 51 L. D. 278, 450).

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.

ACCOUNTS—PARAGRAPH 85, CIRCULAR NO. 616 (46 L. D. 513), AMENDED

INSTRUCTIONS

[Circular No. 1148]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 3, 1928.

REGISTERS, UNITED STATES LAND OFFICES:

Hereafter you will carry as "unearned moneys" all payments of purchase moneys tendered in connection with final proofs on homestead, desert-land, timber and stone, and mineral entries where final certificate is withheld, except payments of deferred installments on homestead entries embracing lands within ceded Indian reservations.

Paragraph 85 of Circular No. 616, approved August 9, 1918 (46 L. D. 513), is amended accordingly.

WILLIAM SPRY,
Commissioner.

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

EXTENSIONS OF TIME UNDER COAL PERMITS—ACT OF MARCH 9, 1928

INSTRUCTIONS

[Circular No. 1149]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 3, 1928.

REGISTERS, UNITED STATES LAND OFFICES:

By act of Congress approved March 9, 1928 (45 Stat. 251), the Secretary of the Interior was authorized to grant an extension of time for a period of two years on any coal prospecting permit issued under the act of February 25, 1920 (41 Stat. 437). The act, which does not apply to Alaska, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any coal 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, as amended, may be extended by the Secretary of the Interior for a period of two years, if he shall find that the permittee has been unable, with the exercise of reasonable diligence, to determine the existence or workability of coal deposits in the area covered by the permit and desires to prosecute further prospecting or exploration, or for other reasons in the opinion of the Secretary warranting such extension.

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 coal permit that has already expired because of lack of authority under existing law to make extensions, may, in the discretion of the Secretary, be extended for a period of two years from the date of the passage of this Act.

Accordingly, a permittee who has been unable with the exercise of reasonable diligence to determine the existence or workability of the coal deposits, or who gives other reasons, which, in the opinion of the Secretary, warrant an extension, and who desires to prosecute further prospecting, may, if the facts warrant, be granted an extension of time upon filing an application therefor, accompanied with his own affidavit setting forth what efforts, if any, he has made to comply with the terms of his permit and the reasons for failure fully to comply therewith, such showing to be corroborated by the affidavit of at least one disinterested person having actual knowledge of the facts.

Under the second section of the act, even where a permit expired prior to the passage of the act, it may be extended for a period not exceeding two years from the date of the act subject to valid intervening rights and to the provisions of section 1 of the act. In no case would an extension under section 2 go beyond March 9, 1930.

As the permit bond is limited to the period for which the permit was granted, a permittee must furnish with an application for extension a properly executed assent by the surety to the extension of his bond to cover the life of the permit as it will be extended if an extension is granted, or furnish a new bond.

The application for extension may be filed in the General Land Office or in the local land office having jurisdiction over the land involved by the permit, to be promptly forwarded by the register to this office. The application should show how much additional time is considered necessary to complete prospecting work. Extensions will be limited to such period, not exceeding the two years authorized, as may be determined to be allowable under the circumstances in each particular case.

You will give to the regulations the widest publicity possible without expense to the Government.

WILLIAM SPRY,
Commissioner.

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

CONSTRUCTION OF THE ACT OF JUNE 4, 1920, WITH RESPECT TO PATENTS ISSUED ON CROW HOMESTEAD ALLOTMENTS

Instructions, June 4, 1928

INDIAN LANDS—MINERAL LANDS—ALLOTMENT—PATENT—TRUST PATENT—RESERVATION—VESTED RIGHTS—OFFICERS—JURISDICTION—STATUTES.

The act of June 4, 1920, did not impair or adversely affect rights that had theretofore become vested, and it is beyond the power of an administrative officer by the issuance of a new or supplemental patent to deprive an Indian allottee of vested rights to minerals in allotted lands previously acquired under a trust patent without mineral reservation or limitation.

INDIAN LANDS—ALLOTMENT—PATENT—ALIENATION—STATUTES.

The act of June 4, 1920, contemplated that a fee patent, if applied for by an Indian in connection with his homestead allotment, should be in the form of a restricted fee restraining alienation of the lands for the period specified in section 13 thereof.

INDIAN LANDS—ALLOTMENT—PATENT.

A conveyance issued upon an Indian homestead allotment must be construed as to its legal force and effect in accord with the terms of the law under which it was granted and not by the terms of the patent itself.

FINNEY, *First Assistant Secretary:*

Your [Commissioner of the General Land Office] letter (1290528–B–JO'C) dated May 9, 1928, requests instructions in the matter of a fee patent issued March 8, 1928, to J. E. Eggert, purchaser of 40

acres of the allotment of Olive Elk, an allottee on the Crow reservation in Montana.

It appears that said allottee was given a trust patent December 2, 1907, under the provisions of the general allotment act of February 8, 1887 (24 Stat. 388), for 160 acres of land described as the SW. ¼ NW. ¼ Sec. 15, T. 5 S., R. 35 E., and W. ½ SE. ¼, SE¼ SW ¼ Sec. 27, T. 5 S., R. 25 E., without limitation or restrictions as to minerals.

The act of June 4, 1920 (41 Stat. 751), outlined a comprehensive plan for the apportionment or allotment of the unallotted lands of the diminished Crow reservation, containing something over 1,500,000 acres of unallotted lands. After providing for allotments of 160 acres to certain deceased members of the tribe, the equalization of allotments previously made in certain other instances, the continued reservation of areas needed for administrative purposes, and granting certain sections to the State for school purposes, the remaining allottable lands were to be divided pro rata among the members of the tribe living on a certain date, in such manner that each member would receive an equal share of the allottable tribal lands for his total allotment as a member of the Crow tribe. Section 13 of the act provided—

> That every member of the Crow Tribe shall designate as a homestead six hundred and forty acres, already allotted or to be allotted hereunder, which homestead shall remain inalienable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee: *Provided*, That the trust period on such homestead allottments of incompetent Indians may be extended in accordance with the provisions of existing law: *Provided further*, That any Crow Indian allottee may sell not to exceed three hundred and twenty acres of his homestead, upon his application in writing and with the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe: *And provided further*, That said land to be sold by said Indian allottee shall not exceed more than one-half of his irrigable nor more than one-half of his agricultural land and shall not include the improvements consisting of his home.

With respect to minerals, section 6 of the act provided—

> That any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes, upon the request of the tribal council under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, but no lease shall be made for a longer period than ten years, but the lessees shall have the right to renewal thereof for a further period of ten years upon such terms and conditions as the Secretary of the Interior may prescribe: *Provided, however*, That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *And provided further*, That at the expiration of fifty years from

the date of approval of this Act unless otherwise ordered by Congress the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs.

Under the provisions of said act Olive Elk was given a new or additional trust patent for 360 acres of land, and a 25-year trust patent on her homestead allotment of 640 acres, which patent issued in 1923 and included the 160 acres embraced in her former trust patent of December 2, 1907, the later patent of 1923 reserving for the benefit of the Crow tribe all the coal, oil, gas, or other mineral deposits in all the lands so patented.

The 40-acre tract, viz, SW. ¼ NW. ¼ Sec. 15, T. 5 S., R. 35 E., purchased from Olive Elk by J. E. Eggert is a portion of her original allotment which was patented in 1907, and as above pointed out, is also included in the homestead patent of 1923 which contained a reservation of minerals in accordance with the provisions of the act of June 4, 1920, *supra*, under which the new or additional allotments were made. Consequently, the fee patent given to the purchaser, Eggert, contained the same reservation of minerals as Olive Elk's homestead patent of 1923.

It is stated in the submission that the Eggert patent has been returned, accompanied by a request for a new patent without reservation or limitation as to minerals, the purchaser contending that the land is not subject to the mineral reservation authorized by the act of June 4, 1920, *supra*, as it was allotted prior to that act.

The department believes this contention to be well founded, and a new patent should issue to Eggert as requested.

The original 160-acre allotment made to Olive Elk was without reservation of minerals. The trust patent of 1907 upon said allotment conformed to the law under which it was made and was without mineral reservation or limitation. Under said patent Olive Elk took and held a vested interest in the land. She acquired said interest 13 years before the passage of the act of 1920, and she could not be deprived thereof, against her will, even by Congress, or except through the sovereign power of eminent domain. *Howe* v. *Parker* (190 Fed. 738); *Morrison et al.* v. *United States* (243 Fed. 854); *Cornelius* v. *Kessel* (128 U. S. 456, 461); *Ballinger* v. *Frost* (216 U. S. 240). Not only was it beyond the power of Congress to invade a property right, or alter, diminish, or take from the estate vested in the allottee under the patent of 1907, but it clearly was not the intent or purpose of the act of 1920 to impair or adversely affect rights which had theretofore become vested; and if it is beyond the power of Congress to invade a property right surely by the same token it is beyond the power of an administrative officer by the issuance of a

new or supplemental patent to take away an interest that has once vested.

Another question propounded relates to orders which have been received in some cases directing the partition of the homestead lands and the issuance of new trust patents to the heirs. You say that this would seem to call for a declaration in the new patent that the trust period therein fixed will run from the date of the original homestead patent as directed in 38 L. D. 558, and the act of May 18, 1916 (39 Stat. 123). This conclusion being based on the premise that the instrument or conveyance given to the Indians on their *homestead allotments* is a *trust patent* in the form drafted by the Solicitor of this department in his approved opinion of October 26, 1923 (unpublished), respecting the evidence of title to be given Crow allottees under the act of June 4, 1920, *supra*.

You say further that in event the homestead patent is considered a restricted fee patent, and not a mere trust patent, new trust patents apparently should not issue on the orders which have been received directing the partition of the homestead lands, but appropriate measures should be taken for the disposition thereof under the provisions of the act of June 25, 1910 (36 Stat. 855).

The act of June 4, 1920, *supra*, under which the diminished Crow reservation was allotted, imposed a restriction upon the alienation of lands set aside for homestead purposes, as set out in section 13 hereinabove quoted. The act contemplated the issuance of trust patents to all allottees for all their lands but provided that competent Indians, if they elected in writing, were to be given patents in fee simple, except for their homestead lands. It was provided in section 1 of the act that "no patent in fee shall be issued for homestead lands of a husband unless the wife joins in the application, who shall be examined separately and apart from her husband, and a certificate of the officer taking her acknowledgment shall fully set forth compliance with this requirement." It was clearly intended, however, that the fee patent, if applied for by the Indian in connection with his homestead allotment, should be in the form of a restricted fee restraining alienation of the lands for the period specified in section 13, inasmuch as that section declares in unequivocal terms that homestead lands "shall remain inalienable for a period of 25 years from the date of issuance of patent therefor or until the death of the allottee."

From what has been said it is clear that the instruments or conveyances issued upon these Crow homestead allotments must be construed as to their legal force and effect in accord with the terms of the law under which they were granted and not by the terms of the patent itself. *United States* v. *Saunders* (96 Fed. 268); *Burke* v.

Southern Pacific Railroad Company (234 U. S. 669). If the allottee, being competent, elected to take a patent in fee then the patent issued to him must be regarded as conveying the fee subject to the stated restrictions against alienation, notwithstanding the allottee may actually have been given the prescribed form of trust patent. With respect to this class of patents or allotments, that is, restricted allotments, trust patents should not issue on orders directing the partition of the homestead lands. Such cases should be returned to the Commissioner of Indian Affairs for such further action as may be appropriate under the act of June 25, 1910 (36 Stat. 855), and the act of June 4, 1920, *supra*.

NEVADA IRRIGATION DISTRICT [1]

Decided January 13, 1928

WATER-POWER PROJECT—POWER SITE—APPLICATION—LICENSE—WITHDRAWAL—FEDERAL POWER COMMISSION.

The filing of an application for a license for water-power privileges under the act of June 10, 1920, automatically withdraws the land from entry and disposal, and the power site thus created is reserved from disposal under other laws until otherwise directed by the Federal Power Commission or by Congress.

WATER-POWER PROJECT—LICENSE—RIGHT OF WAY—LAND DEPARTMENT—FEDERAL POWER COMMISSION—JURISDICTION.

The land department is prohibited by section 24 of the Federal Water Power Act, in the absence of a determination by the Federal Power Commission as required by that section, from granting a right of way under the act of March 3, 1891, as amended, over lands embraced within a license for water-power privileges issued pursuant to the former act, notwithstanding that the applicant for the right of way and the licensee are one and the same person.

WATER-POWER PROJECT—LICENSE—RESERVATION—FEDERAL POWER COMMISSION.

A declaration in a license issued by the Federal Power Commission pursuant to the act of June 10, 1920, to the effect that it "will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired," relates only to such reservations as those defined in section 4 of the act, and is not in any wise a determination such as that contemplated by section 24 thereof.

WORK, *Secretary:*

The Nevada Irrigation District has appealed from a decision of the Commissioner of the General Land Office dated July 11, 1927, rejecting its application for a right of way for certain reservoirs and canals, under the provisions of the act of March 3, 1891 (26 Stat. 1095), as supplemented by section 2 of the act of May 11, 1898 (30 Stat. 404).

[1] See decision on motion for rehearing, page 377.

The record shows that on May 3, 1927, prior to the decision appealed from, the Commissioner ruled the district to show cause why its application should not be rejected on the ground that the lands are not now subject to disposal under the said acts of 1891 and 1898, the project being practically the same as that upon which a license was granted to the district by the Federal Power Commission on November 16, 1925, under the provisions of the act of June 10, 1920 (41 Stat. 1063). Answer to the rule was made by the district and submitted to the Federal Power Commission for consideration. In his reply the executive secretary discussed the showing and argument submitted in support of the application and for reasons stated therein advised of the objection of that office to the approval of the application. The Commissioner of the General Land Office concurring in the views expressed by the executive secretary rejected the application. Copy of the letter of the executive secretary was furnished the district, together with the Commissioner's decision, and appeal was taken in due season.

The basis of objection, as appears from the letter of the executive secretary, may be stated briefly as follows:

1. That the issuance of the license constitutes a disposal of the lands affected in accordance with the definition of the word "disposal," as used in the opinion of this department reported in 50 L. D. 660, concerning the matter of a license issued to the San Joaquin Light and Power Company.

2. That the lands are reserved from entry, location, or other disposal under the laws of the United States by the provisions of section 24 of the Federal Water Power Act until otherwise directed by the Commission or by Congress.

3. That under the power act Congress has taken pains to preserve certain rights to the United States which should be retained unimpaired in the administration of the two statutes (citing *Utah Power and Light Company* v. *United States*, 243 U. S. 389), and if the two rights are inconsistent it would be beyond the authority of administrative officers to grant a greater right than is contemplated by the act under which disposal has already been made (citing *Kern River Company* v. *United States*, 257 U. S. 147), and that if the rights for irrigation and power are not inconsistent the licensee making use for both purposes needs no new grant.

The questions raised on appeal concern primarily the above-mentioned grounds of objection. In addition the executive secretary expressed the view that the district is not in need of additional authority for the construction, maintenance, and operation of the works, since its irrigation rights are unaffected by the license; and further, that under its contract with the Pacific Electric and Development Company the main use of the right of way is the production

of power and not for irrigation, as required by the acts of 1891 and 1898, under which the application is made.

Counsel for the district has submitted brief and argument in support of the application and appeal, and oral arguments were presented before the department on December 15, 1927.

The statements submitted on behalf of appellants concerning the organization of the district and the purposes of this project are briefly as follows:

The district is a public corporation, organized and existing under and by virtue of the California irrigation district act. As organized August 14, 1921, it embraced a little over 200,000 acres of land. It was enlarged in 1926 to include upwards of 60,000 acres, and probable additional lands will bring the aggregate area to a total of more than 300,000 acres, located in Nevada, Placer, and Yuba Counties. In 1925 the State division of water rights issued permits to the district for the appropriation of waters for the irrigation of the lands. In 1922 the district filed an application with the Federal Power Commission for a license to use certain parcels of unappropriated public lands for the purpose of transporting the waters from the point of appropriation to the place of use within the boundaries of the district, and under date of November 16, 1925, the commission granted a license to the district under the provisions of the act of June 10, 1920, known as the Federal Water Power Act. It is further stated that it would not be feasible for the irrigable lands to carry the cost of the project without the aid to be derived from the utilization of the waters in the development of hydroelectric energy, and that in routing the waters from the higher altitudes for use in irrigation it is feasible and practicable to so route them as to develop approximately 1,400,000,000 kilowatt-hours of hydroelectric energy per year at an estimated approximate cost of $37,000,000. The use of water for the development of electric power for irrigation districts is authorized by the laws of the State to aid in carrying out the main purposes of supplying water for irrigation purposes to the lands within such districts. The district has determined to develop hydroelectric energy as subordinate to its main and primary business of furnishing water for irrigation and has provided that power development shall be carried out within the control and under the direction of the district through an independent corporate agency, assuming responsibility for financing, developing and operating the same under contract. The application under the acts of 1891 and 1898 was filed for the purpose of securing a more stable and permanent title on which to establish a financial structure and to enable it to develop the necessary water and construct the enlarged works indispensable to the impounding and transportation of such water.

In the arguments and statements presented in behalf of appellant it is urged that the project is in its nature a public enterprise; that the district is a *bona fide* irrigation district whose chief aim is the irrigation of the lands within its boundaries; that it is organized and established under State laws; that it has acquired water rights under State laws for the irrigation of the lands, and the development of power is subordinate to its main and primary purpose of furnishing water for irrigation, and that therefore it has an absolute right to a grant of rights of way for its canals and impounding works, and that the United States may not in law, and certainly not in equity, deny such rights of way over the public lands.

All of the above matters would be proper subjects for consideration before a right of way under the acts as applied for may be granted in any case, but before this department may consider the application with a view to its approval or rejection, according to its merits, it is necessary to determine whether, in view of the granting of the license by the Federal Power Commission affecting the lands in question, it would have authority to grant a right of way under the above-mentioned acts as now applied for. This issue is raised by the objections of the executive secretary hereinbefore referred to and the answer of counsel in the appeal submitted.

Considerable of the argument is devoted to a discussion of the view of the executive secretary to the effect that the license issued by the Federal Power Comission constitutes a disposal of the tract in accordance with the definition of the term "disposal" appearing in the opinion of the Acting Secretary of the Interior as cited in the letter. In that opinion it was held that the issuance of the license constituted a disposition of the tract within the meaning of section 2 of the act of September 22, 1922 (42 Stat. 1017), and that the Secretary is forbidden to quitclaim the tract to the party who conveyed it to the United States. Counsel concedes that to quitclaim the land affected to the former owner, or his successor in interest, after the Federal Power Comission had issued a license to the corporation, would have created conflicting interests in the same lands. It is urged, however, in this case, that the licensee under the Federal Water Power Act and the applicant for right of way before this department are one and the same party, and that therefore no conflicting interests in the same land will arise through the granting of the right now applied for.

This department, however, does not believe that the identity of the licensee under the Federal Water Power Act and the applicant for right of way under other acts now before this department, involving the same lands and the same project, can have any material bearing in the determination of the questions presented to this department by this appeal.

The act of 1891 provides for rights of way through the public lands and reservations of the United States for ditches, canals, and reservoirs for the purpose of irrigation, but not for any other purpose. The act of 1898 did no more than to permit rights of way obtained under the act of 1891, the use of which was restricted to irrigation, to be used also for purposes of water transportation, for domestic purposes, or for the development of power. Irrigation was still to be the main purpose, and the other purposes were to be subsidiary. *Kern River Company* v. *United States* (257 U. S. 147). The right of way intended by the act was neither a mere easement nor a fee simple absolute but a limited fee on an implied condition of reverter, in the event the grantee ceased to use or retain the land for the purpose indicated in the act. *Rio Grande Western Railway Company* v. *Stringham* (239 U. S. 44, 47); *Kern River Co., supra.*

Under the Federal Water Power Act the commission is authorized and empowered to issue licenses to qualified parties for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, and transmission lines for the development, transmission, and utilization of power upon and across the public lands and reservations of the United States, provided—

> That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

The terms and conditions under which such license shall issue are fixed by the statute.

Authority to grant licenses under the Federal Water Power Act is vested by law in the Federal Power Commission, and authority to grant rights of way under the acts of 1891 and 1898 in the Secretary of the Interior. Applicant has applied for and secured a right for the project under the Federal Water Power Act. The rights of the licensee and the effect of the application for and the issuance of the license, with respect to the lands affected, must be determined according to the provisions of that act. The status of the land affected by the license is fixed by that act, which is controlling upon the Federal Power Commission and this department as well.

By reason of the filing of appellant's application for and the granting of the license, the lands in question, by express terms of that act, have been "reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress." Section 24 of the act reads as follows:

> That any lands of the United States included in any proposed project under the provisions of this act shall from the date of filing of application therefor

be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the commission, for the purposes of this act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this act, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites or in connection with water-power development or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained.

It will thus be seen that the lands were automatically withdrawn from entry and disposal by the filing of the application for water-power privileges under the act, and the power site thus created is reserved from disposal under other laws until otherwise directed by the commission or Congress. The section also prescribes, upon a determination by the commission that the value of the lands will not be injured or destroyed for the purposes of power development by location, entry, or selection, under public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection subject to certain reservations for the benefit of the Government and the licensee. This department manifestly is without authority to declare the lands open to location, entry, or selection unless the Federal Power Commission shall make the determination as required by law, nor until it shall receive due notice thereof as prescribed by the section in question.

The argument is made on behalf of the district with respect to the provisions of section 24, that others would be prohibited from applying under the act of 1891, but by reason of a merger of interests of the rights of the licensee with the rights of applicant, said section 24 would have no prohibitive effect, and even though it did have, it would leave the Federal Power Commission without good reason for not consenting to the granting of the application

under the act of 1891, and further that the declaration in the license to the effect that it "will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired" constitutes a determination by the Federal Power Commission, and this department, having notice thereof, is now required to declare the lands described in the application now under consideration open to entry.

In the opinion of this department the prohibitive effects of section 24 are plainly applicable regardless of the identity of the licensee and the present applicant. The purpose of the present application is to secure a right of a different nature subject to different conditions and under other laws. Such right could not be granted in the absence of a determination by the commission as required by section 24. Nor can the declaration in the license, referred to in the brief, be taken as a determination within the meaning of said section, which would authorize this department to declare the lands open to entry, location, etc., since such declaration clearly has no relation to the determination contemplated by the section. It concerns such reservations as national forests, military reservations, etc., as defined in section 4, regulation 1, of the rules and regulations of the Federal Power Commission, within which the commission is authorized to grant licenses under certain conditions under section 4 (d) of the Federal Water Power Act. The language of the statute is plain, and the necessary determination essential to the opening of the lands to other filings under other laws has not been made.

It is therefore the opinion of this department that in view of the status of the lands created and existing by reason of the outstanding license granted by the Federal Power Commission under the act of June 10, 1920, *supra*, it is without authority to grant the right of way affecting the same lands under the acts of March 3, 1891, and May 11, 1898, *supra*, as applied for by the district.

For the reasons above stated, the action of the Commissioner in rejecting the application must be

Affirmed.

NEVADA IRRIGATION DISTRICT (ON REHEARING)

Decided June 4, 1928

WATER-POWER PROJECT—APPLICATION—JURISDICTION—LAND DEPARTMENT—FEDERAL POWER COMMISSION.

Jurisdiction of the Land Department over lands of the United States included in any proposed project under the act of June 10, 1920, automatically terminates upon the filing of an application therefor with the Federal Power Commission, and it has no further control over such lands until and unless jurisdiction is restored by the commission or by Congress.

FINNEY, *Acting Secretary:*

By decision dated January 13, 1928 (52 L. D. 371), this department rejected the application of the Nevada Irrigation District for right of way for certain reservoirs and canals on the public lands, under the provisions of the act of March 3, 1891 (26 Stat. 1095), as amended by the act of May 11, 1898 (30 Stat. 404).

Motion for rehearing has been filed, contending in substance that the conclusion reached is based upon an interpretation and application of the provisions of section 24 of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), that is so strict and narrow as to be wholly unwarranted by the language or purposes of said section.

I am not impressed with this contention. The language of the law is clear and decisive. Under the first sentence of section 24 the mere filing of an application for water-power privileges operates automatically to withdraw water-power sites from entry, location, or disposal under other laws "until otherwise directed by the commission or by Congress." Section 29 of the act repeals all acts or parts of acts inconsistent therewith. It is clear beyond question that the jurisdiction of this department over any lands of the United States included in any proposed project under the provisions of said act automatically terminates upon the filing of an application therefor with the Federal Power Commission, and this department has no further control of the lands until and unless jurisdiction is restored by the commission or by Congress.

I see no such doubt or ambiguity in the language employed in the act as to justify resort to other aids for construction. The statute is plain and decisive and affords its own interpretation.

The motion for rehearing is, therefore, denied.

Motion denied.

BOARD OF SUPERVISORS, MOHAVE COUNTY, ARIZONA

Instructions, June 13, 1928

PUBLIC LAND—SECRETARY OF THE INTERIOR—PRICE—MINIMUM PRICE—STATUTES.

Where the law permits the Secretary of the Interior to fix the price at which any particular body of public lands is to be disposed of, and he thereafter sets a price for their disposition pursuant thereto, the price thus fixed is the "minimum price."

MINING CLAIM—ASSESSMENT WORK—EXPENDITURES—DISCOVERY—ADVERSE CLAIM—RECREATION LANDS—EVIDENCE—BURDEN OF PROOF—PRESUMPTION.

Where mining locations have been unchallenged for a number of years, and development work has been done upon them, the certificate of location creates presumption of discovery and a valid location, and anyone seeking rights under other public-land laws adverse to those of the mining claimants must assume the burden of controverting the *prima facie* title of the mineral claimants.

MINING CLAIM—ADVERSE CLAIM—RECREATION LANDS—NOTICE—HEARING—LAND DEPARTMENT.

The Government can not convey an unassailable title under some other public-land law to lands embraced within a mining location until, after due notice of charges and opportunity to be heard has been given to the mining claimant, there has been an adjudication by the Land Department that the claim is invalid.

COSTS—PRACTICE—SELECTION—RECREATION LANDS—MINING CLAIM—ADVERSE CLAIM.

Where a selection is made under the act of June 14, 1926, for lands for recreational purposes that are embraced within a mining location, no public interest exists that dictates that the Government assume the burden of expense of removing the cloud created by such claim on the title sought by the selector, but that burden must be borne by the selector himself.

NOTICE — PRACTICE — MINING CLAIMANT — PATENT — DISCOVERY — ASSESSMENT WORK—ADVERSE CLAIM—RECREATION LANDS.

Where adverse proceedings are directed against a mining claim, patent to which is not being sought by the claimants thereof, charging failure to make discovery of mineral and to perform the required assessment work, no authority of law exists for service of notice by publication, but service must be personal as provided by Rule 7 of Practice.

FINNEY, *First Assistant Secretary:*

Consideration has been given to the letter of the Commissioner of the General Land Office to the register of the local office at Phoenix, Arizona, directing notice of classification and approval of selection for recreational purposes of Sec. 20, T. 20 N., R. 15 W., G. and S. R. M., made by the board of supervisors of Mohave County, Arizona, which section was withdrawn pursuant to the petition of the selectors under the act of June 14, 1926 (44 Stat. 741).

The department concurs in the view that the reasonable value of the land is $1.25 per acre and that the act authorizes the Secretary to fix the price, which price by the terms of the act becomes the price fixed by law. The price at which the law says any particular body of lands is to be disposed of is the "minimum price." See 29 L. D. 501, 503.

The last paragraph of the proposed letter, however, reads:

> You are also hereby directed to notify the mineral claimants that unless within thirty days from notice hereof they file a formal protest against the recreational application as to the lands embraced in mineral claims Silver Bell Nos. 2 and 4, action on the said application will proceed without regard to the alleged mineral claims.

This is in fact a requirement that the mineral claimants come forward and affirmatively show by sufficient allegations that they have valid mining locations, and in the event they fail to do so, proceedings will be taken to sell the tract under the act of June 14, 1926, upon the assumption that no such valid claims exist. This procedure is predicated upon a report of an inspector. The regulations for

proceedings on special agents' reports (44 L. D. 572) provide for the formulation of charges and notice thereof to claimants. Under the above-quoted procedure no charges are preferred, no invalidity of the claims is specified, and no issue is tendered claimants. Moreover, the well-settled rule that the burden of proof is upon the Government is reversed. "System, order, and the uniform application of the established rules of practice of the Department to all litigants alike are essential in the administration of justice in the Department as in the courts." *Howe* v. *Parker* (190 Fed. 738, 757), I know of no law or regulation that imposes such a duty on mining claimants as is implied in this order. Where there is no legal duty there can be no default. It has been held that where mining locations have been unchallenged for years, and development work has been done upon them, the certificate of location creates presumption of discovery and a valid location. *Vogel* v. *Warsing* (146 Fed. 949; 77 C. C. 199); *Cheeseman* v. *Hart* (42 Fed. 98). Anyone seeking rights under other public-land laws adverse to those of the mining claimants should assume the burden of controverting the *prima facie* title of the mineral claimants.

The inspector very fairly and with abundant caution concedes in his report that because of the rugged surface and dense brush and the absence of any aid by the mineral claimants, mineral showings and works of a mining nature other than those observed may have escaped his attention. If certain of the mentioned claims are valid, and the claimants thereof, resting upon their vested rights, ignore the proposed monition, there would be no adjudication of fact by this department which would estop them from thereafter asserting their rights.

Consequently, before the Government can be assured that it can convey an unassailable title under the said act to Mohave County, it is essential, after due notice of charges and opportunity to be heard has been given to the mining claimants, that there be an adjudication by the department that the claims are invalid.

The report of the inspector appears to warrant the conclusion that the lands are (1) nonmineral in character; (2) that no discovery has been made; (3) that no assessment work has been performed on any of the claims for the years 1924, 1925, 1926, and 1927. However, there is no special benefit inuring to the Government in the disposal of the land at the appraised price under this act, as a greater price would be exacted if the land were sold as mineral land; and as said act expressly reserves the minerals in any patent that may be issued thereunder, there is no public interest that dictates that the Government should assume the burden of expense of removing the cloud now existing on the title sought by the petitioners.

It would, therefore, be incumbent upon the petitioners, as a prerequisite to further consideration of their petition as to the land embraced in such conflicting claims, to obtain relinquishments to the United States from the record title holders thereof of all their interest therein and file the same in the local office, or make application to contest such claims as are not fully relinquished, supporting such application with verified charges challenging the validity thereof, and apply for a hearing thereon. Notice of contest and other proceedings thereafter shall be in accordance with the Rules of Practice (51 L. D. 547), except that petitioners must file proof of personal service as provided in Rule 7, there being no authority of law to serve notice by publication. Upon receipt of the register's report and recommendations such action will be taken as the record appears to warrant. The letter is therefore returned to be recast in accordance with these views.

JAMES E. CREE (ON REHEARING)

Decided June 13, 1928

NATIONAL FORESTS—RELINQUISHMENT—RECONVEYANCE—LIEU SELECTION—WITHDRAWAL—STATUTES.

The act of September 22, 1922, did not reserve or withdraw lands conveyed under the act of June 4, 1897, from Executive administration and control, and in determining whether or not a disposition of the base lands had been made within the contemplation of section 2 of the former act, the status of the lands as of the time action is taken upon the application for relief thereunder controls.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *San Joaquin Light and Power Corporation* (50 L. D. 660) cited and applied.

FINNEY, *First Assistant Secretary:*

By decision dated April 24, 1928, this department affirmed the action of the Commissioner of the General Land Office denying the application of James E. Cree for a quitclaim deed under the act of September 22, 1922 (42 Stat. 1017), to SE. ¼ Sec. 15, T. 1 N., R. 9 W., S. B. M., California, on the ground that the tract has been disposed of within the meaning of section 2 of the act above referred to.

Motion for rehearing has been filed, contending in substance, among other things, that the instant case is distinguishable from the case of *San Joaquin Light and Power Corporation* (50 L. D. 660), in that the land there in question had been disposed of prior to the passage of the act of September 22, 1922, *supra*, whereas the tract here involved was disposed of *after* the passage of said act, and in contravention of its purpose.

The difference in the cases is not material. The act referred to authorized a quitclaim deed to relinquished base lands only in the event other rights of a public or private nature had not attached. The law does not look or refer to conditions as they existed at the date of its passage and does not reserve or withdraw lands conveyed under the act of June 4, 1897 (30 Stat. 11, 36), from Executive administration and control. The status or condition of the base lands must be determined as of the time action is taken upon an application for relinquishment or quitclaim.

The motion cites the case of *Peale* v. *Work*, wherein the Supreme Court of the District of Columbia issued a writ of mandamus requiring the Secretary of the Interior to issue a relinquishment and quitclaim to the lands involved in the *San Joaquin case* hereinabove mentioned. With respect thereto it suffices to say that the judgment of the District Supreme Court was reversed and the mandate dissolved June 4, 1928, by the Court of Appeals of the District of Columbia (26 Fed., (2nd), 1002).

On due consideration no reason is seen for disturbing the action heretofore taken, and the motion is accordingly denied.

Motion denied.

CONSTRUCTION OF SECTION 27 OF THE LEASING ACT, AS AMENDED, WITH RESPECT TO CORPORATE INTERESTS

Opinion, June 22, 1928

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—LIMITATION AS TO ACREAGE—CORPORATIONS—STATUTES.

The provisions and limitations of section 27 of the leasing act, as amended, with respect to the maximum acreage of permits and leases that may be taken and held by one corporation, can not be evaded by the expedient of organizing another or other corporations by the same stockholders, inasmuch as the department may look beyond the corporate form to its purpose and to those identified with that purpose.

FINNEY, *First Assistant Secretary:*

I have your [I. Parker Veazey, jr.] letter of June 13, requesting an opinion as to the proper interpretation of section 184, title 30, U. S. C. (section 27 of the Leasing Act of February 25, 1920, 41 Stat. 437, as amended by the act of April 30, 1926, 44 Stat. 373), regarding the maximum acreage on a structure which may be leased to one person. You ask:

Is there any question that individual corporations may acquire individual permits even though made up of the same stockholders, provided the total of the indirect interest of each stockholder in the separate permits or leases of the corporations (the number resulting from applying to the total acreage of a

corporation the percentage of the stockholder's interest as to each corporation and adding these together) does not exceed the maximum acreage which the stockholder could take separately?

In other words, you wish to know if this department considers that interests whose acquisition by direct methods is expressly prohibited by law may be acquired by indirect methods.

In an unpublished decision of February 15, 1927, in the case of W. G. Skelly, C. C. Herndon, and W. P. C. German (Las Cruces 029418, 029420, M-20812, 20814), the department held that this could not be done. It was held, upon authority of decisions of the Supreme Court of the United States, Federal courts, and State courts, that the department could look beyond the corporate form to the purpose of it and to those who were identified with that purpose.

INDIAN ALLOTMENTS ON THE PUBLIC DOMAIN UNDER SECTION 4, ACT OF FEBRUARY 8, 1887, AS AMENDED

REGULATIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., February 1, 1928.

The fourth section of the general allotment act of February 8, 1887 (24 Stat. 388), amended by the act of February 28, 1891 (26 Stat. 794), was further amended by section 17 of the act of June 25, 1910 (36 Stat. 855, 859), to read as follows:

That where any Indian entitled to allotment under existing laws 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 manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred and sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indian shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the manner and with the restrictions provided in the act of which this is amendatory. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

CERTIFICATES

Any person desiring to file application for an allotment of land on the public domain under this act must first obtain from the Commissioner of Indian Affairs a certificate in accordance with regulations approved September 23, 1913, showing that he or she is an Indian and entitled to such allotment, which certificate must be attached to the allotment application, blanks for which will be furnished. Application for the certificate must be made on a regular form, blanks for which will also be furnished, and must contain information as to the applicant's identity, such as thumb print, age, sex, height, approximate weight, married or single, name of the Indian tribe in which membership is claimed, etc., sufficient to establish his or her identity with that of the applicant for allotment. Each certificate must bear a serial number, record thereof to be kept in the Indian Office.

TRIBAL MEMBERSHIP

An applicant for allotment under the fourth section is required to show that he is a recognized member of an Indian tribe or is entitled to be so recognized. Such qualifications may be shown by the laws and usages of the tribe. The mere fact, however, that an Indian is a descendant of one whose name was at one time borne upon the rolls and who was recognized as a member of the tribe does not of itself make such Indian a member of the tribe. The possession of Indian blood, not accompanied by tribal affiliation or relationship, does not entitle a person to an allotment on the public domain. Tribal membership, even though once existing and recognized, may be abandoned in respect to the benefits of the fourth section.

ALLOTMENT APPLICATIONS

The applicant, upon receipt of the required certificate, will fill out the blank form of allotment application and present the same, properly executed, to the register of the land office for the district in which the land is situated. The affidavits attached to the applications for certificate and allotment may be executed before the register or the acting register of the district land office, or any inspector or agent of the Indian Service, or a United States commissioner, 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.

United States commissioners and notaries public must attach their seal, and justices of the peace must attach to each application at least one certificate by the clerk of the proper court that they are duly authorized to administer oaths.

In case an allotment application is presented without the required certificate, the register will suspend the same for a period of 90 days from notice to enable the applicant to obtain and file such certificate, and that officer will advise the applicant and the Commissioner of Indian Affairs by duplicate notice that unless such certificate is furnished within that time the allotment application will be finally rejected, unless prior to the expiration of the 90-day period the Commissioner of Indian Affairs shall ask for additional time within which to determine the applicant's Indian status.

The filing of an application for allotment on public lands does not secure to an Indian a vested right.

DUTY OF OFFICERS TO ASSIST APPLICANTS

The district land officers, the Indian school superintendents, or other field officers of the Indian Bureau, will afford every facility to Indians desiring to take fourth-section allotments, and will assist them whenever practicable, by advice or otherwise, in the proper steps to be taken, as well as assist them in the preparation of their applications and the required proofs.

Forest rangers and supervisors and district foresters will perform similar services where the allotment applications are made under section 31, act June 25, 1910. (36 Stat. 855, 863.)

Blank forms for application may be had from the Office of Indian Affairs and district land office or district forester's office.

HEIRS OF INDIAN SETTLERS AND APPLICANTS

Allotments are allowable only to living persons or those in being at the date of application. Where an Indian dies after settlement and filing of application, but prior to approval, the allotment will upon final approval be confirmed to the heirs of the deceased allottees.

In disposing of pending applications in which the death of the applicant has been reported, the heirs of an applicant who was otherwise qualified at the date of application should be notified that they will be allowed 90 days from receipt of notice within which to submit proof that the applicant personally settled on the land applied for during his or her lifetime, and while the land was open to settle-

ment, and upon failure to submit such proof within the time allowed, the application will be finally rejected.

When it is sufficiently shown that an applicant was at the time of death occupying in good faith the land settled on, patent will be issued to his or her heirs without further use or occupancy on the part of such heirs being shown.

CERTIFICATE OF ALLOTMENT AND FIELD EXAMINATION

When the register accepts an application under the fourth section he will issue to the applicant a "certificate of allotment," on a prescribed form, showing the name in full of the applicant, post-office address, name of the tribe in which membership is claimed, serial number of the certificate issued by the Commissioner of Indian Affairs, and a description of the land applied for.

A copy of the "certificate of allotment" will be mailed by the register to the Commissioner of Indian Affairs and a copy to the division inspector.

If the division inspector deems it necessary, he will make an investigation, and will report as to the character of the land applied for, whether irrigable, nonirrigable agricultural, or nonirrigable grazing, and as to timber, mineral, coal, phosphate, oil, power site, reservoir, and watering place possibilities; also as to the proper marking of the claim if unsurveyed.

Where the application under investigation is that of a single person over 21 years of age, or of the head of a family, report will also be made as to the character of the applicant's settlement and improvements. A similar report will be made on applications filed in behalf of minor children as to the character of the settlement and improvements made by the parent, or the person standing *in loco parentis*, on his or her own allotment under the fourth section. In case the division inspector has no information in his office showing the necessity of an examination or investigation in the field, he will report the fact promptly to the district land officer.

SETTLEMENT

The nature, character, and extent of the settlement, as well as the manner in which performed, must be fully set forth in the allotment application. 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 instincts of the race, as well as to the character of the land taken in allotment.

While the act contains no specific requirements as to what shall constitute settlement, it is evident that the Indian must definitely

assert a claim to the land based upon the reasonable use or occupation thereof consistent with his mode of life and the character of the land and climate.

To enable an Indian allottee to demonstrate his good faith and intention the issuance of trust patent will be suspended for a period of two years from date of settlement; but in those cases where that period has already elapsed at the time of adjudicating the allotment application, and when the evidence, either by the record or upon further investigation in the field, shows the allottee's good faith and intention in the matter of his settlement, trust patents will issue in regular course. Trust patents in the suspended class, when issued, will run from the date of suspension. Each case will be determined and adjudicated upon its own facts and merits.

In the matter of fourth-class applications filed prior to these regulations, where, by the record or upon further investigation in the field, it appears that such settlement has not been made as is contemplated by these regulations, such applications will not be immediately rejected, but the applicant will be informed that two years will be allowed within which to perfect his settlement and to furnish proof thereof whereupon his application will be adjudicated as in other cases.

CHARACTER OF LAND AND AREA SUBJECT TO ALLOTMENT

The law provides that allotments may include not to exceed 40 acres of irrigable land, 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land.

Irrigable lands are those susceptible of successful irrigation at a reasonable cost from any known source of water supply; nonirrigable agricultural lands are those upon which agricultural crops can be profitably raised without irrigation; grazing lands are those which can not be profitably devoted to any agricultural use other than grazing.

Where an Indian makes settlement in good faith upon lands not reserved therefrom, an allotment therefor can not be denied on the ground that the lands are too poor in quality. Also where settlement was made in good faith the presence of valuable timber does not warrant the rejection of the allotment.

An allotment may be allowed for coal and oil and gas lands, with reservation of the mineral contents to the United States.

For regulations governing coal laws see General Land Office Circular No. 557 (46 L. D. 131). For regulations governing oil and gas and other minerals, see General Land Office Circular No. 672 (47 L. D. 437).

SEGREGATIVE EFFECT OF APPLICATION

An allotment application under the fourth section filed prior to the regulations of September 23, 1913, does not, in the absence of a certificate from the Indian Office showing that the applicant is an Indian entitled to allotment, segregate the land, and subsequent applications for the same land may be received and suspended to await final action on the allotment application.

Where an allotment application under the fourth section, filed subsequent to the regulations of September 23, 1913, is not accompanied by the requisite certificate from the Indian Office showing the applicant to be entitled to allotment, and the applicant is given time to furnish such certificate, the application does not segregate the land, and other applications therefor may be received and held to await final action on the allotment application.

Where an allotment application under the fourth section, accompanied by a certificate from the Indian Office showing that the applicant is an Indian and entitled to allotment, as required by the regulations of September 23, 1913, is found to be in all respects complete and is accepted by the district land officer, it operates as a segregation of the land, and subsequent applications for the same land will be rejected.

APPLICATION FOR UNSURVEYED LANDS

An allotment application under the fourth section for unsurveyed lands must conform to the following rules along the lines of those found in departmental circular of November 3, 1909. (38 L. D. 287.)

It must contain a description of the land by metes and bounds, with courses, distances, and reference to monuments by which the location of the tract on the ground can be readily and accurately ascertained. The monuments may be of iron or stone, or of substantial posts well planted in the ground, or of trees or natural objects of a permanent nature, and all monuments shall be surrounded with mounds of stone, or earth when stones are not acessible, and must be plainly marked to indicate with certainty the claim to the tract located. The land must be taken in rectangular form, if practicable, and the lines thereof follow the cardinal points of the compass unless one or more of the boundaries be a stream or other fixed object. In the latter event only the approximate course and distance along such streams or objects need be given, but the other boundaries must be definitely stated; and the designation of narrow strips of land along streams, water courses, or other natural objects will not be permitted.

An allotment to a minor child need not be contiguous to that made by the head of a family, but it is required that each allotment made to an individual, whether the head of a family, a single adult, or a minor child, when such allotment embraces more than one legal subdivision, must be composed of contiguous tracts, as in ordinary disposition of the public domain under a settlement law. An additional allotment must be governed by the same rule.

The approximate description of the land, by section, township, and range, as it will appear when surveyed must be furnished, or if this can not be done, an affidavit must be filed setting forth a valid reason therefor.

The address of the claimant must be given, and it shall be the duty of the register, upon the filing of the township plat in the district land office, to notify him thereof, by registered letter, at such address, and to require the adjustment of the claim to the public survey within 90 days. In default of action by the party notified the register will promptly adjust the claim to the public land survey, if possible, and report his action to the General Land Office.

Notice of the application describing the land as above directed must be posted in a conspicuous place upon the land and a copy of such notice and proof of posting thereof filed with the application.

MINORS

An Indian settler on public lands under the fourth section is also entitled upon application to have allotments made thereunder to his minor children, stepchildren, or other children to whom he stands *in loco parentis*, provided the natural children are in being at the date of the parent's application, or the other relationships referred to exist at such date. The law only permits one entitled himself under the fourth section to take allotments thereunder on behalf of his minor children or of those to whom he stands *in loco parentis*. Orphan children (those who have lost both parents) are not entitled to allotments on the public domain unless they come within the last-mentioned class. No actual settlement is required in case of allotments to minor children under the fourth section, but the actual settlement of the parent or of a person standing *in loco parentis* on his own public-land allotment will be regarded as the settlement of the minor children.

INDIAN WIVES

Where an Indian woman is married to a white man or other person not entitled to an allotment under the fourth section, and not a settler or entryman under the general homestead law, her right, and that of the minor children born of such marriage, to allotments

on the public domain will be determined without reference to the quantum of Indian blood possessed by such woman and her children but solely with reference as to whether they are recognized members of an Indian tribe or are entitled to such membership.

An Indian woman married to an Indian man who has himself received an allotment on the public domain or is entitled to one, or has earned the equitable right to patent on any form of homestead or small holding claim, is not thereby deprived of the right to file an application for herself, provided she is otherwise entitled, and also for her minor children where her husband is for any reason disqualified.

An Indian woman who is separated from her husband who has not received an allotment under the fourth section will be regarded as the head of a family and may file applications for herself and for the minor children under her care.

In every case where an Indian woman files applications for her minor children it must appear that she has not only applied for herself under the fourth section but has used the land in her own application in some beneficial manner.

CHARGES AND PROTESTS AGAINST INDIAN ALLOTMENTS

The act of April 23, 1904 (33 Stat. 297), limits the jurisdiction of the Secretary of the Interior to cancel first or trust patents issued on Indian allotments to specific instances without authority from Congress. In view of the fact that information respecting the classes defined in said act is obtainable from the department's records, no charges preferred as to those classes will be entertained. Third parties are never invited to attack Indian allotments with the hope or expectation of securing any advantage by reason of such attack. Such parties must assume and pay the expense of a hearing, but at the same time they acquire no preference right to enter the land in the event of the cancellation of the allotment, and this whether first or trust patent has issued or not. Section 2 of the act of May 14, 1880 (21 Stat. 140), does not apply to proceedings of this character.

However, where a party claims equitable rights to lands covered by an Indian allotment for which trust patent has been issued, on account of prior settlement and improvements, a hearing may be ordered on direction of the department with the view of recommending to Congress that such patent be canceled, if the showing made at the hearing justifies such action. In this class of cases, and in cases of charges preferred against allotments on which trust patents have not issued, the following rules will be observed:

The charges must be filed in the proper district land office in the form of a duly corroborated affidavit, clearly setting forth the specific grounds for such charges. The register will forward the papers to the General Land Office, which will give the Indian Office full information thereof.

Where it is charged that the lands applied for are not of the character subject to allotment, that the required settlement has not been made, that the contestant has a prior and better claim, and that the applicant for allotment is not seeking to obtain the land in good faith but is acting in the interest of another person not entitled thereto, the General Land Office will cause a preliminary investigation to be made by an inspector in the field as to the truth and merits of the charges, if such action is deemed necessary. The charges will be dismissed unless they appear to be probably true.

If sufficient showing is made, a hearing will be had before the proper district land officer after due notice to all parties. The taking of testimony and other proceedings in such hearings will be in accordance with the rules of practice governing proceedings before the district land officer.

Nothing in the foregoing will prevent the department from accepting an Indian's relinquishment of an unpatented allotment and directing its cancellation if, after the charges are filed, it is shown that the allotment ought to be canceled.

Third parties are not privileged to intervene in proceedings to determine whether lands applied for are of the character subject to allotment or as to the right of the Indian to an allotment, as this is a matter resting solely in the judgment of the department.

ALLOTMENTS WITHIN NATIONAL FORESTS

By the terms of section 31 of the act of June 25, 1910 (36 Stat. 855, 863), allotments under the fourth section of the act of February 8, 1887, as amended, may be made within national forests. See Appendix No. 3 for copy of the act.

An Indian who desires to apply for an allotment within a national forest under this act must submit the application to the supervisor of the particular forest affected, by whom it will be forwarded with appropriate report, through the district forester and forester to the Secretary of Agriculture, in order that he may determine whether the land applied for is more valuable for agriculture or grazing than for the timber found thereon.

Should the Secretary of Agriculture decide that the land applied for, or any part of it, is chiefly valuable for the timber found thereon, he will transmit the application to the Secretary of the Interior and

inform him of his decision in the matter. The Secretary of the Interior will cause the applicant to be informed of the action of the Secretary of Agriculture.

In case the land is found to be chiefly valuable for agriculture or grazing, the Secretary of Agriculture will note that fact on the application and forward it to the Commissioner of Indian Affairs.

The application must be filed with the register, district land office, in which the land applied for is located. The register will record the application in the books in that office and will certify whether there is any prior valid claim against the land. He will then forward the case to the General Land Office, where it will be properly noted, and if found satisfactory it will then be transmitted to the Office of Indian Affairs for consideration and submission to the Secretary of the Interior. If the Secretary approves the application, he will transmit it to the General Land Office for issuance of a trust patent.

The provisions of said section are not limited to Indians occupying, living on, or having improvements on lands within a national forest at the date of the passage of the act, but apply also to Indians whose settlement, occupation, or improvements occurred subsequent to the passage of the act.

The listing and opening to entry of lands under the provisions of the forest homestead act of June 11, 1906 (34 Stat. 233), do not preclude their being taken as an allotment under section 31.

An allotment under this section may be made for lands containing coal and oil and gas with reservation of the mineral contents to the United States, but not for lands valuable for metalliferous minerals.

The rules given in this circular for the conduct of fourth-section applications apply equally to applications under said section 31.

SALE, HEIRSHIP, WILLS, ETC.

The existing laws and regulations relating to the sale of allotted Indian lands, the determination of heirs, the issuance of patents in fee, the disposal of trust allotments by will, and the extension of the trust period, applicable to reservation allotments under the provisions of the act of February 8, 1887, as amended, are equally applicable to allotments made under the fourth section of said act.

ALLOTMENTS—RESERVATION

No general regulations governing the class and area of land to be given allottees on all reservations can be promulgated, as this is controlled in part by special acts of Congress applying to particular reservations. Special instructions applicable to particular reserva-

tions are, at times, issued under the act of February 8, 1887 (24 Stat. 388), for allotments on reservations, for the allotment of which no special act has been provided.

RELINQUISHMENTS

Relinquishments of Indian allotments, if filed in a district land office, will not be noted on the records of that office but will be forwarded to the General Land Office without action, and will be transmitted by the Commissioner of the General Land Office to the Commissioner of Indian Affairs for consideration and recommendation. Where the application has not been approved, the Commissioner of Indian Affairs has authority to accept or reject the relinquishment, as he may deem proper. Where the allotment application has been approved, departmental approval of the recommendation of the Commissioner of Indian Affairs must be had before the relinquishment can be accepted. On the acceptance of a relinquishment, the General Land Office will be notified of the fact. The land affected will not become subject to entry until after the district land officer has noted the fact of the relinquishment and cancellation on his records.

NOTICE OF ACTION

Notice to Indian allottees, or to their parents, if minors, of any action adverse to their interests must be given by registered letter to the proper Indian superintendent, as well as to the party in interest.

Registers will keep informed of the names and addresses of the Indian superintendents charged with the interests of the Indians in their districts, but if no such officer is known to them, notice will be sent to the Commissioner of Indian Affairs of this city, by the registers.

CITIZENSHIP

Under section 6 of the act of February 8, 1887 (24 Stat. 388), every Indian born within the territorial limits of the United States, to whom allotments are made under that act, and every Indian who voluntarily takes up his residence separate and apart from any tribe of Indians and adopts the habits of civilized life is declared to be a citizen of the United States.

The act of May 8, 1906 (34 Stat. 182), section 6, changed the time when an Indian became a citizen by virtue of the allotment made to him to the time when patent in fee should be issued on such an allotment.

The act of June 2, 1924 (43 Stat. 253), conferred citizenship on all noncitizen Indians born within the territorial limits of the United

States, but expressly reserved to them all rights to tribal or other property. These rights include that of allotment on the public land if qualified. (51 L. D. 379.)

INDIAN HOMESTEADS

These regulations do not apply to homestead entries by Indians under either the act of March 3, 1875 (18 Stat. 402, 420), or July 4, 1884 (23 Stat. 76, 96), as the rules and regulations governing regular citizen homestead entries are applicable to this class of entries by Indians. The act of July 4, 1884, expressly states that no fees or commissions shall be charged on account of Indian homestead entries, and a patent different in character from the citizen homestead patent is issued on entries made under either of said acts. The acts in question are printed in the appendix to these regulations as matter of information.

INDIAN OCCUPANCY

Registers will ascertain by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend and transmit to the General Land Office all applications made by others than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

ALLOTMENTS IN ALASKA

The rules and regulations relating to allotments in Alaska are given in the general instructions relating to the acquisition of title to public lands in the Territory of Alaska, Circular 491.

THOS. C. HAVELL,
Acting Commissioner, General Land Office.
CHAS. H. BURKE,
Commissioner of Indian Affairs.

Approved February 1, 1928.
E. C. FINNEY,
First Assistant Secretary.

APPENDIX

(No. 1)

INDIAN ALLOTMENTS

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

SEC. 1. That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable lands shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided,* That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further,* That where a treaty or act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or act subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified in this act, with the consent of the Indians expressed in such manner as the President in his discretion may require.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation,

the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian entitled to allotment under existing laws 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 manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the manner and with the restrictions provided in the act of which this is amendatory. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. 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: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are

situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided, however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians to whom such reservation belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterwards delivered, free of charge to the allottee entitled thereto. 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. And hereafter in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every

Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this act shall not extend to any Indians in the Indian Territory.

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, such allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

The above is the act of February 8, 1887 (24 Stat. 388), as amended by the act of February 28, 1891 (26 Stat. 794), and as amended by the act of May 8, 1906 (34 Stat. 182), and as amended by the act of June 25, 1910 (36 Stat. 855).

(No. 2)

LEASE AND DESCENT

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

* * * * * * *

SEC. 2. That where allotments have been made in whole or in part upon any reservation under the provisions of said act of February eight, eighteen hundred and eighty-seven, and the quantity of land in such reservation is sufficient to give each member of the tribe eighty acres, such allotments shall be revised and equalized under the provisions of this act: *Provided*, That no allotment heretofore approved by the Secretary of the Interior shall be reduced in quantity.

SEC. 3. That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations, and conditions as shall be prescribed by such Secretary for a term not exceeding three years for farming or grazing or ten years for mining purposes: *Provided*, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming and agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians for a period not to exceed five years for grazing or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.

* * * * * * *

SEC. 5. That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabitated together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child: *Provided*, That the provisions of this act shall not be held or construed as to apply to the

lands commonly called and known as the "Cherokee Outlet": *And provided further*, That no allotment of land shall be made or annuities of money paid to any of the Sac and Fox of the Missouri Indians who were not enrolled as members of said tribe on January first, eighteen hundred and ninety; but this shall not be held to impair or otherwise affect the rights or equities of any person whose claim to membership in said tribe is now pending and being investigated.

Approved, February 28, 1891. (26 Stat. 794.)

(No. 3)

INDIAN ALLOTMENTS WITHIN NATIONAL FORESTS

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

* * * * * * *

SEC. 31. That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws as amended by section [17] of this act, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

Approved, June 25, 1910. (36 Stat. 855.)

(No. 4)

PENALTY FOR UNLAWFUL SALE

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

* * * * * * *

SEC. 5. That it shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds. Any person violating this provision shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred dollars for the first offense, and if convicted for a second offense may be punished by a fine not exceeding five hundred dollars or imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That this section shall not apply to any lease or other contract authorized by law to be made.

Approved, June 25, 1910. (36 Stat. 855.)

(No. 5)

INDIAN HOMESTEAD ENTRIES

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

* * * * * * *

SEC. 15. That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: *Provided, however*, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor: *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; and any transfer, alienation, or incumbrance of any interests he may hold or claim by reason of his former tribal relations shall be void.

Approved, March 3, 1875. (18 Stat. 402, 420.)

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

* * * * * * *

That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and 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 widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

Approved, July 4, 1884. (23 Stat. 76, 96.)

(No. 6)

CITIZENSHIP

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

Approved, June 2, 1924. (43 Stat. 253.)

(No. 7)

APPROPRIATION FOR SURVEY

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior for the fiscal year ending June 30, 1928, namely:

* * * * * * *

For the survey, resurvey, classification, and allotment of lands in severalty under the provisions of the act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), entitled "An act to provide for the allotment of lands in severalty to Indians," and under any other act or acts providing for the survey or allotment of Indian lands, $40,000, reimbursable: *Provided,* That no part of said sum shall be used for the survey, resurvey, classification, or allotment of any land in severalty on the public domain to any Indian, whether of the Navajo or other tribes, within the State of New Mexico and the State of Arizona, who was not residing upon the public domain prior to June 30, 1914.

* * * * * * *

Approved, January 12, 1927. (44 Stat., part 2, 934, 940.)

4—012

Certificate No. ____ *Serial No.* ____

APPLICATION FOR ALLOTMENT OF PUBLIC LANDS, DEPARTMENT OF THE INTERIOR, UNITED STATES LAND OFFICE

_____, 19____

I, _____ (_____) whose post-office address
(Male or female)

is _____, do hereby apply to have allotted to _____ under the provisions of section 4
(Me or my minor child, naming it)

of the act of February 8, 1887 (24 Stats. L. 388), as amended by the act of February 28, 1891 (26 Stats. L. 794), and the act of June 25, 1910 (36 Stats. L. 855–859), the[1] _____

_____

containing _____ acres, and I do solemnly swear that the land above described

[1] Insert description of the land, if surveyed, by legal subdivisions; if unsurveyed, by metes and bounds, beginning with natural or other objects that may be easily identified, or a permanent artificial monument or mound set for the purpose, or in such other manner as to admit of its being readily identified when the official survey comes to be extended.

is[2] _____ in character; that I am an Indian of the _____ tribe; that I am the _____ of _____
(Father or mother)
aged ____ years; that[3] ____ ha____ not heretofore received an allotment under any law or any other acts of Congress except[4] _____

_____

that I have made actual bona fide settlement on the[5] _____

_____

that I have made improvements thereon as follows:[6]

_____

_____

that I have used or occupied the land[7] _____

_____

that I am the[8] _____ of the identical person named in the accompanying certificate from the Commissioner of Indian Affairs; that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined the same; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no 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, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied or improved by any other Indian, and contains no valuable watering places.

_____ witness.

_____

_____ witness.

Sworn to and subscribed before me this ____ day of _____, 19____

_____

_____
(Official character) (See note below)

This affidavit may be sworn to before the register of the land district in which the land is situated, or before any United States commissioner, the judge or clerk of any court of record; also before any agent, special agent, or inspector of the Indian Service, or before any officer authorized to administer oaths and having a seal in the county or land district where the land is situated. United States commissioners must attach their seal and justices of the peace must attach to each application at least one certificate by the clerk of the proper court that they are duly qualified to administer oaths.

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[2] Insert "irrigable," "nonirrigable-agricultural," or "nonirrigable-grazing," as the case may be.

[3] Insert "I," "he," or "she," as the case may be.

[4] Give character of prior entry or allotment, if any, together with acts under which filed or received.

[5] Insert description of lands on which settlement has been made.

[6] Insert manner in which settlement has been made, such as posting notices, marking of four corners, erection of house, etc.

[7] Give length and nature of use or occupancy.

[8] Cross out "of the" or insert "Father," "Mother," "Grandfather," etc., as appropriate.

CORROBORATIVE AFFIDAVIT

We, _____ and _____ do solemnly swear that we are well acquainted with _____ an Indian of the _____ tribe, and know that actual bona fide settlement has been made by the applicant on the _____

_____

and that he has used or occupied the land [9] _____

_____ and that the lands applied for in the foregoing application are _____ in character.

(Insert "irrigable," "nonirrigable-agricultural," or "nonirrigable-grazing")

_____

_____

Sworn to and subscribed before me this ____ day of _____ 19____.

_____

_____

(Official character)

UNITED STATES LAND OFFICE,

_____, 19____

I, _____, register of the Land Office, do hereby certify that the above application is for [10] _____ lands and that there is no prior valid adverse right to the same.

_____

Register.

(The register will examine papers carefully to see that they are correct and properly executed.)

No application will be accepted by the local officer unless a certificate from the Commissioner of Indian Affairs is furnished that the person for whose benefit the application is made is an Indian entitled to allotment of public land, under the act of February 8, 1887, as amended. (Departmental order of September 23, 1913.) No application for a minor child will be accepted unless the parent making the application has settled on public land under the fourth section of said act, which land must be described in the application for the child.

If the land is unsurveyed, the same must be described according to the rules approved November 3, 1909 (38 L. D., 287), a description of the lands by metes and bounds with reference to artificial monuments or natural objects being given, as well as an approximate description by section, township, and range, as it will appear when surveyed.

(Extract from the act of Congress approved February 8, 1887:)

SEC. 5. * * * And if any conveyance should be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned (25 years or longer, in the discretion of the President), such conveyance or contract shall be absolutely null and void.

(Extract from the act of Congress approved June 25, 1910:)

SEC. 5. That it shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such

---

[9] Give length and nature of use or occupancy.

[10] Insert "surveyed" or "unsurveyed," and "irrigable," "nonirrigable-agricultural," or "nonirrigable-grazing," as the case may be.

Indian, or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds. Any person violating this provision shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred dollars for the first offense, and if convicted for a second offense may be punished by a fine not exceeding five hundred dollars or imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That this section shall not apply to any lease or other contract authorized by law to be made.

5—149

INDIAN ALLOTMENT APPLICATION FOR LANDS WITHIN THE NATIONAL FOREST

Section 31, act of June 25, 1910, 36 Stat. L. 855. (To be submitted through the forest supervisor.)

_____,
_____, 19____

Application No. ____

I, _____, being an Indian of the_____ Tribe, do hereby apply to have allotted to[1] _____, under the provisions of section 31 of the act of June 25, 1910 (36 Stat. L. 855), the following-described lands within the_____National Forest:[2]

_____

_____

(Insert description and acreage)

In support of the foregoing application I do solemnly swear that I am an Indian of the above tribe as alleged; that I have not heretofore received an allotment; that I have made actual bona fide settlement on the lands described herein (or that I have valuable permanent improvements located thereon consisting of _____); that I am applying for these lands for my exclusive use and benefit; and that the lands described are more valuable for agricultural (or grazing) purposes than for the timber found thereon.

_____
(Name)

_____

Witnesses:

_____

_____

Subscribed and sworn to before me this ____ day of _____, 192—.

_____
(Official designation)

---

[1] Insert "to me, as the head of a family, aged —— years," or "to me, as a single person —— years of age," or "to my minor child" (giving the name and age of the child), as the case may be. The same blank may be used in making application in the case of an orphan child, the agent's or special agent's name being inserted in place of the parent's, and the phraseology changed to suit the case.

[2] Insert description of the land, if surveyed, by legal subdivisions; if unsurveyed, by metes and bounds, beginning with some object that may be easily identified, or a permanent artificial monument or mound set for the purpose, or in such other manner as to admit of its being readily identified when the official survey comes to be extended. If the application is for grazing land, it should be stated in the application that the lands are "only valuable for grazing purposes."

CORROBORATIVE AFFIDAVIT

We, _____, and _____, do solemnly swear that we are well acquainted with [3] _____, who has made application for allotment, as described in the foregoing; that he is an Indian of the _____ tribe; that he was born in the United States, and that [4] ____ is actually living on [5] (or has valuable improvements on [3]) the lands described in the foregoing application.

_____

_____

Subscribed and sworn to before me this ____ day of _____, 19

_____

(Official designation)

NOTE.—The affidavits may be made before the register of the land district in which the land is situated, or before the judge or clerk of any court of record having a seal; also before any superintendent or inspector of the Indian Department, or before any officer authorized to administer oaths and having a seal, in the land district where the land is situated. United States court commissioners must attach their seal, and notaries public or justices of the peace, besides their seal, must attach to each application at least one certificate by the clerk of the proper court that they are duly qualified to administer oaths.

[Extract from the act of Congress approved February 8, 1887]

SEC. 5. * * * And if any conveyance should be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned (25 years or longer, in the discretion of the President), such conveyance or contract shall be absolutely null and void. * * *

NONMINERAL AFFIDAVIT

I, _____, do solemnly swear that I am well acquainted with the character of the land described in this application and with each and every legal subdivision thereof, having frequently passed over the same; that my present knowledge of such lands is sufficient to enable me to testify intelligently with regard thereto; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock bearing gold, silver, zinc, tin, copper, or other deposit, and there is not within the limits of said land to my knowledge any cement or any valuable mineral deposits; that the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no part of said land is claimed for mining purposes under the customs and rules of miners or otherwise; that no part of the land is worked for minerals during any part of the year by any person or persons.

_____

Subscribed and sworn to before me this ____ day of _____, 19

_____

(Official designation)

---

[3] Insert name of beneficiary, thus: "—— ——, the head of a family," or "—— ——, a single man," or "—— ——, minor son (or daughter) of —— ——," or "—— ——, wife of —— ——," as the case may be.

[4] Insert "he," or "she," as the case may be (meaning the beneficiary).

[5] Strike out the words not applicable.

CERTIFICATE AS TO CHARACTER OF LAND

DEPARTMENT OF AGRICULTURE,
Washington, D. C., _____, 19____

I hereby certify that I have caused the lands herein applied for to be examined, and find the following-described tracts to be more valuable for _____ than for the timber found thereon:

_____

_____

_____
Secretary of Agriculture.

Returned to applicant, to be presented to the register of the district land office at _____

USE OF REVESTED OREGON AND CALIFORNIA RAILROAD AND COOS BAY WAGON ROAD GRANT LANDS FOR RECREATIONAL PURPOSES—CIRCULAR NO. 1085, SUPPLEMENTED

INSTRUCTIONS

[Circular No. 1156]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 18, 1928.

REGISTERS, UNITED STATES LAND OFFICES,
ROSEBURG AND LAKEVIEW, OREGON:

The act of April 13, 1928 (45 Stat. 429), extending the provisions of the recreational act of June 14, 1926 (44 Stat. 741), to revested Oregon and California Railroad and Coos Bay Wagon Road grant lands, reads as follows:

That the provisions of the Act of Congress approved June 14, 1926 (Forty-fourth Statutes at Large, page 741), entitled "An Act to authorize acquisition or use of public lands by States, counties, or municipalities for recreational purposes," are hereby extended to former Oregon and California Railroad grant lands revested in the United States under the Act of June 9, 1916 (Thirty-ninth Statutes at Large, page 218), and to former Coos Bay Wagon Road grant lands reconveyed to the United States under the Act of February 26, 1919 (Fortieth Statutes at Large, page 1179): *Provided*, That any lands leased hereunder shall thereafter be exempt from any further claim by the county wherein such leased lands are located for payment of moneys, the equivalent of taxes, as authorized under the Relief Act of July 13, 1926 (Forty-fourth Statutes at Large, page 915): *Provided further*, That only such lands as are within or contiguous to the former limits of said grants may be accepted in an exchange hereunder for such former grant lands and that all lands and timber secured by virtue of any such exchanges shall be disposed of in accordance with the terms and provisions of said Revestment Act of June 9, 1916: *And provided further*, That no sales of lands classified under said Act of June 9, 1916, as of class 3, or agricultural lands, shall be made for less than $2.50 per acre, and of lands of class 2, or timberlands, for less than the appraised value of the timber thereon.

SEC. 2. That all moneys received from or on account of any lands leased or sold hereunder shall be applied in the manner prescribed by the aforesaid Acts of June 9, 1916, and February 26, 1919.

The existing regulations approved July 23, 1926, Circular No. 1085 (51 L. D. 505), as issued pursuant to the recreational act of June 14, 1926, with the following supplemental instructions added thereto, are hereby adopted for the purpose of carrying into effect the provisions of said act of April 13, 1928:

Revested Oregon and California Railroad and Coos Bay Wagon Road Grant Lands.—The said act of April 13, 1928, is applicable only to such former grant lands revested in the United States under the acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), which have been reported or classified under said act of 1916 as either timber or agricultural in character, lands classified thereunder as chiefly valuable for water-power sites and reserved for that purpose being excepted from the operation thereof.

Any of such revested lands leased for recreational purposes shall thereafter be exempt from any further claim by the county wherein such leased lands are located for payment of moneys, the equivalent of taxes, as authorized under the act of July 13, 1926. (44 Stat. 915.)

Only such lands as are within or contiguous to the former limits of said grants may be accepted in exchange for such grant lands and all lands and timber secured by virtue of any such exchange shall be disposed of in accordance with the terms and provisions of said revestment act of June 9, 1916.

No sale of lands classified under said act of June 9, 1916, as of class 3, agricultural lands, shall be made for less than $2.50 per acre and of lands of class 2, timber lands, for less than the appraised value of the timber thereon.

All moneys received from or on account of any lands leased or sold or acquired through exchange under said act of April 13, 1928, shall be applied in the manner prescribed by the said acts of June 9, 1916, and February 26, 1919.

When application is filed for any revested lands classified or reported as timber in character the district cadastral engineer at Portland, Oregon, may also, if necessary, be instructed to submit report and recommendation thereon, in addition to the examination of such land and report which the division inspector may be instructed to make in accordance with Circular No. 1085.

WILLIAM SPRY,
Commissioner.

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

WAKEFIELD v. RUSSELL

Decided June 21, 1928

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—FEES AND COMMISSIONS.

Existing departmental practice directs that an application for an oil and gas prospecting permit which is accompanied by an insufficient filing fee be merely suspended until the applicant has had thirty days within which to tender the requisite fee and, until the expiration of that period, a later prospecting permit application for the same lands must be treated as a junior application.

APPLICATION—FEES AND COMMISSIONS—PRIOR DEPARTMENTAL REGULATIONS MODIFIED.

Modification directed of the general rule contained in Circular No. 616 (46 L. D. 513), which requires that all applications that are accompanied by insufficient filing fees, regardless of the amounts tendered, be merely suspended with segregative effect.

FINNEY, *First Assistant Secretary:*

On August 12, 1927, B. T. Russell filed application for a permit to prospect for oil and gas upon all of Secs. 10, 15, 22, and 27, T. 4 N., R. 102 W., 6th P. M., Colorado. By letter dated the following day the register of the local land office held the application for rejection for the reason that—

> * * * your application was not accompanied by the required fee of $2.00 for each 160 acres or fraction of 160 acres. The acreage of the land applied for is 2,355.56 acres, requiring a fee of $30.00. Personal check by Mrs. A. P. Russell, transmitted with your application, in the amount of $5.00 is returned herewith. Personal checks are not acceptable; remittances must be made by money order, certified check, or bank draft on Denver. You are allowed thirty days from notice hereof in which to remit $30.00 in proper form * * *.

Within the time allowed the applicant made payment as required.

On August 13, 1927, C. Guy Wakefield filed an oil and gas prospecting permit application for all of Secs. 10, 15, and 22, N. ½ and SW. ¼ Sec. 27, W. ½ and NW. ¼ SE. ¼ Sec. 34, said township.

By decision of April 3, 1928, the Commissioner of the General Land Office rejected the application of Wakefield to the extent of conflict with the prior application of Mrs. Russell, stating that the latter was shown acceptable for the issuance of a permit.

Wakefield has appealed. He states that on the day his application was made the "acting deputy" informed him that B. T. Russell had sent in an application for the land inclosing a personal check for $5.00; that inasmuch as the amount was insufficient and was not tendered in acceptable form the land was open for filing; that he then filed his application and paid the required fee; and that relying on the validity of his filing he has expended considerable money, time, and effort in perfecting a contribution develop-

ment program on the Skull Creek structure on which the land involved lies.

Under authority of section 38 of the leasing act the department has prescribed that in connection with each application for a permit to prospect for oil and gas, "there shall be paid a fee of $2 for each 160 acres, or fraction thereof, in such application, but such fee in no case to be less than $10."

In the case of *J. Sam Friedman* (50 L. D. 581), the department held (syllabus):

> As neither the leasing act of February 25, 1920, nor the regulations thereunder specify the procedure to be followed where applicants for prospecting permits tender an insufficient filing fee the general instructions of August 9, 1918, Circular No. 616, relating to the keeping of records and accounts, are applicable.

See also *Witbeck* v. *Hardeman* (51 L. D. 36).

In its said Circular No. 616 (46 L. D. 513), the department has issued general instructions in part as follows (p. 514):

> * * * Where no money is tendered, the application, etc., will be rejected. * * * You will not in such cases, pending the receipt of the money, segregate the land. * * * Where any form of remittance other than those specified in paragraph 72 hereof is tendered or where an insufficient amount is tendered in any form, you will merely suspend the application, etc., and allow the party 30 days in which to tender the required amount.

It will be noted that Mrs. Russell's application was suspended and that she was given opportunity to pay the requisite fee, strictly in accordance with the rules and regulations of the department now in force.

The decision appealed from is accordingly affirmed and the appellant's application is finally rejected to the extent of conflict with that of Mrs. Russell. The papers are returned to the General Land Office for appropriate action.

The department is of the opinion, however, that there should be some modification of the regulations which have been cited. It does not seem just that an application or filing in connection with which no money is tendered, although required, must be rejected without segregative effect, while an application or filing in connection with which a remittance of any amount and in any form is tendered may be suspended and given segregative effect pending payment of the required amount. It would be preferable that a minimum of the amount which might be tendered with segregative effect be fixed. For instance, in connection with an oil and gas prospecting permit application, a fee of not less than $10 is required, regardless of area. A tender of less than the minimum fee should not be considered sufficient to justify segregation of the land applied for.

The Commissioner is instructed to prepare and submit for consideration and approval by the department amended instructions or regulations on the subject under discussion.[1]

Affirmed.

ELIZABETH M. JONES (ON REHEARING)

Decided June 22, 1928

HOMESTEAD ENTRY—CHANGE OF ENTRY—UNDIVIDED INTEREST—TRANSFER—ESTOPPEL.

An original entryman who, after the unauthorized cancellation of his entry, acquires from the patentee an undivided half interest in the land, becomes seized with an interest in the whole of the premises and is, therefore, estopped from invoking the relief which the act of January 27, 1922, would have afforded him had the title remained in another.

HOMESTEAD ENTRY—TRANSFER—DEEDS—PRESUMPTION—EVIDENCE—ESTOPPEL.

One who contracts to acquire the title to land and subsequently conveys to a third party, is estopped to deny that he had title at the time of the conveyance where the deed is passed upon the assumption of title in him and purports to convey that title.

DEPARTMENTAL DECISION RESTATED AND APPLIED.

Case of *Lars B. Haralside* (51 L. D. 245), restated and applied.

FINNEY, *First Assistant Secretary:*

This is a motion on behalf of Elizabeth M. Jones, devisee of Matthew Jones, for reconsideration of departmental decision of February 16, 1928, rejecting her application under the act of January 27, 1922 (42 Stat. 359), to change the homestead entry of the said Matthew Jones from the SW. ¼ NW. ¼, W. ½ SW. ¼ Sec. 29, and the NW. ¼ NW. ¼ Sec. 32, T. 152 N., R. 25 W., 5th P. M., Minnesota (160 acres) to 160 acres of other land. The action complained of was based generally on a decision by this department in the case of *Lars B. Haralside* (51 L. D. 245), and specifically on the insufficiency of applicant's relinquishment of the land above described in that it contained the following qualification: "This deed is operative only as to the title acquired through the above cash certificate issued to Matthew Jones."

Under the admitted facts of this case and applicable decisions of the courts, particularly that of the Supreme Court of the United States May 21, 1917, in *Lane* v. *Hoglund* (244 U. S. 174), the entry of Matthew Jones was confirmed, and he was entitled to a patent for such land pursuant to the provisions of section 7 of the act of March 3, 1891 (26 Stat. 1095, 1098). But on September 7, 1917, the land was

[1] See instructions of August 1, 1928, Circular 1158, p. 463.—Ed.

erroneously patented to one Andrew Irvine. Thus it eventuated that the legal title to said land passed from the United States, leaving the Land Department without jurisdiction to take the further steps directed by said act of March 3, 1891. This same general situation, involving many entries, seemed to call for Congressional relief. But relief legislation took the form and substance of relief to the patentee, who was in danger of a suit by the original or first entryman, to charge a trust for his benefit under the patent. There was no purpose manifested and none can be gathered from the act of January 27, 1922, to invest the original entryman with any additional right, but rather on terms stated and subject to the discretion of the Secretary of the Interior to permit him, his heirs or assigns, to present a proper application and have his entry, together with fees and commissions paid thereon, transferred to another tract of land. This would protect the patentee from a suit because it would be persuasive on the original entryman not to bring such a suit. In furtherance of that end it was provided that an applicant for the privilege of transferring his entry should relinquish to the United States Government all his right, title, and interest in the land originally entered. The foregoing is but a restatment of the *Haralside case*, *supra*, but it clarifies both the legal and administrative situation presented by this motion.

It is urged in support of the motion that inasmuch as Matthew Jones had, under the facts stated, succeeded to the title of Irvine to the extent of a one-half interest, or 80 acres only, in the 160-acre tract, therefore he, Jones, had and his devisee still has, a cause of action against Irvine for the remaining interest, amounting to 80 acres, and that therefore there remains the right to a transfer of entry to the extent of the remaining 80 acres.

It seems clear that at the date of this application, and at all times, Jones and his devisee were estopped by operation of law from asserting any claim thereto as against the patent to Irvine. It appears from an abstract of title filed in support of the application that on February 2, 1916, Andrew Irvine by warranty deed conveyed "an undivided ½ interest" in the land to Matthew Jones. An undivided interest in a tract of land is an interest in the whole of it and not a divided interest in any part of it. That deed created an estate in common. Although such an estate may be severed by agreement of the parties or by a friendly suit, admittedly there has been no partition. At no time after the delivery of the deed could Jones have maintained a suit to charge a trust under the Irvine patent. Any legal title holder under that patent would have been a necessary party to such a suit, and Jones, being seized of such title, could not sue himself. Nor could he dispute his vendor's title. One who has accepted a deed with covenants of

seizin is estopped to allege that the covenants were broken because he himself was seized of the premises at the time the deed was executed. *Corpus Juris*, volume 21, page 1072, cases cited. Further, it appears from this abstract of title that on January 21, 1920, Matthew Jones and wife, by "warranty timber deed," conveyed to the Larson Brothers Lumber Company an undivided one-half interest in certain kinds of timber on said land and that on February 26, 1920, Andrew Irvine made a deed to the same company for the other undivided one-half interest in the same timber. Both of these deeds were filed for record on the same day—March 10, 1920. Again, it appears from said abstract that on August 17, 1921, the said Andrew Irvine conveyed to Matthew Jones and wife by mortgage deed all of his remaining interest in said land for an expressed consideration, due on or before three years from date and the abstracter certifies that no instrument had been filed in the office of the register of deeds after that date and particularly between July 31, 1923, and September 12, 1927. So, in so far as appears from this abstract, the legal title to practically the entire interest in this land under the Irvine patent is in Jones's estate or has passed through him with covenants of title under that patent. These significant facts also show an estoppel against Jones to dispute his vendee's title. For a vendor, no less than a vendee, is estopped to deny that he had title at the time of the conveyance where the deed is passed upon the assumption of title in him and purports to convey that title. If it bears on its face evidence that the grantee expected to become invested with an estate of a particular description or quality and that the bargain had proceeded upon that footing, it creates an estoppel against the grantor in respect to the estate thus described, although no technical covenants are inserted, "at least in so far as to estop him from ever afterwards denying that he was seized of the particular estate at the time of the conveyance." *Van Rensselaer* v. *Kearney* (11 How. 297, 18 U. S. 631, 640). The deed from Jones to the Larson Brothers Lumber Company forever estops him from asserting that he was not seized of the land under the Irvine patent or that he has or had a superior title from the United States or that the title is held in trust for him under that patent. Inasmuch, therefore, as the Government's patentee and parties holding under him are secured of that title and inasmuch as the devisee of Jones has no sufficient title to relinquish to the United States under the original entry and has not undertaken to make such a relinquishment, no right to a change of entry in whole or in part exists under said act of January 27, 1922.

The motion is denied.

Motion denied.

REED v. HEIRS OF FROST

Decided June 22, 1928

CONTEST—NOTICE—PRACTICE.

While all notices of contest should bear the date when issued, yet the date the notice is actually issued is the governing date within the purview of Rule 8 of Practice.

CONTEST—ABATEMENT—APPEAL—PRACTICE.

The overruling of a motion to abate a contest is not a final decision on the contest, and consequently the right of appeal from such action is not accorded by Rule 74 of Practice.

FINNEY, *First Assistant Secretary*:

Ella H. Frost *et al.*, heirs at law of Walter C. Frost, deceased, have appealed from a decision of the Commissioner of the General Land Office dated February 20, 1928, overruling their motion for abatement of the contest of Sheldon M. Reed against the desert-land entry made by Walter C. Frost on October 9, 1911, for the S. ½ Sec. 28, T. 38 N., R. 17 W., N. M. M., Colorado.

Relief having been granted the entryman under the act of March 4, 1915 (38 Stat. 1138, 1161), he elected on March 7, 1921, to perfect the entry under the purchase provisions of the relief act. Entryman died June 8, 1924, leaving as his heirs Ella H. Frost, widow, and Hildreth Frost and Hester Frost, adult children. Final proof was submitted by the heirs on June 16, 1926, but final certificate was withheld at the request of the division inspector.

Reed's contest was initiated April 11, 1927, on the charge that neither the entryman nor his heirs had used the land for agricultural or grazing purposes for a period of three years or at all. Notice of contest issued on the date the application to contest was filed, and personal service on all of the heirs was made on May 9, 1927. Proof of such service was filed May 11, 1927.

On June 6, 1927, the defendants appeared specially by attorney and moved that the contest be noted as abated, contending that the notice had not been served within the time fixed by the Rules of Practice.

The motion was based on the fact that the notice was *dated* April 7, 1927—the date the application to contest was executed.

Rule 8 of the Rules of Practice (51 L. D. 547) provides in part:

> 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, * * * the contest shall abate.

While all notices should bear the date when issued, the date the notice is actually issued is the governing date.

As the contest was not initiated until April 11, 1927, an inspection of the records of the local office would have disclosed that the date of the notice was erroneous.

The overruling of the defendants' motion was not a final decision on the contest, and the commissioner erred in allowing the right of appeal. (See Rule 74.)

The appeal is without merit. The commissioner's decision is affirmed, and the case remanded with direction that the defendants be allowed 30 days from notice within which to serve and file answer.

Affirmed and remanded.

FRITZ HELMKE

Decided June 25, 1928

REPAYMENT—COAL LANDS—WITHDRAWAL—STATUTES.

Where a coal entry had been erroneously allowed for lands reserved from sale and for that reason canceled, application for repayment of the purchase money falls within the provisions of the act of June 16, 1880, rather than the act of December 11, 1919.

REPAYMENT—STATUTES.

Section 2 of the act of June 16, 1880, which authorizes repayment of purchase money where for any cause an entry has been erroneously allowed and can not be confirmed, does not limit the time within which application therefor must be filed.

FINNEY, *First Assistant Secretary:*

This is an appeal by Fritz Helmke from decision of November 7, 1927, by the Commissioner of the General Land Office rejecting his application for repayment of the purchase money paid in connection with his coal entry, Seattle 04573, amounting to $2,984.20.

The record shows that on December 4, 1919, Helmke filed his coal declaratory statement for lots 3, 4, 5, and SE. ¼ SW. ¼ Sec. 6, T. 25 N., R. 12 E., W. M., containing 149.21 acres, and on November 19, 1920, he filed application to purchase the land. Upon due proof of publication, posting of notice and payment of the purchase price at the rate of $20 per acre the entry was allowed on January 13, 1921.

The land is in the Snoqualmie National Forest, and a protest against the entry was filed on July 11, 1921, by the Forest Service, alleging the land to be noncoal in character. A hearing was had and the case finally reached the department for decision. The record was carefully reviewed by decision of April 13, 1925, wherein it was held that the leasing act of February 25, 1920 (41 Stat. 437), was effective to withdraw from sale coal lands, except as to valid claims existent at the date of the act and thereafter properly main-

tained. As to what constitutes the opening and improving of a mine of coal, the decision in the case of *McKenna* v. *Seymour* (47 L. D. 395), was cited, and in that connection it was said:

> The only showing that the appellant made at or prior to the date of the filing of his application to purchase that has any bearing upon the validity of the claim as of the date of the approval of the leasing act was that contained in his coal declaratory statement, wherein he alleged merely that between November 28 and December 2, 1919, he opened a valuable mine of coal on the land which he improved as such at a cost of $50, and that the improvements consisted in the driving of a tunnel for a distance of more than 10 feet in and upon an exposed coal vein. Neither the thickness nor the quality of the coal alleged to have been exposed was shown. In his application to purchase, which, however, as before stated, was not filed until nine months after the approval of the leasing act, the claimant alleged that he had then expended the sum of $1,000 upon the land in the discovery, opening, and development of four veins of coal from 4 to 9 feet in thickness, and that at that time he had upon the land 35 feet of tunnel and other openings. But it nowhere appears in said application when the work in addition to that recited in the declaratory statement was performed, nor was it shown that even as of that date coal deposits alleged to have been opened possessed any value. In any event, the showing fell far short of evidencing the initiation by the appellant of a valid claim to the land prior to the approval of the leasing act by the opening and improving of a mine of coal thereon within the meaning of section 2348 as defined in *McKenna* v. *Seymour*, *supra;* and, hence, afforded no sufficient ground for the allowance by the local officers of an entry therefor on the appellant's application filed long after the leasing act had become effective.

The entry was finally canceled on July 15, 1925. The application for repayment of the purchase money was filed on September 12, 1927, and the Commissioner of the General Land Office held that it was barred under the repayment act of December 11, 1919 (41 Stat. 366), which provides that repayment in claims of the character therein specified may not be allowed unless application therefor be filed within a period of two years after rejection of the application, entry, or proof upon which the payment was made.

Under the finding of facts and the conclusion reached in the decision of cancellation of this entry, it appears that the entry was erroneously allowed by the local officers and that it was not susceptible of confirmation because of the reservation of the land from coal entry by the leasing act of February 25, 1920. Therefore, the application for repayment of the purchase price paid upon the said illegal entry comes within the provisions of section 2 of the repayment act of June 16, 1880 (21 Stat. 287), which allows repayment of purchase money where for any cause the entry has been erroneously allowed and can not be confirmed. Under that act there is no limit of time within which such application must be filed.

It has heretofore been held that where lands have been reserved from sale and entry thereof has been erroneously allowed and for that

reason canceled, the application for repayment of the purchase money falls within the provisions of the act of June 16, 1880, rather than the act of December 11, 1919.

The decision appealed from is accordingly reversed and the record is remanded for further appropriate action in harmony herewith.

Reversed and remanded.

MARGARET RUSSELL JUSTHEIM ET AL. (ON PETITION)

Decided June 25, 1928

OIL AND GAS LANDS—PROSPECTING PERMIT—SURVEY—SEGREGATION—LEASE.

Where oil and gas prospecting permits have been granted for an entire body of a given area of unsurveyed lands and segregated on the records in terms of future subdivisional survey descriptions with common boundaries, intruding applications will not be allowed for narrow strips of land between individual claims which, due to error in measurements, were not covered by the metes and bounds descriptions of the prior permits, but the lands thus segregated will be held subject to adjustment to conform to the lines of the future official survey upon application for lease should discovery of oil or gas be made.

FINNEY, *First Assistant Secretary:*

The above-listed applications (Salt Lake City 038970, 038971, 039061, 041029) for prospecting permits under the leasing act of February 25, 1920 (41 Stat. 437), for unsurveyed lands were rejected by the local land office at Salt Lake City, Utah, because of conflicts with existing permits as identified on the records by descriptions in terms of the probable and approximate future survey subdivisions. Upon appeal to the General Land Office it was urged there were in fact no conflicts according to the metes and bounds descriptions contained in the prior permits and the several subsequent applications. However, the Commissioner rejected the applications on the ground that it would be impracticable to issue permits for the narrow strips of land said to exist between certain existing permits. Upon further appeal to the department the cases were carefully considered in three successive decisions wherein the action below was sustained. A further review has been requested especially in behalf of Margaret Russell Justheim. Present consideration will be confined to the latter case.

The application calls for a tract 2½ miles long and 10.95 chains wide, and an adjoining tract 1 mile long and 1.42 chains wide. It is contended that these strips are vacant because of failure of joinder by surrounding prior permits if the metes and bounds descriptions

be strictly adhered to and followed from the respective ties to the distant survey monuments.

The only practical method for segregating on the records such permits covering unsurveyed lands is to note them in terms of future survey descriptions. This, of course, can not be precise but it is sufficient for the purpose. The law provides that the land must be located in a reasonably compact form, and if the lands are unsurveyed they must be located in an approximately square or rectangular tract the length of which shall not exceed 2½ times its width. In case of discovery of oil or gas, and when application is made for a lease, the area to be selected by the permittee shall be in compact form, and, if unsurveyed, it is to be surveyed by the Government at the expense of the applicant for lease, and the lands so leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys. It is not contemplated that irregular or abnormal subdivisions shall be established to suit the convenience of the applicant for lease, but that he shall conform to the subdivisions established according to the surveys as extended in harmony with the regular system.

In the regulations of March 11, 1920 (47 L. D. 437, 438), for the administration of said act, it was said—

> 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 may be deemed to warrant.

The prior permittees here involved have located their claims on the ground and monumented the same as having common boundaries, and the descriptions according to future surveys were given and accepted as covering the areas in dispute. The fact that some discrepancies exist due to the extra length of the surveyed townships to the north and east from which the locations were made, affords no reason for recognition of intruding applications for such narrow strips as may not be strictly covered by the metes and bounds descriptions.

For purposes of practical and orderly administration, it must be considered that the tracts are segregated from further appropriation pending such adjustments as may be found necessary and proper in the premises. Any application for lease based on the prior permits could not be precisely located on the ground until after an official Government survey. The present descriptions will be deemed sufficient to segregate the lands under existing conditions. The petition is accordingly denied.

Petition denied.

SOUTHERN PACIFIC RAILROAD COMPANY

Decided June 25, 1928

RAILROAD GRANT—MINERAL LANDS—EVIDENCE—BURDEN OF PROOF.

The question as to whether a particular subdivision within the primary limits of a railroad grant, which excepted mineral lands, is mineral or nonmineral in whole or in part, is a matter for judicial determination upon the record before him by the officer before whom the issues are pending decision, with the burden of proof upon the railroad grantee to establish what, if any, specific portions of the subdivision passed under the grant.

RAILROAD GRANT—MINERAL LANDS—SURVEY.

It is neither the duty nor is it within the discretion of the surveyor who is commissioned to make segregation surveys of lands within the primary limits of a railroad grant, to locate the position of the vein in the subdivision or decide what specific area adjacent to the outcrop of the vein is impressed with a mineral value.

RAILROAD GRANT—MINERAL LANDS—ANSWER—EVIDENCE.

An answer by a railroad grantee to a charge that certain tracts are mineral in character is insufficient where it does not specifically describe by aliquot parts of a subdivision or by definite metes and bounds what portions of the tracts it admits and what portions it denies to be mineral.

FINNEY, *First Assistant Secretary:*

This is an appeal filed by the Southern Pacific Railroad Company from a decision of the Commissioner of the General Land Office dated April 16, 1925, affirming the local register in holding upon charges and answer without submission of testimony, that lot 1, Sec. 25, T. 7 N., R. 1 E., S. B. M., embraced in its primary list No. 191, Los Angeles 033556, was mineral in character, but suspending final action "pending the outcome of the court proceedings instituted by the railroad company, to determine whether it may select less than a 40-acre subdivision."

Adverse proceedings were directed against the list as aforesaid, charging that the land was mineral in character. The answer, in so far as material, in response, was as follows:

Affiant further says that the said Maurice P. Hayes and T. W. Mack have personally examined lot 1 of Sec. 25, T 7 N., R. 1 E., S. B. M., and reported that the following-described tract is not, nor is any portion of said tract mineral land; that portion of said lot 1 not included within an area crossed by a strong well defined quartz vein which traverses the entire lot in a northerly and southerly direction and its exposed width varies from six to thirty feet. (This vein crosses the south boundary of lot 1 at a point approximately nine hundred feet west of the southeast corner of said lot and extends in a northerly direction crossing the north line of the lot approximately 750 feet west of the northeast corner of the section), and that he (affiant) believes said report to be true and in this behalf refers to the attached affidavits of said Maurice P. Hayes and T. W. Mack.

And the company applied for a hearing and a survey to segregate the mineral from the nonmineral land.

The decision appealed from followed a previous and then governing rule in the administration of railroad grants, which was to the effect 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. This rule, however, has been reversed by the department in view of the decision in *Work* v. *Central Pacific Railway Company* (12 Fed., 2d series, 834), holding that under the acts making a grant of lands to the last-named company, the title to all 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 said nonmineral land constituted only a part of a quarter quarter of a section or of a lot. See instructions of July 9, 1926, Circular No. 1077 (51 L. D. 487).

The answer of the company, however, is insufficient. It leaves uncertain and indefinite just what specific area within the lot it admits to be mineral by reason of the quartz vein passing through it, and a like uncertainty and indefiniteness as to what specific area it denies is mineral. If the allegations of the answer were established, no basis for the rendition of a judgment would appear. In a recent unreported decision in the case of *Central Pacific Railway*, decided September 24, 1927 (A. 10630), where there was also indefiniteness as to the precise description of the land conceded to be mineral, the department said:

> It is a cardinal rule as to judgments of the courts, which would seem to apply with equal force to judgments of the department, that where they affect real or personal property, the description thereof must be specific and certain, or can be made certain by reference to the pleadings or record in the case or even in some cases by extrinsic documentary evidence; that an uncertain description or no description at all, renders the judgment erroneous and void.

It is not the duty nor within the discretion of the surveyor who is commissioned to make segregation surveys in cases of the kind in question, to locate the position of the vein in the subdivision or decide what specific area adjacent to the outcrop of the vein is thereby impressed with a mineral value. The question as to whether a particular subdivision is mineral or nonmineral in whole or part is a matter for judicial determination upon the record before him by the officer before whom the issues are pending decision, with the burden of proof upon the railroad grantee to establish what, if any, specific portions of the subdivision passed under the grant. This may be shown, and preferably should be shown, in order to avoid a segregation survey by a description of aliquot parts of a subdivision

(instructions of July 9, 1926, *supra*), both in the pleadings and proof. But it also may be shown, particularly in the event there are conflicting mining locations, by metes and bounds description, and if it be established that the mineral portion of the subdivision is within definite metes and bounds, one-half the cost of the survey must be paid by the grantee. Departmental decision of December 13, 1927, in *Central Pacific Railway Company* (52 L. D. 235).

In the instant case the railroad grantee should be given opportunity to amend its answer by alleging therein, in either manner above stated, what specific portions of the tract in question it admits and what portions it denies to be mineral in character. Upon so doing, hearing should be ordered as to such of the portions upon which an issue arises regarding the character of the land.

In accordance with these views, the commissioner's decision is reversed and the case is remanded for proceedings as above directed.

Reversed and remanded.

STATE OF FLORIDA (ON REHEARING)

Decided June 25, 1928

SCHOOL LAND—INDEMNITY—SELECTION—SURVEY—FLORIDA.

A State is not entitled to indemnity for losses of school sections in place in a township made fractional by reason of a natural cause where the aggregate area of the surveyed lands of the township is less than 640 acres.

SCHOOL LAND—INDEMNITY—SELECTION—SURVEY—COMMISSIONER OF THE GENERAL LAND OFFICE—RES JUDICATA—FLORIDA.

Information furnished by the Commissioner of the General Land Office to the effect that a State is entitled to indemnity on account of the fractional condition of a township, based upon a protraction of the lines of survey, is not conclusive and does not obligate the department to approve selections to which the State is not entitled under well-established rulings and decisions.

SCHOOL LAND—INDEMNITY—SELECTION—AMENDMENT—WITHDRAWAL—FLORIDA.

An indemnity school selection, rejected because of the tender of fatally defective base, can not be amended so as to defeat the force and effect of an intervening withdrawal.

FINNEY, *First Assistant Secretary:*

By decision dated May 10, 1928, this department affirmed the action of the Commissioner of the General Land Office, holding for cancellation a list of school-land indemnity selections of the State of Florida, filed October 14, 1924, embracing lot 2, Sec. 20, T. 38 S., R. 42 E., lot 1, Sec. 21, T. 32 S., R. 28 E., lot 2, Sec. 29, T. 18 S., R. 16 E., fractional NW. ¼, and fractional SW. ¼ Sec. 30, T. 18 S., R. 20 E.

As shown above, the list embraces five tracts or parcels, with an aggregate area of 12.19 acres, for which the State assigned an alleged loss or deficit of equal area in T. 42 S., R. 34 E., which township is made fractional by Lake Okeechobee. In disposing of the case the Commissioner held that the State was not entitled to indemnity or further indemnity on account of the fractional condition of said T. 42 S., R. 34 E.; that said township was covered by the waters of Lake Okeechobee; that a few small islands had been surveyed in the township, the aggregate area thereof being less than 640 acres, and under the rule laid down by this department in the case of *State of Colorado* (48 L. D. 138), the area of the township as surveyed determined the quantity of school land to which the State was entitled if school sections were fractional or entirely wanting. It was found furthermore that the selections were defective and incomplete in that notice thereof had not been published as required by the regulations of June 23, 1910 (39 L. D. 39), and that said selections could not be completed as to lot 2, Sec. 20, T. 42 S., R. 34 E., and lot 2, Sec. 29, T. 18 S., R. 16 E., even though valid base should be tendered therefor, because said tracts were within the scope of Executive orders of December 8, 1924, and July 3, 1925, which withdrew "islands belonging to the United States in Florida situated in the waters off the coast or in the coastal waters of the State," and "all lands on the mainland within three miles of the coast."

On this motion it is contended among other things that the question as to the right of the State to indemnity on account of the fractional condition of said T. 42 S., R. 34 E., is *res judicata* in that the Commissioner of the General Land Office, under date of March 10, 1920, furnished the then State selecting agent for school lands a written statement, based upon a protraction of the lines of survey, showing that the State was entitled to indemnity of 36.52 acres, exclusive of selections theretofore approved by reason of the fractional condition of said T. 42 S., R. 34 E.

It appears that information of the nature alleged was furnished the State selecting agent, but that action is not conclusive of the matter and does not obligate this department to approve selections to which the State is not entitled under well-established rulings and decisions. Furthermore, the action of the Commissioner in this instance was clearly erroneous, and in contravention of instructions previously given because this department long ago advised the Commissioner in the (unreported) case of *State of Florida* (D–5877), decided March 11, 1909, involving an application by the State for the protraction of the public surveys over the area covered by the waters of Lake Okeechobee, that such protraction was unauthorized. In

that case the department quoted extensively from its decision of February 3, 1909 (37 L. D. 430), in the case of *State of Idaho*, as follows:

> From the foregoing it is clear that for the purpose of adjusting the school grant the township was taken as the unit, and Congress plainly declared what should constitute for that purpose a full township, three-fourths of a township, etc., and that the area of the township should determine the quantity of school land to which the State should be entitled if school sections were fractional or entirely wanting.
>
> Where a permanent body of water, such as a lake, etc., occurs, and the township in which it is embraced, or the several townships surrounding it, as the case may be, are thereby rendered fractional, it is evident that only those portions of such townships as are susceptible of being surveyed may properly be regarded as land, and if in such cases the school sections are not surveyed, under the rule of adjustment established by Congress, the area of such land as the township is found to contain will determine the quantity of school land to which the State is entitled. If by reason of its great area such body of water covers what would otherwise be an entire township or several townships, the State would be entitled to no school land on account of such alleged townships, because there being no land surveyed such townships do not actually exist, and there is nothing upon which the State can base any claim whatever.

This ruling, which in principle was reaffirmed in the case of *State of Colorado* (48 L. D. 138), is conclusive of the questions here presented.

The decisions in the (unreported) cases of *John M. Sutton* (A–8368) and *James O. Webster* v. *State of Florida* (A–10032), cited in support of the contention that the incomplete and fatally defective selection here involved was effective to exclude the lands from the force of the withdrawals of December 8, 1924, and July 3, 1925, are not applicable to the case at bar. No question of defective base or invalid right was in issue in those cases. One of them involved an application to locate Valentine scrip, the other an application for soldiers' additional entry. In both cases a *valid right* was tendered or assigned, the applications being incomplete at the time of the withdrawal only in slight matters of proof not affecting the substance of the right theretofore fairly earned.

In the instant case the base tendered by the State was fatally defective or adjudged to be bad, and the selection can not be amended so as to defeat an intervening withdrawal or claim. The case is governed by the ruling in the case of *Fred A. Kribs* (43 L. D. 146), which is in harmony with the principle announced by the Supreme Court of the United States in *Robinson* v. *Lundrigan* (227 U. S. 173).

No reason is seen for disturbing the action heretofore taken, and the motion is accordingly denied.

Motion denied.

FRANCES R. M. STEFFENSMIER

Decided June 30, 1928

HOMESTEAD ENTRY—STOCK-RAISING HOMESTEAD—MARRIAGE—STATUTES.

The stock-raising homestead act of December 29, 1916, enlarged the rights of both the husband and wife under the homestead law, and the act of April 6, 1914, as amended, allowing the intermarriage of homesteaders, did not in any wise abridge their rights under the former act.

HOMESTEAD ENTRY—STOCK-RAISING HOMESTEAD—ADDITIONAL—MARRIAGE—RESIDENCE—STATUTES.

An entrywoman who, after her marriage, made her home upon her husband's entry as authorized by the homestead law, continues to own and reside upon her original entry within the meaning of section 5 of the stock-raising homestead act, and is entitled to make an additional entry thereunder of land within 20 miles of her original entry.

FINNEY, *First Assistant Secretary:*

On July 28, 1921, Frances R. M. Steffensmier made entry under the stock-raising homestead act for (as amended) lots 2 and 4, SW. ¼ NE. ¼ Sec. 5, T. 28 N., R. 21 E., M. M., NE. ¼ NE. ¼ Sec. 13, SE. ¼ SE. ¼ Sec. 35, T. 29 N., R. 21 E., M. M., lot 4 and NW. ¼ SE. ¼ Sec. 5, T. 28 N., R. 22 E., M. M., and NE. ¼ NE. ¼ Sec. 19, T. 29 N., R. 22 E., M. M., (319.15 acres), as additional to her entry under the enlarged homestead act, made July 3, 1913, for SE. ¼ SE. ¼ Sec. 20, lots 1 and 2 of Sec. 28, NE ¼ and N. ½ SE. ¼ Sec. 29, T. 29 N., R. 22 E., M. M., (319.04 acres).

Final proof on the additional entry was submitted March 21, 1928, which the register rejected on the ground that it failed to show that entrywoman was residing on her original entry when the additional entry was made.

An appeal from the action of the register has been submitted to the department.

When Mrs. Steffensmier made the additional entry she was residing on her husband's original entry, he having elected on January 20, 1915, under the act of April 6, 1914 (38 Stat. 212), to make the family home thereon, which election was accepted by the Commissioner of the General Land Office on July 27, 1915.

Thus the question is presented whether the additional entry is governed by section 5 of the stock-raising homestead act.

The act of April 6, 1914, *supra*, as amended by the act of March 1, 1921 (41 Stat. 1193), reads as follows:

> That the marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a

compliance with the residence requirements upon each entry: *Provided*, That the provisions hereof shall apply to existing entries: *Provided further*, That in the administration of this act the terms "entryman" and "entrywoman" shall be construed to include bona fide settlers who have complied with the homestead law for at least one year next preceding such marriage.

It was apparently the intent of Congress when it sanctioned the intermarriage of homesteaders that each of the parties should thereafter be treated as residing on his or her entry. The fact that both the entries described in the husband's election have been perfected does not affect the rights of the parties. The rights of both the husband and wife under the homestead law were enlarged by the stock-raising homestead act of December 29, 1916 (39 Stat. 862), and the act allowing the intermarriage of homesteaders should not be so interpreted as to in any way abridge their rights thereunder.

A similar question was presented by the appeal of *Oscar Moler* (Bozeman 012480), and the department by decision of November 27, 1922 (unreported), held that the said entryman, who was residing on his wife's entry pursuant to an accepted election under the act of April 6, 1914, *supra*, when he made an additional entry under section 7 of the enlarged homestead act, could perfect the additional entry by continuing to reside on his wife's patented entry, which was located within 20 miles of the land described in his additional entry.

Although entrywoman was making her home on her husband's entry when she made the entry in question, she owned and resided on her original entry within the meaning of section 5 of the stock-raising homestead act.

As it appears that the required improvements had been made, the final proof is approved, and the register will issue final certificate upon payment of all sums due.

CONRAD BJERKE

Decided July 3, 1928

REPAYMENT — LEGAL REPRESENTATIVE — ASSIGNEE — STATUTES — WORDS AND PHRASES.

The term "legal representatives" as used in the act of January 8, 1926, which authorizes repayment of the difference between the amounts paid by purchasers of town lots and the price fixed as result of reappraisement, includes an assignee of an original purchaser.

DEPARTMENTAL DECISION AND INSTRUCTIONS APPLIED.

Case of *Clear Water Timber Company* (44 L. D. 516), and instructions of October 25, 1916 (45 L. D. 520), applied.

FINNEY, *First Assistant Secretary:*

This is an appeal by Conrad Bjerke from decision of the Commissioner of the General Land Office dated March 23, 1928, denying his application under the act of January 8, 1926 (44 Stat. 708), for repayment of such moneys as may be found due, paid by his predecessors in interest in connection with the purchase of lot 6, block 20, in the town site of Bowdoin, Montana.

The act above referred to authorized repayment to purchasers or their legal representatives of the difference between the amounts paid by purchasers of the lots, and the price fixed as a result of reappraisement May 11, 1925, by the Secretary of the Interior.

It appears that said lot was purchased April 6, 1918, for $175 by Freda P. Gordon, who paid the first installment of $35 and by deed dated July 1, 1919, assigned same to James P. Dunn. Dunn paid the second installment on the purchase price and by deed dated January 30, 1920, assigned same to Bjerke. The amounts paid apparently were in excess of the reappraised value of the lot. Patent issued in the name of the original purchaser January 6, 1926.

As shown above, the law authorizes repayment to the original purchasers or their legal representatives of the excess over the reappraised value of the lots. The Commissioner denied repayment in the instant case on the ground that the term "legal representatives" employed in the act of January 8, 1926, *supra*, does not embrace "assignees."

Under the repayment law the department recognizes a qualified assignee as the legal representative of the assignor. See *Clear Water Timber Company* (44 L. D. 516), and instructions of October 25, 1916, governing repayments (45 L. D. 520, 525).

In the circumstances the excess, if any, paid in connection with the purchase of said lot 6 over the price fixed as result of reappraisement, should be refunded.

The decision appealed from is

Reversed.

SAM CLARK AND ANGELINE D. CLARK

Decided May 17, 1928

TOWN SITE—DECLARATORY STATEMENT—MINING CLAIM.

The acts of Congress relating to town sites recognize the possession of mining claims within their limits and the mere filing of a declaratory statement by a town-site trustee is no bar to the exploration and purchase of mineral lands therein.

TOWN SITE—MINING CLAIM—DISCOVERY—EVIDENCE—HEARING—RES JUDICATA.

A finding by the department in a proceeding between a mining claimant and a town-site applicant that there had been no discovery of mineral is conclusive as to the status of the mining claim at the time of the hearing, but a finding made in dismissing without prejudice a mining claimant's protest against a town-site application is not conclusive on the mining claimant.

TOWN SITE—MINING CLAIM—DECLARATORY STATEMENT—DISCOVERY—PRIORITY—FINAL CERTIFICATE—VESTED RIGHTS.

The superior right of a mining claimant who makes discovery subsequent to the filing of a town-site declaratory statement by another depends upon whether or not discovery of mineral was made prior to final entry of the town site or prior to the date that the town-site claimants have done everything required under the laws and regulations to entitle them to a certificate of purchase and the issuance of it is all that remains to be done.

MINING CLAIM — DISCOVERY — OCCUPANCY — POSSESSION — DILIGENCE — ADVERSE CLAIM.

Prior to discovery an explorer in actual occupation and diligently searching for mineral is a licensee or tenant at will, and no adverse right can be initiated or acquired through a forcible or fraudulent intrusion upon his possession, but if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, another may acquire a valid right by peaceable entry and compliance with the law.

TOWN SITE—MINERAL LANDS—FINAL CERTIFICATE—VESTED RIGHTS—WORDS AND PHRASES—STATUTES.

In construing the town-site laws in their relation to the mining laws, the term "date of town-site entry" means the date when final entry of the town site is made and certificate of purchase issued, or when the right of the town-site claimants becomes vested.

TOWN SITE—MINING CLAIM—EVIDENCE—PATENT.

As between mineral and town-site claimants, the conditions with respect to the character of the land, as they exist at date of entry, or at the time when all the necessary requirements of law have been complied with by the one seeking title, determine whether the land is subject to sale or other disposal under the law upon which the application for patent is based.

TOWN SITE—MINING CLAIM—DISCOVERY—PATENT.

A discovery of minerals after a town-site patent has been issued does not defeat or impair the title of persons claiming under the patent.

FINNEY, *First Assistant Secretary:*

Sam Clark and Angeline D. Clark have appealed from a decision of the Commissioner of the General Land Office dated November 10, 1927, rejecting their application, Phoenix 060886, filed February 19, 1927, for patent to the G. & M. lode mining claim, alleged to have been originally located January 1, 1915, on account of deposits of gold, silver, and copper. The claim is wholly within the bounds of Rowood Town Site, for which declaratory statement was filed Feb-

ruary 12, 1917, application to purchase May 12, 1921, and amended application to purchase May 4, 1922. Final proof was made June 12, 1922. Payment of purchase price was tendered December 28, 1923, and final entry made January 4, 1924, upon which patent issued February 26, 1924. Predicated upon evidence adduced at a hearing concluded in September, 1918, wherein the above-named applicants were defendants, the department by decision of December 20, 1919, affirmed a decision of the Commissioner of April 23, 1919, to the extent of holding that upon the G. & M., Howard No. 2, and three other lode locations there had not been made a discovery of mineral upon any of them sufficient to support an application for patent, but held that the evidence fails to show that the land was nonmineral in character.

On February 3, 1920, motion for rehearing and request for suspension of the case pending further exploration was denied, it being stated in answer to said request that: "The effect of the departmental decision is to leave the mineral claimant in possession, free to conduct such further exploration as he may desire." Further testimony was offered by Clark as to the mineral showings on the claims in support of his protests againt the original and amended town-site applications on July 7, 1921, and June 12, 1922. The Commissioner by decision of September 28, 1922, dismissed Clark's protests. In affirming this action, the department in its decision of April 7, 1923, stated—

> The department has not, as a result of any evidence presented, adjudicated or classified the land embraced in this proposed town site as mineral or as nonmineral in character, nor does it now in this decision do so, but such alternative determination is not essential to a decision whether or not a patent on the town-site entry can be issued at this time. See decision of the department in the case of *Lalande et al.* v. *Townsite of Saltese* (32 L. D. 211). Further discussion of this matter at this time appears to be useless, although possibly mention should be made of certain claims of discoveries, which claims were made by Sam Clark in his deposition taken June 12, 1922, when testimony was offered in support of the protest against the allowance of the town-site application.

There follows a brief summary of the statements of Clark on deposition to the effect that a drill hole had been sunk on the G. & M. claim to the depth of 105 feet in which gold and copper in rock in place had been encountered, and as to certain mineral showings on other claims, after which recital the decision goes on to say: "Nothing appears to indicate the dates of these alleged discoveries. These statements of Sam Clark which were uncorroborated, made in his deposition of June 12, 1922, are not deemed sufficient to warrant any change in the conclusions of the department as expressed in its former decisions above mentioned." Also, pursuant to instruc-

tions in this decision that a supplemental survey and plat be made eliminating the C. & A. No. 2 claim from the town-site area prior to the issuance of final certificate, such survey and plat were made and accepted December 12, 1923, and thereafter the town-site trustee paid the purchase price, as above stated.

It appears that subsequent to the issuance of patent to the town site, Sam Clark and his coclaimants instituted in the Superior Court of Pima County, Arizona, an action of ejectment against the town-site trustee of the town of Rowood to recover the land embraced in the Howard No. 2 claim, and a like action was brought by Sam Clark and Angeline D. Clark to recover the land in the G. & M. claim, based upon asserted possessory rights to the same under the mining laws. The town-site trustee pleaded in bar of the action in each case, the decisions aforementioned of April 23, 1919, and December 29, 1919, by the Commissioner and the department, respectively, finding said claims invalid for lack of discovery, and demurrers to the pleas were overruled and judgments entered for the defendants, which judgments were affirmed on appeal by the Supreme Court of Arizona. *Clark et al.* v. *Jones, Town-Site Trustee*, (249 Pac. 551); *Sam Clark and Angeline D. Clark* v. *Gerald Jones, Trustee of Rowood Town Site* (249 Pac. 555). In the first case cited the Supreme Court of Arizona, following the rule in and quoting extensively from *Lockwitz* v. *Larson* (16 Utah, 275; 52 Pac. 279) held, among other things, that the time when the character of the land within a claimed town site is to be determined is when application to enter is made " and when the town-site patent issued, right of patent became fixed and vested from the time of entry of town site *by filing declaratory statement* pursuant to Revised Statutes, section 2387, and locators of mining property did not acquire superior right to premises, even if they made discovery of minerals thereon before the issuance of town-site patent." (Italics supplied.)

Speaking of the Commissioner's decision holding the Howard No. 2 claim (and the G. & M. as well) null and void, the court said:

> * * * The effect of that decision was not to oust appellants from the possession of the land, nor even to determine that they had no further right to such possession, but on the contrary, as stated by the Secretary of the Interior in affirming the Commissioner's decision, left them " in possession, free to conduct such further explorations as they may desire," and such possession they may maintain against the world, save and except the United States and persons claiming by legal or equitable title under it. 32 Cyc. 822.

The court, however, held that the patent related back to the date of the filing of the declaratory statement so as to bar the acquisition of intervening rights under the mining laws, the concluding paragraph of the opinion being as follows:

Appellants have seized upon the language of the Secretary of the Interior hereinbefore mentioned, that "the effect of the department decision is to leave the mineral claimant in possession free to conduct such further explorations as he may desire," as recognizing their superior right to the premises if they were able to make a discovery of mineral thereon before the issuance of the town-site patent. Such is not the correct construction to be placed upon this language. Appellants were in possession and had a right to maintain such possession against everyone, except the United States and anyone holding from it by right or title superior to theirs, as already shown. The town-site patent had not yet issued, and it did not, as a matter of fact, issue for four or five years thereafter. It was quite within the range of possibility that it might never be issued—the application might have been withdrawn or denied. Until the patent issued upon the original application and declaratory statement filed before the hearing in September, 1918, the appellee was in no position to show a right to the premises superior to that of appellants. When the patent did finally issue in March, 1924, the right of the appellee to the land, theretofore inchoate and unsubstantial, became fixed and vested, not from the date of the patent merely, but from its inception at the time of the entry of the town site by the filing of the declaratory statement by appellee's predecessor in office.

The Commissioner expresses the view that the conclusions of the Supreme Court of Arizona in *Clark* v. *Jones*, *supra*, seem to be sustained by the authorities cited therein and also cites *Bonner* v. *Meikle et al.* (82 Fed. 697) and *Young et al.* v. *Goldsteen* (97 Fed. 303), holding that the date of the town-site settlement or occupation is controlling, in further support of said conclusion. Warrant for the court's holding is also found by the Commissioner in the alternative use of the words "entry" and "declaratory statement" in section 2388, Revised Statutes, it being stated that in this statute "The entry and the declaratory statement are placed upon an equal footing as proceedings taken for the protection of the town-site settlers." The ground, however, upon which the Commissioner bases his action rejecting the application is stated as follows:

It is not necessary to hold that the date of the town-site occupancy prior to the time of the declaratory statement was filed is controlling. As a matter of fact it is conclusively established that the lands were not known to be mineral on June 12, 1922, the date of the hearing of Clark's protest against the amended town-site application, at which time all the proofs required by the town-site claimants were submitted.

The conclusion just stated is predicated upon a further holding by the Commissioner as follows:

The decision of the department of April 7, 1923, considers the testimony offered in support of the claim that after September, 1918, and before June 12, 1922, a discovery had been made, and the department specifically held the testimony insufficient to establish the fact of such discovery. Therefore, any claim of discovery prior to June 12, 1922, comes clearly within the rule that an issue once tried and determined between the parties will not be made the subject of further consideration. In other words, the matter is *res judicata*.

The department is unable to concur in the Commissioner's conclusion that applicants are conclusively bound by the findings as to the insufficiency of the mineral showings in the departmental decision of April 7, 1923, dismissing Clark's protest.

The last-mentioned decision was based on the rule in *Lalande et al.* v. *Townsite of Saltese*, *supra*, which has been repeatedly applied in numerous other departmental decisions, to the effect that the town-site patent does not operate to convey title to lands known to be valuable at the date of town-site entry; that its issuance can not prejudice rights under the mining laws that claimants may have acquired to such lands; that upon filing an application for mineral patent subsequent to the town-site patent they may then show that the lands claimed were known to be valuable at the date of town-site entry; that in the absence of such patent proceedings the department will not undertake to determine the mineral claimant's rights. In other words, the decision mentioned was a dismissal without prejudice to be heard again on the same matter upon filing the application for patent. Such a decision has not the force of a final adjudication on the merits. The judgment must be one adjudicating the rights of the litigant in a conclusive and definite manner in order that the judgment may be final and conclusive within the meaning of the rule of *res judicata*. See 34 C. J., Judgments, Subtitle, Res Judicata, sections 1186, 1207. The applicants, after being told in said former decision, that they had no standing before the department as protestants and that they would have another day in court upon the filing of a patent application, can not now be held to be concluded by findings upon issues that were held to be not properly subject of determination at that time.

The findings of the department, however, in its decision of December 20, 1919, that Clark and his coclaimants had made no discovery of mineral on the claim at the date of the hearing in September, 1918, is conclusive as to the status of the claim at the time of said hearing. As stated by the Supreme Court of Arizona in the decision above referred to, the power of the department to make such inquiry and the conclusive effect of its findings is settled since the decision of the Supreme Court in *Cameron* v. *United States*. (252 U. S. 450.) There being no discovery, the G. & M. claim was not valid. Acts of location in the absence of discovery confer no rights in the land located as against the Government, both being essential to a valid claim, nor did the doing of assessment work take the place of discovery. The location would become effective only from the date of discovery, but in the presence of an intervening right it must remain of no effect. *Union Oil Company* v. *Smith* (249 U. S. 337, 346–348); *Cole* v. *Ralph* (252 U. S. 286, 296); 40 C. J., Mines

and Minerals, section 181. The validity and life of the claim begins only with the act of discovery. *Cole* v. *Ralph*, *supra*, *Redden* v. *Harlan* (2 Alaska, 402); *Cedar Canyon Consol. Min. Co.* v. *Yarwood* (Wash., 67 Pac. 749). In advance of discovery an explorer in actual occupation and diligently searching for mineral is treated as a licensee or tenant at will, and no right can be initiated or acquired through a forcible, fraudulent, or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably and not fraudulently or clandestinely and makes a mineral discovery and location, the location so made is valid and must be respected accordingly. *Cole* v. *Ralph*, *supra*, and cases there cited. Applying these well-settled principles to the case at bar, it seems clear that, passing for the present the question whether any rights to the minerals could be acquired by the Clarks after September, 1918, in the event the town-site title was perfected by patent, all the right that they had was to continue in actual occupation of the ground claimed in search for minerals, and if a sufficient discovery was made, their rights would date from the date of such discovery provided no intervening right of another had attached thereto. The statement that the effect of the department's decision is to leave the mineral claimants in possession free to conduct such further exploration as he may desire, meant no more than this. The "possession" referred to was the actual possession which the testimony then showed Clark had. There being no discovery, the mineral claimants did not have the exclusive right of possession of a locator after discovery.

It must now be considered whether a discovery of minerals after the filing of the declaratory statement would give the mining claimants a superior right and warrant the issuance of a mineral patent to the claim upon which the discovery was made, and if so, at what time such discovery must be shown to have been made.

It is well settled that a discovery of minerals after the town-site patent is issued does not defeat or impair the title of persons claiming under the town-site patent. The lands must be known to be valuable for mining purposes when the town-site patent takes effect to except them from the town-site patent. *Mill Side Lode* (39 L. D. 356); *Davis's Administrator* v. *Weibbold* (139 U. S. 507, 526–530); *Dower* v. *Richards* (151 U. S. 658, 663), and see other cases cited under note 8, section 722, U. S. C. A. The departmental rule for determining whether there is such an exception is embodied in the town-site regulations, subtitle, Town Sites on Mineral Lands (38 L. D. 92, 114; 52 L. D. 106, 127), which read as follows:

The general town-site laws, comprised in sections 2380 to 2394 United States Revised Statutes, authorize the entry of town sites, or the sale of lots therein, upon public lands which may include unpatented mineral claims, but the rights of mineral claimants upon any land entered or sold under said town-site laws are expressly protected by sections 2386 and 2392. These two sections recognize the superior rights, as against any town-site claimant—whether corporate, community, or individual—of all claimants for mineral veins possessed agreeably to local custom, or for any valid mining claim or possession held under existing law. The precedence and superiority so accorded to mineral claims, however, depend in final analysis upon the question of fact whether, at date of town-site entry or lot sale, the lands claimed under the mining laws were "known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them." (39 L. D. 356.) Where an affirmative showing in such behalf is made in due course by the mineral claimant, his right to a patent for the land (subject to the distinction hereinafter noted as to incorporated towns) will not be prejudiced by any previous town-site entry, deed, or patent covering the same land. (27 L. D. 144; 29 L. D. 426; 32 L. D. 211; 34 L. D. 276 and 596.)

In view of repeated constructions of the town-site and kindred laws in *pari materia* with the mining laws by the Supreme Court and the department the expression "date of town-site entry" must evidently be held to refer to the date when final entry of the town-site is made and certificate of purchase is issued, or at least to the date when the town-site claimants have done everything required under the laws and regulations to entitle them to such certificate and nothing remains but to issue it. Not until such time does the right of the town-site claimants become vested or equitable title pass as against the United States. In *Wyoming* v. *United States* (255 U. S. 489, 501) the court said:

* * * And as respects cash entries and entries under the preemption, homestead, desert land, and kindred laws the Land Department always has ruled that if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral he acquires a vested right which no subsequent discovery of mineral will divest or disturb.

and quoting from *Kern Oil Company* v. *Clarke* (30 L. D. 550), the department said (p. 556):

* * * In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the Government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal.

In *Harkrader et al.* v. *Goldstein* (31 L. D. 87), involving a contest between mineral and town-site claimants, it is stated (p. 94):

> It is well settled that the conditions with respect to the character of land, as they exist at the date of entry, or at the time when all the necessary requirements have been complied with by the person seeking title, must determine whether the land is subject to sale or other disposal under the law upon which the application for patent is based.

In the *Tombstone Town-Site Cases* (1887, 15 Pac. 26; 17 Pac. 72, Ariz., writs of error dismissed, 1892, 145 U. S. 629, 647), the court held that where a patent to a town site and a patent to a mining claim conflict, the one will be sustained which first vests the right.

The mere filing of a declaratory statement by the town-site trustee would be no bar to the exploration and purchase of mineral lands included therein. In *Steel* v. *Smelting Company* (106 U. S. 447, 450), the court said:

> The acts of Congress relating to town sites recognize the possession of mining claims within their limits, and forbid the acquisition of any mine of gold, silver, cinnabar, or copper within them under proceedings by which title to other lands there situated is secured, thus leaving the mineral deposits within town sites open to exploration, and the land in which they are found to occupation and purchase, in the same manner as such deposits are elsewhere explored and possessed and the lands containing them are acquired. (Rev. Stat., secs. 2386, 2392.)
>
> Whenever, therefore, mines are found in lands belonging to the United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with.

No right or title under the town-site application would attach if the existence of such minerals became known before the lands ceased to belong to the United States; in other words, before the land became private property by the town-site trustees' full compliance with all the requisites that entitled him to patent. The town-site patent when issued does not purport to carry title to such mineral validly possessed and claimed under the mining laws. In *Talbott* v. *King* (6 Mont. 76; 9 Pac. 434), involving a contest between parties claiming under mineral patents and others claiming under town-site patents, where the mining claim had been located but not patented before the issuance of town-site patent, and held to be not affected by the town-site patent, the court said (p. 442):

> The doctrine of relation can not be invoked in aid of a town-site patent as against the Smoke House mining claim, for that patent did not purport or attempt to convey any interest in that or any other mining claim or possession within the bounds of the town site. The town-site patent could only convey title to public lands. The grounds within the boundaries of the Smoke House location ceased to be public lands when that location was made.

The views of the court in this case are apparently approved in *Davis's Administrator* v. *Weibbold*, *supra* (p. 530). In *Lockwitz* v.

Larson, supra, following *Shepley* v. *Cowan* (91 U. S. 330), *Pomeroy* v. *Wright* (2 L. D. 164), it was held that by the filing of the declaratory statement the trustee acquires an inceptive right to the legal title to the land, however, in trust for the persons who are at the time of filing the occupants and entitled to possession, and if the application is accepted, the entry allowed, purchase money paid, and patent issued, the title relates back to the date of the filing of the declaratory statement. It does not appear in those or other cases applying the same principle that there was any issue as to the mineral character of the lands or whether the lands were subject to disposition under the laws invoked by either contending claimant, the sole question being who first initiated the right to land that each might have acquired so far as its disposability was concerned. The rules there stated are inapposite in the present case. A declaratory statement is but the initial step for making town-site entry. It must be kept alive by following it up within the proper time after it has been filed by other steps essential under the law to the establishment of a town site. The scope of it does not extend as far as a cash entry. *Placer County* v. *Lake Tahoe, etc., Company* (209 Pac. 900) and departmental decisions there cited.

It follows from what has been said that if the applicants present an application containing a clear and definite *prima facie* showing that subsequent to the date of hearing in 1918 but prior to final entry January 4, 1924, they had discovered on the G. & M. claim not only mineral in rock in place or even valuable minerals, but that the claim was known to contain minerals to such extent and value as to justify expenditures for the purpose of extracting them, the application could be entertained and proceedings could be ordered between the mineral applicants and the town-site patentee or his successor to determine the truth of the matters so alleged. Examination, however, of the application presented does not disclose, *prima facie*, any rights in the applicants under the mineral land laws. The application merely alleges the following:

> Practically the entire claim is covered with from 75 to 150 feet of overburden consisting of a conglomerate or cement formation, the mineral on this and adjoining patented claims being at some depth. In the shaft described as No. 2 shaft by the mineral surveyor under the head of "Expenditures," on which the affiants have expended about $5,000.00, there is copper, gold, and silver to be found in every assay, beginning at a depth of about 125 feet and continuing to the present depth of 193 feet. The values vary as to all of the minerals mentioned, but the average is about 1¾ per cent in copper, with a gold value of an average of better than $1 per ton and a like value in silver. In this shaft there is mineral in place in rock in place which has continued for more than 50 feet after the rock in place began to show values.

The shaft shown on said report as being 72 feet in depth and upon which the owners have expended about $800 show values in gold, silver, and copper.

In the proof of mineral character the allegations are as follows:

There are number of shafts and diggings upon said claim, one of said shafts being about 190 feet in depth; that the rock coming from said shaft at a considerable depth, probably 100 feet, shows to be mineralized and the rock is in place. The rock carries gold, silver, and copper and shows by the assays to be of a fair value. The adjoining claim to the south known as the Quartzite is a patented mineral claim, and on the said Quartzite the mineral is in place at much less depth than the G. & M., and it can be seen from an examination of the various shafts on the said Quartzite that the ore is dipping to the north, and one would expect to encounter the same class of ore to be found on the Quartzite at about 100 to 150 feet in depth on the G. & M. claim. The said G. & M. is at all points covered with an overburden from the very near-by hills of at least 75 to 125 feet. The ore found upon the G. & M. is the same as that encountered on the Quartzite. The C. & A. No. 1, just to the south, which adjoins the Quartzite, is also a patented claim and is highly mineralized, and the ore on that claim shows the same to be dipping to the north. Also the C. & A. No 2 lode claim, which is a mineral segregation and which adjoins the G. & M. claim, is highly mineralized and on account of a less overburden shows mineral at a less depth than the G. & M. The main improvements upon the said G. & M. claim consist of two shafts. The first one is down to a depth of more than 190 feet and is described above and shows mineral in place in rock in place. This shaft is timbered to a considerable depth and is about 4 by 8 feet. The other main shaft is about 4 by 8 feet and is about 70 to 75 feet in depth and has a fair mineral showing. The amount approximately expended by the owners of this claim is $7,000. In addition to the two main shafts above described, there are a number of other workings upon said claim, all showing slight mineralization.

There is nothing in the foregoing allegations showing that the alleged findings of mineral were the result of developments subsequent to the hearing in 1918 adjudging no discovery had been made. They are insufficient to show, *prima facie*, the existence of a mine or valid claim or possession within the meaning of section 2392, Revised Statutes, at the time of final entry of the town site and excepted from the town-site patent. In other words, there is no showing that there is any mineral land within the bounds of the patented town site belonging to the United States and over which the department has jurisdiction. For this reason, the decision appealed from, rejecting the application, is

Affirmed.

SAM CLARK AND ANGELINE D. CLARK

Motion for rehearing of departmental decision of May 17, 1928 (52 L. D. 426), denied by First Assistant Secretary Finney, July 3, 1928.

SOUTHERN PACIFIC RAILROAD COMPANY

Decided July 9, 1928

HEARING—EVIDENCE—TESTIMONY—WITNESSES—RESIDENCE—STATUTES.

Section 4 of the act of January 31, 1903, applies only to the taking of testimony of a witness or witnesses who reside "outside the county in which the hearing occurs."

HEARING—EVIDENCE—TESTIMONY—WITNESSES—COSTS.

When witnesses of both parties are assembled under authority of the act of January 31, 1903, and then in reality the hearing is held, 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, just the same as when hearing is held before the local land officers.

HEARING—EVIDENCE—TESTIMONY—WITNESSES—DEPOSITION—COSTS—RESIDENCE—STATUTES.

Whether the entire costs of taking testimony of witnesses supœnaed under the act of January 31, 1903, should be paid by the party producing such witnesses depends upon whether the deposition is of a witness who resides outside the country in which the hearing is held, and whether the mode prescribed in sections 4 and 5 of the act for obtaining such testimony theretofore has been pursued.

HEARING—CONTINUANCE.

Defendants in land proceedings should not be compelled to combat a case piecemeal because it is brought by the Government, except by stipulation or proper showing satisfactory to the register that the public interest requires a continuance.

MINING CLAIM—RAILROAD GRANT—DISCOVERY—EVIDENCE—PRESUMPTION—BURDEN OF PROOF.

Where in the case of a lode mining claim in partial conflict with a railroad grant, discovery is made of a vein or lode on such claim without the boundaries of the grant, the presumption is that the vein extends to the limits of the location and the burden is upon the railroad grantee to overcome the presumption.

HEARING—EVIDENCE—DEPOSITION—WITNESSES—RESIDENCE—STATUTES.

Where witnesses are assembled in a hearing under the act of January 31, 1903, and one of the witnesses resides outside of the county in which the hearing occurs, his deposition may be taken under section 4 of that act in the county where he resides regardless of the fact that the local land office is situated in that county.

FINNEY, *First Assistant Secretary:*

The Southern Pacific Railroad Company has appealed from a decision of the Commissioner of the General Land Office dated April 16, 1925, canceling its primary list 169, Los Angeles 024247, as to W. ½ NW. ¼ NW. ¼ Sec. 25, and holding for cancellation said list as to lot 1, SE. ¼ SE. ¼ Sec. 3, E. ½ NW. ¼ NW. ¼, and SW. ¼ NW. ¼ Sec. 25, all in T. 10 N., R. 9 E., S. B. M., and dismissing its protest against paying for the testimony on its cross-examination of certain Government witnesses who testified in the proceedings.

Pursuant to notice regularly issued by the register of the local office, summoning the parties to appear, respond, and offer evidence before a United States commissioner at San Bernardino, San Bernardino County, California, on January 25, 1924, touching a charge that the tracts above described were mineral in character, containing valuable deposits of gold, silver, and copper, a representative of the Government and the railroad grantee appeared in response to and in accordance with the notice, whereupon testimony of certain witnesses for the Government was taken by direct and cross-examination. When the taking of such testimony was concluded, the representative for the Government announced that he would take the testimony of one Bell, who resided in Los Angeles County, at the final hearing before the register. The attorney for the railroad grantee thereupon took the position that there could not be two hearings in the cause, and that the testimony theretofore taken was on depositions under the act of Congress, which required the party taking them to pay the entire cost of the testimony, and declined to pay for his cross-examination, or to submit evidence to refute the charge until the Government had completed its testimony in chief. The United States commissioner ruled that the cross-examination should not be transcribed by the reporter unless the railroad attorneys gave assurances that the costs of taking it would be paid by the railroad company. The attorney for the company thereupon, under protest, gave such assurance. The taking of testimony was completed on March 19, 1924, the date of final hearing, before the register.

The Commissioner of the General Land Office held that the submission of testimony at the final hearing after the taking of testimony before a designated officer, is in the nature of a continuance and governed by the Rules of Practice, citing *McEuen* v. *Quiroz* (50 L. D. 167), and that the apportionment of costs should be in accordance with the provisions of Rule 53 of Practice, which provides that in cases other than those involving a claim of preference right, 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 order setting the case for hearing before the United States commissioner was made pursuant to, and by virtue of, the authority of Rule 28 of Practice. Rule 30 provided in such cases that the costs should be taxed in the same manner as costs are taxed by registers and receivers. Section 288, Circular 616, approved August 9, 1918 (46 L. D. 513, 583), provides that—

> When the deposition is taken in its true sense the fees of the officer taking it shall be paid by the party on whose behalf it is taken. When witnesses of both parties are assembled under authority of the act of January 31, 1903, *supra*, and then in reality the hearing is held, 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, just the same as when hearing is held before the local land officers.

The contention in the railroad company's briefs to the effect that any testimony taken elsewhere than at the local office is a deposition under section 4 of the act of January 31, 1903 (32 Stat. 790), and therefore the entire cost thereof must be paid by the party taking the deposition, as provided therein, is clearly untenable. That section applies only to the taking of testimony of a witness or witnesses who reside "outside the county in which the hearing occurs." Certain language used in an unreported departmental decision of June 26, 1922, in the case of *United States* v. *Central Pacific Railway Co.* and cited by appellant, appears to resolve the question of the taxing of costs upon the absence or presence of the fact that subpœnas were issued under the authority of said act of 1903, but it is plain, when the whole opinion in that case is considered, that it only had reference to subpœnas issued pursuant to application to take *depositions* under said act. Section 1 of the act authorizes the issuance of subpœnas in all matters requiring a hearing before registers and receivers, and is the authority for compelling the attendance of witnesses in any proper proceeding before such officers. Whether the entire costs of taking testimony of witnesses subpœnaed under the act of 1903 should be paid by the party producing such witness, depends upon whether the deposition is of a witness who resides outside the county in which the hearing is held, and whether the mode prescribed in sections 4 or 5 of the act of 1903 for obtaining such testimony theretofore has been pursued. The action of the representative of the Government in deferring the taking of testimony of a certain Government witness until final hearing, though it may not have been the proper procedure under the circumstances, and may be just cause of complaint, did not operate to change the character of the proceeding, or affect the rule as to costs. The deposition of the witness Bell should have been taken under section 4 of the act of 1903 prior to the hearing, as he was not a witness that could be compelled to attend in San Bernardino County. The fact assigned as the cause for postponement that he was a resident of Los Angeles County, the county in which the local land office is situated, constituted no bar to invoking the act of 1903. It is sufficient, if the witness resides in any county other than where the hearing is to occur. The rule between private parties is that where testimony is authorized to be taken elsewhere than at the local office, neither party should be permitted on the day of hearing to submit further testimony without due notice to the other, and *appropriate order therefor made by the local office; Dahlquist* v. *Cotter* (34 L. D. 396);

McEuen v. *Quiroz*, *supra*. Defendants should not be compelled to combat a case piecemeal because it is brought by the Government, except by stipulation or proper showing satisfactory to the register that the public interest requires a continuance, and order thereon by him granting the same. In the instant case, however, the register heard further testimony for the Government, and the appellant acquiesced in that action by submitting his testimony at the same time, and no prejudice resulted.

As to the land in Sec. 25, the Government charged that the entire W. ½ NW. ¼ was mineral in character. The company failed to deny the charge as to the W. ½ NW. ¼ NW. ¼. The charge, therefore, in so far as it involved that tract, should, under Rule 14 of Practice, be taken as confessed. The cancellation of the list as to that tract for failure to answer was correct. The Commissioner held the list as to the remaining tracts involved for cancellation because of his finding from the evidence that they were mineral in character. It is contended that the evidence is insufficient to sustain such finding.

With respect to the E. ½ NW. ¼ NW. ¼, and SW. ¼ NW. ¼, two mineral examiners for the grantee testified that these tracts were decidedly nonmineral in character, and that there was no evidence of mineralization thereon. The evidence for the Government fails to show any specific disclosure of rock showing mineralization to refute it. As to the entire W. ½ NW. ¼, there is no dispute that the mineral showings consist of a fairly well-defined vein running northerly and southerly and actually disclosed from an incline shaft or an open cut near the dividing line between the W. ½ NW. ¼ NW. ¼ and SW. ¼ SW. ¼ and running thence northerly through said W. ½ NW. ¼ NW. ¼. The railroad examiners only seem to have taken the pains to fix by course and distance the location of said shaft or cut and found it 100 feet within said W. ½ NW. ¼ NW. ¼. It was established that said vein is within the boundaries of the Liberty No. 2 lode mining claim located in 1918 and running northerly and southerly with the course of the vein, and occupying a portion of said W. ½ NW. ¼ NW. ¼ and projected approximately half of its length from the discovery monument into the SW. ¼ NW. ¼. The testimony is in agreement that this vein is about 18 inches thick in the southernmost cut across the vein. One of the mineral examiners characterized the vein as altered granite. The Government inspector described it as a mineralized quartz vein showing copper stain, the main formation being granite and quartzite; he also said that he did not make enough study of it to determine whether the vein was on a contact between granite and schist. The assay from the sample he took returned only a trace of gold and silver.

Lietzow, witness for the Government and manager, secretary, and treasurer of the Mojave United Mining and Milling Company, owners of the Liberty No. 2, testified that he had traced the vein northerly for about 1,800 or 2,000 feet from the discovery shaft, and had taken about 20 samples therefrom which ran from a trace to $12 (per ton) in gold and silver; that the vein system shows quartz and silica on the contact between granite and quartzite. The uncontradicted testimony of the railroad examiners was to the effect that they had Lietzow select a sample from the most southerly shaft on this vein, which they had assayed, and which returned only a total value of $1.17 in gold and silver, and that Lietzow, who accompanied them, was unable to show them any evidence of mineralization other than on the W. ½ NW. ¼ NW. ¼, and "said he had showed us all the ore there was to his knowledge." The vein is exposed on both the north and south sides of the cut, but it is admitted by the Government witnesses that not enough work has been done to demonstrate that it persists into the SW. ¼ NW. ¼. The railroad grantee, however, offered no evidence to destroy the presumption that the vein continued throughout the length of the claim. The examiners appear to have classified the said W. ½ NW. ¼ NW. ¼ as mineral, based upon the showings upon this claim and the evidence as to the showings on the vein north of the exposure, which is admitted by the said examiners to be a well-defined vein. The testimony as to this vein is considered sufficient to conclude that a valid discovery has been made upon the claim. In *United States* v. *Central Pacific Railway Company on rehearing* (49 L. D. 588, 590), the department said:

> The true rule is, as has been held by the department, that proof, in a proper proceeding of the inclusion within the limits of a lode mining claim, made in good faith, and based upon a sufficient discovery, of an area comprising part of an odd-numbered section within the primary limits of a railroad grant, which area, if mineral in character, would be subject to appropriation under the mining laws of the United States, establishes *prima facie* or presumptively the mineral character of such area, and that unless that presumption be overcome by satisfactory evidence that the conflict area is not mineral in character, it must be held to be excepted from the operation of the grant.
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> There is no suggestion in the case that either of the claims was not laid along the discovery vein, or that there was any fault or other disturbance or change in formations that would break or terminate the vein at any point to the south of the north end of the claim, or otherwise preclude its extension throughout the entire length of the claim. It must, therefore, be held that the entire area in question is shown by the record to be mineral in character, and that for that reason is excepted from the operation of the grant to the company.

The land within the Liberty No. 2 claim must be held to be mineral in character. But, as all the evidence as to mineralization relates to the land within the Liberty No. 2 claim, there is no basis for finding

that the E. ½ NW. ¼ NW. ¼, or the land within the SW. ¼ NW. ¼ outside said claim, did not pass under the grant: *United States* v. *Central Pacific Railway Company* (49 L. D. 303). A segregation survey is necessary to separate said claim from the remainder of the SW. ¼ NW. ¼ and to lot said remainder. Upon application by the company and deposit by it of one-half the estimated cost, such survey should be made, and the company should be allowed to amend its list by substituting the E. ½ NW. ¼ NW. ¼ and the fractional lots in the SW. ¼ NW. ¼ in place of the W. ½ NW. ¼.

With respect to lot 1 and the SE. ¼ SE. ¼ Sec. 3, a mineral examiner for the Government testified that he made an examination of these tracts in February, 1920, and on the line between the two tracts, 600 feet from the northeast corner of the SE. ¼ SE. ¼, he found a cut and monument with a notice of the location of the Hermit No. 3 lode claim, February 5, 1908; that the cut was 18 feet long, 4½ feet wide, and 6 feet on the face, exposing a vein 1½ to 2 feet wide with strike northerly and southerly, underlain by granite schist; that the seam showed quartz and copper in the form of malachite. He found one wall, the foot wall of granite schist, but did not notice the dip of the vein or whether it was on a contact, or take any samples, or trace the vein, or search for croppings at other points. This cut was the only development work he saw and he did not search for or find any monuments of the Hermit claim, which he stated on information had been relocated. On cross-examination he admitted that a small quantity of copper disseminated through that region would be sufficient to make the stain of the character he saw; that whether it would pay to develop or not could only be determined after more extensive and deeper workings; that they were sufficient for an ordinary prospector to go ahead and do more work, but from what was disclosed in one cut it would be a broad statement to say there was a reasonable prospect of developing a paying mine; that great mines had been developed from showings much less than on this claim, and others had been failures; that the showing warrants the expenditure of some money in extending the workings and gaining more depth to ascertain the extent and value of the showings exposed on the surface; that the showings he saw were not sufficient to support an application for patent.

Lietzow testified that the mineral indications were plainly to be seen; that there were exposures of ore. In the cut mentioned by the inspector he stated that he saw red hematite, iron oxide, copper malachite, and the vein which strikes northerly and southerly is exposed by croppings for 1,200 feet to the south but not to the north; that the vein gangue is quartz silica on a granite schist on the foot wall:

that it was not a contact exactly; that there are workings a little southeasterly on adjoining claims, one of which is a tunnel which shows red-stained quartzite, very silicious, containing gold values, presumably the same vein as on the land in question; that he had taken no samples from the land adjoining but panned and got gold colors; that whether the vein on the land is persistent could only be determined by working; that he had seen mines made on less showings, the last statement being the only reason for his opinion that the land was valuable for mineral.

The testimony of Bell, a witness for the Government, was in substance as follows: He has been prospecting and mining since 1886 and located the Hermit, now Lucky Boy, group of three claims in 1908. He did not know whether the claims were in 2 or 3, or any other section, but the claims lie end to end in an easterly and westerly direction, the Hermit No. 3 being the most westerly. He has a copper and gold ledge on that claim and did assessment work on it the year after he located. Since then he has done tunnel work on the central claim as group development work. In a cut on Hermit No. 3 there is a ledge 18 inches wide with 2 feet of iron below that dipping to the north and striking east and west. He had learned to assay from books and by assisting assayers, and obtained from samples of this vein from $4 to $15 in gold and from 5 to 6 per cent copper. His tunnel where the vein is 27 feet wide is 2,200 feet from this cut. From this vein he obtained assays of from $25 to $30 in gold and $1 in silver and no copper, and from 8 to 10 crosscuts he could trace the vein 500 feet west of the Hermit No. 3.

On cross-examination he could specify but four cuts between the tunnel and the discovery cut on Hermit No. 3; the nearest of these being, according to his figures, over 1,400 feet from the cut on Hermit No. 3. He further testified on cross-examination that he had assayed over 100 samples from his workings, of which he kept no record, the last being 6 years ago; that the average of assays in the tunnel was $5.40 in gold and no copper, and his samples ran from $5 to $128 in gold, and the sample from the discovery cut on Hermit No. 3 ran $6 or a little over in gold and about 6 per cent copper.

The company's examiners testified that they examined the tracts in question in October, 1923. They are positive in their statements that there is no connection between the mineral indications in the tunnel and other excavations to the west thereof, and which they identify as being within the SW. ¼ SW. ¼ of Sec. 2, with the mineralization in the discovery cut on Hermit No. 3; that the former is a mass of mineralized quartz, without defined walls and with no definite strike, the mineral merging into the country rock; that the

general strike of the mass appeared to be southwesterly and northwesterly, and the quartz was an entirely different nature than that exposed on Hermit No. 3, and much more mineralized; that a line drawn from the tunnel through the cuts would run about N. 35° W. and pass east of the cut on Hermit No. 3. The showing in the sole cut on Hermit No. 3 is described by one mineral examiner for the company as an isolated exposure in altered granite that could not be traced in any direction and not worth sampling and by the other examiner as a small quartz stringer with slight malachite stain, probably a small gash vein, resulting from a secondary deposition of mineral in a region without intrusive dikes and which could not be expected to attain any depth.

The testimony of Bell shows a number of inaccuracies and changes of statement on material points and disagrees with all other witnesses as to the course of the vein on Hermit No. 3. The company, by a preponderance of evidence, overcame his testimony that the mineralization on adjacent land could be traced to the Hermit claim. Considering the testimony of competent expert opinion on both sides, it is believed that the showing in the small cut on the line between lot 1 and SE. ¼ SE. ¼ is insufficient to induce the belief that the land is valuable for its mineral content. Bell held the claim for about 16 years prior to the hearing, and made no further effort to demonstrate the contrary.

There is no sufficient proof that a mining claim exists in conflict with these tracts; but should there be such, the showings are insufficient to constitute a discovery thereon within the meaning of the law, and likewise insufficient to segregate the lands within the boundaries thereof as public mineral lands. The decision of the Commissioner holding the list for cancellation as to these tracts is therefore reversed, and the case remanded for proceedings as to the other tracts as hereinabove directed.

Reversed and remanded.

J. M. BEARD[1]

Decided May 17, 1928

SURVEY—RESURVEY—PUBLIC LANDS.

In making resurveys of public lands the township is to be considered as a unit, and the purpose to be subserved by such resurveys can, as a general rule, be properly accomplished only by the process which will lay, as the foundation therefor, the same character of control as that laid in the original survey.

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[1] See decision on motion for rehearing, p. 451.

SURVEY—RESURVEY—PUBLIC LANDS—BOUNDARIES—EVIDENCE.

Where it becomes necessary, in the absence of original corners, to define the legal subdivision included in any claim to public land, items of topography which were noted merely as incidental in their relation to the lines of the public survey and performed no function in the establishment of the position of the corners thereof will not control.

SURVEY—RESURVEY—PUBLIC LANDS—LAND DEPARTMENT—COURTS — OFFICERS—FRAUD—JURISDICTION.

The power of making surveys of the public lands which is vested in the Land Department can not be divested by the fraudulent action of a subordinate officer, nor can its exercise of jurisdiction in determining what are public lands subject to survey and disposal under the public land laws be questioned by the courts before it has taken final action.

COURT DECISION CITED AND APPLIED.

Case of *Kirwan* v. *Murphy* (189 U. S. 35) cited and applied.

FINNEY, *First Assistant Secretary.*

J. M. Beard has appealed from a decision of the Commissioner of the General Land Office dated December 14, 1927, dismissing his protest against the acceptance of the resurvey of T. 2 N., R. 11 W., S. B. M., California. A brief in support of the appeal, covering 41 typewritten pages, has been supplemented by oral argument.

The north half of said township was surveyed by W. H. Norway, under contract, in 1875, and the plat was approved April 3, 1876. The remainder of the township, except the SW. ¼ Sec. 30 and W. ½ and SE. ¼ Sec. 31, was surveyed by G. W. Pearson in 1884, the plat being approved on September 15, 1884.

All of the township is within the Angeles National Forest.

It appears that on June 4, 1925, a suit in ejectment was instituted by said Beard in the Superior Court of Los Angeles County, California, against George H. Cecil, forest supervisor, who was occupying the West Fork Ranger Station, the plaintiff alleging that the tract occupied as a ranger station is the S. ½ S. ½ Sec. 16, T. 2 N., R. 11 W., S. B. M., which was purchased from the State of California by A. G. Strain in 1905, and by the latter transferred to Beard on January 20, 1922. In support of the suit, a "map showing the location of the S. ½ S. ½ Sec. 16, T. 2 N., R. 11 W., S. B. M.," was prepared by LeGrand Friel, a licensed surveyor. By decision rendered March 31, 1926, the court held that Friel had correctly relocated the S. ½ S. ½ said Sec. 16, and that Beard was entitled to judgment against defendant for possession of the tract.

Thereafter the Secretary of Agriculture requested that this department cause a resurvey to be made of the entire township or of so much thereof as might be necesary to establish the precise location of the West Fork Ranger Station.

The supervisor of surveys was thereupon directed to make an investigation as to the correctness of the Norway and Pearson surveys and to execute a resurvey if the existing conditions demanded it.

The resurvey of the township was begun on November 10, 1926, and was completed September 24, 1927. The plat of resurvey was approved by the supervisor of surveys on November 28, 1927, and the survey was accepted by the Commissioner of the General Land Office on December 14, 1927.

The United States surveyor who executed the resurvey reported as follows:

Field retracements covering all of the exterior boundaries and twenty miles of subdivisional lines in T. 2 N., R. 11 W., S. B. M., California, failed to reveal any evidence of subdivisional survey by either Norway or Pearson, the deputies reporting this work. Five corners only were found on the township exteriors; the point for the quarter-section corner on the west boundary of Sec. 7 has been identified from the one remaining bearing tree, which is standing and in sound condition. Deputy Sickler's restoration of the west boundary of Sec. 6 was found properly monumented in the field. On the north boundary of the township the corner for Secs. 2, 3, 34, and 35, and the corner for Ts. 2 and 3 N., Rs. 10 and 11 W., were found and positively identified. No evidence of Norway work on the east boundary could be found, nor any of the subdivisional surveys reported by him. Nothing in the Pearson survey was found in the field. It may be reasonably concluded that Norway did not attempt any subdivisional surveys, nor fully and properly monument the exterior boundaries.

From a consideration of Norway's topographical data it is readily seen that his returns were based upon a very superficial investigation of the territory involved, the major item varying in position from moderate amounts to, in the greatest instance, a mile and a quarter. The Tujunga Wash, noted at 74 chains south of the corner for Secs. 2, 3, 34, and 35, is, in fact, 88 chains south of this corner; the southwest corner of Sec. 4 will fall in the canyon—is reported as situate 53 chains south of the draw; the line between Secs. 4 and 9 will lie in the canyon bottom—is noted as occupying a position about midway between the wash and the dividing ridge between the Tujunga and the San Gabriel Canyons, an error of nearly half a mile. Through the center of the township, along the San Gabriel Canyon, the returns are even more greatly in error. The San Gabriel Wash lies about 22 chains south of the point for the corner of Secs. 17, 18, 19, and 20, and is noted as occupying a position 5 chains north of this corner. The river flows easterly through the township, crossing the east boundary at a point 115 chains south of where Norway notes the stream in his survey. The Pearson returns are as flagrantly erroneous as the Norway record. His greatest departure from fact, save in the noted ties to Norway subdivisional surveys, is in the location of the dividing ridge between the San Gabriel and the Santa Anita Canyons. This prominent ridge swings northwest from Monrovia peak, near the southeast corner of the township, for a distance of two and a half miles, then west and south to Mount Wilson, near the corner position for Secs. 29, 30, 31, and 32, which latter point is given by Pearson as being nearly 40 chains too far to the north. The south boundary of Sec. 36 is noted as lying to the north of this divide, and in continuing west crosses the ridge and lies along the south slope of the mountain. No notation is made of the main canyon of the Santa Anita, a deep and precipitous draw extending to the south through the eastern portion of Sec. 34. While the topographic calls are in many instances very explicit, one can not reconcile the returns in any instance to actual features encountered.

Previous search for evidence of original surveys in this township by the U. S. Forest Service conducted intermittently since the designation of this area as a national forest has failed to reveal any trace of subdivisional survey. None of the Pearson work has ever been found, either boundary or subdivision. Several attempts by local engineers to establish the boundaries of alienated lands have resulted, due to lack of tangible evidence upon which to base a return, in an approximation of the lines intended—and so reported by them. In Mr. L. Friel's survey, purporting to depict the S. ½ of the S. ½ of Sec. 16 an attempt was made to base the location upon specific calls in the Norway notes. (During a telephone conversation Mr. Friel advised me that no monuments or corners of the original survey were found, but that his basis of location was entirely governed by topographic calls in the Norway returns.) The plat covering the Friel survey is appended hereto. This area has been monumented in the field and is in direct conflict with the U. S. Forest Service administrative site, known as the West Fork Ranger Station. The question of position and title has been in dispute for many years, and although Beard's claim to title has been sustained in the local courts there is no valid contention for his basis of claim. The position of the S. ½ of the S. ½ of Sec. 16, based upon original legal subdivisions of section determined by a dependent restoration of the outboundaries of Sec. 16 will occupy a position about half a mile to the north and east of its present definition, as is shown upon the accompanying plat. Other field work within the township was carried by a series of triangulation and traverse from known extant corners to the south, and in lack of local evidence of the original survey is considered as an approximate location only. This work covers a half a mile of line along the west boundary of Sec. 29, and a fragmentary subdivision, noting the SW. ¼ of the SW. ¼ of Sec. 36, and is marked by wooden stakes, without symbol or lettering, and is held as satisfactory pending an official resurvey.

As to the proper type of resurvey, and the method to be followed, the surveyor reported:

The corner for Ts. 1 and 2 N., Rs. 10 and 11 W., will be established by single proportion between the corners for Secs. 7, 12, 13, and 18, T. 1 N., Rs. 10 and 11 W., and the original northeast corner of Sec. 1, T. 2 N., R. 11 W., and at record distance west of the original corner for Secs. 5, 6, 31, and 32, Ts. 1 and 2 N., R. 9 W. Corners on the west boundary of T. 2 N., R. 10 W. will be set at proportionate distances, those referring to R. 11 W. at 40 and 80 chains from the southeast corner of T. 2 N., R. 11 W. The north boundary of the township will be restored by single proportion between known extant corners, and the corners thereon marked to refer to sections in T. 3 N. only. Original corners upon the east boundary of R. 12 W. will be marked to refer to that range only—the remainder of this line, from the present quarter-section corner for Secs. 7 and 12 will be projected south, establishing corners thereon at record distances to and including the quarter-section corner for Sec. 25, thence south to an intersection with the south boundary of the township, where a corner for T. 2 N., R. 11 W. only will be established. The south boundary of the township will be projected west, setting corners at record distances of 80.18 for sections in both townships to and including the corner for Secs. 5, 6, 31, and 32, thence west establishing the quarter-section corner for Sec. 31 only at 40 chains to the point of intersection with the west boundary projected south. Corners on the west boundary thus established will be placed at 40 and 80 chains in latitude from the southwest corner of Sec. 31.

Subdivisional surveys will proceed regularly throughout the township, closing corners to be established upon intersection with the north boundary. Quarter-

section corners will be established midway between closing corners save on the north boundary of Sec. 6, which will be placed 40 chains west.

By the resurvey it is found that the Friel survey of the S. ½ S. ½ Sec. 16 is approximately half a mile south and more than a quarter of a mile west of the true position of the S. ½ S. ½ Sec. 16 as determined by reference to the corners of the original survey.

In dismissing Beard's protest the Commissioner of the General Land Office stated:

> It appears that the Friel survey is based solely upon a single item of topography, the west fork of San Gabriel River and its tributaries, without regard to the present existing corners of the original survey of the township and without regard to other items of topography equally as prominent and equally as permanent as the west fork of the San Gabriel River. It is also apparent that the positions of the items of topography noted in the field notes of the original surveys and shown upon the original plats of T. 2 N., R. 11 W., are generally so erroneous with relation to each other and to existing corners of the original survey as to preclude the satisfactory identification of the boundaries of any section or legal subdivision in the township by reference to topography alone.
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> For example, if the Friel survey of the S. ½ S. ½ Sec. 16 based solely upon the reported position of the west fork of the San Gabriel River is competent, the location of the boundaries of Sec. 33 by reference in departure to the prominent ridge (of which Mount Wilson is the highest point) shown upon the original plat to lie in a general north and south direction through Secs. 20, 29, and 32, and by reference in latitude to the equally prominent and well-defined divide between the San Gabriel River and Santa Anita Creek is equally acceptable. This divide is shown by the returns of the original survey of T. 2 N., R. 11 W., to have been crossed on the west boundary of Sec. 33 at a point approximately a quarter of a mile south of the northwest corner of the section. In the returns of the original survey of the east boundary of Sec. 33 the divide is reported as being nearly a half a mile south of the northeast corner of Sec. 33.
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> By the present resurvey it has been found that in the area in question the divide between the west fork of the San Gabriel River and Santa Anita Creek is approximately one mile north of its reported position and that the west fork of the San Gabriel River is approximately one-half mile south of its reported position, the distance from the divide to the river being in fact approximately one mile instead of approximately 2½ miles, as shown upon the plat of the original survey.
>
> If the Friel location of the S. ½ S. ½ Sec. 16, were permitted to stand and Sec. 33 were located by reference to topographic features as above outlined, all of Secs. 21 and 28, each of which is shown upon the original plat as being one mile square and containing 640 acres, would be eliminated except as to a strip of land approximately a half a mile wide from north to south and containing approximately 320 acres. Obviously this office can not sanction any resurvey procedure which would result in such an incongruity, nor can it recognize claims to land located by such procedure as bona fide rights subject to protection as such.

Looking to the purpose to be accomplished by the resurvey, undertaken as an administrative measure at the request of the Department of Agriculture, it seems apparent that no procedure short of a retracement and reestablishment of the lines of the original survey as

shown on the plats approved April 3, 1876, and September 15, 1884, in their true original positions, according to the best available evidence of the position of the original corners, would give the needed information.

In the absence of original corners to define the legal subdivision included in any claim, the question arose as to the manner in which this could be consistently and legally accomplished. As in cases of similar nature, where the corners of the original survey are missing, the General Land Office followed the authority and direction contained in the act of March 3, 1909 (35 Stat. 845), providing for the necessary resurvey of public lands. The method for the making of these necessary resurveys is defined by said act—" under the rectangular system now provided by law." The regulations issued under said act, contained in Circular No. 520 (45 L. D. 603), are based upon the assumption that the township is to be considered as the unit for resurvey.

Experience has shown that the purpose to be served by resurveys of public lands can not, as a general rule, be properly accomplished by any other process than that which will lay, as the foundation therefor, the same character of control as that laid in the original survey, viz, the township boundaries defining an area six miles square, into which there are to be subdivided thirty-six sections, in rectangular form, each containing, as nearly as may be, 640 acres. This was the fundamental ordinance adopted by the Continental Congress on May 20, 1785, and has since been followed in surveying the public lands.

In the instant case this purpose was followed—*first*, by the definition of the exterior boundaries of the township, not with reference to any particular tract therein but with relation to the township as a whole, whereby was established the same character of foundation upon which the original survey of the township was based; *second*, upon this foundation, following the approved methods of dependent resurvey, all necessary lines for the fixation of the interior corners were determined in their proper relation to the corners on the exterior boundaries, and thus the corners necessary for the identification of the lands in Secs. 16, 20, 21, 29, 30, 31, and 32 were established with data developed for a like determination of the position of all the other corners in the township necessary to define not only one but any tract of land described by reference thereto. Thus, there was provided, in orderly steps, the means by which any tract of public lands in the township might be identified by the same method by which such lands could have been defined if the corners of the original survey had not been found wanting. By the resurvey there has been reestablished the same character of relationship between the sections of the township that existed in the original survey, and the

means to be adopted for the identification of any land in the township, by relation to its description, have been supplied. These are, primarily, the corners of the public-land survey, to which the attention of one seeking to identify any tract of land in a township is necessarily directed. In the instant case, inquiry was directed toward the identification of the public lands occupied by the Forest Service as a ranger station, alleged to have been established many years ago at the junction of the west fork of the San Gabriel River and what is known as Short Cut Canyon. By the resurvey of the public lands in the township, built up in the manner provided by the act of March 3, 1909, *supra*—"under the rectangular system now provided by law"—the location of the topographic features by relation to which the ranger station was established—at the junction of Short Cut Canyon with the San Gabriel River—were developed as lying in the NE. ¼ Sec. 20, which land is shown by the records to be public lands, and therefore subject to administrative control by the Forest Service.

The west fork of the San Gabriel River is shown to enter the township on the west boundary of Sec. 18, to flow southeasterly into and through Secs. 19, 20, 21, 22, 23, and 24, and to pass out of the township about one mile southerly of the location of its entrance. Thus there has been developed the fact that the San Gabriel River is found at no point to invade Sec. 16, but that its course lies generally about one-half mile south of the southern boundary of Sec. 16, crossing Sec. 21 from west to east.

The identification of the S. ½ S. ½ Sec. 16 is rendered certain by the evidence established in the resurvey of the position of the reestablished corners of the public survey with such certainty that there can not be any reasonable doubt as to its proper location. Sec. 16 is shown in its proper relation to the adjoining sections, and the rights thereto acquired by the State are referable to the lands shown on the plat of resurvey. There can be no uncertainty as to the identification of these lands. They occupy their normal relation to the remainder of the township, and no valid rights have been impaired by the resurvey.

It follows that the rights of the transferee of the State are referable to the lands in Sec. 16, lying north of Sec. 21, and with relation to the corners of said Sec. 16; that the attempt on the part of Surveyor Friel to identify the S. ½ S. ½ Sec. 16 failed of its purpose, and departed widely from the legal manner of defining the boundaries of the section. These boundaries were not established by reference to items of topography. The latter were noted as incidental in their relation to the lines of the public survey, and performed no function in the establishment of the position of the corners thereof. To attempt to locate legal subdivisions by reference to items of topog-

raphy in the subdivision of the public lands is to reverse the regular procedure and to clothe these items with an importance to which they are not entitled and which they did not possess at any stage of the proceedings. To recognize them as of major importance in the definition of the public-land surveys would be productive of results repugnant to the whole system of rectangularity—the undeniable and fundamental principle governing the structure.

Counsel for Beard relied on, and quoted at length from the decision of the United States Circuit Court of Appeals in *Kirwan* v. *Murphy* (109 Fed. 354), overlooking the fact that said decision had been reversed by the Supreme Court of the United States (189 U. S. 35), which held (p. 54):

> The administration of the public lands is vested in the land department, and its power in that regard can not be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. * * * The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the Government, and the Land Department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction can not be questioned by the courts before it has taken final action.

The Land Department has not issued a patent for any portion of said Sec. 16, which was granted by Congress to the State of California for the support of its common schools; and when Beard, in 1922, purchased the S. ½ S. ½ Sec. 16 from the State's grantee, the tract shown by the Friel survey was occupied by the Forest Service as a ranger station.

The protestant has not alleged that the plat of resurvey is erroneous, but he contends that the Land Department was without authority to make the resurvey. The contention is without merit.

The decision appealed from is

Affirmed.

J. M. BEARD (ON REHEARING)

Decided July 25, 1928

SURVEY—RESURVEY—PUBLIC LANDS.

In the resurvey of public lands two distinct types have been adopted, namely the dependent resurvey, and the independent resurvey, each of which is dissimilar from the other.

SURVEY—RESURVEY—BOUNDARIES.

A dependent resurvey consists of a retracement and reestablishment of the lines of the original survey in their true original positions, according to the best available evidence of the positions of the original corners, without reference to tract segregations of alienated lands entered or patented by legal subdivisions of the original survey.

SURVEY—RESURVEY.

In legal contemplation, and in fact, lands contained in a certain section of the original survey and those contained in the corresponding section of a dependent resurvey are identical.

SURVEY—RESURVEY—BOUNDARIES.

An independent resurvey consists of the running of what are in fact new section or township lines without reference to the corners of the original survey and of the designating by metes and bounds of the lands entered or patented by legal subdivisions of the sections of the original survey which are not identical with the corresponding legal subdivisions of the independent survey.

SURVEY—RESURVEY—BOUNDARIES.

The fact that in the resurvey of a township the boundaries of all the original sections were not remonumented in nowise affects the position of the section lines which were resurveyed and the corners which were reestablished.

SURVEY—RESURVEY—NATURAL MONUMENTS—BOUNDARIES.

Items of topography in the interior of sections are based upon estimates by the surveyor rather than upon actual measurements, and represent only an approximation of the actual positions of natural monuments and are not to prevail over courses and distances.

SURVEY—RESURVEY—BOUNDARIES—PATENT.

In a township where the interior section corner monuments can not be found the proper method of determining what land passed from the Government by patent or grant is by proportionate measurement between existing and properly restored corners on the township boundaries without regard to incidental items of topography.

SURVEY—RESURVEY—PATENT.

Where lands in a grant or patent from the United States are described in terms of the rectangular surveying system the only right, title, or interest acquired thereby is that defined by the corners of the original Government survey upon which the description is based.

SURVEY—RESURVEY—BONA FIDES.

In the execution of resurveys the Government is bound to protect only *bona fide* rights acquired through the exercise of good faith, and a claimant who fails to exercise that degree of good faith cognizable in law or equity is not entitled to protection.

COURT DECISION CITED AND APPLIED:

Case of *Security Land and Exploration Company* v. *Burns* (193 U. S. 167), cited and applied.

FINNEY, *First Assistant Secretary*:

A motion for rehearing has been filed on behalf of J. M. Beard in the matter of his protest against the acceptance of the dependent resurvey of T. 2 N., R. 11 W., S. B. M., California, wherein the department, by decision of May 17, 1928 (52 L. D. 444), affirmed a decision of the Commissioner of the General Land Office dated December 14, 1927, dismissing the protest.

Counsel contends that the decision complained of was based on a misapprehension as to the facts and on errors of law.

It appears that in 1905 A. G. Strain purchased the S. ½ S. ½ Sec. 16, said township, from the State of California, and that on January 20, 1922, Strain transferred the said tract to Beard, who, on June 4, 1925, instituted a suit in ejectment in the Superior Court of Los Angeles County, California, against George H. Cecil, a forest supervisor, who was occupying the West Fork Ranger Station, alleging that the tract occupied as a ranger station is the S. ½ S. ½ said Sec. 16. In support of the suit a map prepared by LeGrand Friel was filed, and the court held that Friel had correctly relocated the S. ½ S. ½ said Sec. 16, and that Beard was entitled to judgment against defendant for possession of the tract.

The plat of dependent resurvey shows the tract surveyed by Friel as located approximately half a mile south and more than a quarter of a mile west of the true position of the S. ½ S. ½ Sec. 16 as determined by reference to the corner of the original survey.

There appears to be a misapprehension on the part of counsel as to the nomenclature commonly used by the General Land Office in connection with resurveys. There are in general two types of resurveys used: The dependent resurvey and the independent resurvey. The procedure followed in the execution of the two types of resurveys is entirely dissimilar, and it appears that counsel has confused the dependent resurvey procedure adopted in the reestablishment of the lost section corners in T. 2 N., R. 11 W., S. B. M., with the independent resurvey procedure used in the resurvey of the township under consideration in the case of *Cox* v. *Hart* (260 U. S. 427).

A dependent resurvey consists of a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. A statement to this effect appears in the form of a marginal notation on the plats of all dependent resurveys recently executed by the General Land Office. No tract segregations of alienated lands entered or patented by legal subdivisions of the original survey are made in a dependently resurveyed township, for the reason that the section lines and lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of the lands patented on the basis of the plat of the original survey. In the vast majority of cases no new areas are shown on the plat of the dependently resurveyed sections, or subdivisions of sections, and where disposals are afterwards made in a dependently resurveyed township reference is made to the plat of the original survey for areas and more detailed descriptions of the lands resurveyed. In legal contemplation, and in fact, the lands contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical.

An independent resurvey is, as the name implies, a running of what are in fact new section or township lines independent of and without reference to the corners of the original survey. In an independent resurvey it is, of course, necessary to preserve the boundaries of the lands patented by legal subdivisions of the sections of the original survey, which are not identical with the corresponding legal subdivisions of the sections of the independent resurvey, and this is accomplished by surveying out by metes and bounds and designating as tracts the lands entered or patented on the basis of the original survey. These tracts represent the position and form of the lands alienated on the basis of the original survey, located on the ground according to the best available evidence of their true original positions.

If the General Land Office were to make a tract survey of the lands of the appellant, the boundaries of that tract would be coincident and identical with the boundaries of the S. ½ S. ½ of the dependently resurveyed Sec. 16, as shown upon the plat of T. 2 N., R. 11 W., S. B. M., accepted December 14, 1927, and would not be in the position indicated by the private survey executed for the appellant by LeGrand Friel, licensed surveyor of California. Having by the dependent resurvey identified the position of the S. ½ S. ½ of original Sec. 16 according to its true original position, as shown by the corners of the original survey, it makes no difference whether the lands thus identified are designated in the returns of the resurvey as legal subdivisions, by a tract number, or what not. Their position on the earth's surface is the same, and a second identification of the S. ½ S. ½ Sec. 16 as a tract would not change its position with regard to the corners of the original survey in the least.

The impression also seems to exist that inasmuch as all of the interior section and quarter-section corners of the township were not remonumented, the retracement of subdivisional lines in the township was confined to the boundaries of those sections shown as resurveyed upon the plat accepted December 14, 1927, and that no search was made for corners of the original survey throughout the remainder of the township. This impression is erroneous. Every subdivisional section line in the township was retraced in connection with the resurvey, but after careful and diligent search no original corners in the interior of the township could be found, and the reestablished subdivisional section and quarter-section corners are, therefore, necessarily referred to and based upon the identified or properly restored original corners on the boundaries of the township. Inasmuch as the lands in the sections not shown as resurveyed upon the plat accepted December 14, 1927, are all reserved public lands within the Angeles National Forest, and are not subject to disposal, no present necessity

for the remonumenting of the corners on the boundaries of the sections other than those shown as resurveyed upon the plat exists. The fact that the boundaries of all of the original sections in the township were not remonumented in no wise affects the position of the section lines which were resurveyed and the corners which were reestablished.

Counsel contends that items of topography noted in the returns of an original survey constitute natural monuments, which, in the absence of original corners, govern the section lines and subdivision of section lines in the township. Undoubtedly this contention finds some support in the decisions of the Supreme Court of California.

An analysis of the survey question involved in the case of *Chapman* v. *Polack* (70 Cal. 487; 11 Pac. 764), one of the California decisions cited in the appeal brief, reveals the following conditions: A portion of T. 11 N., R. 9 W., M. D. M., including Sec. 13, was surveyed in 1867, the plat being approved December 2, 1867. The northwest and southwest corners of Sec. 13, as well as the quarter-section corners on the south and west boundaries thereof, were properly monumented in accordance with the provisions of the Manual of Surveying Instructions. The positions of the northeast and southeast corners of the section were fixed by witness corners thereto properly established. The quarter-section corners on the east and north boundaries of the section were not monumented, nor the points therefor fixed by witness corners. In the general description in the field notes of the survey is the following statement:

> There is a hotel for the accommodation of visitors on the south bank of the creek in the NE. ¼ Sec. 13.

There is no measured tie to this hotel of record in the field notes. Its position as shown upon the plat therefore apparently is based entirely upon its estimated position, as set forth in the general description in the field notes of the survey. In 1854 defendants located school-land warrants on the NE. ¼ Sec. 13, then unsurveyed, and subsequently received patent. The defendants acquired title in the belief that the hotel was located on the NE. ¼, but without having the subdivisional lines of the section surveyed in order to determine the exact position thereof. The grantor of the plaintiff received patent to the SE. ¼ of Sec. 13 in 1877 under the preemption laws, also without having the subdivisional lines of the section surveyed. Subsequently, the point for the quarter-section corner on the east boundary of Sec. 13, not marked in the original survey, was established by a private survey at midpoint and on a direct line between the northeast and southeast corners of the section, as fixed by the established witness corner thereto, in accordance with the provisions of the act of February 11, 1805. (2 Stat. 313; section 2396

U. S. R. S.) The east and west center line of the section then appears to have been run as a straight line between the quarter-section corner on the east boundary of the section, as thus established, and the original quarter-section corner on the west boundary of the section, as provided by the act of February 11, 1805, *supra*, and it was found that the hotel was not located in the NE. ¼ of the section as estimated by the deputy surveyor, but was actually in the SE. ¼ thereof. In rendering its decision in the case, the court held that the position of the east and west center line of Sec. 13, as thus established according to the plain provisions of law as above stated, was incompetent, and that the position of the east and west center line of the section would be governed by the position of the hotel as shown upon the plat of the original survey, and cited section 2396 of the Revised Statutes as authority for its decision. It thus appears that, in the opinion of the court, the position of the subdivisional center line of a section is to be governed not by the opposite corresponding quarter-section corners properly established in accordance with the plain provisions of the act of February 11, 1805, but in accordance with the position of an incidental item of topography shown upon the original plat, the position of which is derived by no direct measurement but is based solely upon an estimated location mentioned in the general description in the field notes of survey as a matter of information only. Needless to say, no such promiscuous survey procedure has ever been sanctioned by the Federal courts, the department, or the General Land Office.

It should be remembered that the position of items of topography in the interior of sections, as shown upon the plats of the public-land surveys, have been in the past and are in surveys executed by the cadastral engineering service at the present time, almost invariably based upon estimates by the surveyor, rather than upon actual measurements thereto. It is ordinarily only the distances at which section lines intersect various items of topography that are actually measured on the ground. The platted position of topography in the interior of sections therefore depends entirely upon the individual skill and ability of the surveyor in estimating directions and distances, and at best represents only an approximation of the actual position of the topography.

The weight to be given an item of topography noted in the field notes of an original survey, and shown upon the plat thereof, should be commensurate with the importance attached thereto in the execution of such original survey. The survey of the north half of T. 2 N., R. 11 W., S. B. M., by W. H. Norway in 1875 was executed under the provisions of the Manual of Surveying Instructions for

1855, which by the act of May 30, 1862 (12 Stat. 409), "shall be taken and deemed a part of every contract for surveying the public lands of the United States."

On page 3, under Process of Chaining, the Manual of 1855 provides:

> In measuring lines with a two-pole chain, every five chains are called "a tally" because at that distance the last of the ten tally pins with which the forward chainman set out will have been stuck. He then cries "tally," which cry is repeated by the other chainman, and each registers the distance by slipping a thimble, button, or ring of leather, or something of the kind, on a belt worn for that purpose, or by some other convenient method. The hind chainman then comes up, and having counted in the presence of his fellow the tally pins which he has taken up, so that both may be assured that none of the pins have been lost; he then takes the forward end of the chain and proceeds to set the pins. Thus the chainmen alternately change places, each setting the pins that he has taken up, so that one is forward in all the odd and the other in all the even tallies. Such procedure, it is believed, tends to insure accuracy in measurement, *facilitates the recollection of the distances to objects on the line*, and renders a mistally almost impossible.

And under "Of Field Books," on page 15, it is provided:

> The field notes afford the elements from which the plats and calculations in relation to the public surveys are made. They are the source wherefrom the description and evidence of locations and boundaries are officially delineated and set forth. They, therefore, must be a faithful, distinct, and minute record of everything officially done and observed by the surveyor and his assistants, pursuant to instructions, in relation to running, measuring, and marking lines, establishing boundary corners, &c.; and present, as far as possible, a full and complete topographical description of the country surveyed, *as to every matter of useful information, or likely to gratify public curiosity.*

Under the circumstances there appears little justification for counsel's contention that items of topography, the positions of which in the interior of sections were based solely upon an estimate or guess on the part of the surveyor, and the record distances to which on the section lines were dependent upon the "recollection of the chainmen," and which were noted as "matters of useful information or likely to gratify public curiosity," should thereafter be accorded the dignity of natural monuments to which both courses and distances must give way.

No such importance has been attached to items of topography by the General Land Office, the department, or the Federal courts. In *Galt et al.* v. *Willingham et al.* (300 Fed. 761) the United States District Court for the Southern District of Florida held (syllabus):

> A section corner as fixed by a Government surveyor being more important, and one in which he would ordinarily take more care, will prevail over minor conflicting points in the lines as fixed by him.

On appeal the decision of the district court was affirmed by the circuit court of appeals (11 Fed., 2d series, 757, 758), in which the court said:

> It is also apparent from the evidence that the government surveyor was mistaken in the call of his field notes to cross New River Sound 45 chains north on his second mile. None of the engineers was able to so run the line as to leave any considerable acreage in lot 8 or to cross the sound as called for in the original survey. However, these mistakes do not impeach the integrity of the survey as a whole. A surveyor would naturally be more careful in establishing section corners than in noting minor points, especially in territory that was difficult to survey at best, where the primary object of the survey was to ascertain the acreage of lands which the government owned.

The appellant contends that his *bona fide* rights have been impaired by the resurvey. If this contention is well founded, the resurvey is undoubtedly bad. But he did not and could not acquire *bona fide* rights in any lands except in those contained in the S. ½ S. ½ Sec. 16, T. 2 N., R. 11 W., S. B. M., in its true original position, as defined by the *corners* of the original survey. The law is well established that no right, title, or interest is acquired by grant or patent from the United States to lands described in terms of the rectangular surveying system, except in the lands described in such grant or patent as defined by the corners of the original Government survey upon which the description is based.

The lands included in the Friel identification of the S. ½ S. ½ Sec. 16 are located by reference to a single item of topography (the west fork of the San Gabriel River and its tributaries), without any reference whatsoever to extant corners of the original survey of T. 2 N., R. 11 W., S. B. M., or any original corner in any of the adjoining townships. No attempt was made by Friel to identify the S. ½ S. ½ Sec. 16 in accordance with its true original position as defined by the corners of the original survey. Had he made a *bona fide* attempt to locate the S. ½ S. ½ Sec. 16 by reference to any extant corner of the original survey of T. 2 N., R. 11 W., S. B. M., or by reference to any of several existing original corners in the adjoining townships, he would have found that the S. ½ S. ½ Sec. 16 does not and never did occupy a position in the bottom of the canyon of the San Gabriel River, but that it is located on the side of a mountain nearly a half mile north of the canyon bottom.

As above stated, the law is that the S. ½ S. ½ Sec. 16 is governed by the corners of the original survey. The position of the S. ½ S. ½ Sec. 16, or any other section or legal subdivision, is not and never was controlled or affected by the erroneous depiction of topography on the plat of the township in which the land is located.

The *bona fide* rights which the General Land Office is bound to and does protect in the execution of resurveys are those which are

acquired through the exercise of good faith. In failing to attempt to identify the S. ½ S. ½ Sec. 16 by reference to the corners, or at least by reference to some one corner of the original Government survey, the claimant failed to exercise that degree of good faith cognizable in law or equity, and has therefore no *bona fide* rights under his title to the S. ½ S. ½ Sec. 16 in the approximately 160 acres of land included in the Friel survey in the bottom of the canyon of the west fork of the San Gabriel River.

The foregoing principles are applicable to the reestablishment of the lines and corners of any original survey, the corners of which have, by the action of the elements, by accident, or otherwise, become lost or obliterated. As a matter of fact, the reported surveys of the subdivisional lines in the north half of T. 2 N., R. 11 W., S. B. M., by Deputy Surveyor Norway in 1875, and of the south boundary and subdivisional lines of the south half of the township by Deputy Surveyor Pearson in 1884, are purely fraudulent and entirely fictitious.

In the report of the field investigation, dated October 7, 1926, the investigating surveyor states:

> From a consideration of Norway's topographical data it is readily seen that his returns were based upon a very superficial investigation of the territory involved, the major items varying in position from moderate amounts to, in the greatest instance, a mile and a quarter * * * The Pearson returns are as flagrantly erroneous as the Norway record. His greatest departure from fact, save in the noted ties to Norway subdivisional surveys, is in the location of the dividing ridge between the San Gabriel and Santa Anita Canyons. * * * While the topographic calls are in many instances very explicit, one can not reconcile the returns in any instance to the actual features encountered.
>
> Previous search for evidence of original surveys in this township by the U. S. Forest Service conducted intermittently since the designation of this area as a national forest has failed to reveal any trace of the subdivisional survey. None of the Pearson work has ever been found, either boundary or subdivision.

While the topography of the entire township is not shown upon the resurvey plat, the topographic maps of the area published by the Geological Survey bear out the statements of the investigating surveyor. The creek (indicated on the resurvey township plat as flowing in what is designated as Short Cut Canyon, and designated upon the Geological Survey topographic maps as Trail Fork, San Gabriel River), which the appellant contends is the creek shown upon the township plat approved April 3, 1876, as the branch of the west fork of the San Gabriel River flowing southeasterly through Sec. 17 and joining the west fork of the San Gabriel River in the SW. ¼ Sec. 16, has a general course of slightly west of south for nearly a mile above its confluence with the river, instead of a southeasterly course as shown upon the original township plat.

The west fork of the San Gabriel River is indicated on the original plat as flowing in a direction slightly north of east through Sec. 16. Through what the appellant contends is the S. ½ S. ½ Sec. 16, the river actually flows in a direction nearly 20° south of east. Upon the original township plat the west fork of the San Gabriel River in Sec. 16 is shown to be approximately a mile and a quarter south of the divide between the Tujunga and San Gabriel. As a matter of fact, the divide is more than two miles north of the river.

On the original plat of the south half of the township the divide between the San Gabriel and the Santa Anita is shown as approximately 2½ miles south of the west fork of the San Gabriel River through Sec. 16. This divide is actually only one mile south of the San Gabriel in the area in question.

Throughout the township generally the topography indicated on the original township plat is equally as erroneous as in the vicinity of original Sec. 16.

The fact that the original surveys of the subdivisional section lines of the township were fraudulent does not render inappropriate the reestablishment of original corners (or establishment of corners reported to have been set, for in fact no original corners were established in the interior of the township), by proportionate measurement based upon the recorded courses and distances shown upon the original township plats.

The proper method of determining what land in the township did pass from the Government by patent or grant is by determining, by proportionate measurement between the identified original or restored corners on the township boundaries, using the recorded bearings and lengths of the subdivisional lines of the township as the basis of proportion, the points which the interior section lines and corners would have occupied had such lines and corners in fact been surveyed and monumented as reported by Deputy Surveyors Norway and Pearson.

The appellant appears to have encountered great difficulty in connection with the weight to be given the decision of *Kirwan* v. *Murphy* (109 Fed. 354). Whatever may have been the technical grounds for the reversal of *Kirwan* v. *Murphy* by the Supreme Court (189 U. S. 35), the opinion of the lower court in the case was completely overruled by the Supreme Court in *Security Land and Exploration Company* v. *Burns* (193 U. S. 167), in which the question before the court was identical with that in the case of *Kirwan* v. *Murphy*, which involved title to other portions of the same belt of land lying between Cedar Island Lake and its meander line.

The survey questions involved in *Security Land and Exploration Company* v. *Burns*, *supra*, and those involved in the appeal of Beard are nearly identical in that, in the former case:

(*a*) The reported original survey of the subdivisional lines of the township involved was fictitious and fraudulent. Only one original subdivisional section corner in the township was ever found.

(*b*) The depiction of topography on the township plat was grossly inaccurate.

(*c*) The plaintiff contended that a so-called natural monument (the shore of a lake) should control both course and distance.

(*d*) The value of the land involved was to a great extent dependent upon its position with relation to a body of water.

(*e*) The methods employed in the resurvey of T. 57 N., R. 17 W., was that of proportionate measurement between existing or properly restored corners on the township boundaries without regard to incidental items of topography.

While in the case at hand:

(*a*) The reported original surveys of the subdivisional section lines of the township are entirely fraudulent and fictitious. No interior section corners whatsoever can be found.

(*b*) The depiction of topography on the township plat is grossly inaccurate.

(*c*) The plaintiff contends that an item of topography (in this instance a creek and its tributaries) constitutes a natural monument which should control both course and distance.

(*d*) The value of the land involved appears to depend to a great extent on the question as to whether or not it is located in the bottom of the canyon of the west fork of the San Gabriel River.

(*e*) The method employed in the resurvey of the township was that of proportionate measurement between existing original or properly restored corners on the boundaries of the township without regard to incidental items of topography.

To quote those portions of the decision of *Security Land and Exploration Company* v. *Burns*, *supra*, applicable to the present case, would mean to quote the major portion of the twenty-two pages of the reported decision. The decision leaves no possible doubt in the present case as to the authority of the Government to make the resurvey, the sufficiency and appropriateness of the methods employed in making the resurvey, the rights of the protestant under his title to the S. ½ S. ½ Sec. 16, and the weight to be given to the indicated positions of items of topography erroneously depicted on the original township plats of T. 2 N., R. 11 W., S. B. M.

With reference to counsel's inquiry in the motion for rehearing as to whether a call for the Mississippi River would be ignored, it may be stated that under authority of *Security Land and Exploration Company* v. *Burns*, *supra*, *White et al.* v. *Luning* (93 U. S. 514), and numerous other decisions of the Supreme Court of the United States involving the survey of lands erroneously omitted from original surveys, a call for the Mississippi River (or for that matter a call for the Pacific Ocean) would be ignored if, due to gross error or fraud in the execution of the original survey, its platted position with reference to the lines of the public-land surveys were found to be widely at variance with its actual position with reference to those lines as de-

fined by the identified or properly restored corners of the original survey. This is the underlying principle upon which every "omitted land" survey is founded. Public lands described by the rectangular surveying system are defined by the lines and corners of such survey; not by their erroneously indicated positions with reference to the Mississippi River, the Pacific Ocean, the west fork of the San Gabriel River, or any other item of topography.

No reason appears why the decision of May 17, 1928, should not be adhered to. The motion for rehearing is therefore denied.

Motion denied.

CHAFFIN v. BOHLKE

Decided July 31, 1928

CONTEST—CONTESTANT—PREFERENCE RIGHT—LAND DEPARTMENT—STOCK-RAISING HOMESTEAD.

A contestant does not gain a preference right where the entry under attack is canceled not as the result of the contest but upon adverse proceedings previously instituted by the Land Department upon a charge substantially the same as that upon which the contest was predicated.

FINNEY, *First Assistant Secretary:*

On November 10, 1925, Michael P. Bohlke made original stock-raising homestead entry, Phoenix 057353, for the N. ½ S. ½ Sec. 10, and the S. ½ N. ½ and S. ½ Sec. 11, T. 14 S., R. 15 E., G. & S. R. M., Arizona.

On July 26, 1927, pursuant to the recommendation of an inspector, adverse proceedings against the entry were ordered by the General Land Office, upon the charge that the entryman had not established and maintained residence on the land.

On November 23, 1927, the register of the district land office transmitted the papers in the case to the General Land Office, including an unclaimed registered letter containing a notice of the charge as above, directed to the entryman at his post-office address of record. The register recommended that the entry be canceled because the entryman had failed to deny the charge.

On January 13, 1928, Walter W. Chaffin filed a contest against the entry charging that Bohlke had abandoned his entry for over six months, and that he had never built a house or placed any improvements upon the land. The contest was suspended by the register of the district land office because of the adverse proceedings already instituted on behalf of the Government.

On February 3, 1928, the Commissioner of the General Land Office canceled Bohlke's entry and closed the case. This action was taken pursuant to the adverse proceedings instituted on behalf of the

Government. The Commissioner held that the entryman's default after proper notice was an admission of the truth of the charge against him.

On February 9, 1928, the register notified Chaffin that the Commissioner had canceled Bohlke's entry, and that his, Chaffin's, contest accordingly was dismissed, and that he had gained no preference right of entry. Chaffin appealed to the General Land Office.

In a decision dated April 20, 1928, the Commissioner stated that Bohlke's entry had been reported for cancellation 1 month and 20 days before Chaffin's contest was filed, and that the matters alleged in his contest affidavit were well known to the General Land Office when the contest was filed, as the contestant's charge was substantially the same as that embodied in the adverse proceedings instituted by the Land Department. In view of these facts the Commissioner approved the register's action, dismissed Chaffin's contest, and denied him a preference right of entry.

Chaffin has appealed to the department. He contends that the Commissioner's action is contrary to the action taken by the department in another case which involved lands in the Phoenix, Arizona, land district.

The department finds that the Commissioner's action was correct. A preference right of entry is given only in case a contestant has "procured the cancellation" of an entry under contest. Act of July 26, 1892 (27 Stat. 270). In the instant case it is plain that Chaffin did not procure the cancellation of Bohlke's entry. When the entry was cancelled there was nothing left for Chaffin to contest, and his contest against the entry properly was dismissed.

The decision appealed from is

Affirmed.

FEES REQUIRED WITH PERMIT APPLICATIONS—SECTION 31, CIRCULAR NO. 672, CONSTRUED—CIRCULAR NO. 1115, AMENDED

INSTRUCTIONS

[Circular No. 1158]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 1, 1928.

REGISTERS, UNITED STATES LAND OFFICES:

There appears to be a lack of uniformity in the action of the different land offices in the matter of fees for oil and gas permit applications. Some offices collect $32 and no more as the maximum amount for lands included in one oil and gas application, while others are collecting $2 additional for any excess acreage above 2,560 acres.

As a matter of equitable administration, permits are issued for areas exceeding 2,560 acres by invoking the rule of approximation; and while section 31 of Circular No. 672 (47 L. D. 437) provides that the filing fee on an application for permit shall be "$2 for each 160 acres or fraction thereof," that provision is held to apply only to cases involving less than 2,560 acres; and as the law fixes the limit of 2,560 acres in any one case for which a permit may be issued, the maximum fee of $32 only should be charged in cases where the maximum acreage is exceeded but the rule of approximation is not violated.

Hereafter an application for oil and gas prospecting permit will not effect a segregation of the land applied for if not accompanied by at least the minimum fee of $10. If less than such amount is tendered, you will give the application current serial number and allow the applicant thirty days from notice within which to pay the required amount. Should any application for the same land be received in the meantime, accompanied by at least the minimum fee, the latter application will be given priority over the other.[1]

The above rule as to segregation will also hereafter be applied to agricultural and other kinds of applications or selections where a minimum fee or minimum payment is specified. The minimum fees or payments necessary to gain segregative effect for such other kinds of applications or selections shall be those which are prescribed by existing regulations in connection with the particular application or selection that may be involved.

Provided, however, That where the laws or regulations so plainly express the full amount of fees or other payments required to be made at the time of filing that no mistaken interpretation thereof could reasonably be made, the amounts tendered by the conflicting applicants when filing their applications may be an element for consideration in the adjudication of their respective priorities, notwithstanding a tender of the minimum fee has been made by all of them.

The minimum fee, as in the case of all other fees, must be in the form prescribed by paragraph 72, Circular No. 616 (46 L. D. 513), approved August 9, 1918, and as amended by the regulations contained in Circular No. 1008 of May 20, 1925 (51 L. D. 148).

In the matter of oil and gas prospecting permit applications filed upon the effective date of cancellation of an oil and gas prospecting permit, the drawing-service fee of $10 prescribed by Circular No. 1115 (52 L. D. 59), approved March 17, 1927, must accompany the application, together with the proper fee required by paragraph 31 (*a*) of Circular No. 672. However, instead of immediately earning the service fee you will carry it in the unearned account until 10 o'clock

[1] See decision in the matter of *Wakefield* v. *Russell*, *ante*, p. 409.—Ed.

a. m., and should no other application be filed, thereby obviating the necessity of a drawing, you will return such fee to the applicant by your official check. If more than one application is filed, thus requiring a drawing, the service fee will be earned as instructed by Circular No. 1115. Where only one application is filed, the words "neither returnable nor repayable" will be lined out of the notation required by Circular No. 1115 to be made upon such applications.

All existing regulations not in harmony herewith are modified accordingly.

THOS. C. HAVELL,
Acting Commissioner.

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

CLAUDE M. ALBRECHT

Decided August 8, 1928

REPAYMENT — DESERT LAND — FINAL PROOF — RELINQUISHMENT — STATUTE OF LIMITATION.

Where a desert-land entryman withdrew his final proof, but permitted the money paid for the land to remain in the possession of the United States to his credit pending the submission of new proof, and thereafter relinquished his entry before the expiration of the period of extension granted for that purpose, the limitation fixed by section 1 of the act of December 11, 1919, began to run from the date of the relinquishment, not from the date when the proof was withdrawn.

FINNEY, *First Assistant Secretary:*

Claude M. Albrecht has appealed from the decision of the Commissioner of the General Land Office dated April 5, 1928, denying his request for repayment of money paid by him at the time of submitting final proof upon his desert-land entry, Salt Lake City 010801, embracing 120 acres in Sec. 10, T. 27 S., R. 3 E., S. L. M., Utah.

The entry was allowed on December 16, 1912. Final proof was submitted on February 20, 1918. On February 23, 1918, Albrecht paid $120 as the purchase price of the land, evidenced by receiver's receipt No. 2212182.

The proof was suspended by the register and receiver because a water right was not shown. On March 11, 1918, Albrecht asked additional time within which to supply the evidence required by the local officers. On March 13, 1918, the register granted his request and suspended the proof for 60 days.

On June 25, 1918, Albrecht addressed a letter to the district land office in which he stated that the Freemont Irrigation Company, from which he was to obtain his water rights, was unable at that time to issue a certificate evidencing such rights, as their Forsyth Reservoir was then being completed. He stated, however, that he had over $1,000 worth of stock in the enterprise which would insure him sufficient water for the purposes of irrigation. In the last paragraph of his letter he said: "I will not be able to make the proof on the water but will ask that the time be extended 12 months, so the irrigation company can issue a certificate on that water." A few days prior to the date of this letter Albrecht had filed an affidavit of the secretary of the Freemont Irrigation Company setting forth that the company's reservoir was not completed and approved by the State engineer and that for that reason Albrecht could not have the water right represented by his stock apportioned to him. Pursuant to this request, apparently, the General Land Office extended the time for making final proof to December 16, 1920.

The register and receiver considered Albrecht's letter of June 25, 1918, as a withdrawal of his proof, and closed the case on June 29, 1918, so far as the proof was concerned.

Thereafter successive extensions of time for submitting proof were granted to Albrecht, the last one being to December 16, 1928.

On January 14, 1927, Albrecht filed a paper in the district land office in which he stated that because of the breaking of the reservoirs intended to supply water for his entry, and the washing away of ditches constructed for the same purpose, he was unable to obtain sufficient water, and that he desired to relinquish his entry. The register, in reply, forwarded a blank form of relinquishment to the entryman, but advised him that he still had until December 16, 1928, within which to submit proof.

On December 24, 1927, Albrecht relinquished his entry, and the relinquishment was received in the district land office on January 29 following.

On March 10, 1928, an application for repayment was filed by Albrecht in the district land office, in which he requested repayment of the amount evidenced by receiver's receipt No. 2212182, which, as already stated, covered the $120 paid by him at the time of submitting proof. The application was transmitted to the General Land Office with the favorable recommendation of the register.

The Commissioner in his decision of April 5, 1928, denied the application for repayment because it had not been filed within two years from the date of the withdrawal of Albrecht's proof, pursuant to his letter of June 25, 1918. The Commissioner cited the act of December 11, 1919 (41 Stat. 366), as authority for his adverse action. Albrecht, as stated, has appealed to the department.

The department does not agree with the Commissioner's conclusion. When Albrecht's final proof was withdrawn, the money paid by him as the purchase price of the land was permitted to remain in the possession of the United States, to his credit, as a prepayment incident to the new proof which both he and the officials of the Land Department then understood was to be submitted in the future. At all events this is the proper construction to be placed upon the transaction, whether or not there was any express agreement between Albrecht and the officials of the Land Department with respect to the matter.

Albrecht's right to submit proof never lapsed, but was extended from time to time by the General Land Office, and at the date of his relinquishment his right in that respect still was good for some time to come. It hardly will be said that had Albrecht submitted satisfactory proof within the additional time granted to him, the Land Department would have refused to issue a patent because the purchase price of the land had been paid as far back as February 23, 1918, and because the proof in connection with which the payment was made had been withdrawn more than two years prior to the submission of the supplementary proof. In the opinion of the department, as Albrecht always was entitled to have the money paid by him applied to the purchase price of the land, he also was entitled to it for every other legitimate purpose, including its repayment to him.

This is not a case coming within the proviso to section 1 of the act of December 11, 1919, *supra*, which requires that a request for the repayment of purchase money shall be made within two years from the rejection of proof. In the opinion of the department the period of limitation fixed by that act did not begin to run against Albrecht until the date of the relinquishment of his entry.

The decision appealed from is

Reversed.

FRED B. ORTMAN

Decided August 10, 1928

MINING CLAIM—LODE CLAIM—PLACER CLAIM—PLAT—NOTICE—EVIDENCE.

The fact that a mining claim was located in the shape and had the usual dimensions of a lode and that the mineral surveyor characterized it as a lode on an official plat is not conclusive that it was the intention to make a lode location where the propriety of locating the land as placer ground is not questioned and the recorded notice of location described it as a placer claim.

MINING CLAIM—LODE CLAIM—PLACER CLAIM—AMENDMENT.

For the purpose of curing imperfections in the original location, correcting errors, or supplying omissions, the same latitude of amendment should be allowed in the case of placers as in lodes.

MINING CLAIM—PLACER CLAIM—AMENDMENT.

A placer location which was defective and not subject to entry and patent in its original form because of nonconformity with the United States system of public-land surveys as required by section 2331, Revised Statutes, is not void, but the defect, in the absence of an adverse claim to the added land, is curable either by suitable amendment or by relocation, provided that the acreage limitation of the statute be observed.

MINING CLAIM—IMPROVEMENTS—ANNUAL ASSESSMENT WORK—EXPENDITURES—TUNNEL—GROUP DEVELOPMENT.

A tunnel constructed for the purpose of developing and facilitating the extraction of the sole deposit covered by a single mining location which due to erroneous or faulty description is subsequently amended or relocated and included in two claims may be accepted as a common improvement and its cost accredited to the development of both claims.

FINNEY, *First Assistant Secretary:*

December 20, 1927, Fred B. Ortman made mineral entry, Sacramento 022011, for the White Clay Deposit No. 1 placer claim embracing the NW. ¼ NW. ¼ SW. ¼ Sec. 29, E. ½ SE. ¼ NE. ¼ and NE. ¼ NE. ¼ SE. ¼ Sec. 30, T. 29 S., R. 38 E., M. D. M. On March 29, 1921, a location was made styled the White Clay Deposit No. 1 placer mining claim by Alex A. Moross and Frank H. Forbis as *placer-mining grounds.* The location is described by metes and bounds and, according to the description thereof in the location notice and upon a plat of a mineral survey filed with the application, was in the shape of a lode location with end lines not parallel, 1,500 feet long and 600 feet wide, running northwesterly and southeasterly and overlapping parts of each of the above-described tracts and outside land, then all surveyed.

On November 23, 1921, the locators conveyed the claim to the Los Angeles Press Brick Company. That company on December 7, 1926, located the said NW. ¼ NW. ¼ SW. ¼ Sec. 29 and NE. ¼ NE. ¼ SE. ¼ Sec. 30 as the White Clay Deposit No. 2 placer. On April 20, 1927, the said company and George H. Morton and George J. Arblaster made an amended location of said White Clay Deposit No. 1 placer describing it as E. ½ SE. ¼ NE. ¼ of said Sec. 30 and on the same day the parties last named filed another amended location notice of said White Clay Deposit No. 1 placer, including all the tracts first herein described.

By decision of April 25, 1926, the Commissioner of the General Land Office held that the original location made upon surveyed land did not conform to legal subdivisions and was evidently intended as a lode location, and no valid location of the White Clay Deposit No. 1 was made until April 20, 1927. That the consolidation of April 20, 1927 (meaning thereby the inclusion of the lands in claims Nos. 1 and 2 in the last-amended location) is invalid in accordance with the decision in *Garden Gulch Bar Placer* (38 L. D. 28), which held that

"The owner of two or more contiguous placer-mining locations can not under the guise of amending one of them substitute therefor a single location," therefore the White Clay Deposits Nos. 1 and 2 placers must each be considered as separate and distinct claims; that a tunnel 144 feet long situate in the southeastern portion of the original location and almost entirely in the NE. ¼ NE. ¼ SE. ¼ and a small portion in NW. ¼ SW. ¼ SW. ¼, and within the White Clay Deposit No. 2 was built prior to the location of the said claim and prior to valid location of the White Clay Deposit No. 1 and could not be applied to either as an applicable improvement. A further reason being given for the inapplicability of the tunnel improvement to the No. 1 claim being that it was not within the claim. In consequence of these conclusions the Commissioner required applicants to show that since the locations of December 7, 1926, and April 20, 1927, $500 was expended upon or for the benefit of each of the claims or to show cause why the entry should not be canceled.

The applicant has appealed, and filed a supplemental showing in the form of corroborated affidavits. Among other things, it is stated that the original location conforms very closely with the outlines of the clay deposit in the Red Rock mining district and can not be made to conform to the public surveys so far as the northerly and southerly lines are concerned without the inclusion of large areas nonmineral in character; that applicant and his grantors have expended more than $1,000 for improvements and have erected a tunnel more than 144 feet long which will be used to mine clay in the southern portion of the White Clay Deposit No. 1; that they do not desire to include additional land merely to enlarge the claim, but on the contrary the amendments were made in good faith on the advice of counsel for the sole purpose of conforming the locations to legal subdivisions and to obtain patent to the land containing the deposit; and applicant is ready and willing to make such relinquishments and amendments as may be necessary so long as the area in the original location remains intact in his application.

The fact that the original claim was located in the shape and has the usual dimensions of a lode and that the mineral surveyor characterized it as a lode on an official plat does not under the circumstances warrant the conclusion that it was the intention to make a lode location. The recorded notice of location is headed "Notice of Location—Placer Claim." It states that "the following-described placer mining grounds" are located, and the claim is denominated a placer claim. The deposit has been examined by a Government inspector, who reports that the land is "underlain by a thick seam of colloidal clay, which has value for different purposes, principally the filtering of oils in the process of refining." The propriety of locating the land as placer ground is not questioned.

Section 2331 of the Revised Statutes (U. S. C., title 30, section 35), however, provides that—

> * * * all placer-mining claims * * * shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant.

Whether placer claims conform sufficiently is a question of fact to be determined by the department. *Snow Flake Fraction Placer* (37 L. D. 250, 257). Citing the cases of *William Rablin* (2 L. D. 764); *Pearsall and Freeman* (6 L. D. 227); *Mitchell et al.* v. *Hutchinson et al.* (76 Pac. 55), where the placer locations not conformable to survey were upheld on the grounds that they need conform to regular subdivisions of survey only so far as reasonably practicable and that such conformity need not be made where it would require claimant to take in land unfit for mining and not placer ground, the appellant contends that the original location conforms as near as is reasonably practicable with the public-land surveys, supporting the suggestion made in his brief that the department may disregard his later locations and issue patent for the original as laid on the ground. Later decisions of the department, however, recognized that the cases above cited though sound in principle led to grave abuses in practice in the making of long, shoe-string or fantastic-shaped claims, splitting the public domain up into fragmentary tracts. See *Snow Flake Fraction*, *supra*, and cases cited.

It appears, however, that the northerly 20-acre tract and the two southerly ten-acre tracts each contain valuable placer ground. In *Hogan and Idaho Placer Mining Claims* (34 L. D. 42, 43), the department held—

> In the first place, assuming that the land embraced in the Hogan and Idaho locations are of sufficient placer value to be patentable under the placer law, and that the adjacent lands are nonplacer in character, as stated, a rearrangement of the lines of the locations to meet the requirements of the law in respect to conformity to the *system* of public-land surveys, considering that tracts as small as ten acres in area, in square form, are recognized as legal subdivisions under the mining laws (sec. 2330, Revised Statutes), would not necessitate the inclusion of the adjacent nonplacer lands to such an extent as to affect the validity of the locations on that account. It not infrequently occurs that tracts of land small portions of which are not valuable for placer mining are embraced within placer locations where the lands as a whole are in fact more valuable for placer mining than for agricultural purposes. There is, therefore, nothing in this phase of the company's contention.

It is the conclusion of the department that when the original location was made in this case it could have been made as later attempted by including the deposit in a claim or claims by aliquot portions of legal subdivisions no smaller than ten-acre tracts. The location was, therefore, defective and not subject to entry and patent in its

original form, but nothing is observed in the placer-mining laws nor is the department aware of any authority that impels the conclusion that the locators gained no rights by their location and that it was absolutely void for want of conformity to the subdivisions of the public-land surveys. The defect, in the absence of adverse claim to the added land, was curable either by suitable amendment or by relocation, provided the acreage limitation of the statute was observed. The privilege of changing boundaries of a mining claim in the absence of adverse rights has been generally recognized independent of State statutes according such rights. (Lindley on Mines, section 397.) For the purpose of curing imperfections in the original location, correcting errors, or supplying omissions the same latitude of amendment should be allowed in the case of placers as in lodes, no legal impediment existing to an amendment to include contiguous, unappropriated, unreserved land valuable for placer deposits, provided the statutory limit as to acreage is not exceeded. (Lindley on Mines, section 460.)

The White Clay Deposit No. 2 was a new and independent location. See *Centerville Mine and Milling Company* (49 L. D. 508). The original White Clay Deposit No. 1, as amended to include only the E. ½ SE. ¼ NE. ¼ Sec. 30 for the purpose of conforming to survey, was a permissible amendment and not a relocation, and there being no adverse intervening rights related back to the date of location by virtue of the prerequisite discovery and attempted compliance with law. (Lindley on Mines, section 398, and cases there cited.)

There is, however, no authority for an owner of two or more contiguous placer claims to substitute therefor a single location, under the guise of amending one of them (*Gordon Gulch Bar Placer*, 38 L. D. 28), as was attempted to be done by the second amendment of the White Clay Deposit No. 1. What had theretofore been done sufficiently met the requirements as to conformity to the public-land surveys, and under the circumstances preserved the rights of the owners to the deposit in the original location. The department, however, does not feel constrained to follow the Commissioner's rule in the present case that the value of the tunnel improvement can not be applied to both the White Clay Deposit Nos. 1 and 2. Although as a general rule improvements made for the benefit of a prior location, or upon ground embraced in a subsequent location, can not be credited to such subsequent location (*Charles H. Head et al.* 40 L. D. 135; *Tough Nut No. 2 and Other Lode Mining Claims*, 36 L. D. 9), yet the reasons for the application of such rule do not exist in the present case. The tunnel was constructed at the expense of the grantors of the claimant for the purpose of developing and facilitating the extraction of the sole deposit covered by the subsisting White Clay Deposit No. 1 as amended and the White Clay Deposit

No. 2, and the tunnel is within the limits of the original location. The declared value is $1,000, which is sufficient in value to support an improvement for the benefit of two claims. There is no attempt to evade the provisions of the mining law as to requisite expenditures by attempting to apply an expenditure, sufficient only for one, to two claims. There are no adverse claims. The tunnel was erected in good faith for the development of the deposit included in both locations. It is alleged that the clay deposit for a distance of several hundred feet north of said tunnel may be mined advantageously through the development and extensions of the present tunnel, including a large portion of the White Clay Deposit No. 1, as amended, and is calculated to facilitate the extraction of clay from said claim to a depth of several hundred feet. In *Clark* v. *Taylor* (20 L. D. 455) it was held that the fact that a part of the work required by law on a placer claim is performed prior to the location of the claim, and while said claim is held as agricultural land does not call for the cancellation of the entry, where the full amount of work required by law is performed prior to entry and good faith is apparent, and no adverse claim exists; that the application of the rule under such circumstances was more technical than is warranted.

The objection that the tunnel does not extend into any part of the White Clay Deposit No. 1 is without merit under the circumstances. It is well settled (Mines and Minerals, section 274, 40 C. J. 831)—

> that where labor is performed or improvements made in good faith for the purpose of developing a certain claim or group of claims and the labor and improvements are such as tend to develop the claims and facilitate the extraction of mineral therefrom, such labor and improvements are available for holding the claims, although they are performed entirely outside the boundaries thereof, such as on adjacent patented land, or on adjacent public land.

It is the view of the department that the tunnel improvement may be accepted as a common improvement for the White Clay Deposit No. 1, as amended December 20, 1927, to include the E. ½ SE. ¼ NE. ¼ Sec. 30, and for the White Clay Deposit No. 2. In accordance with the views expressed, the order to show cause is reversed, but the holding that the White Clay Deposit Nos. 1 and 2 must each be considered as separate and distinct claims is affirmed.

Affirmed in part and reversed in part.

CARL A. WILLIAMS

Decided August 10, 1928

HOMESTEAD ENTRY—ADJOINING FARM ENTRY—APPLICATION—RESIDENCE—CULTIVATION.

One who makes an adjoining farm homestead entry may be allowed credit for residence on the original farm from the date of the filing of the application therefor, provided that the law as to cultivation is met.

HOMESTEAD ENTRY—RESIDENCE—MILITARY SERVICE.

An entryman who enlisted and served 90 days during the war with Germany and her allies is entitled, under section 2305, Revised Statutes, as amended, to credit for the full period of his service under that enlistment, although such term did not expire until after the war ceased.

DEPARTMENTAL DECISIONS OVERRULED—DEPARTMENTAL REGULATIONS MODIFIED.

Cases of *William C. Field* (1 L. D. 68), and *John W. Farrill* (13 L. D. 713), overruled so far as in conflict; paragraph 15, "Suggestions to Homesteaders," Circular No. 541 (48 L. D. 389), modified.

FINNEY, *First Assistant Secretary:*

Carl A. Williams has filed an informal appeal from a decision of the Commissioner of the General Land Office dated June 8, 1928, rejecting the final proof submitted August 3, 1927, on his adjoining farm homestead entry, embracing NW. ¼ NE. ¼ and lot 1 of Sec. 11, T. 14 N., R. 4 E., La. M., Louisiana.

The application to make said entry was filed April 20, 1925. Its allowance was delayed, through no fault of the applicant, until December 27, 1926.

The final proof was rejected on the ground that no credit could be allowed for residence maintained on the original farm prior to the date of the entry.

It appears that entryman served in the United States Army from October 15, 1920, until October 14, 1921, when he was honorably discharged, by reason of expiration of term of enlistment.

According to the final-proof testimony, entryman and his family had resided continuously on the original farm since February 15, 1925, except for an absence caused by the flood, commencing about May 10, 1927. Three acres were cultivated in 1925, and 20 acres during 1926. None of the land was cultivated during 1927, because flooded by the waters of the Mississippi River.

In the case of *William C. Field* (1 L. D. 68) it was held that residence or settlement on an original farm will not be computed as residence on an adjoining tract prior to entry. However, in the case of *Patrick Lynch* (7 L. D. 33), wherein no reference was made to the decision in the *Field case*, *supra*, it was held that final proof submitted July 8, 1884, on an adjoining farm homestead entry made February 19, 1883, should be accepted, it appearing that entryman had resided on the original farm since 1875.

On December 21, 1891, in the case of *John W. Farrill* (13 L. D. 713), the department overruled the decision in the case of *Patrick Lynch*, *supra*, and held that residence on the original farm prior to the date the adjoining farm entry was allowed could not be computed as forming a part of the period of residence required under the latter entry. To the same effect is paragraph 15 of "Suggestions to Homesteaders" (Circular No. 541, 48 L. D. 389). This

holding is not in harmony with the regulations (Circular No. 770) of August 6, 1921 (48 L. D. 174), under the act of July 3, 1916 (39 Stat. 344), adding a seventh section to the enlarged homestead act, wherein it is stated that "residence and cultivation for the requisite period after the date of the application and until the submission of proof will be accepted"; nor with the regulations (paragraph 47 (*f*) of "Suggestions to Homesteaders") governing entries under section 3 of the enlarged homestead act made after final proof on the original entry.

Inasmuch as all rights under an ordinary homestead entry relate back to the date of settlement on the land or the date of filing of an allowable application therefor, no reason appears why a person who makes an adjoining farm homestead entry should not be allowed credit for residence on the original farm from the date of the filing of the application, provided the requirements of law as to cultivation are met. The decisions in the cases of *Field* and *Farrill*, *supra*, are overruled in so far as they conflict with the foregoing, and paragraph 15 of "Suggestions to Homesteaders" will be modified accordingly.

The entryman enlisted and served 90 days during the war with Germany and her allies. He is therefore entitled under section 2305, Revised Statutes, as amended, to credit for the full term of his service under that enlistment, although such term did not expire until after the war ceased.

The final proof is accepted, the decision appealed from being

Reversed.

STOCK-RAISING HOMESTEADS—DRIVEWAYS FOR STOCK—PARAGRAPH 15 OF CIRCULAR NO. 523, AMENDED

INSTRUCTIONS

[Circular No. 1160]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 10, 1928.

REGISTERS, UNITED STATES LAND OFFICES:

On August 8, 1928, the Secretary of the Interior amended paragraph 15 of the regulations contained in Circular No. 523 (51 L. D. 1), under the stock raising homestead act of December 29, 1916 (39 Stat. 862), to read as follows:

DRIVEWAYS FOR STOCK

15. (*a*) Upon the receipt in the proper district land office of a duly executed application, in duplicate, for the withdrawals of public lands for a stock driveway by responsible parties in interest, the lands described therein shall be

segregated from disposition temporarily, pending field investigation and report and final action thereon by the Secretary of the Interior. The register will assign a current serial number to the application, and at once forward one copy to the division inspector and the other copy to the General Land Office, accompanying each copy with a report as to the status of the affected land as shown by the records of his office.

(*b*) Pending and during such temporary segregation, applications to enter or select any affected lands may be received and suspended. If the stock driveway be not created as to the lands covered by suspended applications, the same will be allowed, if otherwise regular. If the application to make the stock-driveway withdrawal be approved, all suspended applications will be rejected.

(*c*) Lands withdrawn for driveways for stock or in connection with water holes can not thereafter be entered or filed upon, and all applications affecting lands so withdrawn will be rejected.

You will give special attention to such applications and immediately furnish the division inspector a duplicate copy thereof and report without delay to this office, with the other copy, the status of each of the tracts involved, and carry out strictly the instructions contained in the amended regulations.

THOS C. HAVELL,
Acting Commissioner.

RICHARDSON v. SEAFOAM MINES CORPORATION

Decided August 11, 1928

MINING CLAIM—ADVERSE CLAIM—POSSESSION—COURTS—JURISDICTION—NOTICE.

When a suit to determine the right of possession to a mining claim in alleged conflict is instituted within the time prescribed by section 2326, Revised Statutes, exclusive jurisdiction thereover is vested in the court, and all proceedings upon the patent application in the land office, except in reference to the publication and proof of notice, are stayed until the controversy shall have been settled, or the adverse claim waived.

FINNEY, *First Assistant Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office denying the motion of the applicant for patent to dismiss the adverse claim of John A. Richardson.

Seafoam Mines Corporation filed mineral entry 041168. Publication of notice was had, and, within the publication period of 60 days, John A. Richardson filed adverse claim 042662, and, within 30 days from the date of filing, brought suit in a court of competent jurisdiction to determine the question of the right of possession.

The adverse claim is based upon an alleged conflict between the Sampson lode, owned by the adverse claimant, and the Stanton lode, owned by the corporation.

Within 30 days from the date of filing the adverse claim, the corporation filed a motion to dismiss such claim, alleging, *first*, that the notice of location of the Sampson claim is insufficient for the reason

that it is not tied to any natural object or permanent monument which would identify the claim or furnish information as to its locus; *second*, that the adverse claim does not show the nature, boundaries, and extent of the Sampson claim, and that no survey or map has been filed showing the location and extent of the Sampson claim.

The motion was submitted to the register who denied the same and appeal was taken to the Commissioner.

In his decision the Commissioner found that the map or plat filed with the adverse claim did not, as required by the regulations, show the boundaries or extent of the claim, a finding in which the department concurs; but the department agrees with the Commissioner that since suit has been instituted by the adverse claimant, exclusive jurisdiction to determine the questions raised by the motion as to sufficiency of location and alleged failure to show by map or plat or otherwise the nature, boundaries, and extent of the adverse claim is in the court.

When an adverse claim is filed within the time required by law, all proceedings upon the application in the land office, except in reference to the publication and proof of notice, are stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. Revised Statutes 2326.

Within the meaning of the statute an adverse claim was filed, and it has not been waived, but has been maintained by the commencement of a suit in proper time in a court of competent jurisdiction. The land office and the department, therefore, have no jurisdiction of a motion to dismiss on the ground that the adverse claim as made does not in some respects comply with the law and regulations. That, as well as other questions, is for determination by the court.

The decision of the Commissioner is

Affirmed.

LEASING OF PUBLIC LANDS FOR AIRPORTS AND AVIATION FIELDS—ACT OF MAY 24, 1928

Regulations

[Circular No. 1161]

Department of the Interior,
General Land Office,
Washington, D. C., August 22, 1928.

Registers, United States Land Offices:

The following regulations are issued under the act of Congress approved May 24, 1928 (45 Stat. 728), entitled "An act to authorize the leasing of public lands for use as public aviation fields."

1. Any contiguous unreserved and unappropriated public land, surveyed or unsurveyed, not exceeding 640 acres in area, may be leased under the provisions of this act.

2. All leases will be subject to valid existing rights initiated prior to the date the application for lease is filed.

3. Applications for lease should be in triplicate, addressed to the Commissioner of the General Land Office, and filed in the proper district land office. Applications will be limited to citizens of the United States, or associations of such citizens, to corporations organized under the laws of the United States or of any State or Territory thereof, and municipalities. No specific form of application is required, and no blanks will be furnished, but the application should include in substance the following points and be under oath:

(*a*) Applicant's name and post-office address.

(*b*) If a corporation, a certified copy of the articles of incorporation.

(*c*) If a city or town, evidence of authority of the mayor or other officer who may be authorized to execute such lease.

(*d*) Description of the land for which the lease is desired by legal subdivisions, if surveyed, and by metes and bounds, if unsurveyed.

4. After assignment of a current serial number and due notations on your records, you will forward all papers to the General Land Office. A status report of all the land applied for should be furnished with each application.

5. Upon receipt of the application in the General Land Office one copy will be referred to the Secretary of Commerce for consideration as to what fuel facilities, lights, and other furnishings are necessary to meet the rating set by that department. After the Secretary of Commerce has reported, a lease in quadruplicate will be prepared and sent you for execution by the applicant. When executed and returned by you the lease will be submitted to the Secretary of the Interior, and, if approved, a copy will be sent to the applicant through your office and a copy forwarded to the Department of Commerce.

6. The lessee shall, within six months from the date of the lease, equip the airport, as required by the Secretary of Commerce, and file a report thereof in your office for forwarding to the General Land Office.

7. At any time during the term of the lease the Secretary of Commerce may have an inspection made of the airport, and if it does not comply with the ratings set by the Department of Commerce, that fact, with a statement as to wherein it fails, will be referred to the General Land Office for appropriate action.

8. The Secretary of the Interior may, in his discretion, cancel a lease issued under this act for any of the following reasons: If the

lessee fails to use the leased premises or any part thereof, or uses it or any part thereof for a purpose foreign to the proper use, or shall fail to pay the annual rental or any part thereof, or shall fail to maintain the premises according to the ratings set by the Department of Commerce, or shall fail to comply with these regulations or the terms of the lease.

9. Leases under this act shall be for a period not to exceed 20 years and may be renewed for like periods upon agreement of the Secretary of the Interior and the lessee.

10. Every lessee under this act shall pay to the lessor an annual rental of ten dollars per year. The first payment of ten dollars shall be made when the application is filed in your office. All subsequent payments shall be paid in advance on or before the anniversary date of the lease.

11. The lessee shall agree that all departments and agencies of the United States operating aircraft shall have free and unrestricted use of the airport and, with the approval of the Secretary of the Interior, any departments or agencies shall have the right to erect and install therein such structures and improvements as are deemed advisable. Whenever the President may deem it necessary for military purposes, the Secretary of War may assume full control of the airports.

12. The lessee will submit to the Secretary of Commerce, for his approval, regulations to govern the use of the airport.

13. The lessor is authorized to cancel any lease for public lands for public aviation fields made under any law in force on the date of this act with the consent of the lessee and to lease such lands to the lessee under the conditions prescribed herein.

14. Government departments and agencies operating aircraft may be granted permission to establish beacon lights and other navigation facilities, except terminal airports, on tracts of unreserved and unappropriated public lands of the United States of appropriate size, on application therefor, under the same rules and regulations prescribed above, except no rental will be charged. They will be withdrawn by the Secretary of the Interior for that purpose on a sufficient showing of the necessity of a withdrawal for such purpose. However, to insure uniformity and centralized control over such facilities, all such applications will be referred to the Secretary of Commerce for consideration and comment.

15. While an application for a lease of not exceeding 640 acres of public lands for a public aviation field under sections 1, 2, and 3 of the act will operate as a segregation of the lands described therein from the time such application is filed in the proper district land office, the Secretary of the Interior is given no authority to withdraw

public lands for terminal airports. He may, however, withdraw such lands for beacon lights or other air navigation purposes, including emergency or intermediate landing fields between terminal airports. Such withdrawals may be made on his own motion or at the instance of the Department of Commerce or other Federal agencies, or lessees of terminal airports, or the applicants for such leases.

16. Prior to the approval of the act of May 24, 1928, public lands were subject to withdrawal by the President for public purposes, and the authority of the President to make such withdrawals is in no manner restricted by such act. Where, therefore, unappropriated public lands are desired by the Department of Commerce or other Federal agencies for airport terminals, requests for their withdrawal may be submitted to the Secretary of the Interior for consideration by the President. All requests for withdrawal should specifically state whether the area is desired for beacon lights, emergency or intermediate landing fields, or terminal airports.

17. All the conditions contained in the prescribed form (4–455) of lease attached hereto, but not mentioned in these regulations, will be considered as a part hereof.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
ROY O. WEST,
Secretary of the Interior.
Approved:
WILLIAM P. MACCRACKEN, JR.
Acting Secretary of Commerce.

4–455

(August, 1928)

LEASE OF LANDS FOR USE AS A PUBLIC AIRPORT

Act May 24, 1928 (45 Stat. 728)

(To be executed in quadruplicate)

Serial No. —

This indenture of lease, entered into this ____ day of _____, 19____, by and between the United States of America, party of the first part, hereinafter called the lessor, acting in this behalf by the First Assistant Secretary of the Interior, and _____

_____

party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and conditions of the act of Congress of May 24, 1928 (45 Stat. 728), entitled "An act to authorize the leasing of public lands for use as public aviation fields," and the regulations thereunder:

WITNESSETH:

SECTION 1. That the lessor, in consideration of rents to be paid and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege of maintaining an airport on the following-described tract of land, to wit: _____

_____

containing approximately ____ acres, together with the right to construct and maintain thereon all buildings or other improvements necessary as an airport for the accommodation of the public for a period of ____ years, with the preferential right in the lessee to renew this lease for a like period upon such terms and conditions as may be agreed upon between the lessor and the lessee, unless otherwise provided by law or regulations at the time of the expiration of such period.

SECTION 2. For and in consideration of the foregoing, the lessee hereby agrees:

(*a*) To establish a public airport on said tract and to maintain same during the life of this lease.

(*b*) To pay the lessor a yearly rental of ten dollars.

(*c*) To complete the construction of facilities for service, fuel, and other supplies necessary to make the land available for public use as an airport within six months from the execution of this lease.

(*d*) That he will at all times keep the airport equipped and maintained in accordance with the ratings set by the Department of Commerce.

(*e*) That all departments and agencies of the Government operating aircraft shall have free and unrestricted use of the airport and with the approval of the lessor shall have the right to erect and install thereon such structures and improvements as the heads of such departments and agencies deem advisable including facilities for maintaining supplies of fuel, oil, and other materials, for operating aircraft.

(*f*) That whenever the President may deem it necessary for military purposes, the Secretary of War may assume full control of the airport.

(*g*) Not to allow the use of the premises included in this lease for unlawful purposes, or for any purpose not in harmony with the proper use as an airport.

(*h*) That authorized representatives of the lessor or of the Department of Commerce shall at any time have the right to enter the leased premises for the purpose of inspection and shall have free access to the books containing records of operations under authority of this lease.

(*i*) Not to assign this lease without the consent of the Secretary of the Interior first had and obtained.

SECTION 3. It is further understood and agreed that rates and prices for accommodation and service may be fixed by the Secretary of the Interior whenever it is deemed necessary.

(*a*) That if the lessee shall fail to use the premises or any part thereof, or shall use it or any part thereof foreign to the proper use, or shall fail to pay the annual rental or any part thereof or shall fail to comply with the provisions of this lease or shall fail to maintain the premises according to the ratings set by the Department of Commerce, the lessor may, in his discretion, terminate and cancel this lease.

(*b*) That upon the termination of this lease by expiration it may be renewed for a like period upon agreement of the lessor and the lessee, under such rules and regulations as then exist.

(*c*) That upon the termination of this lease by expiration or forfeiture thereof, or whenever the United States may claim the right of possession as herein provided, the lessee agrees to surrender possession of the premises to the

United States and to comply with such provisions and conditions respecting the removal of the improvements and equipment on the property as may be made by the Secretary of the Interior.

In witness whereof, I, _____, party of the second part, have hereto affixed my signature and official seal this ____ day of _____.

[SEAL.] By _____

_____

In witness whereof, and as representative of the United States of America, party of the first part, I have hereunto affixed my signature and official seal of this department this ____ day of _____.

[SEAL.] THE UNITED STATES OF AMERICA,

By _____

First Assistant Secretary of the Interior.

WESTMINSTER PETROLEUM CORPORATION AND JOHN T. FREDERICKSEN v. KLINE

Decided August 29, 1928

OIL AND GAS LANDS—PROSPECTING PERMIT—SETTLEMENT—HOMESTEAD ENTRY—PATENT—PREFERENCE RIGHT—NOTICE—WAIVER—RELATION.

Where in accordance with then existing regulations a permit had been granted to prospect lands embraced within a settlement claim, and the agricultural claimant, having been duly notified thereof when called upon to waive rights to the oil and gas contents, failed to give notice of a preference right by virtue of his settlement, regulations subsequently promulgated will not be retroactively applied to enable him to defeat the permit after issuance to him of a restricted patent.

DEPARTMENTAL DECISION DISTINGUISHED.

Case of *Voeltzel* v. *Wright* (51 L. D. 38), distinguished.

FINNEY, *First Assistant Secretary:*

The Westminster Petroleum Corporation and John T. Fredericksen have appealed from that portion of the decision of March 24, 1928, by the Commissioner of the General Land Office whereby their oil and gas prospecting permits are held for cancellation in part on the ground of conflict with the preference right of Marion J. Kline to a permit. The facts in the case are briefly as follows:

Ts. 7 and 8 N., R. 86 W., 6th P. M., Colorado, were withdrawn for resurvey on January 30, 1913, and plats of resurvey were filed in the local land office on January 25, 1923.

On September 30, 1922, an oil and gas prospecting permit was granted to W. P. Carstarphen and C. C. Irwin for certain lands, including lots 5 and 8, Sec. 4, T. 7 N., R. 86 W., lots 9, 10, 11, and 13, Sec. 33, T. 8 N., R. 86 W., as described on resurvey. This permit was conveyed to the Westminster Petroleum Corporation by assignment approved February 6, 1925. An application for further

extension of time within which to comply with paragraph 2 of the permit is now pending.

On April 11, 1924, John T. Fredericksen filed application for a permit to prospect for oil and gas upon certain lands, including lots 6 and 7, Sec. 4, T. 7 N., R. 86 W., and a permit was granted to him on June 2, 1925, which included said lots. Extension of time until September 1, 1928, within which to comply with paragraph 2 of the permit was granted on August 22, 1927.

On June 4, 1924, Marion J. Kline filed application to make enlarged homestead entry of lots 5, 6, 7, and 8, Sec. 4, T. 7 N., R. 86 W., lots 2, 7, 9, 10, and 13, Sec. 33, T. 8 N., R. 86 W., together with petition for designation. The applicant was required to consent to take the land subject to the provisions, reservations, and limitations of the act of July 17, 1914 (38 Stat. 509), and to waive his right to compensation for damages under section 29 of the leasing act. He filed such consent and waiver on February 24, 1925, and on May 19, 1925, entry was allowed on his application. He submitted final proof on October 14, 1926, final certificate was issued four days later, and on January 14, 1927, patent was issued with reservation of oil and gas to the United States. In the final proof it was shown that Kline established residence on the land in June, 1914, was in the Army from October 3, 1917, to July 9, 1919, and took vocational training from May, 1920, until July, 1923. On April 4, 1927, he filed application for a permit to prospect for oil and gas upon the land embraced in his patented entry, claiming a preference right under section 20 of the leasing act.

In the decision appealed from, the Commissioner said:

> In view of the circumstances it appears applicant Kline's preference right under section 20 of the leasing act to a prospecting permit is substantiated.

When the permit which the Westminster Petroleum Corporation now holds was granted and when Fredericksen's permit application was filed the interpretation given to section 20 of the leasing act was that a settlement claim could not be made the basis for a preference right to an oil and gas prospecting permit. *Ada Fletcher* (49 L. D. 204); *Haynes* v. *Smith* (50 L. D. 208). Prior to the instructions of April 28, 1924 (Circular No. 932, 50 L. D. 400), permit applicants were not required to serve notice upon settlers or to show in their applications whether there were any settlers upon the lands applied for. Said instructions are not retroactive. And prior to that time it was not necessary for a permit applicant to examine the land desired to be prospected before making application for a permit. *Van Houten and Dowd* (48 L. D. 185); *Spindle Top Oil Association* v. *Downing et al.* (48 L. D. 555); *Wagner* v. *Coffin* (49 L. D. 655).

Although Kline was duly notified in November, 1924, when he was required to waive rights to oil and gas, and again in February, 1925, when he was called upon for an amended waiver, that there were

adverse claimants under the leasing act, he did not give any notice or information of a preference right by virtue of settlement. At that time no permit had been granted to Fredericksen and the application of the latter might have been rejected to the extent of conflict if Kline had made a proper showing.

The two permits involved were regularly and properly granted. They are still of record and are not in any part or in any manner invalid. The case of *Voeltzel* v. *Wright* (51 L. D. 38), which has been cited on behalf of Kline, has no application here. In that case the homestead claimant, who was a settler prior to February 25, 1920, on land withdrawn for resurvey but not in any petroleum withdrawal, objected and asserted his rights as soon as he was called upon to waive his right to oil and gas and to compensation under section 29 of the leasing act. No permit had been granted, and the department held that a mere paper applicant could not defeat a settler's rights.

The department does not find that Kline has any right superior to those of the appellants as permit holders. No other ground for cancellation in part of the permits involved is stated.

The decision appealed from is

Reversed.

WESTMINSTER PETROLEUM CORPORATION AND JOHN T. FREDERICKSEN v. KLINE

Motion for rehearing of departmental decision of August 29, 1928 (52 L. D. 481), denied by First Assistant Secretary Finney, October 31, 1928.

DESCRIPTION OF LANDS IN OIL AND GAS PERMIT APPLICATIONS

INSTRUCTIONS

[Circular No. 1162]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 29, 1928.

REGISTERS, UNITED STATES LAND OFFICES:

In connection with applications for oil and gas permits filed in your offices it has been found that many of the applications describe lands not in conformity with the latest plat of survey, while in others the description is very uncertain. In a few instances the applicant has described certain tracts by lots or otherwise and added "and all other vacant land within" certain sections or parts of sections.

In order to avoid the uncertainty as to the lands desired and to obviate considerable extra correspondence in relation thereto, you are directed to examine each application in connection with the plats of survey and if discrepancies or uncertainties exist you will immediately advise the applicant thereof and allow him 15 days within which to give a proper description of the land and that upon his failure to do so the application will be considered only as to the tracts of land described in conformity with the latest plats of survey, the balance of the application being rejected.

This matter can be attended to during the period of 30 days you hold the application in your office under the regulations and upon submission of such application to this office you will forward a copy of all the correspondence had with evidence of service and advise as to the action taken by the applicant.

THOS. C. HAVELL,
Acting Commissioner.

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

B. F. FELTON (ON REHEARING)

Decided September 5, 1928

NATIONAL FORESTS — FOREST LIEU SELECTION — RELINQUISHMENT — QUITCLAIM DEED—TAX SALE—REDEMPTION.

The right to a quitclaim deed accorded by the act of September 22, 1922, for lands relinquished to the United States that have not been disposed of or appropriated to the public use, is not conditioned upon redemption of the lands from a tax sale held at a time when the legal title was in the United States.

FINNEY, *First Assistant Secretary:*

B. F. Felton has petitioned for rehearing in the matter of his application under the act of September 22, 1922 (42 Stat. 1017), for quitclaim deed to described lands in Secs. 26 and 35, T. 7 S., R. 73 W., 6th P. M., Colorado, wherein this department, by decision dated June 30, 1928, formally affirmed the action of the Commissioner of the General Land Office refusing to execute such deed unless and until applicant redeemed said lands from tax sales, and extended his abstract of title so as to show such redemption.

The petitioner shows that he has been denied the right to redeem said lands from tax sales by the authorities of Park County wherein the lands are situated, and asserts that his failure in the circumstances to pay said taxes should not prejudice his right to a quitclaim deed from the Government. It is contended, moreover, that applicant's

right under the law to a quitclaim deed from the Government is not conditioned upon redemption of the lands from tax sales or encumbrances, hence the denial of his application was unauthorized.

The material facts in the case are as follows:

The lands in question were relinquished to the United States under the provisions of the act of June 4, 1897 (30 Stat. 11, 36), by deed from Edwin M. Armor, executed March 25, 1902, and recorded in Park County March 26, 1902. Forest lieu selection No. 6046 of Edwin M. Armor, by James E. Tillotson, attorney in fact, based on the lands so relinquished, was filed October 14, 1902, in the district land office at Minot, North Dakota. Certain required corrections in the abstract of title of the base lands were not made within the time allowed and the selection was canceled December 24, 1904. The land was not offered as the basis of another selection or exchange but was later sold by Tillotson, attorney in fact, for Armor, who, by quitclaim deed dated November 16, 1923, conveyed the land to B. F. Felton, the present applicant. The deed to Felton was recorded February 4, 1924. It appears that in the meantime the land had been sold for taxes by the treasurer of Park County, tax-sale certificates issuing December 10, 1921, to George E. Singleton. Tax deed issued June 12, 1925, to the holder of the tax certificate, and was recorded the same day.

The act of September 22, 1922, *supra*, 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.

The purpose of the act, where an exchange can not be agreed upon, and when the relinquished base lands have not been disposed of or appropriated to the public use, as explained in section 2 thereof, was to

authorize a formal quitclaim on behalf of the United States of whatever interest in the land it had acquired from the party who had relinquished the same to the Government. The department has construed the act as remedial in character, and held that it should be liberally construed so that its benefits may be extended to all those who come fairly within its scope. *W. J. Carney* (50 L. D. 435). The decision in that case states (p. 437)—

> The department is of the opinion that in a case where the claimant of the base land openly announces that he does not desire an exchange and declines to apply for one it must be held that an exchange can not be agreed upon and that, all else being regular, a quitclaim deed is authorized.

Upon further consideration the department is convinced that the denial of a quitclaim deed in the instant case, substantially upon the ground that the land had been sold for taxes at a time when the legal title was in the United States, was erroneous. The act explicitly provides that the quitclaim may be to the person who relinquished the land to the United States, his heirs or assigns. The Government has no equitable right or interest in the lands and is not concerned with the interests or claims of third parties. The recorded deed of relinquishment to the United States clouded the title to these lands, and it is the duty of the department under the law to remove this cloud, so far as possible, by disclaiming ownership.

The department's decision of June 30, 1928, is therefore recalled and vacated, and the action of the Commissioner denying a quitclaim deed is

Reversed.

SAMUEL F. MEGUIRE

Decided September 5, 1928

NATIONAL FORESTS—FOREST LIEU SELECTION—RELINQUISHMENT—QUITCLAIM DEED—ASSIGNMENT.

A quitclaim deed executed by the United States pursuant to the act of September 22, 1922, conveys only such title as was acquired by the deed of relinquishment; and the fact that the party who executed and recorded the deed of relinquishment did not have a perfect title to the land would not be ground for denial to him of a quitclaim deed, provided that he had not assigned his rights.

NATIONAL FORESTS—FOREST LIEU SELECTION—RELINQUISHMENT—QUITCLAIM DEED—APPLICATION—ABSTRACT OF TITLE—ALIENATION—EVIDENCE.

The requirement in the proviso to section one of the act of September 22, 1922, is fulfilled if the applicant for quitclaim deed under that act furnishes an abstract, brought down to the date of his application, showing that the deed of relinquishment to the United States had been recorded and that he had not since alienated the land.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *The Collins Land Company* (51 L. D. 190) cited and applied.

FINNEY, *First Assistant Secretary:*

Samuel F. Meguire has appealed from a decision of the Commissioner of the General Land Office dated March 12, 1928, making certain requirements in connection with his request for a quitclaim deed to blocks 1, 2, 3, 7, 8, 9, 10, and 11, town of Acton, California, being a part of Sec. 36, T. 5 N., R. 13 W., S. B. M.

It appears that said Meguire, unmarried, by deed executed and recorded September 14, 1901, conveyed to the United States a tract of land in the Pine Mountain and Zaca Lake Forest Reserve, Los Angeles County, California, described as—

> Beginning at the southeast corner of Sec. 36, T. 5 N., R. 13 W., S. B. M.; thence north along the east line of said section 1,980 feet; thence west 660 feet; thence south 660 feet; thence west 1,980 feet; thence south 660 feet; thence east 660 feet; thence south 660 feet; thence east along the south line of said section 1,980 feet to the place of beginning, containing 80 acres of land, and being otherwise described as blocks one, two, three, seven, eight, nine, ten, and eleven, as shown on the map of the town of Acton, as per map recorded in book 52, page 7, miscellaneous records of said county.

On September 30, 1901, said Meguire filed in the Tucson, Arizona, land office an application to select, in lieu of the tract above described, under the exchange provisions of the act of June 4, 1897 (30 Stat. 11, 36), a tract of 74.23 acres.

By decision dated July 28, 1903, the Commissioner of the General Land Office held that the abstract of title showed that the blocks described were on September 13, 1901, conveyed to the selector, but the abstract was returned and the selector allowed 60 days within which to comply with a number of requirements.

Under date of October 1, 1903, the attorneys for Meguire advised the Commissioner of the General Land Office that, in view of the great difficulty of correcting the abstract, he had decided to file an application to make soldiers' additional entry for the selected tract. Whereupon the forest lieu selection was canceled on December 2, 1903.

The decision appealed from required Meguire to furnish an abstract of title brought down to the date of the recordation of the deed of conveyance to the United States. In the appeal it is contended that all that should be required is an abstract of title from the date of recordation of the relinquishment down to the date of the application for quitclaim deed.

The application for quitclaim was filed September 15, 1927, under the act of September 22, 1922 (42 Stat. 1017), the proviso to section 1 of which reads as follows:

> 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.

To entitle Meguire to a quitclaim deed it is not necessary that he show, by abstract of title, that he had a merchantable title to the base land, but it is necessary that he show that the deed of relinquishment to the United States was recorded and that he had since made no effort to alienate the land.

To this effect was the decision in *The Collins Land Company* (51 L. D. 190), wherein it was held that the assignee of the selector, whose selection was canceled on the ground that he did not have title to the base land, was entitled to a quitclaim deed.

While it is necessary, as provided in the statute quoted above, that the applicant for a quitclaim deed furnish an abstract of title showing relinquishment of the land to the United States, such abstract need not show any prior conveyances; but it is essential that the abstract be brought down to the date of the request for quitclaim deed in order that the Land Department may be advised as to whether the party who relinquished the tract had made an assignment of his rights in and to the land.

In executing a quitclaim deed, the Land Department divests the United States of only such title as was acquired by the deed of relinquishment, and the fact that the person who executed and recorded the deed of relinquishment did not have perfect title to the land would not warrant the denial to him of a quitclaim deed, provided he had not assigned his rights. This was the effect of the decision in *The Collins Land Company*, *supra*.

Meguire should be accorded the privilege of furnishing an abstract of title showing the relinquishment of the tract to the United States, brought down to the current date. If such an abstract is furnished, and it appears that Meguire has not assigned his rights, the quitclaim deed requested should be executed and delivered.

The decision appealed from is modified to agree with the foregoing.

Modified.

BYERS v. STATE OF ARIZONA

Decided September 10, 1928

SCHOOL LAND—ARIZONA—NATIONAL FORESTS—WITHDRAWAL—VESTED RIGHTS—RESTORATIONS.

Section 1946, Revised Statutes, merely reserved sections 16 and 36 in each township in the Territory of Arizona from disposal by the United States in contemplation of a future grant, and the inclusion of those sections within a national forest by a withdrawal prior to the enabling act of June 20, 1910, suspends the vesting of title thereto until their restoration to the public domain.

SCHOOL LAND — ARIZONA — NATIONAL FORESTS — VESTED RIGHTS — MINERAL LANDS—OIL AND GAS LANDS—PROSPECTING PERMIT.

Only nonmineral lands were granted to the State of Arizona for school purposes by section 24 of the act of June 20, 1910, and where the title to a designated school section has not vested in the State the Government, in furtherance of its right and duty of investigating and determining the character of the land, may grant an oil and gas prospecting permit.

SCHOOL LAND—MINERAL LANDS—WITHDRAWALS—RESERVATIONS—STATUTES.

The act of January 25, 1927, extending the grants of school sections in place to certain States to embrace lands mineral in character, had no application to lands within reservations existing when the act became effective.

FINNEY, *First Assistant Secretary:*

By decision of December 13, 1927, the Commissioner of the General Land Office rejected the oil and gas prospecting permit application of Edward R. Byers, filed April 1, 1927, as to Sec. 16, T. 18 N., R. 2 W., G. & S. R. M., Arizona, for the reason that the land was "a school section of the State of Arizona" to which the State's rights had attached.

The applicant has appealed, calling attention to the fact that the land is within the boundaries of the Tusayan National Forest, and citing section 24 of the act of June 20, 1910 (36 Stat. 557, 572). He contends that the Secretary of the Interior "should assume jurisdiction of oil and gas prospecting permits and distribute the proceeds to the public schools of the State of Arizona, as done through the several national forests where school sections are included within their area, in cases where same include timber or minerals"; that such permits should be granted by this department because the State of Arizona has no jurisdiction whatever over school sections so situated.

The appellant requests an early decision because the State of Arizona refuses to lease or grant prospecting permits for such school sections, and because prospecting and development of such lands are held up since neither the department nor the State of Arizona assume jurisdiction.

Plat of survey of said township was accepted and filed in 1878. Part of the township, including Sec. 16, was withdrawn by the Secretary of the Interior on November 25, 1907, for a proposed addition to the San Francisco Mountains National Forest. The same land was included in the Coconino National Forest by proclamation of July 1, 1908, and on July 1, 1910, the name was changed to Tusayan National Forest.

Section 24 of the act of June 20, 1910 (36 Stat. 557, 572), reads in part as follows:

That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said

proposed State not otherwise appropriated at the date of the passage of this act are hereby granted to said State for the support of common schools. * * * *And provided further*, That the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situated within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of said sections when unsurveyed to be determined by the Secretary of the Interior * * *.

The reservation of sections 16 and 36 referred to, is found in section 1946 of the Revised Statutes. No grant was thereby made, no title was conveyed, to the Territory of Arizona. It was merely a reservation from disposal by the United States in contemplation of a future grant. Inasmuch as the withdrawal for a national forest occurred prior to the time that the enabling act of June 20, 1910, *supra*, was passed, title to said Sec. 16 has remained in the United States.

The grant of school sections to the State of Arizona under section 24 of the act of June 20, 1910, was of nonmineral lands only. Inasmuch as title to the section in question has not passed to the State the Government has the right and duty of investigating and determining whether the land is mineral in character. For the purpose of such investigation and determination this department may grant an oil and gas prospecting permit. In this connection, see instructions of September 17, 1925 (51 L. D. 196).

The act of January 25, 1927 (44 Stat. 1026), extending the grants of school sections in place to certain States to embrace school sections mineral in character, has no application whatever in this case. Subsection (*c*) of section 1 of said act provides—

That any lands included within the limits of existing reservations of or by the United States * * * are excluded from the provisions of this act.

The department has construed this portion of the act as follows (Circular No. 1114, 52 L. D. 51, 53):

School-section lands included within the limits of existing reservations of or by the United States * * * are excluded from the provisions of the act. The words "existing reservations" as used in subsection (*c*) are construed generally and subject to specific determination in particular cases if the need therefor shall arise, as including Indian and military reservations, naval and petroleum reserves, national parks, national forests, stock driveways, reservations established under the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), and all forms of Executive withdrawal recognized and construed by this department as reservations existent prior to January 25, 1927.

The decision appealed from is reversed and the record is returned to the General Land Office for consideration with a view to issuance of a permit.

Reversed.

ADA MONIKA WILLIAMS

Decided September 19, 1928

PRIVATE CLAIM—BOARD OF LAND COMMISSIONERS—PATENT—LAND DEPARTMENT—JURISDICTION.

By the act of March 3, 1851, Congress provided the legal procedure by which a corrective was afforded for a wrongful confirmation of a Mexican land grant by the Board of Land Commissioners, and the Land Department is without power to review a decree of confirmation based upon the findings of that board and, upon the issuance of patent pursuant thereto, is deprived of jurisdiction in respect to lands embraced in such a claim.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Beard* v. *Federy* (3 Wall. 478), *Thompson* v. *Los Angeles Farming and Milling Co.* (180 U. S. 72), *Whitney* v. *United States* (181 U. S. 104), *Ben McLendon* (49 L. D. 548), and *John Adams et al.* (51 L. D. 591), cited and applied.

FINNEY, *First Assistant Secretary:*

Appeal has been filed by counsel for Ada Monika Williams from decision of February 14, 1927, by the Commissioner of the General Land Office, affirming the action of the register of the local land office at Los Angeles, California, in rejecting Williams's homestead application for land described as fractional E. ½ E. ½ Sec. 33, and fractional W. ½ W. ½ Sec. 34, T. 1 S., R. 17 W., S. B. M., California. Numerous other similar applications for lands in the same general vicinity were rejected in the same decision.

The tract descriptions given in the applications have no existence in fact, as the lands have never been subdivided into sections. A boundary survey of a private-land claim was made in this locality which meandered the ocean, and the descriptions contained in these applications are either within the confines of that grant or include water areas.

The ground for rejection in all of these cases was stated as follows:

> So far as the records show, a part of the lands applied for are within the exterior limits of the Mexican grant known as the "Rancho Topanga Malibu Sequit," which was patented to Matthew Keller, August 29, 1872 (vol. 9, pages 40 to 56, inclusive), and the remainder of the lands applied for are in the Pacific Ocean, which borders said grant on the south. Therefore, the lands are not subject to homestead entry. Ben McLendon (49 L. D. 548 and 49 L. D. 561), and John Adams et al. (51 L. D. 591) and the cases cited therein.

In behalf of these applicants, it is contended that the decision appealed from ignored the requirements of the Mexican law in regard to grants thereunder and the provisions of the treaty in respect to Mexican claims violated the act of March 3, 1851 (9 Stat. 631), governing the adjudication of private-land claims in California, and disregarded the decisions of the Supreme Court as to the essentials for establishment of valid claims under the act.

It is asserted that the said grant was in legal effect no grant; that it never had any validity under Spanish or Mexican law; that it was unlawfully and corruptly confirmed; that there was no proper foundation for the patent, and that it is null and void. It is accordingly contended that this department should ignore and hold for naught such putative grant and patent.

Concession to these demands would involve adjudication *de novo* respecting the merits of the grant. This untenable position so manifestly conflicts with the plainest principles of jurisprudence, the letter of specific statute, the repeated decisions of this department in like cases, and applicable rulings of the Supreme Court, that any elaborate demonstration of so palpable an error would be mere supererogation.

This grant was confirmed by the United States District Court for the Southern District of California at its October term, 1864, acting under authority of the said act of March 3, 1851. Appeal from that decision was taken by the Government to the Supreme Court of the United States, and by decree of March 10, 1865, the appeal was dismissed on motion of the Attorney General. At the October term, 1865, the said district court declared the decree of confirmation final.

Section 13 of the said act of March 3, 1851, in part, provided:

> * * * for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed and to furnish plats of the same.

Pursuant to that authority the tract was surveyed and patent was issued thereon as stated.

Section 15 of the said act reads as follows:

> *And be it further enacted*, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

In the similar cases of *Ben McLendon* (49 L. D. 548) and *John Adams et al.* (51 L. D. 591) the department exhaustively considered

the contentions there made and here reiterated, and it was conclusively shown that this department never did have authority to adjudicate such grants and has no jurisdiction to disturb a patent issued on such confirmed claim. In the former case it was said (p. 556):

> The only theory then on which an entry could be allowed under the present application must be based on the supposition that the Land Department would be justified in either ignoring the existence of the grant and the patent or in suspending the application until after it had by its own act declared the grant invalid and set aside and vacated the patent.
>
> It seems unreasonable to believe that it could be seriously contended in any quarter that this department, a mere subdivision of the executive branch of the Government, has the power to inquire into, adjudicate, and vacate and annul a decree of confirmation solemnly entered in this case by the United States District Court after the facts have been ascertained and adjudicated by the Board of Land Commissioners to whom Congress committed the power to determine the validity of such grants in the first instance. And this is especially true since there was no existing law at the date of this confirmation which clothed any executive branch of the Government with any power to inquire into or judicially determine the validity of or any question affecting Mexican grants or to take any other action whatever in relation thereto, except the mere act of surveying the lands embraced within them, and the issuing of patents after the grants had been confirmed. Such a contention is made to appear more unreasonable when it is remembered that the courts in considering the effect of the decrees of confirmation of Mexican claims by the Board of Land Commissioners and the district court, have said that "final decrees, touching the validity of such claims, rendered by these tribunals, are conclusive and final between the claimants and the United States. Such decrees are not open to review in any court."

The authorities there cited completely refute in every particular the contentions renewed in this case respecting the finality of the confirmation of the grant and the patent issued thereon.

A consolidated brief recently filed in support of homestead applications for lands embraced in this and other patented Mexican grants reiterates the contentions theretofore fully presented and insistently urged. The said brief undertakes to show that the patents issued for the four grants therein discussed are utterly worthless and void, as having been issued upon grants confirmed without legal authority. It is contended that the Government of Mexico had no authority to grant lands except under the provisions of its general colonization act of August 18, 1824, and the regulations thereunder of November 21, 1828; that it had no authority to make a grant in California after May 13, 1846; that no Mexican grant was entitled to recognition unless it was shown of record in the archives of the Mexican Government; that the said grants, having been confirmed and patented in violation of these conditions and restrictions, are not now entitled to recognition, but should be regarded as mere nullities and as affording no obstacle to the homestead applications.

Without attempting to demonstrate the legal sufficiency of these grants at the time when they were presented to the Board of Land

Commissioners for confirmation, it may be well to suggest that the stated restrictions and conditions were not so inelastic or certain as counsel contends. In the case of *Whitney* v. *United States* (181 U. S. 104, 108, 112) it was said:

> In reviewing questions arising out of Mexican laws relating to land titles we recognize what an exceedingly difficult matter it is to determine with anything like certainty what laws were in force in Mexico at any particular time prior to the occupation of the country by the American forces in 1846–1848. This difficulty exists because of the frequent political changes which took place in that country from the time the Spanish rule was first thrown off down to the American occupation. Revolutions and counter-revolutions, empires and republics followed each other with great rapidity and in bewildering confusion, and emperors, presidents, generals, and dictators, each for a short period, played the foremost part in a country where revolution seems during that time to have been the natural order of things. Among the first acts of each government was generally one repealing and nullifying all those of its predecessors.
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> * * * * * * *
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> In the early history of these Mexican land titles it had been supposed that the colonization law and the regulations above mentioned were all that were in force in Mexico after their dates. *United States* v. *Cambuston*, 20 How. 59, 63; *United States* v. *Vallejo*, 1 Black 541, 552; *United States* v. *Vigil*, 13 Wall. 449, 450.
>
> Subsequently, the claim was urged that that law and the regulations had been repealed by virtue of the law of April 4, 1837. (Reynolds, p. 222.) See also law of April 17, 1837, p. 224 of Reynolds' Compilation.
>
> The claim was urged by way of argument by counsel and referred to by Mr. Justice Lamar in his opinion in *Interstate Land Grant Company* v. *Maxwell Land Grant Company*, 139 U. S. 569, 578. Again, in *United States* v. *Coe*, 170 U. S. 681, 696, Mr. Justice McKenna, in speaking of the colonization law of August 18, 1824, said that "by a law passed April 4, 1837, all colonization laws were certainly modified and may be repealed."

In respect to the contention that the Government of Mexico could not legally grant lands in California after May 13, 1846, attention is called to decisions of the Supreme Court to the effect that Mexican authority to alienate the public domain in California terminated with the capture of Monterey by the United States forces on July 7, 1846. See *United States* v. *Pico* (23 How. 321) and *Beard* v. *Federy* (3 Wall. 478.) The latter case may also be cited in refutation of other contentions here urged. Among other things, it was held (syllabi):

> To give jurisdiction to the Board of Land Commissioners to investigate and determine a claim to land alleged to have been derived from the Spanish or Mexican Governments, it is not necessary that the petition of the claimant should aver that such claim was supported by any grant or concession in writing; it is sufficient if the petition allege that the claim asserted was by virtue of a right or title derived from either of those governments. The right or title may rest in the general law of the land.
>
> * * * * * * *

A patent of the United States issued upon a confirmation of a claim to land by virtue of a right or title derived from Spain or Mexico is to be regarded in two aspects—as a deed of the United States, and as a record of the action of the government upon the title of the claimant as it existed upon the acquisition of California. 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. As a record of the government it is evidence 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 and parties claiming under the government, this record, so long as it remains unvacated, is conclusive.

The case of *Thompson* v. *Los Angeles Farming and Milling Co.* (180 U. S. 72) involved lands in the Rancho ex-Mission de San Fernando, one of the grants here in question. That claim was based on a deed of grant by the Mexican governor of California made on June 17, 1846. The claim was confirmed by the Board of Land Commissioners and was patented.

The above case was an action in ejectment brought by claimant under the patent. The defendant alleged that the Governor of California had no authority to make the grant and that the decree of confirmation was without authority of law, and was absolutely void and a mere nullity and that the patent was likewise null and void. In speaking of the authority of the Board of Land Commissioners and the effect of the decree of confirmation and patent under the act of March 3, 1851, the court said (p. 77):

* * * 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 procedure 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 fulfil 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.)

It should be clear that these patented lands are not open to further entry and it is to be regretted that claimants should indulge the futile hope that this department will allow entry in conflict with the patents. The several hundred such applications which have been filed involve a burden on the Government in disposing of them and can only result in loss and disappointment to those who have been drawn into this hopeless adventure.

The decision appealed from is

Affirmed.

LESTER A. PARKER

Decided September 28, 1928

ISOLATED TRACT—APPLICATION—PURCHASE—STATUTES.

Disposition of an application for the sale of an isolated tract of public land pursuant to section 2455, Revised Statutes, as amended, is to be governed by the conditions existing at the time the application is filed rather than at the time that action thereupon is taken by the Land Department.

ISOLATED TRACT—APPLICATION—ADVERSE CLAIM—HOMESTEAD ENTRY—PREFERENCE RIGHT—LAND DEPARTMENT.

Where action upon an application for the sale of an isolated tract of public land, allowable when filed, was not taken by the Land Department within a reasonable time, the applicant acquired equities superior to those of one seeking to include the land within an entry of an adjoining tract which would not have been subject to entry until after sale of the tract in dispute had not the delay occurred.

FINNEY, *First Assistant Secretary:*

Lester A. Parker has appealed from the decision of the Commissioner of the General Land Office dated April 25, 1928, rejecting his application, Cheyenne 042508, for the sale of the SW. ¼ NE. ¼ Sec. 6, T. 30 N., R. 77 W., 6th P. M., Wyoming, as an isolated tract, pursuant to section 2455 of the Revised Statutes as amended.

The reason for rejecting the application, as given by the Commissioner, is as follows:

> The application can not be allowed under that portion of section 2455, Revised Statutes, which permits the offering of tracts isolated for two years because an adjoining tract was entered on April 21, 1927.

Section 2455 of the Revised Statutes, providing for the sale of isolated tracts, has been amended by three acts of Congress, to wit, the act of February 26, 1895 (28 Stat. 687), the act of June 27, 1906 (34 Stat. 517), and the act of March 28, 1912 (37 Stat. 77).

The act of February 26, 1895, *supra*, added the proviso "that lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the Government."

The proviso quoted above was stricken from the act of June 27, 1906, *supra*, and does not appear in the act of March 28, 1912, *supra*, but the circular of January 19, 1912 (40 L. D. 363), with respect to isolated tracts, reinstated it in a modified form, as follows:

7. No tract of land will be deemed isolated and ordered into the market unless, at the time application is filed, the said tract has been subject to homestead entry for at least two years after the surrounding lands have been entered, filed upon, or sold by the Government, except in cases where some extraordinary reason is advanced sufficient, in the opinion of the Commissioner of the General Land Office, to warrant waiving this restriction.

The substance of this provision has been carried through subsequent circulars and now appears in section 7 of Circular No. 684 of February 25, 1926 (51 L. D. 357). The sections 7 of the two circulars cited are identical, except that in the latter circular the words "filed upon, or sold by the Government," do not appear.

In the instant case Parker filed his application for the sale of the SW. ¼ NE. ¼ of the said Sec. 6 on August 31, 1926. The records of the General Land Office indicate that at that date the land had been subject to homestead entry for two years after the surrounding lands had been entered. One of the surrounding entries was that of Otto L. Fluder for the S. ½ SE. ¼, NE. ¼ SE. ¼, SE. ¼ NE. ¼ of the said Sec. 6, which had been allowed on August 23, 1921.

Fluder's entry was canceled on December 13, 1926, which was three months and 13 days after Parker filed his application for the sale of the tract now in question. On April 21, 1927, Grace Wirth made homestead entry for the land formerly embraced in Fluder's entry, and it is her entry to which the Commissioner refers in his decision.

While the Commissioner's decision, which is very brief, contains no statement of the points of law which his action involved, it would seem that he was of the opinion that Parker's application for the sale was to be judged by the conditions existing at the time he, the Commissioner, took action upon the same, rather than by the conditions existing at the time the application was filed. As at the time of the Commissioner's action one of the tracts surrounding the land in question had not been included in the entry of Grace Wirth for two years,

the Commissioner rejected Parker's application pursuant, apparently, to his construction of sections 7 and 9 of Circular No. 684, *supra*.

The department does not agree with the Commissioner's conclusions. In the opinion of the department the questions arising under section 7 of Circular No. 684 were to be determined in accordance with the facts existing on August 31, 1926, the date of Parker's application.

Since the rendition of the Commissioner's decision, however, another question has arisen in the case which must be disposed of. In a letter dated July 13, 1928, addressed to the Commissioner, the register of the Cheyenne, Wyoming, district land office stated that Grace Wirth had filed an application to amend her homestead entry so as to include the SW. ¼ NE. ¼ of the said Sec. 6, the isolated tract now in question.

While it is true that it has been held that an application for the sale of land as an isolated tract does not withhold the land from entry by another person prior to the time when the order of the Commissioner authorizing such sale is noted upon the records of the local land office (*Jacob Schutz*, 25 L. D. 146; *Erikson* v. *Harney*, 38 L. D. 483; section 9 of Circular No. 684), yet the department is of the opinion that the principle underlying those decisions is not present in the instant case.

Parker filed his application for the sale of the SW. ¼ NE. ¼ Sec. 6 almost one year and eight months prior to the Commissioner's decision. While the application for the sale did not segregate the land from entry, it is apparent that the application was allowable when filed, and that, as the case then stood, the Commissioner could not have rejected it unless he did so through the exercise of an arbitrary discretion, which the law does not countenance. Parker was entitled to reasonable diligence on the part of the Land Department in acting upon his application, and had action thereon been taken within a reasonable time the situation with respect to Wirth's proposed amendment of her entry would not have arisen. Under the conditions existing in this case it is believed that Parker has equities which are superior to those of Wirth and that her application to acquire the land embraced in Parker's application for its sale should not prevent favorable action upon Parker's application.

The Commissioner's action accordingly is reversed, with directions that the sale of the SW. ¼ NE. ¼ Sec. 6, T. 30 N., R. 77 W., 6th P. M., Wyoming, be authorized in accordance with Parker's application therefor, in default of reasons to the contrary which are not apparent upon the record.

Reversed.

JOHN F. SILVER

Decided October 22, 1928

STOCK-RAISING HOMESTEAD—APPLICATION—VESTED RIGHTS—PREFERENCE RIGHT—WITHDRAWAL.

A stock-raising homestead application for undesignated land has no segregative effect, but merely confers upon the applicant a preference right to enter the land, as against others, when and if designated as subject to the provisions of the stock raising homestead act, and a withdrawal prior to designation will prevent attachment or exercise of the right.

FINNEY, *First Assistant Secretary:*

Reference is had to your [Commissioner of the General Land Office] communication of October 2, 1928, requesting instructions in connection with the application for additional entry (Sacramento 016959), and petition for designation of lands under the stock raising homestead act, filed by John F. Silver.

It appears from the submission that Silver has a patented entry in T. 19 N., R. 7 W., M. D. M., California, upon which he resides. He filed additional application and petition for designation May 28, 1926, the additional application being for 160 acres in Secs. 11 and 15, T. 20 N., R. 6 W., M. D. M. Under date of April 1, 1927, the Geological Survey made a report stating that some of the tracts applied for, viz, E. ½ NE. ¼, NE. ¼ SE. ¼ Sec. 15 are not subject to designation under the act of December 29, 1916 (39 Stat. 862), because included in a first form withdrawal for irrigation works (Orland project), approved December 23, 1926, under authority of the act of June 17, 1902 (32 Stat. 388).

The submission invites attention to various orders, circulars, and instructions of this department concerning the effect of an application to enter and petition for designation under the stock raising act, viz, 47 L. D. 629 and 50 L. D. 580, and to other regulations and orders respecting the disposition of applications to enter, locate, or select public lands which have been withdrawn and reserved for use in connection with the construction and operation of reclamation works, or for other public purposes, viz, 47 L. D. 624, 48 L. D. 97, and 48 L. D. 153.

The question presented is whether under the circumstances disclosed, and in view of the rules, regulations, and instructions above referred to, the action of the Geological Survey in connection with Silver's petition for designation was correct.

For present purposes it is unnecessary to review and discuss at length the regulations and orders last above referred to, or the principle upon which they are based. However, it may be stated that since the decision of the United States Supreme Court in the cases

of *Payne* v. *Central Pacific Railway Company*, decided February 28, 1921 (255 U. S. 228), and *Payne* v. *State of New Mexico*, decided March 7, 1921 (255 U. S. 367), the department has applied the previously more or less well-settled rule that when a person has done all that the law requires to entitle him to an entry or to obtain a right under the public-land laws, he has, in the eye of the law, obtained that right, even though it has not been acknowledged or recognized by the Land Department. A contrary rule was applied by the department in the case of *John J. Maney*, decided October 19, 1906 (35 L. D. 250), but by order approved May 27, 1921, referred to in circular dated June 18, 1921 (48 L. D. 153), hereinabove mentioned, the department modified the *Maney case* so far as in conflict with the action taken in said order, the view being that the doctrine of the *Maney case* should be made to yield to the principle announced by the Supreme Court, and theretofore more or less directly applied by this department in the case of *Charles C. Conrad* (39 L. D. 432). In this connection see the cases of *Rippy* v. *Snowden*, and *Louise E. Johnson* (47 L. D. 321, and 48 L. D. 349); also instructions dated April 23, 1921 (48 L. D. 98), under the oil leasing law of February 25, 1920, wherein the doctrine of the *Conrad case* was referred to as having received the sanction of the Supreme Court decisions above cited.

The principle of the *Conrad case* is not of recent development. It found expression long ago in the case of *Gilbert* v. *Spearing* (4 L. D. 463), and was therein stated as follows (syllabus):

> The right of entry is complete, and in contemplation of law the land is entered, from the moment when the application, affidavit, and legal fees are placed in the hands of the local officers, if the land is properly subject to such appropriation.

The idea finds warrant in the decided cases of *Lockwitz* v. *Larson* (16 Utah 275); *Hasty* v. *Bonness* (84 Minn. 120; 86 N. W. 896), and in *Ard.* v. *Brandon* (156 U. S. 537).

In other words mere administrative delay in recording or putting a claim of record for lands *subject to entry* does not in anywise affect the legal operation of a valid application. However, it should be noted that the rule is pertinent only to cases where, upon the face of the record, the applicant is qualified, and the land subject to appropriation by entry at the date of the application. See *Conrad case*, *supra*; *Lewis* v. *Dunning* (49 L. D. 440).

The department has consistently held that a stock-raising homestead application for *undesignated* land has no segregative effect—does not affect the status of the land prior to its designation; that such an application and petition for designation merely confer upon the applicant a preference right to enter the tract, as against others, when

and if designated as subject to the provisions of the act. (Instructions, 47 L. D. 250; 47 L. D. 629.) A right to be preferred in the purchase or other acquisition of land is not such right as will, prior to its attachment or exercise, except the land from the operation of a withdrawal. Clearly, therefore, the mere filing or presentation of a stock-raising homestead application creates or confers no such right or interest in public lands prior to their designation, or prior to investigation by the department and a determination as to their character, as will defeat the right of the Government to appropriate and reserve them for public purposes. *Jefferson E. Davis* (19 L. D. 489); *Strader* v. *Goodhue* (31 L. D. 137); *Emma H. Pike* (32 L. D. 395); *Taylor et al.* v. *Graves* (36 L. D. 80); *David A. Cameron* (37 L. D. 450); *Henry Sanders* (41 L. D. 71); *Emblen* v. *Lincoln Land Company* (184 U. S. 660); and instructions (32 L. D. 387).

From what has been said it is clear that the refusal of the Geological Survey to classify or recommend the designation of lands withdrawn for use in connection with the construction and operation of the Orland project was correct.

PROCEDURE RELATING TO THE TAKING OF DEPOSITIONS

Instructions, October 26, 1928

WITNESSES—PRACTICE—HEARING—DEPOSITION—EVIDENCE—STATUTES.

Section 4 of the act of January 31, 1903, contains the authority and prescribes the procedure for the taking of testimony of witnesses who reside outside of the county in which the hearing occurs, by deposition either orally or by written interrogatories.

PRACTICE—WITNESSES—EVIDENCE—DEPOSITION—STIPULATION—OFFICERS.

Rule 27 of Practice is not restrictive of any of the other rules relating to the taking of depositions, but provides a means whereby the parties to the litigation may, by agreement and stipulation, take depositions before any officer authorized to administer oaths.

FINNEY, *First Assistant Secretary:*

The department has considered your [Commissioner of the General Land Office] letter, October 15, 1928, forwarding a communication received by you from the chief of field division at Denver, Colorado, relative to a holding in the unreported decision of July 16, 1928, in *United States* v. *Charles Grandy* (Blackfoot 033846, 035685).

You have since forwarded a similar communication from the chief of field division at Salt Lake City, Utah.

The portion of the decision of July 16, 1928, which the field officers request to be reconsidered is as follows:

> If it is proposed to take oral depositions, it must be by stipulation, to the terms of which both parties shall have agreed, and the stipulation so entered into must be filed with the register. Rule of Practice 27 (51 L. D. 547, 553).

So far as the Rules of Practice are concerned, complete provision for the taking of depositions is made by Rules 20 to 32, inclusive. Rule 20 provides for the taking of depositions by interrogatories under certain specified conditions relating to the witness whose testimony is sought, and Rule 28[1] authorizes the taking of testimony, upon order of the register, before an officer near the land in controversy. Rule 27 is not restrictive of any of the other rules relating to the taking of depositions, but provides a means whereby the parties to the litigation may, by stipulation, take depositions before any officer authorized to administer oaths, orally or by interrogatories. It is not only not restrictive of any other rule relating to depositions, but on the contrary is an independent and liberal authorization of procedure where the parties are in agreement.

However, the decision of July 16, 1928, failed to take into consideration the fact that the taking of the deposition there in controversy was authorized by section 4 of the act of January 31, 1903 (32 Stat. 790), as to which the instructions of March 20, 1903 (32 L. D. 132, 134), provide in part:

> Section 4 authorizes any party to the proceedings to take the testimony of any witness who resides outside of the county in which the hearing occurs, by deposition, which, upon ten days' previous notice, may be taken before any United States commissioner, notary public, judge or clerk of a court of record in the county where the witness resides. In such case the party desiring to take the deposition will be required to file with the register or receiver an affidavit setting forth the name and the address of the witness; that he resides outside the county in which the land office is situated, and that for such reason he desires to take the testimony of the witness named, in the form of a deposition. Whereupon it shall be the duty of the register or receiver, or either of them, to enter an order designating the time and place at which such deposition will be taken, and to issue a commission to some officer designated by this act to take the same. In such case either the register or receiver or the officer before whom the deposition is to be taken is authorized to issue subpœna for the witness, using substantially the form hereinbefore prescribed, and disobedience thereof as defined in the act is punishable as in case of violation of a subpœna to appear before the register or receiver.

Viewed in this light, the chiefs of field divisions should find no difficulty in taking the depositions of witnesses. If the witness resides in the county where the hearing occurs, he can be subpœnaed to appear at the hearing, while if he resides outside the county his deposition, either orally or by written interrogatories, may be taken by complying with the provisions of section 4 of the act of January 31, 1903, *supra*.

In so far as in conflict with the views herein expressed, the decision of July 16, 1928, in the case of *Grandy* is overruled.

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[1] See order of October 26, 1928, p. 503, amending Rule 28 of Practice, promulgated November 3, 1928, by the General Land Office as Circular No. 1172.—Ed.

PRACTICE—TESTIMONY—RULE 28, AMENDED[1]

ORDER[2]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 26, 1928.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

Rule of Practice 28 provides that testimony may 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.

To give the rule more extended operation and remove doubt as to its application, it is hereby amended by omitting "by deposition" and "near the land in controversy" from the first sentence thereof, so that the rule as amended will read as follows:

Rule 28. Testimony may, by order of the register and after such notice as he may direct, be taken before a United States commissioner or other officer authorized to administer oaths, 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.

E. C. FINNEY,
First Assistant Secretary.

SHORES v. STATE OF UTAH ET AL.

Decided October 27, 1928

SCHOOL LANDS—APPLICATION—PUBLIC LAND—COAL LAND—PREEMPTION—RECORDS.

Lands presumptively passing under school-land grants are excluded from appropriation by individuals under other public-land laws, and the administrative rule that applications for tracts embraced in any entry of record give rise to no rights unless such entry has been canceled of record, is applicable thereto.

SCHOOL LAND—APPLICATION—COAL LAND—CONTESTANT—PREFERENCE RIGHT—PRESUMPTION—WITHDRAWAL.

An application for a tract of land presumptively passing under a school-land grant, in the absence of statute or departmental regulations to the contrary, confers the legal status of a contestant of the State's title without preference right, and is no obstacle to a withdrawal of the land by the United States.

SCHOOL LAND—COAL LAND—APPLICATION—PRESUMPTION—STATUTES.

A coal-land application for land that presumptively passed under a school-land grant is not a "valid claim" within the purview of the saving clause of the leasing act of February 25, 1920.

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[1] See instructions of October 26, 1928, p. 501.—Ed.
[2] Promulgated by the General Land Office November 3, 1928, as Circular No. 1172.—Ed.

SCHOOL LAND—VESTED RIGHTS—MINERAL LAND—JURISDICTION.

Where the title to land has passed to a State either under its original school-land grant or by virtue of the additional grant of January 25, 1927, the jurisdiction and authority of the department to adjudicate the issue as to the character of the land has ceased.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Work* v. *Braffet* (276 U. S. 560), and *State of Utah, Pleasant Valley Coal Company, interveners* v. *Braffet* (49 L. D. 212), cited and applied.

FINNEY, *First Assistant Secretary:*

July 23, 1915, Cyrus W. Shores filed application 015509 to purchase under the coal-land laws the SE. ¼ Sec. 36, T. 12 N., R. 9 E., S. L. M., Salt Lake City land district. September 18, 1915, the State of Utah filed a protest against the application, charging that the land was not known to be valuable for coal on January 4, 1896, the date upon which the granting provisions of the enabling act of July 16, 1894 (28 Stat. 107), became effective as to surveyed lands falling within their purview; that relying upon its title under the enabling act and the good faith of the United States in making the grant, it had sold and patented the east half of the tract to William O. Williams, and the west half to T. A. Ketchum. Shores made answer denying the charges. Subsequently, the Ketchum Coal Company, claiming as transferee of T. A. Ketchum, and the Pleasant Valley Coal Company, claiming as transferee of Williams, intervened. After a number of continuances and postponements, hearing was held on the protest beginning February 2, 1920, the coal claimants and interveners only participating. By decision of February 21, 1923, the Commissioner of the General Land Office, following the rule in State *of Utah, Pleasant Valley Coal Company, intervener* v. *Braffet* (49 L. D. 212), affirmed the local officers in rejecting Shores's application, but after a lengthy review of the testimony and recital of evidence in the above-cited case, reversed the local officers in holding that the land was not known to be coal in character on January 4, 1896, and that it, therefore, passed to the State under its grant. Both Shores and interveners appealed.

Pursuant to departmental instructions of May 26, 1926, Circular No. 1067, action upon these appeals was suspended pending disposition of proposed legislation to confirm the titles of the States to school sections mineral in character, and to await final adjudication of a pending suit by Braffet, challenging the correctness of the conclusions of the department as to the legal status of his application. The passage of the act of January 25, 1927 (44 Stat. 1026), confirming in States and Territories title to lands granted by the United States in aid of common schools, subject to certain conditions, reservations, and limitations, and the final adjudication of the injunction proceedings brought by Braffet against the Secretary, *Work* v. *Braffet*

(276 U. S. 560), removed all impediments to the disposition of these appeals, which disposition, pursuant to the instructions of March 15, 1927, Circular No. 1114 (52 L. D. 51), may now be made in the light of the additional grant in the act above mentioned of January 25, 1927.

In *Work* v. *Braffet*, *supra*, the Supreme Court sustained the rules applied in *State of Utah, Pleasant Valley Coal Company, intervener*, v. *Braffet*, *supra*, to the effect that the administrative rule that applications for tracts embraced in any entry of record give rise to no rights unless such entry has been canceled of record, applies to school-land grants, which grants are considered as excluding the land presumptively passing thereunder from other appropriation by individuals under other public-land laws; that such applications in the absence of statutes or departmental regulations to the contrary, but confer the legal status of a contestant of the State's title without preference right, and that such right of contest is no obstacle to a withdrawal of the land by the United States; the application not being a "valid claim" saved under section 37 of the leasing act from the operation of said act. There was no error, therefore, in the rejection of Shores's application. The Commissioner's action rejecting it was unquestionably correct.

By decision of June 6, 1928, the department, in the (unreported) case of *Louis R. Lawyer* v. *State of Utah, Pleasant Valley Coal Company, intervener*, disposed of a controversy similar to the instant case, involving identical questions of fact and law as are presented here with respect to the SW. ¼ NW. ¼ of Sec. 36, T. 12 N., R. 9 E. In that case as in this, the land had been surveyed long prior to the grant, the surveyor general had returned the land as mineral in character, classification and appraisal of the land as coal land was made in 1907, and again in 1911, and the land was not subject to any of the exceptions mentioned in paragraph (*c*) of the first section of the act of January 25, 1927. For the reasons set forth in the decision referred to, it must be held that the tract here in question passed to the State either under the original or the additional grant, and jurisdiction and authority by the department to adjudicate the issue as to the character of the land has ceased, but nevertheless, as the original grant passed an absolute fee and the additional grant but a conditional fee with a possibility of reverter to the United States, as set forth in said decision, in the event the State fails to observe the conditions of such grant, it is deemed the duty of the department to express its views from the evidence presented, as to whether the State obtained title under the original grant which inured to the purchasers, or whether it passed solely by virtue of the later grant of mineral land and the purchasers took nothing theretofore.

The evidence adduced at the hearing has been carefully considered. Much of it relates to coal exploration and development that has occurred or become manifest since the date of the State's admission. Putting such evidence aside, and with it the assignments of errors made in considering it and evidence in the companion case of Braffet, enough clearly remains to warrant a conclusion as to the known character of the land on January 4, 1896. No attempt will be made to review the evidence in detail. It may be observed that little conflict of testimony exists as to physical indicia disclosed at the time the grant took effect; the difference is largely between opinions of experts as to what conclusions should be drawn from them. With regard only to evidence as to known conditions at the time the grant would have otherwise taken effect, it can be said that the following stated undisputed facts appear:

From the heights on the tract in question the surface slopes precipitously southwesterly to Price River and southeasterly to Willow Creek, which streams meet within a quarter of a mile south of the tract. A massive bed of sandstone, 80 to 120 feet thick, known as the Castlegate Sandstone Floor, is exposed on both sides of Price Valley, the south side of Willow Creek, and for many miles to the east along a prominent escarpment three miles south of the land known as Book Cliffs. This sandstone bed is exposed from a few feet to a quarter of a mile south of the land and has a fairly uniform dip of from 6 to 10 degrees to the north, forming a steep bluff where exposed. This bed is recognized as a marker for a widespread and persistent seam of coal resting immediately upon it, which, subsequent to the disclosure of coal seams stratigraphically higher, was termed the "A" seam. A little less than a half mile westerly from the southwest corner of the tract in question a mine, known as the Castlegate No. 1, was opened on this seam in 1888 or 1889, and many millions of tons of coal were taken from it during its operation for 20 years, the operations being thereafter transferred to a higher seam later disclosed. There is not upon the land any natural exposure of coal, but there was evidence of coal croppings and blossoms within a few hundred feet south and southwest of the land, and a workable seam at the Anderson mine, upon which some development had been made in 1891 in the SW. ¼ NW. ¼ of Sec. 6, T. 13 N., R. 10 E., and mention is made of other like-known seams on that section and adjacent Sec. 1.

There appears to be no disagreement that the coal-bearing horizon, meaning the coal-bearing strata disclosed at the outcrops, but not necessarily the coal, passes through the land in controversy, and there are no faults observed that would militate against such conclusion. The experts for the interveners laid emphasis on the absence of actual exposures on the land and the possibilities evidenced by certain indicia that they observed, that the "A" seam was erratic as to thick-

ness and showed evidence of thinning below a thickness that would be profitable to work as it neared the land in question, therefore displayed no certain assurance of developing a coal bed of commercial size. It was admitted, however, by one of such experts that the outcrop of the Castlegate Sandstone Floor to the west and south of the tracts would have warranted prospect cuts on that coal floor to determine the thickness of the coal existing at those points.

Taking into consideration the evidence as to workable coal seams in mines existing prior to 1896 on adjacent and neighboring lands, there appears no good reason for the assumption at that time that the "A" seam on the land in question would be thin any more than it would be to assume that it would be of commercial thickness. Nor is there any ground to conclude, when the evidence as to outcropping coal beds, their proximity to the land, the quality and thickness of the coal where found and mined, the topographical and structural features, the direction and dip of the coal are considered, that any practical coal man would have been deterred from exploration with the hope of opening a paying mine on the land in question because of the uncertainty which seems incident to any unexplored coal area, that the beds possibly would become too thin to work at a profit. Furthermore, the evidence that the tract has any value for any other purpose than for coal amounts to nothing, and the record shows that prior to 1896 all adjoining land south and adjoining lands east and west and neighboring lands to the south traversed by Price River had all been patented under coal cash entries, the circumstances pointing convincingly to the fact that the surrounding lands were regarded as valuable coal lands prior to 1896.

The department is convinced that the evidence as to adjacent disclosures and other surrounding external conditions known at the date aforesaid were sufficient to engender the belief that the land contained coal of such quality and quantity as would render its extraction profitable and justify expenditures to that end; *State of Utah, Pleasant Valley Coal Company, intervener*, v. *Braffet, supra; Diamond Coal and Coke Co.* v. *United States* (233 U. S. 236).

In consideration of the facts and for the reasons above stated, it is the department's conclusion that the tract in question did not pass under the grant of July 16, 1894, but only by virtue of the act of January 25, 1927, and that, therefore, the interveners obtained nothing by their purchase prior to the last-mentioned act, and that if the disposal of the coal deposits thereon is not made in accordance with the terms of the latter act, recommendations to the Attorney General to institute forfeiture proceedings would be warranted. The department concurs in the Commissioner's findings, but in view of the provisions of the additional grant to the State, the land passed thereunder.

Affirmed in part and reversed in part.

UNITED STATES v. LANDT (ON PETITION)

Decided November 19, 1928

CONFIRMATION—DESERT LAND—CONTEST—GOVERNMENT PROCEEDING—NOTICE—STATUTES.

An order issued by the Commissioner of the General Land Office directing proceedings against the validity of an entry will defeat the confirmatory effect of the proviso to section 7 of the act of March 3, 1891, even if no party be named therein, and the date of the issuance and service of notice upon the real party in interest is immaterial.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Jacob A. Harris* (42 L. D. 611) cited and applied.

FINNEY, *First Assistant Secretary:*

A petition for an order under Rules of Practice 78 and 79 has been filed on behalf of Edward B. Landt, from which the following facts appear:

On April 10, 1914, Pitts H. Hopkins made desert-land entry for W. ½ NW. ¼ Sec. 28, T. 9 N., R. 10 W., S. B. M., California. The entry was assigned to Edward B. Landt on January 18, 1926, which assignment was recognized by the Commissioner of the General Land Office on March 4, 1926.

Final proof was submitted by the assignee on June 8, 1926, but final certificate was withheld at the request of the division inspector. Receipt No. 2857873 for the final payment of $1 per acre and $2.25 as testimony fees was issued on June 8, 1926.

Under date of June 5, 1928, the Commissioner of the General Land Office addressed a letter to the register of the local land office as follows:

Los Angeles 023262 "F" MDH Claimant: Ethel H. Cowan, one of the heirs and for the heirs of Pits H. Hopkins, deceased.	Directing adverse proceedings. Entry made April 10, 1914. Final proof June 8, 1926. F. C. not issued.

REGISTER, LOS ANGELES, CALIFORNIA.

SIR: Referring to the entry by the claimant, whose name and serial number of the entry appear above, you will proceed in accordance with the circular of February 26, 1916, and in the notice provided for in paragraphs 3, 4, and 5 thereof you will state that the following charge has been filed by a representative of the General Land Office:

"That not as much as one-eighth of the land embraced in the entry has been reclaimed by cultivation and irrigation in the manner and to the extent contemplated by the desert land law."

In due time make full report of the proceedings had and the result thereof.

Notice of the charge was issued to Ethel H. Cowan on June 13, 1928. On July 18, 1928, Landt entered a special appearance and moved that the proceedings abate, alleging, among other grounds, that notice of the charge had not been served on the assignee. Whereupon the register served notice of the proceedings on the assignee

and also served a copy of the notice on his attorney. A protest and appeal were then filed by the attorney for the assignee, upon consideration of which the Commissioner of the General Land Office, by decision dated August 2, 1928, denied the motion to dismiss and directed the register to proceed. The petition under consideration was then filed.

It is contended on behalf of Landt (1) that the register had no authority to institute proceedings against a desert-land entryman; (2) that the Commissioner of the General Land Office on June 5, 1928, attempted to bring adverse proceedings against Ethel H. Cowan, but that he in nowise brought any charges against the assignee, Landt, and (3) that the action of the register in inserting the name of Landt as a party defendant was an unauthorized act, and in this respect his action was *ultra vires* and void.

The proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095, 1099), reads as follows:

> That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber culture, desert land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

Counsel has misconceived the effect of the proceedings instituted on June 5, 1928. The transferee of the entry was not named in the Commissioner's order but the proceedings were against the validity of the entry, and the order would have stopped the running of the statute even if no party had been named therein, it being incumbent on the register to ascertain from his records who was the real party in interest and serve him with notice. Paragraph 3 of the regulations of February 26, 1916 (44 L. D. 572). See also Rule of Practice 5.

In *Jacob A. Harris* (42 L. D. 611), which was cited with approval by the Supreme Court of the United States in *Lane* v. *Hoglund* (244 U. S. 174), it was held (p. 614):

> Upon mature consideration, the Department is convinced that a contest or protest, to defeat the confirmatory effect of the proviso, must be a proceeding sufficient in itself to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well-established practice of the Department, such a proceeding will be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge. The date of the issuance and service of notice is immaterial, if without undue delay and pursuant to the orderly course of business under the regulations.

The issuance by the register on July 18, 1928, of a notice to Landt was not the initiation of a proceeding against the latter, but notice

of a proceeding against the validity of the desert-land entry which had been commenced within two years after June 8, 1926. If the case had proceeded without notice to Landt, the cases cited by counsel on the subject of jurisdiction would have been in point.

It is apparent that the register proceeded in accordance with paragraphs 1, 3, and 4 of the regulations of February 26, 1916, *supra*, quoted by counsel in his motion to dismiss, and that the notice to Landt was given without undue delay.

Counsel's contentions are devoid of merit. The petition is denied.

Petition denied.

WALTER MAINE

Decided November 22, 1928

STOCK-RAISING HOMESTEAD—DESERT LAND—LIMITATION AS TO ACREAGE—STATUTES.

The effect of the stock-raising homestead act was to enlarge the right of homestead entry from 160 acres of land of the character specified in the act to 640 acres, and the making of a desert-land entry for 160 acres does not affect one's right under that act or under any of the homestead laws.

FINNEY, *First Assistant Secretary:*

The Commissioner of the General Land Office has submitted to the department an appeal by Walter Maine from the rejection by the register of the Carson City, Nevada, land office of his application to make entry under section 4 of the stock-raising homestead act for SW. ¼, S. ½ SE. ¼, NE. ¼ SE. ¼ Sec. 20, and NW. ¼ SW. ¼ Sec. 21, T. 23 N., R. 46 E., M. D. M., Nevada (320 acres).

The application was rejected on the ground that applicant had exhausted his right under the homestead law.

It appears that on September 10, 1927, Maine filed three applications: (1) To make entry under section 2289, Revised Statutes, for SW. ¼ NW. ¼, E. ½ NW. ¼ and NW. ¼ NE. ¼ Sec. 29, said township; (2) an application to make entry under section 3 of the enlarged homestead act for (as amended September 26, 1927) NW. ¼ NW. ¼ Sec. 29, SE. ¼ NE. ¼ and N. ½ SE. ¼ Sec. 30, said township (160 acres), and (3) an application to make desert-land entry for S. ½ SW. ¼ Sec. 21, NW. ¼ NW. ¼ Sec. 28, and NE. ¼ NE. ¼ Sec. 29, said township (160 acres).

The register allowed the applications to make original and additional homestead entries on September 27, 1927, and forwarded the desert-land application to the chief of field division, for report, in accordance with the existing regulations. No action thereon has been taken.

The application to make an additional entry under the stock raising homestead act and a petition for the designation of the land were

filed on May 9, 1928. The petition for designation has not been acted on.

The act of Congress approved February 27, 1917 (39 Stat. 946), provides:

> That the right to make a desert-land entry shall not be denied to any applicant therefor who has already made an enlarged homestead entry of three hundred and twenty acres: *Provided*, That said applicant is a duly qualified entryman and the whole area to be acquired as an enlarged homestead entry and under the provisions of this act does not exceed four hundred and eighty acres.

The act quoted conferred on Maine the right to make a desert-land entry after entering 320 acres under the enlarged homestead act. His right to have his desert-land application allowed must be determined as of the date when he filed the application and made payment. The application will be allowed if the report of the field investigation indicates that the tract described therein is susceptible of reclamation in the manner proposed by the applicant. Whether or not the desert-land application is allowed, Maine's right to enlarge his holdings under the homestead law to 640 acres is not affected.

The effect of the stock-raising homestead act was to enlarge the right of homestead entry from 160 acres of land of the character specified in said act to 640 acres; and the making of a desert-land entry for 160 acres does not affect a person's right under the stock-raising homestead act or any of the homestead laws. Maine's prior homestead entries having been properly allowed, the only question involved is whether the 320 acres embraced therein and the 320 acres applied for are subject to designation as stock-raising lands.

The decision appealed from is reversed, and the application in question will be suspended to await action on the petition for designation.

Reversed.

TAXATION OF ENTRIES WITHIN RECLAMATION PROJECTS PRIOR TO ISSUANCE OF FINAL CERTIFICATE—ACT OF APRIL 21, 1928

REGULATIONS

[Circular No. 1176]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 27, 1928.

REGISTERS, UNITED STATES LAND OFFICES:

An act approved April 21, 1928 (45 Stat. 439), reads as follows:

> That the lands of any homestead entryman under the Act of June 17, 1902, known as the Reclamation Act, or any act amendatory thereof or supplementary

thereto, may, after satisfactory proof of residence, improvements, and cultivation, and acceptance of such proof by the General Land Office, be taxed by the State or political subdivision thereof in which such lands are located, in the same manner and to the same extent as lands of a like character held under private ownership may be taxed.

SEC. 2. That the lands of any desert-land entryman located within an irrigation project constructed under the Reclamation Act and obtaining a water supply from such project and for whose land water has been actually available for a period of four years, may likewise be taxed by the State or political subdivision thereof in which such lands are located.

SEC. 3. That all such taxes legally assessed shall be a lien upon the lands and may be enforced upon said lands by the sale thereof in the same manner and under the same proceeding whereby said taxes are enforced against lands held under private ownership; *Provided*, That the title or interest which the State or political subdivision thereof may convey by tax sale, tax deed, or as a result of any tax proceeding shall be subject to a prior lien reserved to the United States for all the unpaid charges authorized by the said Act of June 17, 1902, whether accrued or otherwise, but the holder of such tax deed or tax title resulting from such tax shall be entitled to all the rights and privileges in the land of an assignee under the provisions of the Act of June 23, 1910 (Thirty-sixth Statutes, page 592).

The purpose of the law is to permit taxation by States, or political subdivisions thereof, prior to the issuance of final certificate, of lands embraced in reclamation homestead entries and in desert land entries within irrigation projects constructed under the Reclamation Act, and obtaining a water supply from a reclamation project.

Reclamation homestead entries are made subject to such taxation after the submission of satisfactory final proof under the ordinary provisions of the homestead law, and upon the acceptance thereof by the Commissioner of the General Land Office, and desert land entries located within irrigation projects, constructed under the Reclamation Act, at any time after water from said project has been available for the irrigation of the lands in the entry for four years.

Taxes legally so assessed constitute a lien upon the land subject to the prior lien of the United States for all unpaid charges authorized by the Reclamation Act, whether accrued or otherwise, and such lien may be enforced by the State or political subdivision thereof by the sale of the lands under proceedings had as in case of lands held in private ownership.

No tax assessed or levied prior to April 21, 1928, the date of the act, is validated thereby.

In case of the sale for taxes of lands included in a reclamation homestead entry, or a desert land entry within an irrigation project constructed under the Reclamation Act and obtaining its water supply from a reclamation project, the holder of the tax deed or tax title resulting from such tax sale shall be entitled to all the rights and privileges of an assignee under the provisions of the act of June 23, 1910 (36 Stat. 592), as to reclamation homestead entries,

and section 2 of the act of March 28, 1908 (35 Stat. 52), as to desert land entries, only when application for recognition as assignee has been filed in accordance with the governing regulations (47 L. D. 417, as to homestead entries, and 50 L. D. 443, as to desert land entries) and also satisfactory proof of such tax title, and showing that the equity of redemption has expired. After acceptance by the Commissioner of the General Land Office of such evidence as satisfactory, the name of such assignee shall be endorsed upon the records of the General and local land offices as entitled to the rights of one holding a complete and valid assignment under said act of June 23, 1910, or the act of March 28, 1908, *supra*, and such person may at any time thereafter receive patent upon submitting satisfactory final proof, and the proof of reclamation required by the act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof, and in case of desert land entries, the act of March 3, 1877 (19 Stat. 377), as amended by the act of March 3, 1891 (26 Stat. 1095), making the payments required by said acts. In all such cases the purchaser at tax sale must file in the local land office either the original or a duly certified copy of the tax deed, which evidence must be transmitted to this office for consideration the same as in ordinary assignment cases, before the record may be placed in the name of the purchaser as assignee.

In cases of application for exchange of reclamation homestead entries in whole or in part (of lands not sold at tax sale), where the proof as to residence, improvements, and cultivation in support of the base land has been accepted as satisfactory (section 44 of the act of May 25, 1926, 44 Stat. 636, and the regulations thereunder in 51 L. D. 525); in cases where application is made to enter lands formerly included in a reclamation homestead entry which was canceled after acceptance of proof of residence, improvements, and cultivation; in cases where application is made to enter lands formerly embraced in a desert land entry, which obtained its water from a Federal reclamation project, and was canceled after four years from the date of availability of water or where final proof is submitted on a pending desert land entry after four years from the date water was available therefor; there must be furnished in addition to the usual evidence, a certificate by the proper tax officer showing that there are no unpaid taxes or tax sales charged against the land or tax deeds outstanding and that the accrued taxes for the current year have been provided for.

When relinquishments of entries or parts of entries involving taxable lands are filed with the register of a local land office, he will transmit the same to the General Land Office without noting the same on his records, unless there is furnished, as set forth in the

preceding paragraph satisfactory evidence that there are no unpaid taxes charged against, or unredeemed sales of, the lands relinquished, in which case the relinquishment may be accepted or noted as in ordinary cases.

In case of exchange or the cancellation of entries involving lands which have been taxed or are subject to taxation, the register of the local land office will at once, upon the consummation of the exchange or the notation of the cancellation, notify the proper taxing authorities thereof, to the end that such lands may be relieved from future taxation.

The register of the local land office will, upon application therefor, furnish the proper taxing authorities lists of reclamation homestead entries upon which final proof has been submitted and accepted under the ordinary provisions of the homestead law, and of desert land entries where water from a Federal irrigation project has been available for four years, as provided in instructions of October 8, 1907 (36 L. D. 194), and of April 16, 1910 (38 L. D. 575). Circular No. 838 of July 8, 1922 (49 L. D. 168) is hereby revoked.

WILLIAM SPRY,
Commissioner.

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

H. C. SKARIE, AS MORTGAGEE OF FRANK F. BROCKWAY

Decided December 1, 1928

HOMESTEAD ENTRY—FINAL PROOF—CONFIRMATION—MORTGAGEE—STATUTES.

Section 7 of the act of March 3, 1891, presupposes that the entryman himself shall submit proof and pay the necessary fees and commissions, and that the receiver's receipt shall be issued to him, and there is no such privity of interest between the entryman and a mortgagee as will permit the latter to fulfill these conditions of the statute upon the failure of the entryman to do so.

HOMESTEAD ENTRY—MORTGAGE—MORTGAGEE—FINAL PROOF—EQUITY—EVIDENCE.

Where an entryman fails or refuses to submit proof after mortgaging his entry, the mortgagee, in order to be entitled to equitable consideration, must show that the entryman complied with the law of his entry and possessed the necessary qualifications to have enabled him to acquire the legal title to the land.

HOMESTEAD ENTRY—FINAL PROOF—MORTGAGEE—EQUITY—EVIDENCE—OATHS.

Section 2291. Revised Statutes, contemplates that a homestead entryman shall, upon the submission of final proof, appear personally before the proof-taking officer, and an exception to that requirement for the purpose of granting equitable consideration to a mortgagee will be considered only upon a showing that the testimony of the entryman can not be obtained.

FINNEY, *First Assistant Secretary:*

I have to acknowledge your communication of November 22, 1928, requesting advice whether an entry made under the enlarged homestead act by Frank F. Brockway, August 31, 1923, for the S. ½ Sec. 7, T. 23 N., R. 47 E., M. M., Great Falls, Montana, was under the facts hereinafter stated confirmed by the provisions of section 7 of the act of March 3, 1891 (26 Stat. 1095, 1098).

It appears that on January 13, 1926, the Security State Bank of Wolf Point, Montana, filed notice that it had a mortgage covering the land. A short time thereafter, February 18, 1926, Brockway filed a relinquishment of the entry and March 3, 1926, the mortgagee company filed a protest against the acceptance of such relinquishment, and it was rejected by your office letter of May 7, 1926. January 24, 1927, the entryman filed another relinquishment and on February 10, 1927, the company again protested but no action has been taken thereon. In the meantime and on August 17, 1926, one H. C. Skarie, receiver for the bank, submitted final proof on the entry and the receiver's final receipt issued August 24, 1926, but final certificate was withheld at request of the chief of field division.

A proviso to said section 7 of the act of March 3, 1891, directs that after the lapse of two years from the date of the receiver's receipt upon the final entry of any tract of land under the homestead law, "When there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered and the same shall be issued to him." I shall not stop to inquire whether the steps taken with respect to Brockway's entry during the two-year period and still pending constitute a protest or contest, because it is obvious that the law in question has no application to a case like this. This is not a final entry within the meaning of said act. The law presupposes that the entryman shall submit proof and pay the necessary fees and commissions, and that the receiver's receipt *shall have issued to him.* Here the entryman submitted no proof, paid no money, and no receipt was issued to him, but on the contrary, while somewhat doubtfully stated in your letter, informal inquiry discloses that such receipt issued in the name of "H. C. Skarie, mortgagee of Frank F. Brockway." The entryman was making no claim to the land, was asserting that he had abandoned it, that he could not make a living on it, and persisted in proffering the relinquishment of his claim to the Government. The so-called final proof in this case was submitted on behalf of the bank and to the end that the bank might be secured in its mortgage debt. Whether the equitable powers of the Land Department are such that eventually the bank may be substituted to the earned equitable rights of the entryman at the time he abandoned the land,

is for future determination. It will be enough to say at this time that there is no such privity of interest between the entryman and the mortgagee as entitled the bank's receiver to invoke the confirmatory provisions of said act. After the receipt of the field agent's report it will then become the duty of the Commissioner of the General Land Office to pass on the sufficiency of the proof filed by the receiver with a view to submitting the case to the Board of Equitable Adjudication. In any event it will be necessary for the mortgagee to show that the entryman complied with the law of his entry and that he possessed the necessary qualifications to have enabled him to acquire the legal title to the land. Whether any person other than the entryman can make the final oath required of entrymen in such cases or whether in a case like this the execution of such oath may be waived in the interest of equitable administration are questions for further consideration on the merits of the case. In this connection to entitle a mortgagee to equitable consideration within instructions of March 11, 1922 (48 L. D. 582), it should be made to appear that "the testimony of the entryman can not be obtained."

EXPIRATION OF PROSPECTING PERMITS—ACTS OF OCTOBER 2, 1917, FEBRUARY 25, 1920, AND FEBRUARY 7, 1927

INSTRUCTIONS

[Circular No. 926]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 1, 1928.

REGISTERS, UNITED STATES LAND OFFICES:

The instructions of April 5, 1924, Circular No. 926 (50 L. D. 364), are revised to read as follows:

Action taken by certain district land offices on applications for lands which have been included in prospecting permits outstanding for more than two years, indicate that not all district land officials fully understand the status of such permits, and in order that the matter may be made clear, you are instructed as follows:

Permits to prospect for potash under the acts of October 2, 1917 (40 Stat. 297), and February 7, 1927 (44 Stat. 1057), Circular No. 594 (46 L. D. 323), and Circular No. 1120 (52 L. D. 84), and for sodium under the act of February 25, 1920 (41 Stat. 437), Circular No. 699 (47 L. D. 529), are issued for terms of two years without provision for extensions of time. If application for patent or lease, based on claim of discovery within the two-year period, is not filed, the per-

mit expires by limitation fixed by both the law and the terms of the permit and is no longer a bar to the allowance of other filings for the land which it embraced. No formal action to terminate the permit is necessary or will ordinarily be taken.

Coal permits may be extended for a period of two years pursuant to the act of March 9, 1928 (45 Stat. 251). Therefore, a coal permit can not be considered as expired until the full period for which granted and for which it may be extended has elapsed, except permits which expired on or before March 9, 1928, and no extension thereof has been applied for, or permits regularly canceled and the cancellation noted on your records. Where application for lease has not been filed, a coal permit will, at the end of four years from date of issue, be considered no longer in force and no bar to other applications for the lands described therein.

As to oil and gas permits, the law authorizes extensions of time beyond the two-year period, and such permits are to be considered in force until canceled and the cancellation noted on your tract books in accordance with the governing regulations.

WILLIAM SPRY,
Commissioner.

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

HARRY F. DIEMER

Decided December 3, 1928

STOCK-RAISING HOMESTEAD—OIL AND GAS LANDS—WITHDRAWAL.

Lands within a petroleum reserve are not subject to entry under the stock raising homestead act.

STOCK-RAISING HOMESTEAD—HOMESTEAD ENTRY—OIL AND GAS LANDS—WITHDRAWAL.

The different rules adopted with respect to the allowance of entries under the stock-raising homestead act and the allowance of entries under other homestead laws, in cases where the lands have been reserved, involve classification and not discrimination, and a stock-raising homestead applicant has no ground for complaint because other homestead applicants have greater privileges than himself.

FINNEY, *First Assistant Secretary:*

Harry F. Diemer has appealed from the decision of the Commissioner of the General Land Office dated July 5, 1928, holding for rejection his application to amend his additional stock-raising homestead entry Cheyenne 044773, covering certain lands in the State of Wyoming.

The application to make the additional entry, which was known originally as Lander 014459, was filed on October 16, 1923. It included lots 6, 7, 8, NW. ¼ SE. ¼ Sec. 6, lot 1, Sec. 7, T. 49 N., R. 101 W., and lot 7, Sec. 9, T. 49 N., R. 102 W., 6th P. M., as well as seven other tracts in Sec. 9.

In decisions dated April 22, 1924, and May 28, 1924, the Commissioner rejected the application as to the tracts situated in Secs. 6 and 7, T. 49 N., R. 101 W., because they had been included in Petroleum Reserve No. 37 by an Executive order of May 27, 1915, and as to lot 7, Sec. 9, T. 49 N., R. 102 W., because that tract had been included in Stock Driveway Withdrawal No. 44 by the Secretary of the Interior on January 1, 1919. The Commissioner stated, however, that entry would be permitted for the remaining tracts situated in the said Sec. 9.

On June 12, 1924, Diemer withdrew his application as to the lands in Secs. 6 and 7, and as to the lot 7 in Sec. 9, and on the same day his entry was allowed for the following tracts in Sec. 9, T. 49 N., R. 102 W., to wit: Lots 3, 5, 6, SW. ¼ NW. ¼, W. ½ SW. ¼, SW. ¼ SE. ¼, and SE. ¼ SW. ¼.

On October 17, 1927, Diemer filed an application for the amendment of his entry so as to include lots 6, 7, 8, NW. ¼ SE. ¼, Sec. 6, and lot 1, Sec. 7, T. 49 N., R. 101 W., which originally had been included in his application Lander 014459. The amendment was asked because of the departmental decision in the case of *Clifton W. McCoy* (52 L. D. 173), which holds that the clause "designated as valuable for oil and gas," as used in Circular No. 983 (51 L. D. 65), refers only to areas which have been designated as within the limits of producing oil or gas fields. Diemer stated that the tracts sought to be included by amendment were not within the limits of a producing oil or gas field.

In his decision of July 5, 1928, the Commissioner said that as the tracts sought to be included by amendment were within Petroleum Reserve No. 37—as stated in his former decisions—they were not subject to entry under the stock-raising act. He also said that lands in petroleum reserves are not of the class referred to in the decision in the *McCoy case, supra.*

In his appeal to the department Diemer points out that, although homestead entries are not permitted under the stock-raising act for lands within petroleum reserves, such entries are permitted under section 2289 of the Revised Statutes, and under the enlarged homestead act, under certain conditions. He says, in substance, that this is a discrimination against stock-raising entries which involves a distinction without a difference and he contends that it was not the intention of Congress, in the respect stated, to place stock-raising

entries upon a footing different from that of entries made under the other homestead laws.

The department finds that the Commissioner's action rejecting the application to amend was right.

The ruling of the department forbidding the allowance of stock-raising entries within petroleum reserves is found in Circular No. 913 (50 L. D. 261), where it is said that stock-raising entries can be allowed only for unreserved lands. This ruling has been approved by Congress in subsequent legislation and it accordingly must be accepted as a correct statement of the legislative intent with respect to the stock-raising act.

The different rules adopted with respect to the allowance of entries under the stock-raising act and the allowance of entries under other homestead laws in cases like the one at hand involve classification and not discrimination. An applicant to make stock-raising entry has no ground for complaint merely because homestead applicants under other laws have greater privileges than himself, as his rights are positive and not relative.

The decision appealed from is

Affirmed.

GORDA GOLD MINING COMPANY AND WALLACE MATHERS v. ERNEST BAUMAN (ON PETITION)

Decided December 3, 1928

MINERAL LANDS—MINING CLAIM—HOMESTEAD ENTRY—ADVERSE CLAIM—HEARING—RES JUDICATA—LAND DEPARTMENT—EVIDENCE.

Where in a controversy between rival claimants to a tract of public land the issue is as to its character and it is adjudged upon hearing to be mineral, the issue as to the character of the land as of the date of the hearing is *res judicata*, and further consideration of the matter will not be given by the Land Department in the absence of a showing that exploration and development subsequent to the hearing disclosed that the land was not in fact of mineral value.

MINERAL LANDS—MINING CLAIM—ASSESSMENT WORK—LAND DEPARTMENT—HOMESTEAD ENTRY.

The Land Department has nothing to do with the question of the performance of annual assessment work on mining locations made upon lands that continue to be subject to location, entry, and purchase under the mining laws, and an agricultural claimant can not take advantage of defaults of that character.

HOMESTEAD ENTRY—POSSESSION—LAND DEPARTMENT—COURTS.

The Land Department has no means of enforcing its decisions and restoring to an entryman in whose favor it has decided possession to the land unlawfully detained from him by another, but his remedy is in the local courts.

NOTICE—HOMESTEAD ENTRY—ADVERSE CLAIM—MINING CLAIM.

One who puts himself out of range of timely notice by sojourn in a distant country while decision was pending without designating some proper representative upon whom service could be made in his behalf has no ground for complaint of action taken during his absence.

FINNEY, *First Assistant Secretary:*

The Commissioner of the General Land Office, by letter of November 16, 1928, has transmitted for such action and instructions as the department may consider proper a number of communications received May 2, 1927, and on later dates from Ernest Bauman which are in the nature of petitions to reconsider and set aside departmental decision of March 15, 1926, wherein was adjudicated certain conflicts between his homestead entry, San Francisco 06140, and certain mining locations to which claim was asserted either by Wallace Mathers or the Gorda Gold Mining Company. These communications will be treated as an informal petition for the Secretary to exercise his supervisory authority.

Aside from much irrelevant matter, the contents of these communications are in substance and effect as follows:

(1) The findings in said decision that certain portions of his entry were mineral in character are contrary to actual fact.

(2) The mining locations held to be valid have not been maintained by the doing of the required assessment work and have therefore been abandoned.

(3) Mathers, a mining claimant, continues to occupy and possess as a home for himself a portion of the land adjudged by the decision to be nonmineral and properly subject to Bauman's homestead entry, and by threats and acts of trespass has prevented, and does prevent him from exercising his rights as a homesteader, and his property has been damaged in consequence.

(4) That he was unable to register timely objections to the decision rendered and action thereafter taken pursuant thereto by reason of his journeys from place to place in South America, it being averred that first notice of departmental decision was received at Sibundoy, Colombia, South America, on March 17, 1927.

Bauman in effect requests that he be granted patent to the entire entry and that the order to segregate by survey the mining claims adjudged valid from the remainder of his entry issued pursuant to the department's decision be vacated or stayed and the case be reopened. In considering this petition brief reference will be made to the previous adjudications of the department in the case which show the present status of Bauman's entry, the status of the proceedings against it, and his status as a litigant at the present time.

Upon a petition for the exercise of supervisory authority filed by Bauman, the record made at a hearing in the contest proceedings be-

tween the mining claimants above mentioned and Bauman was considered in departmental decision of August 21, 1922. It was therein adjudged that the area of Bauman's entry within sundry locations of the mining claimants was mineral in character and in accordance therewith an order directing the segregation from the entry of the claims held mineral was issued. The decision was adhered to on motion by Bauman for a rehearing October 31, 1922. Thereafter, upon representations of the division inspector to the effect that no part of the entry was mineral in character, and that Bauman had not obtained a fair trial, which representations the mineral claimants challenged, the department vacated the previous decision and reopened the case for further hearing on the protests and for a readjudication upon the record as it shall then appear. A hearing was duly held between the mineral claimants and the Government, Bauman appearing merely as a witness for the Government, and much additional testimony was taken. Upon consideration of the record made at the hearing, the Commissioner reversed the local officers and held the conflicting mining claims were invalid. Upon appeal by the mining claimants, the department in its decision aforesaid of March 15, 1926, modified the Commissioner's decision and held (pages 17, 18, 26) that the Nugget, Gulch, and Lucky Pete placers and another lode claim upon which certain mineral showings existed were valid and directed a survey segregating the areas of such claims and the cancellation of Bauman's entry to the extent of conflict therewith, and as full compliance with the homestead law had not been made during the statutory life of the homestead entry, it was directed that the case be referred to the Board of Equitable Adjudication. It was held that Bauman, notwithstanding representations to the contrary, had a full opportunity to present his case at the first hearing and a fair trial; that he had no right to have it reopened, and that the rehearing must be treated as a proceeding solely between the mineral claimants and the Government. A segregation survey has been directed pursuant to said decision.

Bauman does not show that by exploration and development subsequent to the last hearing, it has been disclosed that the claims held mineral are so in fact. The issue as to the character of the land as of the date of that hearing is *res judicata* and warrants no further inquiry (*Coleman et al.* v. *Mackenzie et al.*, 28 L. D. 348, and cases there cited). If the mining locations held valid have been abandoned they are subject, in the absence of a withdrawal, to relocation under the mining laws. The long-established rule that the department has nothing to do with the question of the performance of annual assessment work on mining locations made upon lands that continue to be subject to location, entry, and purchase under the mining

laws, and that an agricultural claimant can not take advantage of defaults of that character still remains in full force and effect (*Emil L. Krushnic*, 52 L. D. 282).

With respect to his complaint of unlawful detention of part of the premises which the department held were subject to his entry, the answer is that the department has no means of executing its decisions and restoring his possession to the land unlawfully possessed. It is believed he has adequate remedy in the local courts. *Gragg* v. *Cooper et al* (89, Pac. 346); *Haven* v. *Haws* (63 Cal. 514); *Whitaker* v. *Pendola* (78 Cal. 296, 20 Pac. 680); *Thallmann* v. *Thomas* (111 Fed. 277). If by threats or intimidation Bauman is prevented from exercising his rights and enjoying the privileges conferred upon him by the homestead laws, and such threats and other acts of intimidation proceed from a conspiracy, he may advise the division inspector at San Francisco fully as to the circumstances, who will make such investigation, report, and recommendations as to criminal proceedings as the facts ascertained may warrant, with a view to prosecutions.

With respect to Bauman's failure to get timely notice of the decision, it will be observed that as he put himself out of range of timely notice by sojourn in a distant country while decision was pending without deputing to some qualified and competent person authority to take care of his interest and without filing such authority and notice where service might be made upon a proper representative he can not complain of action taken during his absence.

The matter of notice, however, is of no importance. The motion for rehearing filed by Mathers was denied. The grounds for reopening the case have now been considered and are without merit. The petition is accordingly denied.

Petition denied.

STANDARD SHALES PRODUCTS COMPANY

Decided December 12, 1928

OIL SHALE LANDS—MINING CLAIM—ASSESSMENT WORK—RELIEF—NOTICE—STATUTES.

The public resolution of November 13, 1919, and prior resolutions containing substantially the same provisions, afforded relief from the necessity of doing annual assessment work only to those claimants who invoked their benefits in the manner therein provided.

OIL SHALE LANDS—MINING CLAIM—ASSESSMENT WORK—RELIEF—NOTICE—RECORDS—POSSESSORY RIGHT.

Where an oil-shale claimant neither performed the annual assessment work for the year 1919, nor caused the notice provided by the public resolution of November 13, 1919, to be recorded in lieu thereof, all of his rights under the mining law ceased and he could not thereafter bring his claim within the exception in section 37 of the leasing act of February 25, 1920.

OIL SHALE LANDS—MINING CLAIM—GROUP DEVELOPMENT—DISCOVERY—EXPENDITURE—ASSESSMENT WORK—EVIDENCE.

Work of a strictly exploratory nature performed on a group of oil-shale claims, such as work that has value in determining the oil-bearing character of the shale on a continuous group of claims is available as assessment work under section 2324, Revised Statutes, an antecedent discovery being shown.

OIL SHALE LANDS—MINING CLAIM—GROUP DEVELOPMENT—ASSESSMENT WORK—STATUTES.

The restriction in the act of February 12, 1903, relating to oil placers, which limits the benefits of common improvement work to five claims, is not applicable to oil-shale claims.

OIL SHALE LANDS—MINING CLAIM—GROUP DEVELOPMENT—ASSESSMENT WORK—EVIDENCE—LAND DEPARTMENT.

Where development work has actually been done upon a group of oil-shale claims in good faith and is reasonably adapted to the purpose for which it was designed, although it may not have been the best possible mode of development, the department will not substitute its judgment as to its wisdom or expediency for that of the owner.

OIL SHALE LANDS — MINING CLAIM — ASSESSMENT WORK — EXPENDITURES — COSTS—EVIDENCE—STATUTES.

In determining whether the amount of annual assessment work performed upon a mining claim fulfills the requirements of section 2324, Revised Statutes, the test is the reasonable value of the work, not what the contract price was, nor the actual amount paid for it.

FINNEY, *First Assistant Secretary:*

The Commissioner of the General Land Office has transmitted for approval a letter dated November 22, 1928, expressing the opinion that mineral entry, Denver 038111, under which the Standard Shales Products Company seeks to obtain patent to 69 oil-shale placers situate in T. 6 S., R. 99 W., and T. 7 S., Rs. 98 and 99 W., 6th P. M., should be clear-listed and patent should issue, except as to tracts reported by inspectors of the field service as nonmineral in character. Timely discovery being sufficiently shown in the patent application and conceded by the inspectors as to those claims considered by the Commissioner worthy to be clear-listed, the sole question is whether, under section 37 of the act of February 25, 1920 (41 Stat. 437), the claims in question were valid claims existing at the date of the passage of said act and have been thereafter maintained in compliance with the laws under which initiated.

The inspectors report as to six of these claims, namely, G. M. Nos. 39 to 44, inclusive, that no annual assessment work was performed for the calendar year 1919, nor did the claimant take advantage of the benefits of public resolution of November 13, 1919 (41 Stat. 354), by filing a notice of its desire to hold said claims as therein provided, or resume work prior to February 25, 1920. The inspectors therefore recommend a charge be preferred that these six claims are invalid.

With respect to this recommendation it is stated: "Recommendation 5 is not a ground for protest, inasmuch as it pertains to a period prior to February 25, 1920, with which the Government is not concerned, and could be questioned only by adverse claimant under sections 2325 and 2326, United States Revised Statutes."

The conclusion above quoted is not in harmony with the views of the department as to the effect of the leasing act or other withdrawal upon mining claims which were in default in performance of annual assessment work at the date such withdrawals became effective. See *Interstate Oil Corporation and Frank O. Chittenden* (50 L. D. 262, 265); *Emil L. Krushnic on rehearing* (52 L. D. 295, 300).

In determining whether oil-shale claims included in an application for patent fall within the exceptions in section 37, it is as much the concern of the department to determine what claims were valid and existent on the date of the passage of the act as it is to determine whether claims valid and existent on such date have been thereafter maintained. The public resolution of November 13, 1919, and that of October 5, 1917 (40 Stat. 343), and prior resolutions containing substantially the same provisions, by their express terms afford relief from the necessity of doing annual labor and improvement only to those claimants who invoked their benefits in the manner therein provided, and if a mineral claimant failed to invoke such benefits the resolution is of no avail to him. To hold a claim, it was necessary either to do the required assessment work or cause the prescribed notice to be recorded in lieu thereof. *Nesbitt* v. *De Lamar's Nevada Gold Mining Company* (Nev. 52 Pac. 609); *Hatch* v. *Leighton et al.* (Ariz. 209 Pac. 300). The filing of such notice is equivalent in all respects to, and is attended with, the same consequences that result from the actual performance of the assessment work. *Field* v. *Tanner et al.* (Colo. 75 Pac. 917), and conversely, the failure to file the notice is attended with the same consequences as result from the failure to do the work. If, as alleged, claimant neither did the work nor filed the notice within the required period, its possessory right under the mining laws terminated when the year 1919 ended, and as no work was resumed prior to February 25, 1920, all rights of claimant under the mining law ceased and the land became subject to the operation of the leasing act. Suitable charges against these claims should therefore be formulated specifying such default.

The record discloses that affidavits in lieu of assessment work were filed for the year 1919 for all the claims except for the six above mentioned; that the annual assessment work for the succeeding years down to and ending July 1, 1926, consisted largely of open cuts made on vertical cross sections of various horizontal oil-shale strata occurring throughout the geologic column of the shale deposit. The purpose of these cuts is declared to be to expose a

broad vein of unweathered oil shale, facilitating determinations of average oil content over extensive lateral areas and providing information as to the thickness, texture, and variations of dip and other structural conditions of the shale beds existent upon the claim. It is admitted that these cuts were not intended as mine openings or as improvements begun to facilitate the actual extraction of the oil shale but were intended as exploratory operations for the purpose of acquiring knowledge as to structural, geologic, and economic conditions pertaining to a deposit of great magnitude and extent. In substance, it is alleged that the various cuts made throughout the years above mentioned are all a part of a plan of progressive prospecting to obtain correlated data, each single excavation contributing some item of information, which would be valuable in a scheme of development of and beneficial to the entire mineral estate considered as a unit which underlies the claims as a group. A map of the claims shows that the 69 claims in one compact body completely cover a promontory 7½ miles long and 2½ miles wide, rising from its base some 2,000 feet, the shale beds outcropping on the slopes at frequent intervals in the stratigraphic column. The two inspectors who made a detailed examination of the assessment work report that the 354 cuts measured by them are placed so that there are at least three holes on each horizon at some place on the group; "that the applicants have shown good faith as a rule in opening up several different beds of oil shale on each claim;" that "they have done that to a greater extent than almost any other operator in the field."

Work of a strictly exploratory nature performed on a group of oil-shale claims, such as work that has value in determining the oil-bearing character of the shale on a continuous group of claims is considered available as assessment work under section 2324, Revised Statutes, an antecedent discovery being shown, and the apportionment of the benefits of such work is not affected by the restrictions of the act of February 12, 1903 (32 Stat. 825), relating to oil placers which limit the benefits of common improvement work to five claims. Instructions of November 12, 1927, and March 10, 1928 (52 L. D. 333, 334).

Although it seems that claimant, in carrying out its scheme of prospecting, was under the impression that the five-claim restriction in the act of 1903 applied to the work, and that claimant was governed in placing such work on the ground and representing it in the patent application by a misconception as to the legal necessity of conforming to the provisions of that act, yet, if in fact, each cut was considered by claimant as furnishing some contribution to the knowledge of the oil-bearing character of the shale deposits on the entire group considered as a unit, and the nature, extent, and distribution of the work, topographic and surface difficulties duly considered,

tend to show that such was the purpose, claimant should not be held to a demonstration that certain specific work on one claim directly benefits some other specific claim or claims. Criticism, therefore, as to the distance and direction of a cut on one claim with respect to its direct relation to some other claim, or because work was done on a zone on a certain claim that was eroded from another claim it was assumed to benefit, or that the identical oil-shale bed exposed by a cut did not continue without a break to a claim it was assumed to benefit, may be disregarded as of little moment. Whether there was more work done on one shale bed than was necessary to obtain information as to the oil-bearing character thereof; whether too much work was done on lean zones and too little on rich zones; whether there should have been a different distribution of the cuts in defiance of steep escarpments, accessibility to camp sites, and other physical obstacles, whether the information obtained from one shale bed is valuable only with respect to that bed or has value as an element in any scheme of mining and development of the deposit as a whole, are questions relating to the wisdom and expediency of the plan pursued upon which miners of equal judgment and experience might honestly differ. They do, in fact, differ in this case. Where the work has actually been done in good faith and is reasonably adapted to the purpose for which it was designed, although it may not have been the best possible mode of development, the department will not substitute its judgment as to its wisdom or expediency for that of the owner. *Emil L. Krushnic* (52 L. D. 282, 292–295, and cases there cited).

With respect to the value of the work, the record shows that two inspectors made careful and detailed measurements of the open cuts on each of the 69 claims and also the G. M. Nos. 65 and 66 not included in the application, and appraised the values on such work according to the years in which it was alleged to have been done. In your letter these valuations are totaled, and the aggregate amount thereof for each of the years in question when prorated among the 71 claims exceeds $100 for each claim. Evidence has been obtained, however, showing that in certain years, that although claimants paid those who contracted to do the work $100 per claim, the work was subcontracted for $70 a claim, and it is the view of the inspectors that the subcontract price plus certain items of extra work which are considered applicable and done at small cost, should be taken as conclusive as to the value of the work.

The test is the reasonable value of the work, not what was paid for it, nor what the contract price was. Lindley on Mines, section 635, and cases there cited, *Stolp et al.* v. *Treasury Gold Mining Company* (80 Pac. 817, 818). Engineers for claimant and the Government,

experienced in such matters, whose competency and honesty there is no reason to question, have placed valuations on the total assessment work for each year which, when prorated among the 71 claims, show the required expenditure of $100 for each claim. There is no good reason to seek to impeach their combined judgments on the asumption that the value could not possibly exceed the cost.

For the reasons stated, the mineral entry should be clear-listed and patent should issue except as to the G. M. claims Nos. 39 to 44 inclusive, certain tracts that have been heretofore patented, and tracts reported nonmineral in character if the record is otherwise found regular. The case is therefore remanded with these modifications.

Modified and remanded.

ERVIN S. ARMSTRONG ET AL.

Decided January 9, 1929

OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT.

A new permit can not be granted under a partial assignment of an oil and gas prospecting permit where some of the land in the assignment is in a *de facto* producing structure.

OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT—LEASE—CONTIGUITY.

In the case of a partial assignment of an oil and gas prospecting permit such permit will be regarded, ordinarily, as a unit, and separate permits will not be issued to the assignees where it appears that the purpose is to evade the provision in section 14 of the leasing act of February 25, 1920, relating to the granting of a five per cent lease in compact form.

FINNEY, *First Assistant Secretary:*

You [Commissioner of the General Land Office] have recommended approval of a partial assignment by Ervin S. Armstrong of his oil and gas prospecting permit, Sacramento 019492, to the Standard Oil Company of California, the cancellation of Armstrong's permit to the extent of the land assigned, and the issuance of a new permit to the assignee for the land included in the assignment. The Director of the Geological Survey has declined to concur in your recommendation.

Armstrong's permit was issued on June 30, 1922, for the N. ½, N. ½ S. ½, S. ½ SE. ¼, SE. ¼ SW. ¼ Sec. 4, all of Sec. 10, T. 22 S., R. 17 E., all of Secs. 6 and 8, T. 22 S., R. 18 E., M. D. M., California, and it has been extended until March 1, 1929.

It is shown that Armstrong has entered into an operating contract with George F. Getty, Inc., covering all the permitted land in Sec. 4, T. 22 S., R. 17 E., and all of Sec. 6, T. 22 S., R. 18 E., whereby the operator is given the right to select 320 acres in said Secs. 4 and 6, in the event of discovery, for a lease at a royalty of 5 per cent.

The assignment to the Standard Oil Company of California covers Sec. 10, T. 22 N., R. 17 E., and the assignee is given the right to select 160 acres in said section, in the event of discovery, for a lease at a royalty of 5 per cent.

While the case has been under consideration here there has been received an assignment from Armstrong to George F. Getty, Inc., of the land in Sec. 4, T. 22 S., R. 17 E., and all of Sec. 6, T. 22 S., R. 18 E., together with a request on behalf of the assignee that the lands assigned be severed from those in the original permit and that a new permit for the lands covered by the assignment be issued to the assignee. In the assignment there is a stipulation that the assignee shall have the right to select 320 acres for a 5 per cent lease, in case of discovery, in said Secs. 4 and 6, and in the request for severance the explanation is made that with four incontiguous sections in the permit and with separate interests in different parties the division of the 5 per cent acreage presents an extremely difficult problem.

Ordinarily, in the case of a partial assignment of a prospecting permit, such permit will be regarded as a unit, and that is the principle sought to be circumvented in the present case. It is true that the separate permits requested by the two assignees would be given the date of the original permit, but in all other respects there would be two new, separate, and independent permits in addition to the original diminished one. It would appear that the purpose is to avoid the provision in section 14 of the leasing act for a 5 per cent lease in compact form.

The Director of the Geological Survey has reported that at least three-fourths of said Sec. 10 is within the known geologic structure of a producing oil or gas field, so that said section would not now be subject to application for prospecting permit.

The department takes the position that no new and separate permit can be granted in view of the report that some of the land is now in a *de facto* producing structure.

Armstrong's permit embraces 2,547.40 acres, being three full sections and all but 40 acres in Sec. 4, T. 22 S., R. 17 E., so that in case of discovery of oil or gas, a 5 per cent lease for 640 acres could be demanded. But it is clear that a 5 per cent lease, or 5 per cent leases, could not be granted for parts of two full sections. If discovery should be made in Sec. 4, however, the approximate 600 acres of permitted land in that section would not equal the full 5 per cent lease right, and at least one subdivision in Sec. 10 could be and would have to be taken. Under these circumstances the department is inclined to the view that 480 acres of 5 per cent lease area could be taken in Sec. 4, nearest Sec. 10, and 160 acres in Sec. 10, viz, the N. ½ N. ½

or NW. ¼, or W. ½ W. ½. Or the E. ½ Sec. 4, N. ½ Sec. 10 might be selected.

It will be noted that the assignees and the permittee will find it necessary to make some readjustment to make possible an arrangement as suggested. As the case has been presented the permittee retains only Sec. 8, T. 22 S., R. 18 E., and it may be that in case of discovery of oil or gas he would apply for a 5 per cent lease for 160 acres out of that section.

The department declines to issue a new permit to either of the assignees, or to approve either assignment as the matter now stands. The record is returned with instructions that the parties in interest be given opportunity to make readjustment in accordance with the views herein expressed.

CUMMINGS, JR., v. JOHNSON-FENNER AND MURDI (ON REHEARING)[1]

Decided October 30, 1928

PRACTICE—APPEAL—CONTEST—STOCK-RAISING HOMESTEAD.

A decision rendered on the appeal of one party to a controversy will not redound to the benefit of any other party thereto who has failed to appeal except where joint interests are involved which are so related that the rights of all will be affected by any decree made with respect to the rights of any one.

PRACTICE—APPEAL—CONTEST—STOCK-RAISING HOMESTEAD—RECORDS.

While an appeal brings up the whole record, it is only for the purpose of enabling the department to determine the questions presented by the errors assigned, and not for the discovery of error which may have been committed affecting the rights of one who makes no complaint and who is not seeking to have it corrected.

CONTEST — CONTESTANT — PRACTICE — APPEAL — PREFERENCE RIGHT — ADVERSE CLAIM—STOCK-RAISING HOMESTEAD.

Where in a contest proceeding a decision is rendered holding the entry for cancellation but denying a preference right to the contestant, an appeal by the contestee from that part of the decision affecting his rights will not entitle the contestant, who failed to appeal within due time, thereafter to assert a preference right in the presence of an adverse claim even though the decision as to him may have been erroneous.

FINNEY, *First Assistant Secretary:*

By order of July 9, 1928, the department entertained a petition for rehearing filed on behalf of Nellie Almeda Johnson-Fenner and Gracian Murdi in the matter of the contest of Clarence E. Cummings, jr., against the entry under section 1 of the stock-raising homestead act made by Mrs. Fenner on April 14, 1921, embracing

[1] See decision on second motion for rehearing, p. 532.

E. ½ E. ½ Sec. 7, W. ½, S. W. ¼ N. E. ¼, N. W. ¼ S. E. ¼, S. ½, S. E. ¼ Sec. 8, T. 8 S., R. 28 E., M. M., Montana, wherein the department, by decision of April 24, 1928, on a petition for the exercise of supervisory authority filed by Cummings, held that the intervening entry of Murdi would be canceled if Cummings applied to make entry for the land and showed himself to be qualified to make entry.

The petition was duly served on Cummings, who has filed an answer covering 41 typewritten pages, supported by 7 affidavits.

The record has been reconsidered.

The contest of Cummings was initiated January 15, 1926. He charged, in effect, that the required improvements had not been made and that entrywoman had not resided on the land to the extent required by the homestead law. Testimony was submitted June 1, 1926, both parties appearing with counsel. By decision dated December 11, 1926, the register recommended that the contest be dismissed. An appeal was filed by Cummings, which the Commissioner of the General Land Office dismissed by decision dated April 15, 1927, on the ground that Cummings had failed to serve and file his appeal in accordance with the Rules of Practice, but the entry was held for cancellation on the ground of insufficient residence. Entrywoman appealed, and by decision of September 30, 1927, the department affirmed the Commissioner's decision. The entry was canceled on entrywoman's relinquishment filed October 21, 1927, by Gracian Murdi, who at the same time applied to make entry for the land under section 1 of the stock-raising homestead act. Murdi's application was allowed October 29, 1927.

On February 25, 1928, a petition for the exercise of supervisory authority was filed on behalf of Cummings, which the department entertained by order of March 7, 1928, it being held therein—

> Although Cummings did not appeal from the decision dated April 15, 1927, he was warranted in assuming that the entire record would be considered by the department on the entrywoman's appeal, and that the errors in the decision of April 15, 1927, would be corrected.

The petition was granted, as heretofore stated, by decision of April 24, 1928. On May 18, 1928, Cummings filed an application (Billings 029748) to make entry for the land, showing himself to be qualified to make the entry.

According to a corroborated showing filed by Mrs. Fenner and Murdi, after the department had affirmed the commissioner's decision of April 15, 1927, the entrywoman consulted a number of people (among others, a departmental inspector and an attorney) as to her right to sell the improvements on the land and relinquish the entry. She was advised that as Cummings had not appealed from the dis-

missal of his contest he had forfeited the preference right of entry which otherwise he would have been entitled to. She thereupon entered into an agreement with Murdi, who offered to pay her $800 for the improvements, provided that when he appeared at the local land office the records showed that the land would be open to entry upon the filing of the relinquishment. Murdi visited the local office on October 21, 1927, and learned that the registered notice of the Commissioner's decision of April 15, 1927, had been receipted for by Cummings on April 27, 1927, and that the latter had taken no further action in the matter. Murdi was advised by the local office that Cummings had no further rights in the matter, whereupon he filed Mrs. Fenner's relinquishment and his own application to make entry for the land. The $800 agreed upon was paid to Mrs. Fenner and Murdi's application was allowed on October 29, 1927.

The question to be determined is whether the department's holding of March 7, 1928, to the effect that Cummings did not forfeit his rights as a contestant by failing to appeal from the Commissioner's decision of April 15, 1927, is correct.

It is well settled that where a party fails to appeal from an adverse decision, even if said decision was erroneous, he must be held to have acquiesced therein, and is not entitled to assert any further right in the presence of an intervening adverse right. See *Pehling* v. *Brewer* (20 L. D. 363) and cases there cited; *Macbride* v. *Stockwell* (11 L. D. 416), *Parker* v. *Gray* (11 L. D. 570).

The department has never departed from the settled rule of the courts governing appeals. The rule in the courts is that, except where from the very necessity of the case—due to joint interests so related that the rights of all will be affected by any decision made with respect to the rights of any one—no decision rendered on the appeal of one party will work to the benefit of any other who has not appealed.

Some of the States have by statute declared the rule which has long obtained fixing the rights of parties on appeal. Such a statute was discussed in *Morgan* v. *Williams* (137 Pac. 476). There a judgment was taken against a principal and his surety. The surety only appealed, and the judgment as to it was reversed. The principal then sought to claim the benefit of the decree of reversal in favor of his codefendant, on the ground that their interests were joint and that of necessity a decision as to one operated in the same manner as to the other. The court said:

> * * * The necessity of the case contemplated by that statute is an absolute necessity; that is to say, one arising from the inherent nature of the case in that no judgment rendered could, under any circumstances, be valid as to one of the parties and not as to the others. Obviously this is not such a case.

See also *Arnold* v. *Pike et al.* (143 N. W. 662), *Title Ins. & Trust Co.* v. *California Development Co. et al.* (127 Pac. 502).

The fact that the entrywoman appealed from that part of the Commissioner's decision of April 15, 1927, which held her entry for cancellation could in no manner affect Cummings. She was not complaining of the action which denied him a preference right of entry. While an appeal brings up the whole record, it is only for the purpose of enabling the department to determine the questions presented by the errors assigned, and not for the discovery of error which may have been committed affecting the rights of one who makes no complaint and who is not seeking to have it corrected. Cummings's preference was not an issue in the case at the time the appeal of Mrs. Fenner was considered. The only question before the department was whether or not the decision below was correct in holding the entry for cancellation.

After mature consideration the department is of opinion that it was erroneous to hold that, because the record was brought before the department on Mrs. Fenner's appeal, errors not made the basis of any appeal and which had long since become final would be looked into and corrected.

Accordingly, the departmental decision of April 24, 1928, is recalled and vacated, the decision of September 30, 1927, adhered to, and the application of Cummings rejected, leaving the entry of Murdi intact.

Application rejected.

CUMMINGS, JR., v. JOHNSON-FENNER AND MURDI (ON REHEARING)

Decided January 19, 1929

CONTEST—CONTESTANT—PREFERENCE RIGHT—PRACTICE.

A contestant who allows his contest to be dismissed can not thereafter claim the preference right accorded to successful contestants by section 2 of the act of May 14, 1880.

FINNEY, *First Assistant Secretary:*

A motion for rehearing has been filed on behalf of Clarence E. Cummings, jr., in the matter of his application to make entry for E. ½ E. ½ Sec. 7, W. ½, SW. ¼ NE. ¼, NW. ¼ SE. ¼, S. ½ SE. ¼ Sec. 8, T. 8 S., R. 28 E., M. M., Montana, wherein the department, on rehearing, by decision of October 30, 1928 (52 L. D. 529), rejected the application of Cummings, leaving the entry of Gracian Murdi, made October 29, 1927, intact.

The material facts are as follows: On January 15, 1926, Cummings initiated a contest against the entry under the stock-raising

homestead act made by Nellie Almeda Johnson, now Fenner, on April 14, 1921, for the tract above described. He charged, in effect, that entrywoman had not complied with the law as to residence and had not made the required improvements. A hearing was had, both parties submitting testimony. By decision dated December 11, 1926, the register recommended that the contest be dismissed. Cummings filed an appeal, which the Commissioner of the General Land Office dismissed on April 15, 1927, on the ground that Cummings had failed to serve and file his appeal in accordance with the Rules of Practice, but the entry was held for cancellation on the ground of insufficient residence. Mrs. Fenner appealed, and by decision of September 30, 1927, the department affirmed the Commissioner's decision. Entrywoman's relinquishment was filed on October 21, 1927, and at the same time Gracian Murdi applied to make entry for the land, which application was allowed on October 29, 1927. On February 25, 1928, a petition for the exercise of supervisory authority was filed on behalf of Cummings, which petition was entertained by departmental order of March 7, 1928, and was granted by decision of April 24, 1928. A motion for rehearing was thereafter filed on behalf of Mrs. Fenner and Murdi, and was entertained by departmental order of July 9, 1928. The decision now complained of followed, which decision was promulgated by the Commissioner of the General Land Office under date of November 15, 1928.

In the motion counsel contends that Cummings has a clear right to a preference right of entry which may not lawfully be denied him.

The only question disposed of by the decision of October 30, 1928—in fact, the only question then before the department—was whether Cummings was entitled to a preference right of entry; and the department held that his failure to appeal from the commissioner's decision of April 15, 1927, dismissing the contest was fatal to his claim.

It is well settled that though a contestant fails to prosecute an appeal, and thus abandons the contest, the department may, in the interest of the Government, consider the evidence submitted with a view to determining whether the entry should be canceled. *W. L. Rynerson* (7 L. D. 177).

A contestant who allows his contest to be dismissed can not thereafter claim the preference right accorded to successful contestants by section 2 of the Act of May 14, 1880 (21 Stat. 140).

Every contention contained in the motion for rehearing was carefully considered prior to the decision of October 30, 1928. No error appearing, that decision is adhered to, the motion being denied.

Motion denied.

SOLDIERS AND SAILORS' HOMESTEAD RIGHTS

REGULATIONS

[Circular No. 302]

[Reprint and revision of regulations of May 26, 1922 (49 L. D. 118)]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 21, 1929.

1. Any officer, soldier, seaman, or marine who served for not less than 90 days in the Army or Navy of the United States during the Civil War and who was honorably discharged and has remained loyal to the Government, and who makes a homestead entry, is entitled under section 2305 of the Revised Statutes and the act of June 6, 1912 (37 Stat. 123), to have the term of his service in the Army or Navy, not exceeding two years, deducted from the three years' residence required under the homestead laws.

Similar provisions are made in the acts of June 16, 1898 (30 Stat. 473), and March 1, 1901 (31 Stat. 847), for the benefit of like persons who served in the war with Spain, or during the suppression of the insurrection in the Philippines. The act of February 25, 1919 (40 Stat. 1161), as amended by act of April 6, 1922 (42 Stat. 491), makes similar provisions for the benefit of like persons who rendered military or naval service in connection with the Mexican border operations or during the late war with Germany.

2. A soldier or sailor of the classes above mentioned who makes entry as such must begin his residence and cultivation of the land entered by him within six months from the date of filing his declaratory statement, but if he makes entry without filing a declaratory statement he must begin his residence within six months after the date of the entry. Thereafter he must continue both residence and cultivation for such period as will, when added to the time of his military or naval service (under enlistment or enlistments covering war periods), amount to three years; but if he was discharged on account of wounds or disabilities incurred in the line of duty, or honorably discharged but subsequently awarded compensation by the Government for wounds received or disabilities incurred in line of duty in accordance with the act of October 6, 1917 (40 Stat. 398–405), as amended by the act of August 9, 1921 (42 Stat. 147–153), credit for the whole term of his enlistment may be allowed, notwithstanding he may not have served 90 days. However, no patent will issue to such soldier or sailor until there has been residence by him for at least one year.

A soldier with 19 months or more military service will be required to reside on the land at least 7 months during the first entry year; with more than 12 and less than 19 months, he must reside on the land 7 months during the first year and such part of the second year as, added to his excess over 12 months' service, will equal 7 months, and must cultivate one-sixteenth of the area the second year; with 7 and not more than 12 months, he must reside upon the land 7 months during each of the first and second years, and cultivate one-sixteenth of the area the second year; with 90 days and less than 7 months he must reside upon the land 7 months during each year for the first and second years, and such part of the third year as, added to his service, will equal 7 months, and cultivate one-sixteenth of the area the second year and one-eighth the third year; and with less than 90 days' service, will receive no credit therefor in lieu of residence and cultivation unless he was discharged for disabilities or wounds received in line of duty, in which event he would be given credit for the term of his enlistment, not, however, for more than two years. If he delays the submission of proof beyond the period of residence required, the cultivation necessary for the years elapsing before the submission of proof must be shown. He may apply for and receive a reduction in the area to be cultivated, in the same manner and under the conditions required of other applicants. Where the entry is made under the stock-raising provisions of the homestead law, the above rule with respect to residence will be applicable, but the soldier must make the improvements on the land required of other persons under that law, and show in lieu of cultivation that he actually used the land for raising stock and forage crops during the period that he was required to reside on the land. He must show, in any entry under the homestead laws, that he had a habitable house on the land at the date of submitting proof.

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

4. A party claiming the benefit of his military service must file with the register a certified copy of his certificate of discharge, showing when he enlisted, when he was discharged, and the organization in which he served, or the affidavit of two reputable, disinterested witnesses, corroborative of the allegations contained in his affidavit on these points, or if neither can be procured his own affidavit to that effect.

PERIODS OF SERVICE FOR WHICH CREDIT MAY BE GIVEN IN LIEU OF RESIDENCE

5. In determining the rights of parties under sections 2304–2309 of the Revised Statutes the Civil War is held to have lasted from April

15, 1861, to August 20, 1866; the Spanish war and Philippine insurrection from April 21, 1898, to July 15, 1903. The operations in Mexico or along the borders thereof began May 9, 1916, and continued until the beginning of the war with Germany, April 6, 1917, which was officially terminated March 3, 1921, by Public Resolution No. 64 of that date (41 Stat. 1359).

No credit for military service can be given unless the soldier or sailor served for at least 90 days between the dates above mentioned, unless discharged for diabilities or wounds received in line of duty or died while in the service.

In computing the period of service of a soldier "who has served in the Army of the United States," within the meaning of that phrase as used in section 2304 of the Revised Statutes, the entrance of the soldier into the Army will be considered as dating from the time of voluntary entrance of privates into the Army, Navy, or Marine Corps, or appointment of officers (including those appointed from the Officers' Training Corps); in the case of a person enlisted in the Naval Reserve, from the time he was called into active service; in the case of a drafted man, from the time he was mustered into the service; in the case of members of the Federalized National Guard, from the time they were mustered into the United States service.

An entryman having enlisted and served 90 days during any one of the wars above mentioned is entitled under section 2305 of the Revised Statutes as amended to credit for the full term of his service under that enlistment, although such term did not expire until after the war ceased.

The period of service for which credit may be claimed under section 2305, Revised Statutes, upon the submission of proof by a member of the Naval Reserve Force or of the Federalized National Guard, who was called into active service during the Mexican border operations or during the war with Germany, terminates upon the date of his discharge, and not upon the date that he was ordered to inactive duty.

6. A person who served for less than 90 days in the Army or Navy of the United States during said wars is not entitled to have credit for military service on the required period of residence upon his homestead, unless he was discharged because of disabilities incurred in line of duty in which event he is entitled to have deducted the whole term of his enlistment without reference to the length of time he may have served, but no patent shall issue unless the residence and other requirements have been fulfilled for a period of at least one year.

7. A person serving in the Army or Navy of the United States may make a homestead entry if some member of his family is residing

upon the land applied for, and the application and accompanying affidavits may be executed before the officer commanding the branch of the service in which he is engaged. The soldier's family in this connection is restricted to his wife and minor children. Such soldier or sailor is not required to reside personally upon the land, but may receive patent if his family maintain the necessary residence and cultivation until the entry is three years old or until it has been commuted. If the soldier has had war service he may claim credit therefor under the three-year homestead law.

8. A soldier is entitled to the same credit for military service in connection with homestead entries under the enlarged homestead act of February 19, 1909 (35 Stat. 639), and its amendments, and the stock raising act of December 29, 1916 (39 Stat. 862), and its amendments, as is allowed in connection with ordinary homestead entries, but the improvements required by the stock raising act must be placed upon the land as prescribed by the act.

9. The special privileges accorded soldiers or sailors, as above indicated, are not subject to sale or transfer, and can only be exercised by the soldier or sailor himself; but the unmarried widow of a soldier or sailor of the Mexican border operations or of the war with Germany, or the unmarried widow or minor orphan children of a veteran of the Civil War, the Spanish-American War, or the Philippine insurrection, is entitled to the same privileges, under the homestead laws, as the deceased soldier or sailor if he died possessed of a homstead right. The adult child of a soldier has no special privileges in connection with the homestead laws on account of his father's military service.

HOMESTEAD RIGHTS OF WIDOWS AND MINOR ORPHAN CHILDREN OF DECEASED SOLDIERS AND SAILORS

10. (*a*) If a soldier or sailor makes an entry or files a declaratory statement, and dies before perfecting the same, the right to perfect the claim, including the right to claim credit for the soldier's military service, passes to the persons named in section 2291, Revised Statutes; that is, to his widow, or, if there be no widow, to his heirs or devises.

(*b*) In case of the death of a veteran of the Civil War, the Spanish War, or the Philippine insurrection, who would be entitled to a homestead under the provisions of section 2304 of the Revised Statutes, but who died prior to the initiation of a claim thereunder, his widow, or in case of her death or remarriage, his minor orphan children, by a guardian, duly appointed and officially accredited at the Department of the Interior, may make the filing and entry in the same manner that the soldier or sailor might have done, subject to

all the provisions of the homestead laws in respect to settlement and improvements; and the whole term of service, or in case of death during the term of enlistment, the entire period of enlistment in the military or naval service will be deducted from the time otherwise required to perfect the title to the same extent as might have been allowed the soldier. (Sec. 2307, Rev. Stat.)

Where a homestead entry is made under section 2307, Revised Statutes, by the widow or minor orphan children of a deceased soldier or sailor of the Civil War, the Spanish War, or the Philippine insurrection, compliance with law both as to residence and improvements is required to be shown to the same extent as would have been required of the soldier or sailor in making entry under section 2304, Revised Statutes, except that credit will be given upon the three-year period for the entire term of the enlistment, not exceeding two years, where the soldier or sailor died during the term of his enlistment.

(*c*) In case of widows the prescribed evidence of military service of the husband must be furnished, with affidavit of widowhood, giving the date of her husband's death.

In case of minor orphan children, in addition to the prescribed evidence of military service of the father, proof of death or remarriage of the mother must be furnished. Evidence of death may be the testimony of two witnesses or a physician's certificate, duly attested. Evidence of marriage may be certified copy of marriage certificate, or of record of same, or testimony of two witnesses to the marriage ceremony.

Minor orphan children must make a joint entry through their duly appointed guardian, who must file certified copies of the powers of guardianship, which must be transmitted to the General Land Office by the register.

(*d*) In the case of the death of any person who would be entitled to a homestead under the provisions of the act of February 25, 1919 (40 Stat. 1161), because of service in the war with Germany or during the Mexican border operations, but who died prior to having initiated a claim thereunder, pursuant to the provisions of the act of September 21, 1922 (42 Stat. 990), his widow, if unmarried and otherwise qualified, may make entry of public lands under the provisions of the homestead laws of the United States and shall be entitled to all the benefits enumerated in the said act of February 25, 1919, subject to the provisions and requirements as to settlement, residence, and improvements contained in the said act. In such case, the whole term of service will be deducted from the time otherwise required to perfect title to the same extent as may have been allowed the soldier.

Where a homestead entry is made under the act of September 21, 1922, by the widow of a deceased soldier or sailor of the war with Germany or the Mexican border operations, compliance with law, both as to residence and improvements, is required to be shown to the same extent as would have been required of the soldier or sailor in making entry under the act of February 25, 1919.

In the case of such entry, the widow must furnish the prescribed evidence of military service of the husband, with affidavit of widowhood, giving the date of her husband's death, and that she is still unmarried.

Where the widow of a deceased soldier or sailor makes entry pursuant to the act of September 21, 1922, and dies prior to perfection of title, leaving only a minor child or children, patent shall issue to the said minor child or children, upon proof of her death and of the minority of the child or children, without further showing of compliance with the law. The proof may consist merely of affidavits setting forth the facts and duly corroborated. The usual publication and posting of notice of intention to make proof is required in such case.

If the widow of a deceased soldier or sailor makes and perfects the entry pursuant to the foregoing, the final certificate will issue to her, by name, as widow of the deceased soldier or sailor. If the entry is made by the widow and perfected by the minor orphan children as above set forth, the final certificate will issue to such child or children, by name, as minor orphan child or children of (giving the name of the widow), widow of (name of deceased soldier or sailor).

11. All homestead applicants who are not native-born citizens of the United States must have declared their intention to become citizens of this country, and before submitting proof must be fully naturalized.

SOLDIERS' DECLARATORY STATEMENTS

12. (*a*) Soldiers' and sailors' declaratory statements may be filed in the land office for the district in which the lands desired are located by any person entitled to the benefit of sections 2304 and 2307, Revised Statutes, as explained above. Veterans of the Civil War, the Spanish War, or the Philippine insurrection may file declaratory statements of this character, either in person or through an agent acting under power of attorney, but the entry must be made in person and not through an agent within six months from the filing of the declaratory statement, and residence must also be established within that time. Veterans of the World War may file such declaratory statements in person, but not through agent.

The party entitled to file a declaratory statement may make entry in person without filing a declaratory statement if he so desires.

The soldier's declaratory statement, if filed in person, must be accompanied by the prescribed evidence of military service and the oath of the person filing the same, stating his residence and post-office address, and setting forth that the claim is made for his exclusive use and benefit for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person; that he has not heretofore made a homestead entry or filed a declaratory statement under the homestead law (or if he has done so, he must show his qualifications to make a second or additional homestead entry); that he is not the proprietor of more than 160 acres of land in any State or Territory; and that since August 30, 1890, he has not entered or acquired title under the agricultural land laws of the United States, nor is he now claiming under said laws a quantity of land which with the tracts applied for would make more than 320 acres, or, in the case of a claim under the enlarged homestead laws, 480 acres, or in case of a claim under the stock-raising laws, 800 acres.

(*b*) In case of filing a soldier's declaratory statement by agent, the oath must further declare the name and authority of the agent and the date of the power of attorney or other instrument creating the agency, adding that the name of the agent was inserted therein before its execution. It should also state in terms that the agent has no right or interest, direct or indirect, in the filing of such a declaratory statement.

The agent must file (in adition to his power of attorney) his own oath to the effect that he has no interest, either present or prospective, direct, or indirect, in the claim; that the same is filed for the sole benefit of the soldier, and that no arrangement has been made whereby said agent has been empowered at any future time to sell or relinquish such claim, either as agent or by filing an original relinquishment of the claimant.

(*c*) Where a soldier's declaratory statement is filed in person, the affidavit of the soldier or sailor must be sworn to before either the register or the acting register of the United States land office, or before a United States commissioner, 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 a declaratory statement is filed by an agent, the agent's affidavit must be executed before one of the officers above mentioned, but the soldier's affidavit may be executed before any officer having a seal and authorized to administer oaths generally, and not necessarily within the land district in which the land is situated.

The fee to be paid to the register of the land office where the declaratory statement is filed is $2, except in the Pacific States, where it is $3.

(*d*) A homestead entry under a declaratory statement can not be made through an agent, and the entry must be made and settlement on the land commenced within six months after the filing of the declaratory statement. Residence, cultivation, and improvements must be shown to the same extent as though no declaratory statement had been filed.

13. The filing of a declaratory statement will not be held to bar the admission of filings and entries by others, but any person making entry or claim during the period allowed by law for the entry of the soldier will do so subject to his right; and the soldier's application, when offered within such time, will be allowed as a matter of right, and the intervening claimant will be notified and afforded an opportunity to be heard.

14. As implied by the requirements of the oath, a soldier will be held to have exhausted his homestead right by the filing of his declaratory statement, it being manifest that the right to file is a privilege granted to soldiers in addition to the ordinary privilege only in the matter of giving them power to hold their claims for six months after selection before entry, but is not a license to abandon such selection with the right thereafter to make a regular homestead entry independently of such filing. This is clear from the statutory language. Section 2304 provides: "A settler shall be allowed six months after locating his homestead and filing his declaratory statement in which to make entry and commence his settlement and improvement"; and section 2309 requires him "in person" to "make his actual entry, commence settlement, and improvement on the same, and thereafter fulfill all the requirements of the law." These must be done on the same lands selected and located by the filing.

15. Soldiers and sailors are cautioned against dealing with the so-called soldiers' claim agencies, or persons or companies who represent themselves as authorized by the Government to make entries or filings for soldiers. The Government does not employ nor authorize particular individuals to locate soldiers or sailors, or to file declaratory statements for them, except under the conditions above set forth.

RIGHTS OF WORLD WAR VETERANS

16. House Joint Resolution No. 30, approved January 21, 1922, (42 Stat. 358), amended Joint Resolution No. 29, approved February 14, 1920 (41 Stat. 434), by extending the provisions of the last-mentioned resolution for a period of 10 years from and after February 14, 1920, and increased the preference right conferred thereby from not less than 60 to not less than 90 days from the beginning of the preference right period. Said resolution as amended is applicable to all openings of public or Indian lands to entry or to restoration to entry of public lands withdrawn from entry, and confers upon officers, soldiers, sailors, and marines in the Army or Navy of the United States during the late war, who were honorably separated or discharged from such service or placed in the Regular Army or Naval Reserve, a preference right of not less than 90 days from the date of opening or restoration in which to make entry for the land under the homestead or desert-land laws, except as against prior existing valid settlement rights and preference rights conferred by existing laws or equitable claims subject to allowance and confirmation.

Said resolution was further amended by Public Resolution No. 79, approved December 28, 1922 (42 Stat. 1067), extending its provisions to those citizens of the United States who served with the allied armies during the World War, and who were honorably discharged upon the resumption of citizenship in the United States, provided the service with the allied armies was similar to service with the Army of the United States for which recognition is granted by said Resolution No. 29 as amended.

17. The act of July 28, 1917 (40 Stat. 248), protects persons who after making entry or initiating claims under the homstead laws by settlement, application, or entry and thereafter enlisted or were mustered into the military or naval service during the World War or prior to March 3, 1921, from a forfeiture of their claims by reason of the failure of the claimant to do any act otherwise required by law during the period of his service and credits the time in the service as equivalent to residence on and cultivation of the homestead with a maximum credit of two years in case of discharge for disability incurred in line of duty, regardless of actual period of residence and grants complete exemption from further compliance with law by the widow, minor orphan children, or legal representatives where the claimant died in the service, and forbids contest against any homestead entry unless it be alleged and proved that the absence from the land was not due to employment in the military or naval service of the United States.

18. Under the act of February 25, 1919 (40 Stat. 1161), as amended by section 1 of the act of April 6, 1922 (42 Stat. 491), and by Public Resolution No. 79, approved December 28, 1922, one who was in the military or naval service of the United States during the Mexican border operations (regarded as having begun May 9, 1916, and continued until the declaration of war with Germany), or the late war, and who was honorably discharged after having served at least 90 days during such period, or who served for such period with the allied armies during the World War and was honorably discharged and resumed citizenship in the United States, is entitled to a deduction from the homestead residence requirements (three years) equal to the period of service but not to exceed two years—that is, there must be shown residence on the homestead for at least one year even though the military or naval service exceeded two years. If the soldier or sailor was discharged because of disability incurred in line of duty or regularly discharged from the service but subsequently awarded compensation by the Government for wounds received or disabilities incurred in the line of duty, he may claim credit for the full period of his enlistment, subject to the requirement that residence on the homestead for at least one year must be shown. In either case, the credit is in lieu of the cultivation specified by law as well as residence, and if the period of service is such that residence for but one year need be shown, no cultivation is required to be shown for that year. A year's residence under the homestead laws consists of actual residence for at least seven months and allowable absence of five months in not more than two periods, notice of leaving the homestead and returning thereto to be given to the proper district land office. The final proof must show that there is a habitable house on the land and must not be submitted until the full period of compliance with the requirements of the homestead laws has been effected.

Those citizens of the United States who, during the existence of the war with Germany, entered the military or naval service of a country allied with this country in the World War and who, by taking the oath of allegiance to such foreign country prior to April 6, 1917, expatriated themselves, must, before they may avail themselves of the benefits of this resolution, resume their American citizenship.

A citizen who entered such service after April 6, 1917, did not expatriate himself, as the last proviso to section 2 of the act of March 2, 1907 (34 Stat. 1228), provides that:

> No American shall be allowed to expatriate himself when this country is at war.

The service for which credit may be claimed under said resolution must have continued for a period of at least 90 days during the World War and the claimant must show his qualifications to make the entry sought in order to exercise the preference right of entry conferred thereby and in addition thereto as a part of his application or by an accompanying statement sworn to before an officer qualified to verify homestead applications must show the date when his service began, the country with which he served, the nature and length of such service, and that he was honorably separated or discharged therefrom, giving the date thereof. The original or certified copy of the discharge or order of separation from such military or naval service should be attached to the application to make entry or proof thereon. If the claimant has lost his discharge or is otherwise unable to secure a copy thereof, he must in a verified statement explain fully why he can not furnish the same.

19. The act of September 29, 1919 (41 Stat. 288), as amended by section 2 of the act of April 6, 1922 (42 Stat. 491), grants to ex-service men of the late war who made or may hereafter make entry under the homestead laws or who initiate valid homestead claim by settlement or application, and thereafter enter upon a course of training under the vocational rehabilitation act or are furnished hospital treatment by the Government for wounds received or disabilities incurred in line of duty, a leave of absence from the homestead for the purpose of taking such course, or to receive hospital treatment by the Government, and allows the time while so engaged to be credited as constructive residence upon and cultivation of the homestead, subject to the condition that before title by patent may be granted the claimant shall have resided upon, improved, and cultivated the homestead for a period of at least one year. A person who is entitled to the benefits of this act should forward to the local district land office notice of his absence from the land and of the fact that he has been admitted to take a course of vocational training under the act of June 27, 1918 (40 Stat. 617), or that he is receiving hospital treatment by the Government, together with a certificate to that fact by the proper official. He should also file notice of his return to the land so that the district officer may make due notation on his records.

20. The act of March 1, 1921 (41 Stat. 1202), authorizes homesteaders, applicants, or entrymen who initiated their claims and thereafter enlisted prior to November 11, 1918 in the United States Army, Navy, or Marine Corps during the war with Germany, and were honorably discharged or separated because of physical incapacities due to service, and for that reason are unable to return to the land, to make proof without further residence, improvements, and cultivation at such time and place as may be authorized.

Notice of intention to submit proof under this act must be given in the usual manner by posting and publication, and the proof should consist of the affidavit of the homesteader, executed before an official authorized to administer oaths and use an official seal, showing that he is unable to return to the land on account of physical incapacities, due to service in the United States Army, Navy, or Marine Corps during the war with Germany, and should describe the nature and extent of the disability, which facts should be corroborated by the testimony of two witnesses taken in similar manner, one of whom must be a practicing physician. Such affidavit should be accompanied by a copy of the claimant's discharge from the Army, Navy, or Marine Corps, or an affidavit showing all the facts about his service and discharge.

WILLIAM SPRY,
Commissioner.

Approved, January 21, 1929.
E. C. FINNEY,
First Assistant Secretary.

REVISED STATUTES

SEC. 2293. In case of any person desirous of availing himself of the benefits of this chapter, but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land office which the preceding sections require; and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a bona fide improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law.

SEC. 2304.[1] Every private soldier and officer who has served in the Army of the United States during the recent rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February thirteenth, eighteen hundred and sixty-two, and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, and every private soldier and officer who has served in the Army of the United States during the Spanish war, or who has served, is serving, or shall have served in the said Army during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged;

[1] The provisions of sections 2304 and 2305 of the Revised Statutes were extended to veterans of the World War by act of Feb. 25, 1919 (40 Stat. 1161).

and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the Spanish war, or who has served, is serving, or shall have served in the said forces during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter section to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work not otherwise reserved or apropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement. (As amended by act Mar. 1, 1901.)

SEC. 2305.[1] The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements: *Provided*, That in every case in which a settler on the public land of the United States under the homestead laws died while actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the War with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, to make final poof upon and receive Government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage, his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such land shall issue. (As amended by act March 1, 1901.)

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SEC. 2307. In case of the death of any person who would be entitled to a homestead under the provisions of section two thousand three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumer-

[1] The provisions of sections 2304 and 2305 of the Revised Statutes were extended to veterans of the World War by act of Feb. 25, 1919 (40 Stat. 1161).

ated in this chapter, subject to all the provisions as to settlement and improvement therein contained; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

* * * * * * *

SEC. 2309. Every soldier, sailor, marine, officer, or other person coming within the provisions of section two thousand three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in preemption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlement and improvements on the same, and thereafter fulfill the requirements of the law.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a joint resolution entitled "Joint resolution giving to discharged soldiers, sailors, and marines, a preferred right of homestead entry," approved February 14, 1920, be, and the same is hereby, amended to read as follows:

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

"SEC. 2. That the Secretary of the Interior is hereby authorized to make any and all regulations necessary to carry into full force and effect the provisions hereof."

Approved, January 21, 1922 (42 Stat. 358).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any settler upon the public lands of the United States, or any entryman whose application has been allowed, or any person who has made application for public lands which thereafter may be allowed under the homestead laws, who after such settlement, entry, or application, enlists or is actually engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, shall, in the administration of the homestead laws, have his services therein construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor alle-

gation or abandonment sustained against any such settler, entryman, or person unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases hereinafter initiated that the alleged absence from the land was not due to his employment in such military or naval service; that if he shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence, without reference to the time of actual service: *Provided,* That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

SEC. 2. That any settler upon the public lands of the United States, or any entryman whose application has been allowed, or any person who has made application for public lands which thereafter may be allowed under the homestead laws, who dies while actually engaged in the military or naval service of the United States, as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, then his widow, if unmarried, or in case of her death or marriage, his minor orphan children, or his or their legal representatives, may proceed forthwith to make final proof upon such entry or application thereafter allowed, and shall be entitled to receive Government patent for such land; and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation upon such homestead.

Approved, July 28, 1917 (40 Stat. 248).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subject to the conditions therein expressed, as to length of service and honorable discharge, the provisions of sections twenty-three hundred and four and twenty-three hundred and five, Revised Statutes of the United States, shall be applicable in all cases of military and naval service rendered in connection with the Mexican border operations or during the war with Germany and its allies as defined by public resolution numbered thirty-two, approved August twenty-ninth, nineteen hundred and sixteen (Thirty-ninth Statutes at Large, page six hundred and seventy-one), and the act approved July twenty-eighth, nineteen hundred and seventeen (Fortieth Statutes at Large, page two hundred and forty-eight).

Approved, February 25, 1919 (40 Stat. 1161).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person who, after discharge from the military or naval service of the United States during the war against Germany and its allies, is furnished any course of vocational rehabilitation under the terms of the Vocational Rehabilitation Act approved June 27, 1918, upon the ground that he comes within article 3 of the act of October 6, 1917 (40 Stat. 398), and who before entering upon such course shall have made entry upon or application for public lands of the United States under the homestead laws, or who has settled or shall hereafter settle upon public lands, shall be entitled to a leave of absence from his land for the purpose of undergoing training by the Federal Board of Vocational Education, and such absence, while actually

engaged in such training shall be counted as constructive residence: *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

Approved, September 29, 1919 (41 Stat. 288).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any settler or entryman under the homestead laws of the United States, who, after settlement, application, or entry and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the War with Germany, who has been honorably discharged and because of physical incapacities due to service is unable to return to the land, may make proof, without further residence, improvement, or cultivation, at such time and place as may be authorized by the Secretary of the Interior, and receive patent to the land by him so entered or settled upon: *Provided*, That no such patent shall issue prior to the survey of the land.

Approved, March 1, 1921 (41 Stat. 1202).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section 2305, Revised Statutes of the United States, as amended by the act of February 25, 1919 (Fortieth Statutes, page 1161), so far as applicable to those discharged from the military or naval service because of wounds received or disability incurred therein, be, and the same are hereby, extended to those regularly discharged from such service and subsequently awarded compensation by the Government for wounds received or disability incurred in the line of duty.

SEC. 2. That the provisions of the act of September 29, 1919 (Forty-first Statutes, page 288), entitled "An Act to authorize absence by homestead settlers and entryman, and for other purposes," be, and they are hereby, extended to those who, after discharge from the military or naval service of the United States, are furnished treatment by the Government for wounds received or disability incurred in line of duty.

Approved, April 6, 1922 (42 Stat. 491).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the case of the death of any person who would be entitled to a homestead under the provisions of the act of Congress approved February 25, 1919 (Fortieth Statutes at Large, page 1161), entitled "An act to extend the provisions of the homestead laws touching credit for period of enlistment to the soldiers, nurses, and officers of the Army and the seamen, marines, nurses, and officers of the Navy and the Marine Corps of the United States, who have served or will have served with the Mexican border operations or during the war between the United States and Germany and her allies," his widow, if unmarried and otherwise qualified, may make entry of public lands under the provisions of the homestead laws of the United States and shall be entitled to all the benefits enumerated in said act subject to the provisions and requirements as to settlement, residence, and improvements therein contained: *Provided*, That in the event of the death of such homestead entrywoman prior to perfection of title, leaving only a minor child

or children, patent shall issue to said minor child or children upon proof of death, and of the minority of the child or children, without further showing or compliance with the law.

Approved, September 21, 1922 (42 Stat. 990).

Public Resolution No. 79, Sixty-seventh Congress, approved December 28, 1922 (42 Stat. 1067), provides:

That the provisions of the act of Congress of February 25, 1919, allowing credit for military service during the war with Germany in homestead entries, and of Public Resolution Numbered 29, approved February 14, 1920, allowing a preferred right of entry for at least 60 days after the date of opening in connection with lands opened or restored to entry, be, and the same are hereby, extended to apply to those citizens of the United States who served with the allied armies during the World War, and who were honorably discharged upon their resumption of citizenship in the United States, provided the service with the allied armies shall be similar to the service with the Army of the United States for which recognition is granted in the act and resolution herein referred to.

ALASKA-DANO MINES COMPANY

Decided January 22, 1929

MINING CLAIM—POSSESSION—ADVERSE CLAIM—STATUTES.

The protection of possession accorded by section 2332, R. S., to the members of an association of persons, who are locators of a mining claim, is against all who are not members of the association, but the statute does not contemplate that possession and working of the claim by one or more locators shall be adverse to the interests of a locator who is not in possession and has not worked the claim.

MINING CLAIM—CONTRIBUTION—EXPENDITURES—FORFEITURE—NOTICE—STATUTES.

The only method by which an owner of a mining claim may acquire by forfeiture under the mining laws the interest of his coowners for noncontribution to the expenditures made on the claim is by the service of notice upon the delinquent coowner in the manner prescribed by section 2334, R. S.

MINING CLAIM—LOCATION—GIFT—EVIDENCE—PRESUMPTION.

Acceptance of a gift of an interest in a mining claim is presumed where it is evidenced by the naming of the donee in the location notice as one of the locators and by the recordation of such notice, and title can not revert to the donor on the testimony of the latter in an *ex parte* proceeding that the gift was not accepted.

MINING CLAIM—POSSESSION—ABANDONMENT.

Where a mining claim is owned by two or more persons the possession of one is the possession of all, and there can be no abandonment by one owner so long as his coowner continues in possession.

FINNEY, *First Assistant Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office, dated October 25, 1928, holding for cancellation

to the extent of the two claims, Summit and Chatham, the entry of Alaska-Dano Mines Company, Anchorage 06792, made February 21, 1927, for the lode mining claims, Wasp, Dunkle, Silent, Silent Extension, Strad, Lone Duck, Dano No. 1, Blue Lead, Blue Lead No. 4, Alabama, Alabama Extension, Juneau, Boston, July Seventeenth, Frances, Lake View, Sunburst, Happy Days, O. K., Two Shafts, Summit, Seattle, Chatham Extension, Chatham, Winona, Blue Lead No. 2, Dano No. 2, Dunkle Extension, Little Pete and Little Dandy, situate in the Harris Mining District of Alaska, on the ground that the applicant has not complete title to the Summit and Chatham claims.

It appears that the Summit claim was located October 10, 1908, by Thomas S. Nowell, T. H. George, Willis E. Nowell, A. D. Back, Charles Otteson, and J. W. Hunter, and by deed dated April 26, 1920, Charles Otteson and Willis E. Nowell conveyed to the applicant all of their right, title and interest.

Proof by affidavit is submitted by the applicant that Thomas S. Nowell, T. H. George and J. W. Hunter have been dead for several years; that A. D. Back left the Territory of Alaska about ten years ago, and that at all times since January 1, 1914, the applicant and its predecessors in title have been in adverse possession of the claim as against Thomas S. Nowell, T. H. George, A. D. Back and J. W. Hunter, their heirs, devisees, and legal representatives.

The Chatham claim was located April 12, 1910, by P. Falk, John C. Johnson, J. W. Hunter, John Braughton and C. Otteson. Otteson by deeds acquired the interests of all of his colocators except Hunter and Falk, and, subsequently, by deed dated April 26, 1920, Otteson and Falk conveyed to the applicant.

The applicant submits proof by affidavit that Hunter died in August, 1915; that for several years prior to his death he never asserted or claimed any interest in the Chatham claim; and that at all times since January 1, 1911, the applicant and its predecessors in title have been in adverse possession of the claim as against Hunter, his heirs, devisees and legal representatives.

It thus appears that as to the Summit claim A. D. Back and the heirs or devisees of Charles S. Nowell, T. H. George, and J. W. Hunter are coowners of the applicant, and that as to the Chatham claim the heirs or devisees of J. W. Hunter are coowners of the applicant, unless the claim of applicant that they have lost their interests because of adverse possession of the applicant and its predecessors in interest is sustained.

To support its claim of title by adverse possession the applicant has filed the affidavit of Charles Otteson, one of the original locators of the Chatham claim, and a stockholder and president of the

applicant corporation, in which it is stated that Hunter in his lifetime never claimed any interest in the Chatham claim and never did any work thereon or contributed to any assessment or other work done thereon, and that when informed that he had been made one of the locators stated to Otteson that Otteson should not have made him a colocator and that he would not pay any of the assessment work on the claim.

Otteson in his affidavit states as to the Summit claim, of which he was one of the original locators, that Thomas S. Nowell, Back, George and Hunter refused to have anything to do with the claim or to contribute to the assessment work thereon, and none of them ever in any manner contributed to doing any work upon the claim.

It is by reason of such statements in the affidavit of Otteson, which are in a measure corroborated by the affidavits of two other stockholders of the applicant, that the applicant asserts that for more than the ten years provided by the Alaska statute of limitations, it, and its predecessors in interest, held the two claims involved adversely to the interests therein of the colocators whose interests have not been acquired by it.

To sustain its contention applicant relies on section 2332, Revised Statutes, which provides that—

> Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to patent thereto under this chapter, in the absence of any adverse claim * * *.

The words "such person or association", refer to the persons or associations mentioned in the preceding sections of the statutes, who are locators of mining claims, and the meaning of the statute is that where an association of persons has located a claim and by one or more of its members has continued in possession and worked it for the period prescribed by the local statute of limitations, such possession and working is adverse to all who are not members of the association and who may thereafter assert ownership of the claim or any part thereof. It is not meant that there can be possession and working of the claim by one or more locators which is adverse to the interests of the locator or locators who are not in possession and have not worked the claim.

It is provided by section 2324, Revised Statutes, referring to the failure of coowners to contribute their proportion of the expenditures required to maintain possession of a mining claim, that—

> Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the

year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

That is the only method provided by statute for an owner to acquire by forfeiture the interest of his coowners who have not contributed to the expenditures made on the claim. It is exclusive to any other action or proceeding. Lindley on Mines (3d ed.) Sec. 646; *Elder* v. *Horseshoe Mining and Milling Co.* (194 U. S. 248, 255); *Van Sice* v. *Ibex Mining Co.* (C. C. A. Colo., 173 Fed. 895).

Counsel for applicant urge that because of the refusal of the colocators, who are also coowners, to do any work on the claims, or to contribute to the expenditures for work thereon, they thereby abandoned their interest in the claims, and because of such abandonment they lost their interests, and cite authorities on abandonment of claims. The authorities cited have reference to abandonment by the owner of a claim, not to an abandonment by one of two or more owners. Where a mining claim is owned by two or more persons the possession of one is the possession of all, and there can be no abandonment by one owner so long as his coowner continues in possession. *Union Consolidated Mining Co.* v. *Taylor* (100 U. S. 37).

The doctrine of abandonment relates to abandonment of possession, whereupon the land becomes restored to the public domain, and the claim becomes subject to relocation. It can not be applied to terminate the interest of an owner for failure to contribute to expenditures made on the claim by his coowner. Lindley on Mines (3d ed.) Sec. 644; *Union Consolidated Mines Co.* v. *Taylor*, *supra; Fanebel* v. *McFarland* (144 Calif. 717; 78 Pac. 261).

It is asserted by counsel that the coowners who failed to contribute to the expenditures made on the claims had, as appears from the affidavit of Otteson, stated that they were named by Otteson as colocators without their knowledge or consent; that they shortly after location was made, had said they would not do any work or contribute to expenditures, and that thereby they had refused to accept a gift of the interests they acquired by being named as locators, and by reason of such refusal the gift never became effective and therefore they never acquired any interest in the claims, and the record of locations by them is void.

It is true that a gift to become effective must be accepted, but where the gift is, as here, of an interest in a mining claim, which interest is evidenced by the naming of the donee in the location notice

as one of the locators and causing the notice to be recorded, the donee becomes the owner of record of such interest, and acceptance is presumed, and title can not revest in the donor, on the testimony of the donor in an *ex parte* proceeding that the gift was not accepted.

The decision appealed from is

Affirmed.

GUNVALD LANDHEIM

Instructions, January 29, 1929

WATER RIGHT—SUBTERRANEAN WATER—PUBLIC LANDS.

Subterranean percolating water in the public lands is the property of the Federal Government and when artificially developed is not subject to any State law governing the appropriation of water.

WATER RIGHT—SUBTERRANEAN WATER—PURCHASE—LEASE—PUBLIC LANDS.

There is no Federal law providing for the sale, lease, or development of subterranean water in the public lands.

WATER RIGHT—SUBTERRANEAN WATER—OIL AND GAS LANDS—PROSPECTING PERMIT—LAND DEPARTMENT.

The Land Department has the power to permit the use of percolating water developed by wells on public lands embraced within an oil and gas prospecting permit for oil drilling operations and for other domestic purposes, provided that such use does not result in undue waste of the Government's mineral estate.

Instructions by Commissioner Spry of the General Land Office, concurred in by Director Smith of the Geological Survey, and approved by First Assistant Secretary Finney, to Register, Billings, Montana:

By office letter of October 22, 1928, Gunvald Landheim was instructed through you [register, Billings, Montana] how to proceed in order to obtain right of way to utilize the water from a well developed by boring for oil and gas under a permit designated Billings 022111. With letter of November 12, 1928, you transmitted a sworn statement by Gunvald Landheim in regard to the matter. From this statement it appears that the water in question will be used for drilling and operating purposes on the land covered by said permit and adjoining lands covered by another permit granted Landheim, designated Billings 022625 where he is now drilling and operating; that the water is or will be stored—

In a tank at the well or at the place where operations are conducted and will provide sufficient supply for boiler use in conjunction with the uses thereof for domestic purposes in cooking and camp requirements during said operations. That if an attempt were made to build a reservoir to save said water that the greater portion of same would be lost and the manner above mentioned is the only way same can be saved for the use aforesaid on said premises or on adjoining property where this affiant expects to drill and operate.

Further, that in his opinion—

It seems unnecessary to have prepared any maps or plats showing location of the well; that the well is already shown on the records and known as the Republic Well and appears on the maps of the United States Geological Survey, as affiant is informed, and no ground being required for a reservoir, and the map or plat would not make it any more definite as to location and would serve no useful purpose in this instance, and affiant already having under his permit 022111, on which same is located, the use of the ground, and can, with permission of the department to the use of said water for operating purposes, enclose said well in a small building if necessary, to protect same from interference or protection against winter weather.

No definite right of way to conduct the water to any given point can be applied for now, and possibly not later, as this depends upon where affiant is operating. That affiant is now drilling on a well in Sec. 29, T. 16 N., R. 28 E., the location of which was given to the United States Geological Survey when spudded in, as required, and the water used is being hauled in tanks to the drilling site, both for boiler and domestic use. When this well is completed it is affiant's intention to operate elsewhere on said Oiltana Dome, but whether the water will be hauled or piped to that location is not yet determined, but inasmuch as all operations will be on affiant's leases and permits in that vicinity this seems immaterial, but it is important to assure a supply of water from said source, as otherwise it will require hauling same considerable distance and not as good water, and this would be a severe hardship and considerable expense, besides at times being rather difficult on account of very poor roads, on a clay-gumbo formation, and at certain seasons of the year, or in wet weather almost impassable.

In view of this statement Landheim requests permission—

To use the water from said well for the purpose of operating for oil and gas upon the lands and premises embraced in permits 022111 and 022625 and lands and leases adjacent thereto from what is known as the Oiltana Dome and if necessary to protect said right that he be given permission and authority to build a well house on the inclosure to surround said well for the protection thereof from trespassing or interference, allowing a sufficient area around said well for that purpose, there being no conflict in ownership of the lands, with the right to divert said water either in a pipe line to the point of operation or operations, or tank wagon or tank truck as he may see fit and deem best and sufficient for said purposes.

It is apparent from the foregoing that Landheim does not, at this time, seek a right of way through the public lands for the purpose of piping or otherwise transporting the water from the so-called "Republic well." His request is merely that the Government allow him to continue to use, for boiler and domestic purposes, the aforementioned well water; permit him to build, if necessary, a well house around said well; allow him to use, through such permission, sufficient land on which to erect and maintain said well house together with a small amount of land adjacent to and around the well house for the maintenance and protection of said well and well house, to the end that he may have the free, continued and uninterrupted use

of said well water, together with the use of said well in any event whilst engaged in said drilling operations.

Said well water is not subject to the water right law of the State of Montana governing the appropriation of water, it appearing, nothing else to the contrary having been shown, that same is merely subterranean percolating water, and, therefore, a part of the soil itself, public soil or land. The Federal Government, as the owner of the land, is the owner of said water, thus artificially developed and will continue to be such owner as long as it retains unto itself the title to the land whereon said well is situated. Such, also, is the view of the law of the State of Montana, on this subject. See, in this connection, *Ryan* v. *Quinlan* (45 Mont. 521; 124 Pac. 512). See, also, *Hunt* v. *City of Laramie* (181 Pac. 137).

But, unlike the act of March 3, 1925 (43 Stat. 1133) which provides for the leasing of public lands near or adjacent to mineral, medicinal, or other springs, there is no act of Congress which provides for the leasing of public lands containing water wells of the character of this well, or for the sale or lease of subterranean waters, or their development, or their use or disposition, although under oil leases authority is given to the lessee to maintain water plants, etc.

Upon the other hand, there is nothing in any Federal legislation which prevents this department from permitting private individuals or corporations to use, for oil drilling and domestic purposes, percolating waters like these developed by wells sunk on public land while engaged in prospecting such land for oil and gas under a permit or lease under the act of February 25, 1920 (41 Stat. 437) as was done in the case of *Inter-Mountain Water and Power Company* (52 L. D. 217), in connection with a right of way permit to pipe water from a well on a portion of the leased premises. The use of such a natural resource, for such purpose, being conducive to the development of the mineral resources of the Government, may well be recognized by the Government, even though there may not be granted, in connection therewith, a right of way permit, privilege or license, or an oil or gas lease; provided, of course, the allowance of the use of such water does not result in undue waste of the Government's mineral estate. See in connection with this last mentioned proposition section 30 of the oil and gas leasing act of 1920.

No good reason to the contrary appearing, no objection will be interposed by the Government to the use by Landheim of the waters of said "Republic Well," for the purpose indicated, as long as no waste, damage or injury results to the Government in consequence thereof, this consent being revocable at any time within the discretion of the Secretary, and without notice, and, in no event, beyond the life of permit, Billings 022111.

Except as provided for in the act of February 14, 1901 (31 Stat. 790), which permits the Secretary to permit the use of rights of way through the public lands to the extent of the ground occupied by water plants and not to exceed 50 feet on each side of the marginal limits thereof, which act Landheim now seems unwilling to invoke, or at least declines to observe the regulations thereunder, no specific legislation has been enacted whereby formally to grant Landheim permission to use the ground occupied by said "Republic Well" and land around the same. His right to use the land in this regard, in the absence of a permit under said act of 1901, and while the ground occupied by said well remains public land, is neither greater nor less than his right artificially to develop and use the subterranean percolating waters of the public soil, conditioned, as would be the case of a permit under said act of 1901, of effecting no waste of the Government's estate.

As to the ownership of said water well and the well or subterranean percolating waters developed therein and thereby, in the absence of a permit under said act of 1901 and the protection afforded thereby (see in this connection *Swendig et al.* v. *Washington Water Power Company*, 265 U. S. 322), if and when the land covered by the legal subdivision on which said "Republic Well" is located shall be disposed of by the Government, under the homestead or other appropriate public land law, this would seem to be a matter over which the department would have no control upon the patenting of said tract. However, should any attempt be made to enter said tract during the time when same is covered by an oil and gas permit under the act of 1920, notice of such attempt must be, under the regulations, given to the holder of the permit, thereby to afford him opportunity to show cause, if he can, why the application or selection should not be allowed. If in response to said notice a satisfactory protest is submitted, same will receive due consideration and such action taken as may be warranted under all the circumstances.

A formal application for right of way to transport the water in the manner proposed by Landheim, viz., tank wagons or trucks could not, obviously, be entertained, and the informal application for right of way heretofore filed, not being completed in the manner required by the regulations under said act of 1901, and it appearing that Landheim is unwilling to complete the same as by said regulations demanded, is now finally rejected and the case with regard thereto closed.

O. P. PESMAN

Decided February 4, 1929

TOWN SITE—PLAT—STREETS—RIGHT OF WAY—LAND DEPARTMENT—JURISDICTION.

Adoption by the Government of a town-site plat and the sale of lots by reference thereto constitutes an actual dedication to public use of the tracts or strips designated thereon as streets and alleys, and the Land Department can not subsequently vacate them.

FINNEY, *First Assistant Secretary:*

This is an appeal by O. P. Pesman from the decision of the Commissioner of the General Land Office dated November 3, 1928, denying his petition for the vacation of parts of certain streets and alleys in Pompey's Pillar town site on Huntley irrigation project, Montana.

The petition for the vacation of streets and alleys in question was filed October 15, 1928, and was favorably recommended by the superintendent of the Huntley project.

It appears that certain lands in Sec. 23, T. 3 N., R. 30 E., Montana, were reserved for town-site purposes by order of this department dated May 13, 1907. The tract was laid off into blocks, lots, streets, avenues, alleys, public reservations, etc., and the plat thereof approved August 2, 1907. Numerous lots scattered throughout the town site have been sold by reference to said plat. A great many lots remained unsold and they were reappraised and some of them sold at the last public sale held October 8, 1928. At that time as claimed by Mr. Pesman he purchased lots 1 and 2, block 2, lots 1, 5, and 6, block 3, lots 1, 5, and 6, block 6, and lots 1 and 2, block 7. He stated in his petition that the streets and alleys he desired closed are not needed, never have been used and can not be used for public traffic.

The commissioner denied the petition on the ground that the adoption of the plat by the Government and the sale of lots by reference thereto resulted in an actual dedication to public use of the tracts or strips designated thereon as streets and alleys.

The action of the commissioner was correct. Where the owner of real property lays out a town upon it and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with reference to such plan, he thereby dedicates the streets and alleys to the use of the public. 13 Cyc. 455; 3 Dillon on Municipal Corporations (5th Ed.), sections 1083, 1085.

The decision appealed from is accordingly

Affirmed.

AFFIDAVITS—SPRINGS OR WATER HOLES—CIRCULAR NO. 1066 (51 L. D. 457), MODIFIED

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 8, 1929.

THE SECRETARY OF THE INTERIOR:

By decision [unreported] of January 30, 1929, in forest lieu selection case Gainesville 020662 the department directed that the selector be not required to furnish corroboration of the affidavit as to springs and water holes, because of the conditions existing in the State of Florida where the selected lands lie.

This brings up the question of the necessity of any affidavit as to springs and water holes in said State or in the States of Alabama, Mississippi, Louisiana, Arkansas, Michigan, Wisconsin, and Minnesota where like conditions exist.

As stated in Circular No. 1066 (51 L. D. 457), the object of the Executive order of April 17, 1926, was 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.

In none of the States named, so far as I am aware, are the springs or water holes, if any, on the public lands "needed or used by the public for watering purposes." The conditions in those States are entirely different from those in the other public land States where grazing is carried on to a considerable extent and not only springs and water holes but other available sources of water supply are sometimes quite scarce. It appears, therefore, to me that there are no lands in the States mentioned that come within the purview of the Executive order of April 17, 1926, and a non-water hole and non-spring affidavit is not required. If you agree with this view and by the approval of this letter adjudge the lands in such States as not containing springs and water holes needed for public watering places, this office will in the future eliminate said States from the requirement of Circular No. 1066.

WILLIAM SPRY,
Commissioner.

Approved, February 8, 1929.
E. C. FINNEY,
First Assistant Secretary.

JAMES E. HUGHES

Instructions, February 13, 1929

SECOND HOMESTEAD ENTRY—RECLAMATION HOMESTEAD—INDIAN LANDS—PURCHASE PRICE—CONSTRUCTION CHARGES.

Under the act of February 25, 1925, one who has made a reclamation homestead entry for ceded Indian lands is not qualified to make another entry until he has paid the full Indian price of the entered lands, and if he seeks to make a second entry under the reclamation law he must first have paid all reclamation construction charges assessed against the original entry additional thereto.

Instructions by Commissioner Spry of the General Land Office, concurred in by Commissioner Mead of the Bureau of Reclamation, and approved by First Assistant Secretary Finney, to Register, Los Angeles, California:

I am in receipt of your [register, Los Angeles, California] letter of January 11, 1929, and letter to you dated January 8, 1929, from A. H. McClure, 345 Second Street, Yuma, Arizona, requesting to be advised whether James E. Hughes, Route 3, Yuma, Arizona, who has received patent on his reclamation H. E. 040458, upon which all Indian and reclamation charges have been paid *to date* is entitled to make another homestead entry under the provisions of the act of February 25, 1925 (43 Stat. 981). See Circular No. 990 (51 L. D. 84).

The records in this office show that the homestead entry was made by James E. Hughes October 20, 1924, for 40 acres ceded Yuma Indian lands, upon which $10 per acre Indian moneys are payable in annual installments for 10 years; that final certificate issued October 31, 1927, and patent No. 1012728, on February 21, 1928. Up to the present time the installments due are paid but *all* the Indian moneys have not been paid, that is, the entire $400 Indian moneys must be paid before it can be said that all the Indian moneys are paid.

The proviso to said act of February 25, 1925, reads—

* * * 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. [Italics supplied.]

From the above it appears that the proper interpretation is that Mr. Hughes, even though otherwise qualified to make a second homestead entry including a reclamation homestead entry, will not be qualified to make a second homestead entry until there has been paid the full price for this land, that is, the full price of the Indian charges, $400.

Under the reclamation law, act of August 9, 1912 (37 Stat. 265), Mr. Hughes will not be qualified to make another reclamation homestead entry while owning and holding said patented tract until there have been paid all the building and betterment reclamation moneys upon this land and, as already stated, it must also appear that there has been paid the full price or entire Indian moneys for said patented land.

COST OF OFFICIAL SURVEY OF A MINING CLAIM NOT ACCEPTABLE AS ANNUAL ASSESSMENT WORK

Opinion, February 15, 1929

MINING CLAIM—ASSESSMENT WORK—ALASKA—STATUTES.

Section 1 of the act of March 2, 1907, specifies the amount of assessment work that must be performed upon a mining claim in the Territory of Alaska, and wherever the provisions of that act are irreconcilable with section 2324, Revised Statutes, the latter, in so far as applicable to that Territory, is by implication repealed.

MINING CLAIM — SURVEY — ASSESSMENT WORK — EXPENDITURES — PATENT — ALASKA—STATUTES.

An official survey of a mining claim can not be credited as annual assessment work or expenditure required as a prerequisite to patent either under the act of March 2, 1907, which pertains to mining claims in the Territory of Alaska, or under section 2324, Revised Statutes, relating to mining claims generally.

MINING CLAIM—SURVEY—ASSESSMENT WORK—ALASKA—STATUTES.

The act of the Legislature of Alaska (1915, C. 10), providing that the costs of official survey of a mining claim may be credited as assessment work attempts to grant more favorable terms than the Federal statute, act of March 2, 1907, permits, and to that extent is, in the opinion of this department, without force and effect.

COURT DECISION CITED AND APPLIED.

Rule enunciated in the case of *Smelting Co.* v. *Kemp* (104 U. S. 636), applied.

Secretary West to Hon. Addison T. Smith, House of Representatives:

What here follows is according to promise in my letter of February 7, 1929, a further reply to the inquiry of Mr. Gordon C. Smith of Boise, Idaho, whether in the opinion of the Department of the Interior, the cost of the official survey of a mining claim may be properly accredited as assessment work upon the claim, reference being made by Mr. Smith to a recent decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Wigand* v. *Byrne's Unknown Heirs et al.* (24 Fed., 2d series, 179), upholding a session law of the Legislature of Alaska (1915 C. 10), providing that the costs of official survey may be so credited.

The mining laws were extended to Alaska by the act of May 17, 1884 (23 Stat. 24); *Bennett* v. *Harkrader* (158 U. S. 441), and subsequently by section 26, Chapter 786, of the act of June 6, 1900 (31 Stat. 321, 329). The applicable statute relating to assessment work in Alaska is section 1, act of March 2, 1907 (34 Stat. 1243), which provides that "at least $100 worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in Alaska heretofore or hereafter located." So far as the provisions of the last cited act are irreconcilable with section 2324, Revised Statutes, the latter so far as applicable to Alaska is by implication repealed. *Thatcher* v. *Brown* (190 Fed. 708). The words "on or for the benefit or development of", are not contained in the corresponding provision in section 2324, but as the court of appeals in the *Wigand case*, reconciled the territorial statute with the provisions of section 2324, and cited decisions as to kind and character of work required under that section in reaching its conclusions, and as no point appears to have been made that the additional words mentioned in the Federal statute relating solely to Alaska broadened the scope of section 2324, the decision may be regarded as holding that the costs of official survey may be credited under the provisions of section 2324 and would apply in any case wherever arising. In the discussion here following, therefore, it will be assumed that there is no difference in the requirements of the general and local Federal acts as to the kind and character of work and improvements.

At the outset it is advisable to state the rule is settled that the department has nothing to do with the question of annual labor and improvements on mining locations made upon lands containing deposits that continue to be subject to location, entry and purchase under the mining laws. In such cases the question as to compliance with this requirement only arises in disputes over possessory rights between private parties and is justiciable solely in the courts. It is the department's position, however, that it is concerned with this question where there is an assertion of a valid mining claim for and on account of minerals that have been by later congressional enactments reserved or withdrawn from the operation of the general mining laws and made subject to a different mode of disposition. *E. L. Krushnic* (52 L. D. 295); *Gorda Gold Mining Company and Wallace Mathers* v. *Ernest Bauman* (52 L. D. 519). This position has been assailed in the courts, and a decision was rendered on January 7, 1929, in the case of *E. L. Krushnic* v. *United States* by the Circuit Court of Appeals for the District of Columbia unfavorable to the Government's contention (30 Fed., 2d series, 742), but the

Supreme Court may be asked to review and determine the question.[1] Should the conclusion of the District Court of Appeals be accepted by the department or prevail in the Supreme Court of the United States, this department will have no occasion to make the inquiry, and rights of mining claimants will not be affected by the rulings of the department relating to the performance of assessment work.

No matter how the question of the authority to inquire into assessment work may be resolved, it is beyond dispute that the department has jurisdiction and authority to inquire and determine whether $500 worth of work and improvements, required by section 2325, Revised Statutes, as a prerequisite to the grant of a patent, has been had, and whatever may be credited as expenditure for assessment work under section 2324 may be credited as expenditure under section 2325; the decisions of the department and the courts, therefore, as to the kind and character of work creditable under section 2324 may be resorted to to determine what may be accredited under section 2325. *Zephyr and Other Lode Mining Claims* (30 L. D. 510, 513); *E. L. Krushnic* (52 L. D. 282, 292).

Although neither of these statutes specify the kind and character of the work and improvements that must be shown, the department and the courts in the great majority of instances, no matter how liberal they have been in its application, have adhered to and applied the rule formulated in *Smelting Co.* v. *Kemp* (104 U. S. 636, 655), that "labor and improvement, within the meaning of the statute (Sec. 2324, R. S.), are deemed to have been had on a mining claim, whether it consists of one location or several, when labor is performed or improvements are made for its development, *that is, to facilitate the extraction of the metals it may contain,* * * *" [Italics supplied.] See *Copper Glance Lode* (29 L. D. 542, 549); Lindley on Mines, Section 629, and cases cited in note 246, section 28, Title 30, U. S. C. A.

An official survey of a mining claim is one of the essential preliminaries prescribed in section 2325 to obtain patent. The obvious and principal purposes of such official survey are to accurately fix the location of claim with respect to public land surveys and adjacent and conflicting claims, to enable parties concerned to definitely ascertain and assert adverse rights if such are claimed and enable the department to determine the exact limits of the ground that is claimed under the patent application and to convey by appropriate description in the patent, that part to which the applicant may be entitled. A marking necessarily must precede the working of the ground for mining purposes, but that is required and presumed to

[1] Decision of the Circuit Court of Appeals of the District of Columbia affirmed by the United States Supreme Court January 6, 1930. See *Wilbur* v. *Krushnic* (280 U. S. 306).—Ed.

be done when the location is made. It is neither obvious nor readily perceivable to the department that the official survey has any relation to the working of the claim or facilitates the prospecting or extraction of minerals.

In a sense, an official survey is in the nature of a permanent improvement, tends to facilitate development, if development is used in a broad sense, and enhances the value of the claim, if it has any value as such, but so it seems would be repairs to a stamp mill used in connection with mining operations on the claim; *Golden Giant Mining Company* v. *Hill* (198 Pac. 276); procuring water to run an ore crusher used in connection with the mine; *Du Prat* v. *James* (4 Pac. 562); laying out routes or transportation from claim to shipping point; *Kirkpatrick* v. *Curtiss* (244 Pac. 571); sampling and assaying to ascertain mineral values; *Bishop* v. *Baisley* (41 Pac. 936); all of which have been held not to be labor and improvement under section 2324, under the definition of Justice Field in the *Smelting Company case, supra.*

The language of the cases cited by the court in the *Wigand case* when detached from the facts in those cases, lend some support to the court's conclusions, but examination will disclose that the work and improvement claimed in each of those cited cases had some direct relation and are those commonly performed in connection with mining and prospecting. In *McCulloch* v. *Murphy* (125 Fed. 147), the particular work in question was, tunnels, drifts and trenches. In *Wailes* v. *Davies* (158 Fed. 667), the question was whether ore taken from the mine on the claim was work and improvement that was beneficial, it being contended that it was a depletion and not a benefit. The court held that as the work was on the claim, the question whether it was beneficial was not material, but stated "if $100 worth of labor in *the nature of mining* is performed on a claim by the owner, whether the work is beneficial or not, there can be no forfeiture." In *Mount Diablo M. M. Co.* v. *Callison* (5 Sawy. 439, 456), the mistake to which the court alluded was the mistake of taking out ore underground on the dip of a vein that was subsequently ascertained to apex outside the claim. There, again, it was work of a mining nature, the question of its beneficial character being held immaterial. In *Richen* v. *Davis* (148 Pac. 1130), the clearing of brush and trees was to make way for a dredge on a gold placer, which was undoubtedly work to facilitate prospecting and mining, and so are the services of a watchman to take care of the mining works during temporary suspensions to which the court refers. It is noticed that the court below held the territorial act unconstitutional but held that under the circumstances there was a want of equity in the party that claimed the forfeiture. The court in the

interest of justice would be naturally disposed to construe the statute with the utmost possible latitude and liberality. It is the department's view that the territorial act, attempts to grant more favorable terms than the Federal act. Such statute to that extent at least is without force and effect. *Erhardt* v. *Boaro* (113 U. S. 527), and the department would not feel constrained to follow the ruling of the court in the *Wigand case* and credit the expenses of an official survey of the claim toward either annual assessment work or expenditure required as a prerequisite to patent in any cases arising in Alaska or elsewhere unless and until the holding was upheld by more persuasive opinion or by the Supreme Court of the United States.

PUBLICATION OF PROOF NOTICES IN ALASKA HOMESTEAD CASES—CIRCULAR NO. 491, AMENDED

INSTRUCTIONS

[Circular No. 1181]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 19, 1929.

REGISTERS AND RECEIVERS,
ANCHORAGE, FAIRBANKS, AND NOME, ALASKA:

The requirements with reference to publication of proof notices in homestead cases in Alaska, where a special survey has been made, are set forth in paragraph 25, page 33, of Circular No. 491, approved February 24, 1928.[1] The requirements of the law with reference to publication are contained in section 10 of the act of May 14, 1898 (30 Stat. 409, 414). These requirements are applicable to homestead entries, soldiers' additional entries, and trade and manufacturing sites.

In Alaska, in the classes of entries mentioned, the important feature of proof notices is to inform all interested parties of the geographical location of the land, and the information should be given in such a way that the people who read the notice will be able to interpret it properly. The metes and bounds description is technical and not generally understood. Hence, in these cases, it is not of much value to the general public as a means of identification of land. The metes and bounds description adds to the length of the notice and to the cost of the notice to the claimant. The statute does not require the inclusion of such description in the published notice.

[1] Revision of Circular No. 491, of February 24, 1928, not published in this volume.

Adverse claimants may inform themselves as to the exact location of the land by the markings on the ground or from a copy of a plat of survey which must be filed in the district land office and posted on the land.

It is believed, therefore, that in the cases mentioned, and for the reasons stated, the inclusion of the metes and bounds descriptions in the published notices is objectionable and unnecessary. It is directed, therefore, that hereafter such descriptions be omitted.

In the cases referred to, as a means of identification of the land the register will cause each notice hereafter issued to give the survey number and area of the claim with a statement as to the general location of the land. If the survey is not tied to a corner of the rectangular system of the public land surveys, the notice should give the name and number of the location monument to which some corner of the survey is tied, and the course and distance from the location monument to such corner, with approximate latitude and longitude. If the survey is tied to a corner of the rectangular system of the public land surveys, such corner should be identified by section, township, and range. The statement as to general location will identify the land as shown on the plat of survey or otherwise as the register may deem best. The statement where possible should refer to the land in connection with some well-known topographical point or natural object or monument, river, trail, town, mining camp, etc.

Circular No. 491, *supra*, is hereby amended to agree with the above instructions.

WILLIAM SPRY,
Commissioner.

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

MAURICE MORINO

Decided February 21, 1929

HOMESTEAD ENTRY—SETTLEMENT—ALASKA—WITHDRAWAL—STATUTES.

Section 3 of the act of July 8, 1916, as amended by the act of June 28, 1918, which amended the homestead law in its application to the Territory of Alaska, excepts from homestead settlement and entry such other lands as have been, or may be, reserved or withdrawn from settlement or entry.

SETTLEMENT—HOMESTEAD ENTRY—RAILROAD LAND—ALASKA—WITHDRAWAL.

A settlement upon unsurveyed lands in the Territory of Alaska with a view to entry and purchase under the homestead laws creates no rights that will defeat a subsequent reservation in aid of the construction and operation of railroads in that Territory as authorized by the act of March 12, 1914.

FINNEY, *First Assistant Secretary:*

On June 29, 1920, Maurice Morino filed and had recorded in the Nenana recording district, Alaska, a notice of claim, for agricultural purposes, to 160 acres of unsurveyed lands described by metes and bounds, and alleged therein the staking thereof on April 30, 1920. The plat of survey of fractional T. 14 S., R. 7 W., Fairbanks Meridian, was filed in the local office at Fairbanks January 31, 1927. On May 11, 1927, Morino filed application 01458 to enter under the homestead laws the NE. ¼ SW. ¼, NW. ¼ SE. ¼, SE. ¼ NW. ¼, S. ½ SW. ¼ NE. ¼ and S. ½ of lot 3, Sec. 4, in said township and range. Pursuant to instructions in letter of the Commissioner of the General Land Office of October 6, 1927, the entry was allowed October 26, 1927. On November 14, 1927, Morino filed application to amend his entry, alleging in substance that he originally intended to enter the NW. ¼ SE. ¼, NE. ¼ SW. ¼, SE. ¼ NW. ¼ and SW. ¼ NE. ¼ of said section, in conformity with his original location as staked on the ground; that the omission of the N. ½ SW. ¼ NE. ¼ and substitution of S. ½ of lot 3 was error. A sketch accompanying Morino's application shows the public school at McKinley Park and McKinley Park Station of the Alaska Railroad within the said N. ½ SW. ¼ NE. ¼. By Executive order No. 3946 of January 21, 1924, the N. ½ N. ½, N. ½ SE. ¼ NW. ¼ and N. ½ SW. ¼ NE. ¼ of said Sec. 4 were withdrawn, under the act of March 12, 1914 (38 Stat. 305), "from settlement, location, sale, entry, or other disposition and reserved for use in connection with the construction and operation of railroad lines under said act." The S. ½ of lot 3 is a part of the N. ½ N. ½ of said section.

In accordance with instructions in departmental letter of July 9, 1928, the commissioner, by decision of July 23, 1928, denied Morino's application to amend on the ground that the act of March 12, 1914, *supra*, under which withdrawal No. 3946 was made, makes no exceptions, not even settlement claims. He also ordered adverse proceedings "against the entry on the charge that the S. ½ of lot 3 of Sec. 4 was withdrawn by Executive order of January 21, 1924, and was not claimed by Morino as part of his settlement claim, and that the entry was made and is being maintained for the purpose of trade and business." Morino was advised, however, that if he relinquished his entry, he could apply for title under the trade and manufacturing site law to such of the lands subject thereto as contain his improvements.

From this action Morino has appealed.

The action, as above stated by the commissioner, is in substantial accord with the department's instructions of July 9, 1928. No merit is found in the contention of appellant that it is the spirit and intent of the act of March 12, 1914, to protect prior settlement claims in

the withdrawals made under that act; that such prior settlers' rights are vested, and it is therefore immaterial that an exception of such claim does not appear in the order of withdrawal made thereunder.

It is elementary law that rights in public lands can be initiated only under and in compliance with some act of Congress authorizing such appropriation. In the case of a settler, the Government has assumed no obligation with respect to the ultimate disposition of the land; no promise is extended to him that when the land is finally brought into the market it will be disposed of under laws recognizing prior settlement as a basis of right to acquire title thereto. *Lewis G. Norton, On Rehearing* (48 L. D. 507), and cases there cited; *Russian American Packing Co.* v. *United States* (199 U. S. 370). The act of March 12, 1914, makes no exception in the reservations for the purposes of that act. Furthermore, section 3 of the act of July 8, 1916 (39 Stat. 352), as amended by the act of June 28, 1918 (40 Stat. 632), which amended the homestead law in its application to Alaska, excepts from homestead settlement and entry "such other lands as have been, *or may be* reserved or withdrawn from settlement or entry." [Italics supplied.]

A settlement upon unsurveyed lands in Alaska with a view to entry and purchase under the homestead laws in force in Alaska, creates no rights that will defeat a subsequent reservation authorized under the act of March 12, 1914.

The Alaskan Railroad town-site regulations (50 L. D. 27, 83), according preference rights to settlers in the purchase of town lots; the instructions of March 15, 1915 (44 L. D. 22), relating to the reservation of roadways in section 10 of the act of May 14, 1898 (30 Stat. 409); the instructions of December 22, 1921 (48 L. D. 382), relating to the preference right of settlers on the *restoration* from withdrawals for town-site purposes; the decision in *Edward F. Smith et al.* (51 L. D. 454), holding that neither vested nor inchoate rights initiated prior to a reclamation withdrawal could be taken away without due compensation; the decision in *Charley Clattoo* (48 L. D. 435), holding an allotment to an Alaskan native under the act of May 17, 1906 (34 Stat. 197), was a vested right and not affected by a subsequent withdrawal for the common use of a native Alaskan village; the decision in *Henry W. Pollock* (48 L. D. 5), holding that a valid subsisting mining location antedating the act of October 2, 1917 (40 Stat. 297), constitutes a bar to a lease under said act for the tract so located; the unreported decision of the department of February 26, 1916 (D–30918), permitting the allowance of homestead entry, Fairbanks 0369, for tracts settled upon while included in a withdrawal made under said act of March 12, 1914, but subsequently revoked as to such tract; all of which decisions and instructions are cited by appellant as supporting his

contention that the settler can not be deprived of the land settled upon by a subsequent withdrawal thereof, are inapposite, and not in conflict with this rule.

While the rule was recognized in the department's instructions heretofore mentioned, and in the commissioner's decision that a prior settlement claim would not defeat withdrawals made under the act in question, the action taken, possibly inadvertent, did not consistently apply the rule, or necessitate the proceedings of the scope directed. The reason for the denial of the amendment to the application by including the N. ½ SW. ¼ NE. ¼, requires also the cancellation of the entry as to the N. ½ SE. ¼ NW. ¼, as the alleged settlement on either tract did not defeat the attachment of the withdrawal. The application of the rule also requires the cancellation of the entry as to the S. ½ of lot 3, upon the facts shown by the record, and requires no determination of any issue of fact by evidence *in pais*. The proceedings directed should therefore be confined to the issue as to the *bona fides* of the settlement upon the entered lands not within the withdrawal. While that issue remains undetermined, any claim of equities, if any, that appellant might have in the tracts so withdrawn that would justify inquiry by the department as to the propriety of a modification of the withdrawal will not be entertained. In accordance with these views, the rejection of the application for amendment will not be disturbed; the entry should be canceled as to S. ½ of lot 3 and N. ½ SE. ¼ NW. ¼. Proceedings should be directed against the remainder of the entry on the charge only that the entry was made and is being maintained for the purpose of trade and business and not for a homestead, with the option extended to the appellant to relinquish his entry and apply for title under the trade and manufacturing site law upon the conditions and restrictions stated in the commissioner's letter.

As herein modified, the commissioner's decision is affirmed and the case remanded for action accordingly.

Affirmed and remanded.

RIGHTS OF MARRIED WOMEN UNDER THE ALASKA FUR-FARMING ACT

Instructions, March 1, 1929 [1]

FUR FARMING—APPLICATION—LEASE—MARRIED WOMEN—ALASKA—EVIDENCE.

Married women are not excluded from the benefits of the Alaska fur-farming act of July 3, 1926, but where both husband and wife seek leases under the act satisfactory proof should be required that each is acting solely on his or her separate account and not under any agreement or understanding with the other for joint operation.

[1] See instructions of March 19, 1929, Circular No. 1183, p. 570.—Ed.

FINNEY, *First Assistant Secretary:*

The department has considered your [Commissioner of the General Land Office] letter of February 1, 1929, requesting instructions as to the rights of married women under the Alaska fur-farming act of July 3, 1926 (44 Stat. 821).

Section 1 of said act authorizes the leasing of public land in Alaska to be used in the production of furs to—

(a) Corporations organized under the laws of the United States, or of any State or Territory thereof;
(b) Citizens of the United States, and
(c) Associations of such citizens.

I find nothing in the act which would warrant the department in excluding married women from its benefits. It may happen that both a man and his wife will apply for leases, but her application will be tested only in the same manner as that of her husband.

However, in order to insure against the acquisition by a lessee of an interest in a greater acreage than that allowed by law, inquiry should be made of all applicants to determine whether they are married or single, and, if married, whether the husband or wife of the applicant, as the case may be, is the holder of a lease, and if it appears that both husband and wife are applicants, satisfactory proof should be required that each is acting solely on his or her separate account and not under any agreement or understanding with the other for joint operation.

FUR FARMING IN ALASKA—CIRCULAR NO 1108 (52 L. D. 27 AND 262), AMENDED

INSTRUCTIONS

[Circular No. 1183] [1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 19, 1929.

REGISTER AND CHIEF OF FIELD DIVISION,
ANCHORAGE, ALASKA;
REGISTER AND RECEIVER,
FAIRBANKS AND NOME, ALASKA:

The regulations governing fur farming in Alaska issued in pursuance of the act of July 3, 1926 (44 Stat. 821), on January 22, 1927 Circular No. 1108 (52 L. D. 27), and amended January 30, 1928 (52 L. D. 262), as set forth on pages 17, 18, and 19 of Circular No.

[1] See instructions of March 1, 1929, p. 569.

491, approved February 24, 1928,[1] are hereby further amended by inserting after:

Applications should cover, in substance, the following points, and be under oath:

(a) Applicant's name and postoffice address,

the following:

(1) Married or single person.

(2) If married, whether the husband or wife of applicant, as the case may be, is the holder of a lease under said act, or has an application pending.

(3) If both husband and wife are applicants, proof must be furnished that each is acting solely on his or her separate account and not under any agreement or understanding with the other for joint operation.

WILLIAM SPRY,
Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

SOUTHERN PACIFIC RAILROAD COMPANY

Decided March 2, 1929

PLAT—RAILROAD LAND—STATION GROUNDS—SELECTION—RECORDS—SECRETARY OF THE INTERIOR—PATENT—EVIDENCE.

A map required to be filed by a railroad company does not become a public record until its approval by the Secretary of the Interior and where it is necessary to reject a selection of a tract of public land for station grounds under the act of March 3, 1875, because the land had been patented to another, a map can not be accepted officially and filed as evidence of the company's use and occupancy of the tract applied for.

FINNEY, *First Assistant Secretary:*

The Southern Pacific Railroad Company has appealed from the decision of the Commissioner of the General Land Office dated October 26, 1928, holding for rejection its application, Phoenix 063533, for station grounds, made under the act of March 3, 1875 (18 Stat. 482).

On July 9, 1928, the railroad company filed, in the district land office at Phoenix, a map of the land applied for, representing 20 acres in the SW. ¼ Sec. 5 and NE. ¼ SE. ¼ Sec. 6, T. 12 S., R. 12 E., G. & S. R. M., Arizona. The affidavit of the engineer, which is a part of the map, states that the construction of the company's station buildings, etc., was commenced and completed in 1903, but that the company had failed to file maps showing the station grounds prior to the one in question.

[1] Revision of Circular No. 491, of February 24, 1928, not published in this volume.

The register of the district land office rejected the application because the land it covered had been patented, and the commissioner took like action on appeal. The commissioner said that as title to the land had passed out of the Government his office had no further jurisdiction over the matter, and that the company's maps would not be submitted to the Secretary of the Interior for approval.

With its appeal to the department the railroad company has presented a carefully prepared argument in which it states fully its reasons for urging that the department consider and accept its proof of use and occupancy of the 20-acre tract selected by it for station purposes. The argument closes with the request that the case "be remanded to the General Land Office with instructions to accept the map filed by the company as evidence of the use, occupancy and improvement of the lands involved as granted for station-ground purposes under said act of March 3, 1875."

The department finds that the commissioner's action rejecting application, Phoenix 063533, was right.

As the railroad company's application for the station grounds in question is rejected, the map offered by the company can not be accepted officially and filed as evidence of the company's use and occupancy of the tract applied for. The map can become a public record only through its approval by the Secretary of the Interior. As the lands shown by the map have ceased to be a part of the public domain, the Secretary of the Interior no longer has jurisdiction to approve it. As the matter stands the map has no place in the official records of the General Land Office.

The decision appealed from is

Affirmed.

WINFRED A. STEWART

Decided March 8, 1929

PUBLIC LAND—WITHDRAWAL—SURVEY—FLORIDA.

To determine whether a tract of public land comes within the purview of the Executive order of July 3, 1925, which withdrew from all forms of appropriation "all lands on the mainland within three miles of the coast in the States of Alabama, Florida, and Mississippi," measurement should be made from a point on the coast which is nearest to the tract involved.

FINNEY, *First Assistant Secretary:*

Winfred A. Stewart appeals from the decision of the Commissioner of the General Land Office, dated September 26, 1928, holding for rejection his homestead application, Gainesville 021640, filed July 25, 1928, for the N. ½ NE. ¼ Sec. 3, T. 18 S., R. 34 E., T. M., Florida, containing 80 acres, for the reason that parts of both the

NE. ¼ NE. ¼ and the NW. ¼ NE. ¼ are on the mainland and within three miles of the coast of Florida, and therefore, under the Executive order of July 3, 1925, withdrawing from all forms of appropriation "all lands on the mainland within three miles of the coast in the States of Alabama, Florida, and Mississippi," neither of the subdivisions is subject to entry.

The question for determination is whether in fact parts of the two subdivisions are within the three-mile limit. The plats of surveys and accompanying field notes on file in the General Land Office show that they are within such limit.

The applicant has filed two affidavits of surveyors, one of which was filed subsequent to the commissioner's decision, which state that the land is more than three miles from the coast. The sketch which accompanies the last-named affidavit indicates that measurement of the distance was made on a line running directly east from the eastern boundary of the tract. While it is true that such line is slightly more than three miles in length, yet measurement of a line run to the tract from a point on the coast which is nearest to the tract shows that nearly all of the NE. ¼ NE., ¼ and a part of the NW. ¼ NE. ¼ are within the three-mile limit.

To determine whether a tract of land is within three miles of the coast, measurement should be made from a point on the coast which is nearest the tract, and if thereby it is found that the tract is within the prescribed distance, it is not subject to appropriation.

The decision appealed from is

Affirmed.

WINFRED A. STEWART

Motion for rehearing of departmental decision of March 8, 1929 (52 L. D. 572), denied by First Assistant Secretary Dixon, April 16, 1929.

CENTRAL PACIFIC RAILWAY COMPANY v. MULLIN

Decided March 8, 1929

MINING CLAIM—MINERAL LANDS—PLACER CLAIM—DISCOVERY—LOCATION—EVIDENCE—PRESUMPTION—PATENT.

A single discovery of mineral upon public land is sufficient to authorize the location of a placer claim thereon and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify patenting, but such a discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.

MINING CLAIM—MINERAL LANDS—PLACER CLAIM—MINERAL ENTRY.

Any area amounting to a legal subdivision within a placer claim which does not contain or is not valuable for the deposit for which the location was made, is not mineral land within the contemplation of the statute and will be excluded from mineral entry.

MINING CLAIM—MINERAL LANDS—PLACER CLAIM—DISCOVERY—RAILROAD GRANT.

A discovery of mineral upon certain subdivisions of a placer claim located within the primary limits of a railroad grant can not defeat the grant as to the subdivisions within such claim found to be nonmineral in character.

FINNEY, *First Assistant Secretary:*

July 1, 1926, Josephine T. Mullin filed mineral application, Sacramento 017045, Survey No. 5773, for patent to the Golden Rule placer claim containing 155.99 acres, situated almost entirely, according to the now accepted official plat of survey, in the SW. ¼ Sec. 5, T. 15 N., R. 11 E., M. D. M.

A contest was instituted and prosecuted against the application by the Central Pacific Railway Company on the ground that the subdivision above mentioned is nonmineral in character and upon approval of the plat of survey, title thereto inures to contestant by virtue of the grants in the acts of July 1, 1862 (12 Stat. 489) and July 2, 1864 (13 Stat. 356) to its predecessor, the Central Pacific Railroad Company.

Upon the record made at a hearing between the parties held April 7, 1927, the register adjudged that the protest be dismissed. Upon appeal of contestant, the Commissioner of the General Land Office by decision of February 10, 1928, after full consideration and summary of the evidence adduced held the application for rejection except as to the W. ½ SE. ¼ SW. ¼, E. ½ SW. ¼ SW. ¼. The commissioner found as follows:

> The ground, according to the evidence, has been located, relocated and worked in part for many years, and with the exception of what would be the W. ½ SE. ¼ SW. ¼ and E. ½ SW. ¼ SW. ¼ when subdivided no discovery of mineral thereon of any kind appears to have been made.
>
> An ancient gravel channel is said to underlie this portion of the claim and considerable tunneling in the way of development work has been done mostly by claimant's predecessors. Notwithstanding the predecessors' failure to continue with the work, the discoveries made by them and the showing of the present claimant are sufficient, in the opinion of this office, to characterize the portion of the claim upon which the discoveries were made, as mineral, and to warrant its further development for the gold contained therein.

The contest was, therefore, dismissed as to the above-described twenty-acre tracts "upon which discoveries were made."

The contestee only appealed from this decision. There is, therefore, no question before the department as to the character of W. ½ SE. ¼ SW. ¼ and E. ½ SW. ¼ SW. ¼, which must be presumed to be mineral in character.

As to the remainder of the claim, the uncontroverted evidence is to the effect that the mineral claimant and her predecessors have had for a period of more than twenty years opportunity to demonstrate that such area is valuable for placer mining, yet operations have been confined to the tracts the commissioner found to be mineral. The evidence of mineral disclosures on such tracts does not warrant the belief that valuable deposits extend beyond them, the character and extent of deposits thereon and surrounding geologic conditions considered. The finding that the remainder was nonmineral was, therefore, correct.

Appellant, however, contends that one discovery on a placer claim entitles applicant to a patent for the full measure of the area of the claim. If the whole claim were all on public land and subject to disposition under public-land laws, the contention would be without merit.

On public land, if any area amounting to a legal subdivision within a placer claim does not contain or is not valuable for the deposit for which the location was made, it is not mineral land within the contemplation of the statute and such part will be excluded from entry. A single discovery upon such land is sufficient to authorize the location and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify patenting thereof (*Ferrell* v. *Hoge*, 27 L. D. 129), but such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto. *Ferrell* v. *Hoge*, *On Rehearing* (29 L. D. 12).

In *Crystal Marble Quarries Co.* v. *Dantice et al.* (41 L. D. 642) it was held that (p. 646)

> The evidentiary weight to be attached to the actual discovery or disclosure of placer mineral upon one portion of a 160-acre placer claim is dependent upon the character of the deposit and formation, the surrounding geologic conditions, and all the facts and circumstances of the particular case. * * *
>
> * * * It (the mineral claimants) can only succeed as to the area shown to be mineral in character and for this purpose the land may be divided into 10-acre tracts. It is not meant that actual disclosure must be made on each 10-acre tract, but the suggestion is made merely to show that the contest may be sustained as to a part of the land only.

In that case a contest affidavit filed by the mineral claimant that averred the mineral character of the claim as a whole and not by positive averment of mineral character as to each ten-acre subdivision thereof was upheld.

In that case was considered the rule in *American Smelting and Refining Company* (39 L. D. 299) that "In determining the character of land embraced in a placer location, ten-acre tracts normally

in square form, are the units of investigation and determination; and if any such area is found to be nonmineral, it should be eliminated from the claim."

In this case the SW. ¼ of Sec. 5 is a part of an odd section within the primary limits of the grant to the Central Pacific Railroad Company. The plat of survey of the township covering Sec. 5 was accepted February 7, 1928. The grant embraced said section and under its provision was operative as to all nonmineral land within said section which at the time of the definite location of the line of the road opposite the same was not sold, reserved, or claimed for preemption or homestead or otherwise disposed of by the United States. The words in the act "There be and is hereby granted" vested a present title, though a survey of the lands and a location of the road are necessary to give precision to the grant and attach it to any particular tract. *Leavenworth etc. R. R. Co.* v. *United States* (92 U. S. 733, 741); *Deseret Salt Co.* v. *Tarpey* (142 U. S. 241, 249); *United States* v. *Montana Lumber and Manufacturing Co.* (196 U. S. 573, 577); *Carroll* v. *United States* (154 Fed. 245); *Northern Pac. Ry. Co.* v. *Smith* (203 Pac. 503). "The grant then became certain, and by relation has the same effect upon the selected parcels as if it had specifically described them." *Deseret Salt Co.* v. *Tarpey*, *supra; United States* v. *Montana Lumber and Manufacturing Co.*, *supra.*

The finding that the SW. ¼ of Sec. 5 excluding the W. ½ SE. ¼ SW. ¼ and E. ½ SW. ¼ SW. ¼ is nonmineral, established that right and title thereto is in the railroad grantee as of the date of the grant and that such area was, therefore, not public mineral land and subject to disposition under the mining laws. No discoveries upon the subdivisions found mineral could, therefore, defeat the company's grant as to the subdivisions found nonmineral. The railroad company having listed the SW. ¼, the Government can not refuse to issue patent for a portion of it held nonmineral on the ground that the remaining portion is found to contain mineral deposits. *Work* v. *Central Pacific Railway Company* (12 Fed. 2d. series, 834).

For the reasons above stated, the commissioner's decision is

Affirmed.

CAMPBELL v. DODD

Decided March 9, 1929

CONTEST—HOMESTEAD ENTRY—NOTICE—ABATEMENT—PRACTICE.

Where the original notice of contest, issued by the register, is permited to remain in his office, and an unsigned copy thereof is served upon a homestead entryman, the purported copy is not a legal notice, and the contest in due time will abate in accordance with Rule 8 of Practice.

CONTEST—HOMESTEAD ENTRY—NOTICE—ABATEMENT—JURISDICTION—PRACTICE.

Appearance of a contestee before the local office after the expiration of the period provided by the Rules of Practice for service of notice of contest to move the dismissal of the proceedings is merely a plea to the jurisdiction and is in no sense an answer or joinder of action.

FINNEY, *First Assistant Secretary:*

This is the appeal of A. D. Campbell from a decision of the Commissioner of the General Land Office, July 18, 1928, affirming a decision of the district land office April 17, 1928, in the above-styled cause wherein it was held that the contest of said Campbell against the homestead entry, Las Cruces 025230, of Mrs. Emma Dodd for certain described lands situated in T. 22 S., R. 3 E., and T. 22 S., R. 4 E., N. M. P. M., had abated because of defective service in that among other things "notice of contest was not signed by the register of the land office."

Campbell's contest affidavit was filed March 10, 1928, charging lack of residence and improvements and that the entrywoman had abandoned the land. A notice of contest issued, that is, was signed by the register, which was not served but remained in the files of the office. An alleged copy thereof was served on the entrywoman by registered mail March 16, 1928, and due and timely return thereof was made by the contestant. Motion to dismiss the contest was filed by the contestee and sustained as above stated. The undisputed and controlling fact is that the alleged copy of the notice of contest was not signed by the register.

Rule 5 of Practice provides that the register shall promptly issue notice of the contest "directed to the person adversely interested" and Rule 7 provides that personal service of such notice may be made by any person over the age of 18 years or by registered mail. Rule 8 provides that unless notice of contest is personally served and due return thereof made within 30 days after its issuance "the contest shall abate."

Conceding for the purposes of this case that authorized notice duly issued, the question remains whether service thereof was made within 30 days or at all. It is admitted that the notice signed by the register was not served. That paper remained in his office and the Rules of Practice do not in terms provide for personal service by delivering a copy of the notice in such cases. But admitting that a true copy of the notice would have answered the purpose of the original, it remains to be seen whether such a copy was served. See Rule 12.

Obviously, an unsigned paper purporting to be a copy of another paper which was signed, is not a legal paper in any sense. No matter what it contains it is nothing more than a scrap of paper. Even

if the entrywoman may have been able to surmise from the anonymous terms thereof that a contest had been filed against her entry she was not bound to answer; on the contrary, after the time had elapsed as provided by the Rules of Practice for serving notice of contest, the entrywoman had a right to and did appear before the local office and moved to dismiss the proceedings. This appearance by the contestee was altogether regular. Her plea was one to the jurisdiction of the local office and was in no sense an answer or joinder of action. It was a plea in abatement and if the notice provided by the Rules of Practice had not as she alleged been served, she was entitled to an order by that office dismissing the proceedings, and as has been seen, her plea was sustained and such order was made in this case by the register. A statutory notice is not binding unless given as the law directs. *Allen* v. *Strickland* (100 N. C. 225; 6 S. E. 780); *O'Fallon* v. *Railroad Company* (45 Ill. App. 572), and in an action at law the action dies and can not be revived. Bouvier's Law Dictionary, Title, Abatement, Vol. 1, page 6, cases cited. Such is the governing rule of this case. The Rules of Practice cited above had been duly promulgated by the Secretary of the Interior and being authorized regulations had the force and effect of a statute. In the matter of notice a contestant seeking a preference right because of his interest as an informer will be held to a strict compliance with Rule 8 of Practice. *Cassidy* v. *Hall, On Rehearing* (50 L. D. 363).

The decision appealed from is

Affirmed.

CONSERVATION OF OIL AND GAS ON PUBLIC LANDS

INSTRUCTIONS.

[Telegram][1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 13, 1929.

REGISTER,
DISTRICT LAND OFFICE,
PHOENIX ARIZONA:

No oil and gas prospecting permits will be issued on and after March twelfth nineteen twenty nine Stop Reject all applications for oil and gas permits now pending in your office and receive no more Stop All orders for drawings hereby revoked.

WILLIAM SPRY,
Commissioner.

Approved:
RAY LYMAN WILBUR,
Secretary.

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[1] Like telegram sent to all registers.

[Order No. 337]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 16, 1929.

The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.

There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.

Probably in none of the cases on hand has the applicant expended money for developmental purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application.

Where land covered by pending applications is likely to be drained by adjoining wells on privately-owned lands, the question of granting permits on government land will be considered in the light of facts developed by departmental investigation.

With regard to the 20,000 outstanding permits on public lands, the department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be given to carry on developmental work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the Solicitor for the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations.

Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This includes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in a joint drilling program, test wells being drilled by a responsible drilling company on some of the public lands in the area covered by the per-

mits. So long as this program is being diligently prosecuted, no adverse action will be taken.

No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929.

RAY LYMAN WILBUR,
Secretary of the Interior.

[Order No. 338]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 20, 1929.

The following outlines the general procedure in the Department of the Interior for executing the President's public land oil conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

2. All oil and gas cases pending in the office of the Solicitor will be reviewed to determine their present status. Those coming within the new policy should be returned to the General Land Office.

3. The preparation of letters in the General Land Office calling upon delinquent permittees to show cause why their permits should not be canceled will be expedited.

4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public interest.

6. The departmental committee, consisting of the Solicitor, the Commissioner of the General Land Office, and the Director of the Geological Survey, will consider the extent of operations which have been prosecuted under existing oil and gas permits, to determine whether permittees have acquired equities which should be recognized and make appropriate recommendations to the Secretary. In reviewing permits, representative cases may be recom-

mended for public hearing before the Secretary of the Interior to determine lines of policy.

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

8. Applications for extension of permits on hand should be disposed of promptly. Those not involving expenditure of money in development work will be denied by the General Land Office. All other cases will be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record, and of the Geological Survey as to the status of development work.

9. The General Land Office will hold for cancellation, allowing 15 days in which to show cause, all permits on which there is no *prima facie* evidence that expenditure of money in development work has been made. All other cases should be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record and of the Geological Survey as to status of development work.

10. All oil and gas permits in the Geological Survey pending report to the General Land Office will be promptly considered under the new policy. Where these cases involve conflict of agricultural and mineral rights, or questions of similar character, they should be completed by the Geological Survey. All others should be returned to the General Land Office with appropriate report when such is required under the new policy; otherwise without report.

11. Supervisors of oil and gas operations in the Geological Survey must deny approval to notices of intention to drill on permits that are not shown to be in good standing by the terms of the permit itself or an approved extension of time.

12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wildcatting fields where a claim of drainage is made. The special committee will consider the question of drainage only when incidentally involved in individual permits before it for consideration.

13. Permits issued and outstanding in Executive Order Indian Reservations under the act of March 3, 1927 (44 Stat. 1347), will be considered and disposed of in the same manner as provided in the foregoing paragraphs.

RAY LYMAN WILBUR,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 3, 1929.

MESSRS. PETER Q. NYCE, ROBERT D. HAWLEY,
P. C. SPENCER, MERLE N. POE, D. A. RICHARDSON,
National Press Building, Washington, D. C.:

This is to acknowledge the communication transmitted to the Secretary of the Interior under date of April 1, 1929, by you as members of a committee representing certain oil companies interested in the development of oil and gas in public land States. Your communication was placed before the special committee of the department made up of Solicitor E. C. Finney, as chairman, Commissioner William Spry of the General Land Office, and Director George Otis Smith of the Geological Survey. This committee has now submitted to me a memorandum which is incorporated in this letter in answer to each of the five points presented by you.

(1) Applications for permits filed prior to March 12, 1929, should not be rejected by a blanket order without right of appeal. The circumstances surrounding each application should be examined into and the individual applicant, in each instance, should be permitted to show cause why his application should be granted. If the applicant has acted in good faith in making or causing to be made geological examinations and/or improvements and/or expenditures tending toward the development of the property, the permit should issue. Pending applications for permits, otherwise allowable, should be granted where there has been a prolonged delay on the part of the Government in acting thereon without fault of the applicant.

Answer. The President's policy clearly contemplates the disallowance of unapproved permits. This relates to unapproved applications for oil and gas prospecting permits. The law vests in the Secretary discretion to refuse permits. The regulations adopted by the then Secretary of the Interior just after passage of the law so provide. Presumptively no applicant has spent money for development—if he did, it was without departmental permission or knowledge. Other expenses such as general geological surveys, searching for vacant lands, filing fees, etc., do not in our opinion furnish basis for equitable allowance. No applicant was guaranteed the right to file. In fact priority depended on being first to file his application, not upon money expended in preparing to do so.

(2) Permits and leases, and applications for either of them, covering lands which apparently are valuable only or principally for the production of natural gas, should be excepted from the restrictive orders, rules and regulations of the Government relating to the conservation of oil, provided there is an economic demand for such gas.

Answer. Where production of natural gas is shown on lands included in existing permits in good standing, if there be an economic demand for such gas the particular circumstances in each case or locality should govern. Because of the public interest involved, the effort should be to meet the needs of all existing contracts with municipalities or public utilities, but the approval of each program of development for such gas supplies should be conditioned upon meeting present demand without waste so as to provide the longest possible life of each field for this beneficial use of the gas. Equities and expenditures in development of permit areas, in development of groups of permits heretofore approved, for pipe lines under existing arrangements or contracts to supply municipalities, should be considered.

(3) Permits embraced within so-called "group development" or "contribution" projects, where permittees are engaged in a joint drilling program, should be entitled to such further extensions of time as may be allowable under existing laws, so long as said program or any other approved program, is being diligently prosecuted.

Answer. Group or contributory development should not be authorized in any cases in future. Where group or contributory development programs have been authorized in the past, the department has granted specific extensions of time on permits on the promise of an operator to do specified development work substantially equivalent to the combined requirements of the individual permits concerned, and the Government has in every case lived up to its end of the bargain. The operators, to show good faith to the permittees as well as to the Government, should complete the promised development work at least 60 days prior to the expiration of the period of extension in order that permittees may, if appropriate, make application for leases earned by discovery, make timely plans for drilling on individual permits substantially proved by discovery, make plans for further exploratory drilling, etc. At no time has the department agreed to grant successive extensions of time until a large area should be proved up and permit the operator to delay selection of leasing areas until that end had been accomplished. On the contrary each program has been for a limited time with future extensions, if any, to be considered on their merits in the light of conditions existing at or near the expiration of extensions granted. Under present conditions, if the operator has completed his development program on the basis of which extensions were granted, further action should follow the rules applicable to individual permit cases, no legal or equitable right to other action having been earned by completing work promised in payment for special consideration previously granted. If, with good reason, the operator has failed to

make timely completion of the work he promised to do, limited extensions on permits on which promised work is in progress may be made.

(4) In the event of discovery on a permit, both A and B leases covering all the land in said permit should issue upon application therefor. The rights of the permittee, lessee and operator would thus be defined.

Answer. The law mandatorily requires the lease of one-fourth upon discovery. Leasing of the remainder is discretionary and should not issue upon the application of the permittee, unless and until such action is required in the public interest.

(5) It is recognized that true conservation should neither encourage nor demand the drilling of wells on individual permits or leases, except in response to market requirements. (See Federal Oil Committee of Nine Conservation Report of January 28, 1928, to the Federal Oil Conservation Board.) Practical effect to this should be given by extension or suspension of drilling requirements under both permits and leases, thus preserving existing rights and equities thereunder.

Answer. As to leases when issued after discovery of oil or gas, the Secretary can and should relieve from drilling additional wells or from the production of oil from existing wells upon request of the lessee, and this should be the procedure, the relief in each case being made subject to such conditions as are justified. As to approved existing permits in good standing, the law contemplates development and drilling on permits with diligence to a discovery. Cases may arise, however, where, because of existing or threatened excess production or for other reasons in the public interest, the Secretary of the Interior, may, on his own initiative, request cessation of development operations in specific areas, such cessation to be accompanied by equivalent extension of time or suspension of permits.

I concur in the recommendations of the committee on the answers made to each of the five points.

RAY LYMAN WILBUR.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 3, 1929.

In carrying out the President's oil conservation policy, the committee of the Department of the Interior [Commissioner of the General Land Office, Director of the Geological Survey, and Solicitor for the department], for consideration of pending claims, has made a recommendation concerning possible equities in oil and gas cases where adequate geological surveys have been carried on. The recom-

mendation which was approved by the Secretary of the Interior, is as follows:

We recommend that in all cases where clear and definite evidence is filed showing substantial expenditures for reliable geological surveys upon the lands embraced in oil and gas applications and permits, or groups of applications upon the same structure or where the structure is not clearly defined upon the surface, within an area not exceeding six miles square as provided in existing regulations, that the same be regarded as a sufficient equitable basis for the allowance of the applications pending on March 12, 1929, and issuance of permits thereon, or where permits have already issued and requests for extension are timely filed, that it be regarded as sufficient equitable ground for extension of such permits. Geological work may be distinguished from ordinary preliminary expenditures as the latter do not operate for the benefit or enlightenment of the Government, whereas geological work supplies information which is to the advantage of and may be used by the Government in the classification and disposition of the public lands and their resources. This is to be contingent upon a showing of good faith and of responsible diligence on the part of the applicants, permittees or those claiming through or under them.

EXPORTATION OF TIMBER FROM PUBLIC LANDS IN ALASKA—CIRCULAR NO. 1092 (51 L. D. 537), AMENDED [1]

REGULATIONS

[Circular No. 1184]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 20, 1929.

Circular No. 1092 of August 27, 1926 (51 L. D. 537), is hereby amended by substituting for provision (*e*) of paragraph 3 thereof, the following:

(*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. A minimum 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. The sum of such deposit may be in-

[1] For amendments to paragraphs 2, 5, 7, 8, and 9, Circular No. 1092, see Circular No. 1198, approved August 5, 1929, p. 586.—Ed.

creased when, in the opinion of the Secretary of the Interior, the interests of the Government require that a larger amount be deposited. 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.

WILLIAM SPRY,
Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

EXPORTATION OF TIMBER FROM PUBLIC LANDS IN ALASKA—CIRCULAR NO. 1092 (51 L. D. 537), AMENDED [1]

REGULATIONS

[Circular No. 1198]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 5, 1929.

Circular No. 1092, approved August 27, 1926 (51 L. D. 537), containing the regulations governing the exportation of timber from Alaska under the act of April 12, 1926 (44 Stat. 242), is hereby amended as follows:

(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 twenty 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 twenty years' supply is sold the period within which the same must be cut (twenty 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

[1] For amendment to paragraph 3, Circular No. 1092, see Circular No. 1184, approved March 20, 1929, p. 585.—Ed.

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.

(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 chief of field division at Anchorage, Alaska, or to an examiner located in the particular land district who shall have been designated by the chief of field division 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 chief of field division 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 hereof and at intervals of five years thereafter, but in no instance shall the appraisal be at more than double the rate of the original appraisal.

(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 (revision of February 24, 1928),[1] page 92, sections 1 and 2. Contracts entered into under these rules and regulations will also be subject to the right of qualified persons to locate, select, settle upon, or enter the lands involved

[1] Not published in this volume.

under the provisions of the public land laws applicable to Alaska, but such claimants 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, in the discretion of the Secretary of the Interior, be entered into for a period of not to exceed twenty years, 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.

TIMBER SALE CONTRACT

(9) At the end of the period designated herein a new contract may, in the discretion of the Secretary of the Interior, be entered into, for a period of not exceeding twenty years, provided that there is sufficient timber suitable for manufacturing purposes available to warrant, and further provided that the provisions and conditions of this contract shall have been faithfully complied with. The price to be paid for the timber will be based upon an appraisal to be made at that time.

C. C. MOORE,
Commissioner.

Approved:
RAY LYMAN WILBUR,
Secretary.

HOMESTEAD ENTRIES—ABSENCE BECAUSE OF GRASSHOPPER OR CRICKET INVASION—ACT OF FEBRUARY 9, 1929

INSTRUCTIONS

[Circular No. 1185]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C. March 22, 1929.

REGISTER, DENVER, COLORADO:

Section 7 of the act of February 9, 1929 (45 Stat. 1156), provides as follows:

That no qualified homestead entryman who, prior to November 1, 1928, made bona fide entry upon lands of the United States in Moffat, Rio Blanco, and

Routt Counties, Colorado, under the provisions of the homestead laws of the United States, and who established residence in good faith upon the lands entered by him, shall be subject to contest for failure to maintain residence or make improvements upon his land subsequent to the incursion of swarms of crickets or grasshoppers upon said land, or in the vicinity; but such entryman shall, within ninety days after issuance of notice by the Secretary of the Interior that the emergency occasioned by such insect invasion has terminated, file in the office of the register of the local land office an affidavit that he has reestablished his residence on the land, with the intention of maintaining the same for a period sufficient to enable him to make final proof: *Provided*, That any entry heretofore canceled within said counties may, subject to intervening adverse rights, be reinstated on a proper showing by the entryman that a leave of absence under this act would have been warranted: *Provided further*, That no such entryman shall be entitled to have counted as a part of the required period of residence any period of time during which he was not actually upon said land prior to the date of the notice aforesaid.

The time that the homesteader is absent under the provisions of this act does not count as constructive residence upon the lands in his entry. In due course the date of termination of the emergency will be fixed and given due publicity at which time each entryman affected should notify the district office of his return to the land in his entry as provided by the act.

All homesteaders absent under the conditions mentioned in the act should keep the district land office advised as to their present address.

You will give all possible publicity to this act without expense to the Government.

WILLIAM SPRY,
Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

LIMITATION AS TO OIL AND GAS PROSPECTING PERMITS ON A SINGLE STRUCTURE

Decided March 23, 1929

OIL AND GAS LANDS—PROSPECTING PERMITS—LEASES—ASSIGNMENT—LIMITATION AS TO ACREAGE.

While oil and gas prospecting permits will not be granted to a permittee on one structure in such manner as to make it possible for him to include more than 640 acres, in five per cent leases as reward for discovery, yet after leases have been earned and issued no objection will be interposed to the approval of assignments of five per cent lease areas upon one structure provided that they do not exceed in the aggregate 2560 acres to one person.

DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

Case of *Elbe Oil Land Development Company* (52 L. D. 187), cited and distinguished.

EDWARDS, *Assistant Secretary:*

I have your [Messrs. Consaul and Heltman] letter of March 6, regarding the department's holding in the case of *Elbe Oil Land Development Company* (52 L. D. 187), and its administrative ruling in a letter [unreported] of December 15, 1928, addressed to William A. Boekel. You seem to think that the two are inconsistent and express the opinion that the decision in the *Elbe case* should be overruled or modified.

Section 27 of the leasing act of February 25, 1920 (41 Stat. 437), as amended by the act of April 30, 1926 (44 Stat. 373), provides that no person, association, or corporation shall take or hold at one time more permitted land than 2560 acres on the same structure. In section 14 of the leasing act it is provided that a permittee who discovers valuable deposits of oil or gas shall be entitled to a lease for one-fourth of the land at a royalty of 5 per cent, while he shall have a preference right to lease the remainder, if it shall be offered for lease, at a royalty of not less than 12½ per cent. But there is the further provision, "That the permittee shall be granted a lease for as much as one hundred and sixty acres of said lands, if there be that number of acres within the permit."

This last proviso has caused difficulty. If a person, association, or corporation were entitled to take and hold a total permit area of 2560 acres on a structure, regardless of the number of permits, he might desire to apply for 16 permits of 160 acres each, because if granted and if the area should prove productive he would be in a position to demand leases at a royalty of 5 per cent for the total 2560 acres. It was clear that if this could be done practically all lands valuable for oil or gas would be taken under leases at a royalty of 5 per cent.

The department sought to deal with the situation in the *Elbe case*. It was clear that an assignee of an oil and gas prospecting permit, or permits, could not be held qualified to obtain greater rights than he could directly as permit applicant.

After the right to a lease, or leases, has been earned, and after leases have been issued, there can not be any objection, such as before existed, to the approval of assignments of 5 per cent lease areas upon one structure up to 2560 acres to one person, association, or corporation.

I do not find any ground for modifying or changing the ruling in the *Elbe case* nor the administrative ruling in the Boekel letter.

ALLOWANCES OF CLAIMS AGAINST THE ESTATE OF AN ENROLLED MEMBER OF THE OSAGE TRIBE

Opinion, March 25, 1929

INDIAN LANDS—OSAGE INDIAN LANDS—TRUST FUNDS—SECRETARY OF THE INTERIOR.

Funds inherited by an unenrolled member of the Osage Tribe, born subsequent to July 1, 1907, from the estate of an enrolled member of that Tribe not having a certificate of competency, do not lose their restricted or trust character but continue under the supervision and control of the Secretary of the Interior subject to expenditure as provided by existing law.

INDIAN LANDS—OSAGE INDIAN LANDS—TRUST FUNDS—CLAIMS—DISCRETIONARY AUTHORITY OF SECRETARY OF THE INTERIOR.

Authority is conferred upon the Secretary of the Interior by section 6 of the act of February 27, 1925, to pay from the funds of a member of the Osage Tribe not having a certificate of competency, a claim incurred by such member or by his heir by reason of unlawful acts of carelessness or negligence, but that authority is discretionary and payment of the claim is a matter resting in the sound judgment of that officer.

FINNEY, *Solicitor:*

My opinion has been requested as to the authority of the Secretary of the Interior to pay or cause to be paid from funds inherited by Anna St. John from her father, Pierce St. John, a deceased member of the Osage tribe of Indians, a claim founded upon a judgment of the District Court of Osage County, Oklahoma, in favor of one Florence Ivers in the amount of $6,000. This requires a consideration of whether the funds so inherited are subject to the supervision of the Secretary of the Interior and if so whether Congress has conferred upon the Secretary authority to pay therefrom a claim of the nature involved. Any discussion of these questions may well be prefaced by a brief statement of the legislative policy of Congress with respect to the Osages and their property.

The act of June 28, 1906 (34 Stat. 539) directed the preparation of a final roll of the Osage Indians among whom the tribal lands and funds were to be divided per capita. By the terms of that act children born since July 1, 1907, were excluded from participating in such distribution in their own right. The oil, gas, and other minerals underlying Osage lands from which most of the tremendous wealth of these Indians is derived was to remain the common property of the tribe, the income from which was to be distributed quarterly per capita to the enrolled members, the shares of deceased members to be paid to their heirs. Provision was made for the issuance of certificates of competency, the general effect of which was to remove the members from the supervision and control of the Government. Later legislation as found in the act of March 3, 1921 (41 Stat. 1249) as amended by the act of February 27, 1925 (43 Stat.

1008) directed a different disposition of the income of these Indians particularly as to minors and adults not having certificates of competency. The payments to be made to the Indians were limited to specified amounts payable quarterly which were deemed by Congress as sufficient to meet the current needs of the members. The balance of the income due each member, commonly referred to as the "surplus," was to remain under the supervision and control of the Secretary of the Interior as a restricted or trust fund, to be expended under the Secretary's direction as provided in the statute. With these preliminary observations we turn to a consideration of the status of the funds inherited by Anna St. John from her deceased ancestor.

The ancestor, Pierce St. John, was a full-blood Osage allottee not having a certificate of competency. He died leaving an estate of considerable value including some $43,000 surplus funds in the hands of the superintendent of the Osage Indian Agency and 1 17/21 shares in the Osage tribal income. The heir, Anna St. John, who it appears will be entitled to a one-sixth interest in the decedent's estate was born since July 1, 1907, the date fixed for the closing of the tribal roll and under the terms of the act of 1906, was excluded from participating in the tribal income in her own right. Some question was at one time raised as to whether Indians such as she, whose names do not appear upon the final Osage roll, but who had come into the possession of shares of deceased enrolled members, were entitled to the benefit of the laws enacted by Congress relating to the Osages and their property (Solicitor's opinions of January 4, 1922, M–4017, and September 30, 1922, D–46929). However, no extended discussion of this question is necessary in view of the recent act of Congress approved March 2, 1929 (45 Stat. 1478), section 5 of which declares—

> The restrictions concerning lands and funds of allotted Osage Indians, as provided in this Act and all prior Acts now in force, shall apply to unallotted Osage Indians born since July 1, 1907, or after the passage of this Act, and to their heirs of Osage Indian blood.

Under this express direction, it is clear that such funds as may be inherited by Anna St. John from her deceased parent do not lose their restricted or trust character but continue under the supervision and control of the Secretary of the Interior subject to expenditure as provided by existing law.

The authority of the Secretary to pay the Ivers judgment from such funds is equally clear, such authority being expressly conferred by section 6 of the act of February 27, 1925, *supra*, reading in part as follows:

> * * * In addition to the payment of funds heretofore authorized, the Secretary of the Interior is hereby authorized in his discretion to pay, out of the

funds of a member of the Osage Tribe not having a certificate of competency, any indebtedness heretofore or hereafter incurred by such member by reason of his unlawful acts of carelessness or negligence.

The suit which resulted in the judgment in question was founded upon a claim for damages for personal injuries suffered by the plaintiff in an automobile collision alleged to have been caused by the negligence of the defendant. Judgment of the district court against Anna St. John was affirmed by the Supreme Court of Oklahoma on appeal (*St. John* v. *Ivers*, 255 Pac. 706), the court holding that there was "evidence reasonably tending to establish negligence on the part of Anna St. John, in the operation of the car at the time of the accident." The indebtedness created by this judgment thus clearly falls within the authority of the statute in that it is an indebtedness incurred by a member of the Osage tribe "by reason of his unlawful acts of carelessness or negligence."

Presented with the record, however, is a memorandum prepared by the Osage tribal attorney wherein he expresses some doubt as to whether section 6 of the act of 1925, as reproduced above, is sufficiently broad to repeal by implication section 7 of the act of April 18, 1912 (37 Stat. 86) by which the restricted lands and funds of members of the Osage tribe were protected against claims arising prior to the issuance of a certificate of competency, inheritance, or removal of restrictions. It is, of course, well settled that repeals by implication are not favored, but it is likewise well settled that a later statute repeals a former one where clearly inconsistent with the earlier enactment (*United States* v. *Tynen*, 11 Wall. 88; *United States* v. *Yuginovich*, 256 U. S. 450, 463). In so far as the authority of the Secretary of the Interior is concerned it would thus matter little whether the two statutes conflict or not, as the later law by which the authority is conferred would prevail as the last expression of the legislative will.

The matter of paying the claim of Florence Ivers, which does not appear as yet to have been filed with the department, involves a question of administrative policy upon which I express no opinion other than to point out that the statute is not mandatory. The authority conferred is discretionary and payment of the claim if and when filed is a matter resting in the sound judgment of the Secretary.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

57522—27—VOL 52——38

ARIZONA EASTERN RAILROAD COMPANY

Opinion, March 27, 1929

INDIAN LANDS—RIGHTS OF WAY—RAILROAD LANDS—"COOLIDGE DAM"—SECRETARY OF THE INTERIOR—STATUTES.

The broad authority conferred upon the Secretary of the Interior by section 5 of the act of June 7, 1924, to perform any and all acts and to make such rules and regulations as may be necessary in connection with the construction of the Coolidge Dam, does not warrant the waiver of the statutory limitation fixed by Congress in the earlier statutes relating to rights of way for railroad purposes through Indian reservations.

FINNEY, *Solicitor:*

In connection with an enforced relocation of the right of way of the Arizona Eastern Railroad Company, a subsidiary of the Southern Pacific System, through part of the San Carlos Indian Reservation, Arizona, you [Secretary of the Interior] have requested my opinion as to whether the railroad company may be permitted to exceed the limits of widths for such a right of way fixed by the act of March 2, 1899 (30 Stat. 990), as amended.

Briefly the facts at hand are: The Gila Valley, Globe and Northern Railroad Company, predecessor in interest to the Arizona Eastern, obtained a right of way through the San Carlos Indian Reservation, pursuant to the special act of February 18, 1895 (28 Stat. 665), the statutory limitations for such right of way being not to exceed 50 feet on either side of the center line of the road and not to exceed 200 feet in width by 3000 in length for station grounds. By the subsequent act of January 13, 1898 (30 Stat. 227), the time for completing construction of this road was extended to February 18, 1900.

In 1906 the company which evidently had then become the Arizona Eastern, filed application for a right of way through this reservation under the act of March 2, 1899, *supra*, which application was approved by this department on April 13, 1906. No construction appears to have been had under this application, however, within the period prescribed by section 4 of the act of 1899, and on August 3, 1909, the company filed a new application for a right of way through this Indian reservation, including the so-called San Carlos Reservoir site (40 L. D. 470). After extended investigations and hearings the latter application was denied by this department under date of February 17, 1912, without prejudice to the company filing an amended application "at such an elevation as will avoid interference with the reservoir site" (40 L. D. 472). Apparently the company failed to avail itself of this privilege as no record of a renewal of this application is at hand. The company continued, however, to operate its line through this reservation constructed under the earlier act of February 18, 1895.

Earnest efforts made with a view to utilizing the reservoir site at this point culminated in the act of June 7, 1924 (43 Stat. 475), which authorized the Secretary of the Interior, through the Indian Service, to construct a dam across the canyon of the Gila River near San Carlos, Arizona, at a limit of cost of $5,500,000, which dam by the subsequent act of March 3, 1925 (43 Stat. 1152), was designated "The Coolidge Dam." Section 5 of the act of June 7, 1924, reads:

> The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect; and the money hereby authorized to be appropriated shall be available for the acquiring of necessary right of way by purchase or judicial proceedings and for other purposes necessary in successfully prosecuting the work to complete the project.

The dam authorized by the statutes last referred to has been completed. It has a spillway elevation of some 200 feet above the stream bed and the resultant area within the contour level of this reservoir is around 21,500 acres. During the preliminary stages of the work it was realized that a dam of this height would flood some 14 miles of the roadbed of the Arizona Eastern, formerly the Gila Valley, Globe and Northern Railroad Company. Accordingly, negotiations were begun with a view to having the railroad company remove its tracks and other facilities from the area to be flooded. April 15, 1926, a contract was entered into by and between the then Secretary of the Interior and the Southern Pacific Company wherein it was agreed, among other things:

> 1. The railroad shall release to the United States that part of its present right of way of its Arizona eastern branch and its rights to its station and yard grounds and any and all other rights which it may have within the site of the so-called Coolidge Reservoir, which is to be constructed under the aforementioned act of Congress on the Gila River in Arizona.
>
> 2. The United States shall provide the railroad, free of cost, an adequate and complete right of way for its road as it shall be relocated around said reservoir site, and shall also provide adequate and complete station and yard grounds for said relocated line, all as the Secretary of the Interior may be authorized to do by existing law and in conformity with the rules, regulations, and practices thereunder.

March 22, 1928, this department approved a map filed by the Arizona Eastern Railroad Company showing location of that part of its right of way through this Indian reservation in lieu of the one surrendered and released pursuant to the foregoing agreement. This application was filed under the act of March 2, 1899, as amended, and the act of June 7, 1924, *supra*. In submitting a schedule executed by a representative of the railroad company and the superintendent in charge of the San Carlos Indian Agency showing the area covered by the new location of the railroad, the Indian Office points out that the maximum width for a right of way prescribed by the

act of March 2, 1899, as amended, has been exceeded in four instances as shown on said schedule under items numbered 7, 9, 25 and 29.

Section 2 of the act of March 2, 1899, as amended by the act of June 21, 1906 (34 Stat. 325,330), reads:

> That such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include grounds adjacent thereto for station buildings, depots, machine shops, side-tracks, turnouts and water stations, not to exceed two hundred feet in width by a length of three thousand feet, and not more than one station to be located within any one continuous length of ten miles of road.

From an examination of the schedule now here it appears that the excess width of the right of way under item No. 7 is 25 feet for a distance of approximately 375 feet; under item No. 9 an excess of 25 feet for a distance of 351 feet; under item No. 25 an excess of 175 feet for a distance of 275 feet, and under item No. 29 an excess of 50 feet for a distance of 200 feet.

The limitations prescribed by the act of March 2, 1899, as amended, *supra*, are statutory and hence can not be waived by this department. In this connection see 29 L. D. 338 and 30 L. D. 599. It is fundamental, of course, to say that administrative officers by regulation or otherwise are without power to alter or amend existing law: *Morrill* v. *Jones* (106 U. S. 466), *United States* v. *Eaton* (144 U. S. 677, 687). The broad authority conferred upon the Secretary of the Interior by section 5 of the act of June 7, 1924, *supra*, to perform any and all acts and to make such rules and regulations as may be necessary in connection with the construction of the Coolidge Dam is not deemed sufficient authority for you to waive the statutory limitation fixed by Congress in the earlier statutes herein referred to relating to rights of way for railroad purposes through Indian reservations.

As a matter of fact, in the agreement with the Southern Pacific Company hereinbefore referred to covering the relocation of this line it is expressly stipulated that such relocation shall be "* * * all as the Secretary of the Interior may be authorized to do by existing law and in conformity with the rules, regulations, and practices thereunder."

Under the circumstances at hand I am of the opinion that you would not be justified in permitting the railroad company to exceed the maximum widths prescribed by the act of March 2, 1899, *supra*, as amended.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

FRANK ST. CLAIR

Decided April 13, 1929

INDIAN LANDS—INDIANS—ALASKAN NATIVES—CITIZENSHIP.

The Indians and other "natives" of Alaska are in the same category as the Indians residing within the territorial limits of the United States, including the privilege of citizenship.

INDIAN LANDS—ALASKAN NATIVES—ALLOTMENT—STATUTES.

The status of an applicant under the act of May 17, 1906, relating to the allotment of homesteads to the "natives" of Alaska is analogous to that of the Indians of the United States with respect to allotments under section 4 of the act of February 8, 1887.

INDIAN LANDS—ALASKAN NATIVES—ALLOTMENT—STATUTES.

The act of May 7, 1906, is a special act relating to Alaskan natives and is separate and distinct from the act of May 14, 1898, which extended the homestead laws to the district of Alaska.

INDIAN LANDS—ALASKAN NATIVES—ALLOTMENT—STATUTES.

Section 10 of the act of May 14, 1898, and the amendatory act of March 3, 1927, have no application to the allotment of homesteads to Indian or Eskimo occupants of public lands in the Territory of Alaska.

INDIAN LANDS—ALASKAN NATIVES—OCCUPANCY—RESIDENCE—IMPROVEMENTS—STATUTES.

The act of May 17, 1906, does not prescribe that the settlement or occupancy of an Indian applicant thereunder must be continuous or that residence must be maintained on the land to the exclusion of a home elsewhere, nor does it require him to specify the character of his improvements or the purpose for which he desires the land allotted to him.

DIXON, *First Assistant Secretary:*

This is an appeal from the action of the Commissioner of the General Land Office in allowing the allotment application of Frank St. Clair, a native-born Indian of Alaska, under the act of May 17, 1906 (34 Stat. 197), entitled "An act authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska," which provides—

> That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

The application of this Indian was made April 5, 1915, and he asked to have allotted to him as head of a family an unsurveyed tract of land containing 160 acres on the south side of Berg Bay, a tributary of Glacier Bay, Icy Straits, Alaska. It was alleged in a

corroborated affidavit that he had occupied the land applied for since birth. The land is within the enlarged boundaries of the Tongass National Forest withdrawn by proclamation of the President February 16, 1909 (35 Stat., part 2, 2226), in which it was provided that prior rights were not affected. The Indian's alleged occupancy being prior to the establishment of the forest, he had a preference right to an allotment not affected by the withdrawal, consequently no further consideration of this feature is deemed essential (48 L. D. 362). It may be said, however, that the Forest Service is not in favor of allowing the Indian to take the land in allotment under the act of May 17, 1906, as applied for but that—

> If the title is to be given for the land this should be granted under the act of March 3, 1927, amending section 10 of the act of May 14, 1898, rather than under the act which this allotment application is filed. In other words, it would be the recommendation of this Service, in view of the showing hitherto made respecting the use of this land, that the Secretary of the Interior, in exercising the discretion vested in him, do not allot the land under the above-mentioned act but permit the applicant, if he so desires to acquire title under the act of March 3, 1927 (44 Stat. 1364).

Several investigations were had in connection with the Indian's application, the first being in September, 1920, the second in November, 1924, and were made by representatives of the General Land Office. An examination was also made by a forest ranger in 1927 and apparently about the same conditions existed as had been reported previously. At the time of those investigations there were two frame houses or shacks on the land and a fish-drying outfit constructed of poles. One of the shacks contained sleeping bunks and a stove. A trail leads through the woods to these improvements, and when the different examinations were made there were evidences of use and occupancy and that the land had not been abandoned by the Indian. The principal use of the land appears to have been as a home site, or base for fishing operations. At the time of the second investigation a listing survey was made under paragraphs 9 to 13, inclusive, of the regulations of September 8, 1923 (50 L. D. 27, 50–51), which have to do with the location and marking of corners, character and description of the land applied for, etc. Under the listing survey the area is cut down from 160 acres as applied for to 9.38 acres on the ground that the evidence indicates that it was the intention of the Indian to use the land exclusively for fishing purposes. The General Land Office in letter of September 11, 1928, to the Forest Service expressed the view that as use of the land for fishing purposes was a reasonable use the Indian should be allowed to take 9.38 acres. As above shown the Forest Serice is not favorable to an allotment under the act of May 17, 1906, but suggests that if the Indian so desires he should be permitted to acquire title under

the act of March 3, 1927 (44 Stat., part 2, 1364), which amends section 10 of the act of May 14, 1898 (30 Stat. 409, 413). So far as the record at hand shows the wishes of the Indian in the matter have not been consulted.

The act of May 17, 1906, authorizes the Secretary of the Interior in his discretion to allot not to exceed 160 acres of nonmineral land to any Indian or Eskimo of either full or mixed blood who resides in and is a native of the district of Alaska and who is the head of a family or is 21 years of age. It is provided that the land allotted shall be deemed the homestead of the allottee and his heirs and shall be inalienable and nontaxable until otherwise provided by Congress. The act then further provides that "any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding 160 acres." This is a special act relating to Alaska natives and is clearly separate and distinct from the act of May 14, 1898 (30 Stat. 409), extending the homestead land laws of the United States to the district of Alaska. Consequently the provisions of section 10 of said act do not apply to an Indian or Eskimo applicant or occupant of land under the act of May 17, 1906, authorizing the Secretary of the Interior in his discretion to allot homesteads to the natives of Alaska. For a similar reason the provisions of the act of March 3, 1927 (44 Stat., part 2, 1364), amendatory of said section 10 are inapplicable. In fact the latter act limits the area authorized to be purchased to not exceeding 5 acres; whereas it is proposed here to allow the Indian to take 9.38 acres thereunder.

The act of May 17, 1906, does not prescribe what use the Indian applicant must make of the land, the length of his occupancy or that the same must be continuous, the character of his improvements, or require him to state the purpose for which he desires the land allotted to him. The regulations under said act (50 L. D. 27, 48) do require a report from the district superintendent of the United States Bureau of Education on such information as he may have in regard to the application for allotment and covering among other things the following points:

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

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

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

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

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

The purpose of the above information is to aid in determining the applicant's good faith although not based on any specific re-

quirement in the act itself. No such requirements are authorized or made either in the act or regulations in the matter of residence, cultivation and improvements as are found in the general homestead law extended to Alaska by the act of 1898. That act did not include Alaska natives nor did the act of May 17, 1906, extend the provisions of the general homestead laws to the persons in whose interest it was enacted, namely, native Indians or Eskimos, as was done for instance in the act of March 3, 1875 (18 Stat. 402, 420), relating to certain Indians in the United States. In any event no justification can be found for requiring the Indian to show continuous use and occupancy or that he has maintained residence on the land to the exclusion of a home elsewhere.

The vacant and unappropriated lands in Alaska at the date of the cession of 1867 by Russia became a part of the public domain of the United States; and the Indians of Alaska are wards of the Government and as such are entitled to the equal protection of the laws applicable to Indians within the limits of the United States. *United States* v. *Berrigan* (2 Alaska Reports 442); *United States* v. *Cadzow* (5 Alaska Reports 125). The natives of Alaska are wards of the Government and under its guardianship and care at least to such an extent as to bring them within the spirit if not within the exact letter of the laws relative to American Indians; their relations 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 (49 L. D. 592). The Indians and other "natives" of Alaska are in the same category as the Indians of the United States; from an early date, pursuant to the legislative intent indicated by Congress, this department has consistently recognized and respected the rights of the Indians of Alaska in and to the lands occupied by them. 50 L. D. 315; 51 L. D. 155; *Alaska Pacific Fisheries* v. *United States* (248 U. S. 78); *Territory of Alaska* v. *Annette Island Packing Co.* (289 Fed. 671).

The status of an applicant under the act of May 17, 1906, authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska is analogous to section 4 of the act of February 8, 1887 (24 Stat. 388), which provides that an Indian who has settled upon public lands of the United States shall be entitled to have the same allotted to him in the manner as provided by law for allotments to Indians residing upon reservations. This, of course, involves separation and living apart from the tribe. A reservation allottee is not required to reside upon or improve the land allotted to him. The court took the position in the case of *Nagle* v. *United States* (191 Fed. 141), that said act, especially that section thereof which de-

clares an Indian born within the Territorial limits of the United States who has taken up within said limits his residence separate and apart from the tribe to be a citizen, is in effect in Alaska. The regulation under section 4 of the act of 1887 in defining the requirements as to settlement under said section provides (52 L. D. 383, 386)—

> The nature, character, and extent of the settlement, as well as the manner in which performed, must be fully set forth in the allotment application. 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 instincts of the race, as well as to the character of land taken in allotment.
>
> While the act contains no specific requirements as to what shall constitute settlement, it is evident that the Indian must definitely assert a claim to the land based upon the reasonable use or occupation thereof consistent with his mode of life and the character of the land and climate.

The allotment to an Indian or Eskimo under the act of May 17, 1906, creates a particular reservation of the land for the allottee and his heirs but the title remains in the United States. *Charlie George et al.* (44 L. D. 113); *Worthen Lumber Mills* v. *Alaska Juneau Gold Mining Co.* (229 Fed. 966).

There are many similarities in the acts of 1887 and 1906 but in neither is there any requirement that settlement or occupancy must be continuous or that residence must be maintained on the land to the exclusion of a home elsewhere as is the case under the general homestead laws. In the act of 1906 there is recognition of the fact that the right of the Indian is more in the nature of an allotment than a homestead and hence the right is surrounded by safeguards for the Indian's protection not found in the homestead laws.

The department is in accord with the finding of the General Land Office that the Indian's use and occupancy of the land may fairly be regarded as reasonable; but disagrees with the proposed reduction in the area of the land. The application of the Indian as originally made is approved, and in taking this action consideration has been given the fact that he has always used and occupied the land and 14 years have elapsed since he applied to have the same allotted to him.

FREDERICK S. SCHULZ

Decided April 13, 1929

SIOUX HALF-BREED SCRIP—ADJUSTMENT TO SURVEY—RELINQUISHMENT.

> The rule of adjustment of a scrip location to legal subdivision of the official survey is not inflexible and compulsory where the locator can not obtain title to the land he located and intended to enter, and in such case no legal impediment or administrative policy prevents the return of the scrip

to the one entitled to receive it upon proper relinquishment of the title to the location by those in whom it is vested.

SCRIP—VESTED RIGHTS—EQUITABLE TITLE.

Upon the location of scrip in conformity with the statute authorizing it, the holder acquires a vested right and possesses the equitable title to the land, the Government holding the legal title in trust for him.

SCRIP—VESTED RIGHTS—EQUITABLE TITLE.

Equitable title to land located by scrip vests in the locator at the date the Land Department accepts the scrip and issues a receipt therefor.

SIOUX HALF-BREED SCRIP—LOCATION—ASSIGNMENT—ALIENATION—POWER OF ATTORNEY—IMPROVEMENTS.

While Sioux half-breed scrip is not assignable, yet the land located thereunder is alienable as soon as located and the holder of the scrip may give a valid power of attorney not only for the location of the land and for the erection of the improvements thereon but for its conveyance after location.

POWER OF ATTORNEY.

A power executed for a valuable consideration is a power coupled with an interest.

SCRIP—POWER OF ATTORNEY—REVOCATION—LOCATION—RELOCATION.

Although the power to locate scrip can not be made irrevocable, yet the power of sale when coupled with an interest is irrevocable, and this principle is applicable to land relocated under the power to locate, whether exercised by the scripee or by one delegated to act for him.

SCRIP—POWER OF ATTORNEY—APPLICATION—RELINQUISHMENT—LOCATION—LAND DEPARTMENT.

Where the power executed by a scripee is for a valuable consideration and contains ample authority to locate the scrip or to relinquish the land and withdraw the application upon relinquishment the Land Department will not search for grounds of doubt as to the present existence of the power.

SCRIP—ATTORNEY.

Upon cancellation of a scrip entry, the scrip should be returned to the duly authorized attorney who filed it and who was, at the date of the filing, in proper legal possession of it.

SIOUX HALF-BREED SCRIP—ASSIGNMENT—RELOCATION—IMPROVEMENTS.

Improvements made upon certain land by a Sioux half-breed can not be used as a basis for the location of other land under scrip assigned by the half-breed.

SCRIP—DUPLICATE CERTIFICATE—LOCATION—ESTOPPEL.

When a scripee procures the issuance of a duplicate certificate upon untrue representations that the original is lost or destroyed and thereafter makes a location under the duplicate, he is estopped from claiming rights under the original which upon coming into the possession of the department may be rightfully canceled.

DEPARTMENTAL DECISIONS CITED AND DISTINGUISHED.

Cases of *Robert M. Stitt* (33 L. D. 315), *Anna R. Kean* (39 L. D. 554), and *Jacob Weinberger* (44 L. D. 548), distinguished.

DIXON, *First Assistant Secretary:*

January 15, 1909, Frederick S. Schulz, as attorney in fact for Emily T. True, filed application to locate a tract of unsurveyed land,

described as the NW. ¼ NE. ¼ Sec. 31, T. 5 S., R. 5 W., Montana, in satisfaction of a duplicate issued April 28, 1908, of certificate 3–A for 40 acres, dated November 24, 1856, to Emily T. Brisbois, aged 12 years, under the provisions of the act of July 17, 1854 (10 Stat. 304).

On June 22, 1908, said True, formerly Emily T. Brisbois, gave Francis G. Burke two powers of attorney, one containing power to locate the scrip, make the improvements, relinquish the land located, and demand and receive back the scrip upon withdrawal of the application to locate, the other containing power to sell and convey the land located, which power to sell for a consideration of $250.00 was made irrevocable with the right to receive and retain upon the part of the attorney in fact the proceeds of sale of the land for his own use and benefit. Both instruments contain revocable powers of substitution. On September 10, 1908, Burke substituted Frederick S. Schulz in the power to locate and Ted E. Collins in the power to sell. Collins, by quitclaim deed dated March 18, 1909, conveyed the aforesaid NW. ¼ NE. ¼ to Schulz, who thereafter conveyed said tract to others, and title by deed passed through several hands but was subsequently reconveyed to Schulz by deed of February 14, 1916, which title he still holds. The original scrip was submitted in 1916 from another source with inquiry as to its value. The Commisisoner of the General Land Office informed the transmitter that under the rule in *Walter Bourke* (12 L. D. 105) the scripee was estopped from denying the validity of the location under the duplicate and that the original was therefore valueless, and there could be no valid objection by the scripee to its concellation. The original certificate remains in the files of the commissioner's office.

The approved plat of survey of the township above described was filed in the local office February 18, 1919. Schulz declined to adjust the scrip to legal subdivision when called upon to do so and applied for a return of the scrip, stating the legal subdivisions to which it could be adjusted were of no value to him. The commissioner by letter of August 4, 1919, for reasons hereafter stated, denied his request, and the register of the local office by letter of August 19, 1919, advised the commissioner that the location had been adjusted to the said NW. ¼ NE. ¼. On October 14, 1919, Schulz filed an affidavit setting forth more fully the reasons for seeking to abandon the location as adjusted. He points out that Secs. 19, 30, and 31, T. 5 S., R. 5 W., were oversize and required on survey the establishment of an additional tier of lots on the west portion of those sections, and ayers in substance that the surveyor he employed to locate the NW. ¼ NE. ¼ in his survey acted upon the assumption that the township would be regular, from which assumption there resulted error in the designation of the NW. ¼ NE. ¼ as the land actually located; that according to the survey the location marked on the

ground covers, in about equal portions, parts of NW. ¼ NE. ¼ and NE. ¼ NW. ¼ of said Sec. 31; that the land was located for a sheep camp and is in a mountainous country, and, as located, included both springs to supply water to the camp and grounds for camp site; that the survey reveals that the sheep camp is within one of the subdivisions and the springs in the other, and one is valueless to him without the other and he is not in a position to acquire both "forties," and that therefore to compel him to take one or the other of the subdivisions would result in the sacrifice of his scrip without any resulting benefit to him and work serious injustice to him through no fault of his own. A report of a field investigator contains the information that the springs flowing 12,960 gallons per day are on the NW. ¼ NE. ¼. The subdivision to the west which is not properly designated NE. ¼ NW. ¼, but which is lot 1, was entered (Helena 019995) February 17, 1919, and patented May 8, 1923, under the enlarged homestead act.

By letter of February 2, 1922, the commissioner required certain showings from Schultz as prerequisites to the acceptance of a relinquishment of the location and return of the scrip, which Schulz did not furnish in full. He filed, instead, on September 6, 1927, an application to amend his original application by substituting the SE. ¼ SW. ¼ Sec. 15, T. 3 N., R. 5 E., G. & S. R. M., Arizona, repeating his reasons why the original location, as adjusted, was of no value to him. The commissioner, by letter of January 14, 1928, thereupon required additional showings as a prerequisite to the exchange requested, the nature of which requirements and those in the previous decision need not here be particularly mentioned, as they all either have been impliedly revoked or adhered to and restated in the commissioner's decision of October 20, 1928, from which Schulz has appealed. It is sufficient to state that in attempted partial compliance with such requirements Schulz has filed a certified abstract of title showing the land has been reconveyed to him; that the title has not been encumbered except possibly in the matter of tax liens; that he has caused to be recorded among the county records a relinquishment to the United States of the adjusted location executed in his own name and has filed a duplicate thereof in the land office, which is with the record.

In his decision of October 20, 1928, the commissioner denies the application to relocate the scrip and holds the location has become perfected and the scrip satisfied, and advises that the location in Montana in the absence of appeal would be approved for patenting. Therein the rule in *Jacob Weinberger* (44 L. D. 548), is applied, in which case it was held that: "A location of Valentine scrip on unsurveyed land becomes fixed and certain upon identification of the

selected land by survey, and thereafter the locator can not abandon the location and have the scrip returned to him." Other imperfections and obstacles to the relocation of the scrip in general and upon the land in Arizona mentioned by the commissioner may be summarized as follows: (1) That the power of attorney (evidently referring to the power to locate) does not authorize Schulz to sell and convey the land, consequently any conveyance made by Schulz would be invalid; (2) that the relinquishment of the land was not executed by scripee, and there is no evidence that she is now living and can execute a conveyance; (3) that the abstract does not show the land is free from tax liens; (4) that the original location was valid, the locator conveyed the land to Schulz and the powers of attorney became fully executed, and Schulz has no present power to make further location; (5) that the application to amend is made by Schulz in his own name and for his own benefit, whereas it should be made in the name and for the benefit of the scripee; (6) that there is no evidence that scripee has improvements on the land sought to be substituted, and the application therefor is in conflict with a settlement claim of one Buthal.

First, must be considered whether the rule in the *Wineberger case* has application to the facts here, for if it does, that puts at an end any right again to locate the scrip either by scripee or one authorized to act for her, and renders discussion of defects in the application for relocation idle. Wineberger applied to withdraw his scrip because the tract described in his application was, according to survey, three miles distant from the land actually located, which was of another survey description and to which he could obtain title by simply amending his description. The department in that case stated that: "It was not consonant with public policy to allow one seeking to appropriate public lands to play fast and loose, holding land from appropriation of others so long as it suits his convenience and seeking to recover what he pledged as its price." In *Robert M. Stitt* (33 L. D. 315) it was held that the granting of an application for the return of scrip rests in the sound discretion of the head of the department, but its return would not be permitted where the entry can be confirmed and where the only obstacle to confirmation is the arbitrary refusal of the entryman to supply the necessary proof. The facts in the present case hardly bring it within the reason and spirit of these rules. The locator here can not obtain title to the land he located and intended to enter. One of the physical features and a large part of the land constituting the inducement for the selection would be omitted if, under the commissioner's decision, he is forced to take the tract to which the location has been adjusted. If the rule of adjustment to legal subdivision is considered inflexible and com-

pulsory in all cases, instances may easily arise where by necessary shift of area to conform to such adjustments, the locator would lose that part upon which his improvements had been placed, in instances where the subdivision upon which such improvements were placed was in part rightfully occupied by adverse claimants prior to survey. Under the circumstances here shown, it does not appear that any legal impediment or administrative policy stands in the way of setting aside the protested adjustment and treating the actual location as one not susceptible to adjustment by legal subdivision without sacrifice of the locator's rights and permitting the withdrawal of the application, upon proper relinquishment of the title to the location by those in whom it is vested, and returning the scrip to one entitled to receive it with the view to its relocation on other land by one duly authorized by the scripee to make such location.

The commissioner's conclusions as to the requisite procedure to surrender title to the land, to obtain a return of the scrip, and as to the showing of power necessary to relocate for the scripee, next need attention.

Substantially similar transactions respecting the giving by the scripee of powers of attorney to locate and sell and the exercise of rights under such powers as appear in this case have engaged the attention of the courts, and conclusions have been expressed as to the legal effect of such transactions. It seems to be settled that after the scrip is located in conformity with the acts of Congress, the holder acquires a vested right and possesses the equitable title to the land, the Government holding the legal title in trust for him. *Midway Company* v. *Eaton* (183 U. S. 602, 619); *Larriviere* v. *Madegan* (1 Dillon 455; 14 Fed. Cases No. 8,096); *Heerman* v. *Rolfe* (27 N. D. 45, 145 N. W. 601); *Allen* v. *Merrill* (8 L. D. 207); 31 C. J. 528, and cases there cited.

In the cases of *Frank Burns* (10 L. D. 365, 370) and *Henry A. Bruns* (15 L. D. 170), upon the theory that on unsurveyed land the scripee's location was on the same plane as those of a settler, it was held that the scripee had only a preference right of entry against others, and the right was not vested until the land was adjusted to survey. A later decision—*Edward F. Smith* (51 L. D. 454)—expressed the view that the principles in those cases were inconsistent with more recent rulings of the Supreme Court. In *Heerman v. Rolfe*, *supra*, it was held that the equitable title vests at the date the Land Department accepts the scrip and issues a receipt therefor. To the same effect is *Harmon* v. *Clayton* (51 Iowa 36, 50 N. W. 541).

Notwithstanding the scrip is not assignable (*Felix v. Patrick*, 145 U. S. 317), the land scripped is alienable as soon as located, and the holder of the scrip may give a valid power of attorney, not only for

the location of the land and for the erection of the improvements thereon, but for its conveyance after location. See 31 C. J. 528, and cases cited, and especially *Buffalo Land and Exploration Company* v. *Strong* (97 N. W. 575); *Midway Company* v. *Eaton*, *supra*; *Dole* v. *Wilson* (20 Minn. 356); *Thompson* v. *Myrick* (20 Minn. 205); *Gilbert* v. *Thompson* (14 Minn. 544). Although the power to locate can not be made irrevocable (*Anna R. Kean*, 39 L. D. 554), the power of sale when coupled with an interest is irrevocable, and if executed for a valuable consideration, it is a power coupled with an interest. *Buffalo Land and Exploration Company* v. *Strong*, *supra*, *Heerman* v. *Rolfe*, *supra*.

Applying these principles to the facts in the instant case, it is clear that the conveyance after the location of the scrip by Collins under the power to sell vested a good title in Schulz which he could successfully assert against any attempt by the half-breed subsequently to sell to another, and it would form a ground for compulsory conveyance from the half-breed. Upon the issuance of patent scripee would be holding only the dry legal title which Schulz, under the doctrine in *Midway Company* v. *Eaton*, could compel her to convey to him. By the abstract Schulz shows complete title in himself, and no further assurances are required from the half-breed or her heirs by way of relinquishment of title to the land or otherwise to remove any cloud on the title of the United States to the land located. The power to sell being irrevocable would extend to any land that might be relocated under the power to locate, whether exercised by the half-breed or some other delegated to act for her. The existing power under which Schulz acted contains ample authority not only to make the location but to relinquish the land and withdraw the application. There is no suggestion that such power has been revoked by death of scripee or by another instrument, and the department does not deem it necessary to search for grounds of doubt as to its present existence, particularly as the half-breed has received consideration for the power to locate the scrip much in excess of $1.25 per acre. The only loser by the failure of location would be Schulz. The scrip was delivered to the person paying the money to protect him against the exercise of the rights adversely to him. *Patterson* v. *Lane* (6 Terr. L. 92). Upon cancellation of the scrip entry, the scrip should be returned to the duly authorized attorney who surrendered the scrip and made the location, *Joseph Gardepie* (Copp's P. L. L. 1334, vol. 2, 1882).

The application to locate the land in Arizona was, however, properly rejected. No improvements have been made thereon in behalf of the scripee. The contention in appellant's brief that the improvements made on the land in Montana may be vicariously applied to

the land in Arizona is without merit, and is plainly not a compliance with the statute which permits the location upon lands "upon which they (half-breeds) have respectively made improvements." This defect in the application is vital, and no others mentioned by the commissioner need be considered.

It is the conclusion of the department that all beneficial interest in the original location was under valid powers of sale alienated by the scripee, and the equitable title became vested in Schulz; that he has relinquished such title to the United States, and no attempted alienation subsequent to execution of the power of sale by the scripee or by anyone in her behalf or claiming under or through her would affect the title of the United States, consequently upon a sufficient showing by Schulz that no tax liens affect the land located, the entry may be canceled and the scrip returned to him, no assurances being necessary from the scripee or her heirs, if she is dead, that she or they, as the case may be, have not alienated the land because she or they have no beneficial interest in the *land* that may be alienated. In the decision appealed from, the commissioner quotes at length from his previous decision of February 2, 1922, which in part reads: "In the event that the location is canceled, the question of returning the original certificate and to whom, will then be given consideration and the duplicate certificate, having been erroneously issued, will be returned to the Commissioner of Indian Affairs for cancellation."

The duplicate was, however, not improvidently issued. It was issued upon affidavits filed by the scripee that the original was lost or destroyed.

The department has authority to issue a duplicate on such proof. *Administrator of Bernard LaBathe* (37 L. D. 1). The duplicate was not issued by reason of any error on the part of the Commissioner of Indian Affairs, but by reason of allegations by scripee not in accordance with facts.

It has been held that the scripee is estopped from claiming the invalidity of a location made under the duplicate. *Walter Bourke* (12 L. D. 105). The estoppel does not arise, however, from making the location, but from the conduct of the scripee in procuring the issuance of a duplicate on untrue representations. The duplicate is sufficient evidence of her right to locate land under the act of 1854, and she can not complain if the department considered it advisable under the circumstances presented to cancel the original. The Government's obligation to her can be fully performed by the use of the duplicate. In *Anna R. Kean, supra*, it is stated: "The department, by decision of February 24, 1908, held that as the original

scrip was in existence there was no authority to issue a duplicate," but the decision referred to did not go that far. It held that the issuance of the duplicate did not operate as a cancellation of the original and "that the duplicate in view of the existing situation should be treated as a nullity." The record shows in the present case that the location attempted under the original scrip was rejected and no subsequent exercise of rights has been made thereunder, and it is now in the possession of the department. Any authority given to locate said original was necessarily revoked by the subsequent powers under the duplicate which were exercised. The duplicate, so far as it appears, came lawfully into the possession of Schulz and the location as made having been held herein to be impossible of consummation, the presumption of law is that the scrip is in the custody and possession of the attorney empowered to locate it, and while in fact it is in the custody of the Government, the plain duty of the Government is to return it to the attorney in fact who filed it and who was, at the date of the filing, in proper legal possession of it. *Joseph Gardepie*, *supra*. Schulz has no right to the possession of the original and to cancel the duplicate would be to visit upon him the consequences of the fault of the scripee. It, therefore, is held that the original certificate should be returned to the Commissioner of Indian Affairs for cancellation and Schulz, upon completion of his showing of nonencumbrance on the original location, should have returned to him the duplicate scrip.

The inspector reports the volume of water as above indicated on the NW. ¼ NE. ¼ is sufficient for the needs of 2,000 cattle or 5,000 sheep and controls about 4,000 acres of grazing land. The tract seems clearly subject to the withdrawal by Executive order of April 17, 1926 (51 L. D. 457), and is not subject to other filing, entry, or selection. The register of the local land office should be directed that simultaneously with the notation of the cancellation of the location Great Falls 074743 there be noted in the appropriate place on the tract books of his office that said tract is withdrawn and reserved from any selection, filing, or entry of public lands under the order aforesaid, and no such filing, selection, or entry of said land should be allowed.

As modified herein, the commissioner's decision is affirmed, and the case is remanded for procedure in accordance with the views above expressed.

Affirmed.

UNITED STATES v. THE MILLFORK OIL AND SHALE COMPANY

Decided April 13, 1929

MINING CLAIM—LODE CLAIM—PLACER CLAIM—IMPROVEMENTS—CONTIGUITY—PATENT.

The rule enunciated in the departmental decision of *William Dawson* (40 L. D. 17), that where a number of valid lode locations, forming upon the ground a contiguous group are embraced in a single application for patent, upon which due publication and posting of notice has been had, and the application is rejected as to one of the claims because of insufficient patent improvements, the remainder of the claims, although not in themselves contiguous, may be retained and embraced in a single entry and patent, is equally applicable to placer claims.

DIXON, *First Assistant Secretary:*

November 6, 1925, The Millfork Oil and Shale Company filed mineral application, Salt Lake City 036547, for patent to three oil shale placer claims, all within the Uintah Forest Reserve, situate in T. 10 S., R. 6 E., S. L. M., Utah, named and described as to location as Aetna No. 2, embracing the SE. ¼ Sec. 4, Aetna No. 3, embracing the SW. ¼ Sec. 4, and Aetna No. 4, embracing the SE. ¼ Sec. 5, and constituting one tract of land.

At the instance of the Forest Service contest proceedings were instituted, and thereafter such proceedings were had that by departmental decision, dated November 12, 1928, the application to patent Aetna No. 3 claim was held for rejection and the entry thereof for cancellation because of insufficient improvements thereon, and as to claims Aetna No. 2 and Aetna No. 4 the contest proceedings were dismissed, and such decision became final.

The Commissioner of the General Land Office by letter to the register of the local land office, dated January 26, 1929, stated that by reason of the cancellation of the application as to Aetna No. 3 claim, the remaining claims, Aetna No. 2 and Aetna No. 4, covered by the application are not contiguous and for that reason the entry should be canceled to the extent of Aetna No. 2 or Aetna No. 4, and directed the register to notify the applicant that it would be allowed to elect whether it desires patent to Aetna No. 2 or Aetna No. 4; that upon receipt of such election the entry would be finally canceled as to the other claim; and that if the applicant failed to make election or to appeal, the entry would be canceled to the extent of Aetna No. 4.

The applicant has appealed.

While the claims, Aetna No. 2 and Aetna No. 4, are not contiguous, the three claims covered by the application formed a contiguous group. The rejection of the application as to one of the claims because of insufficient improvements affords no ground for cancel-

lation to the extent of one of the remaining claims because not contiguous with the other.

As to lode claims it has been held (*William Dawson*, 40 L. D. 17, syllabus)—

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

There is no reason why the same rule should not be applied to placer claims.

The decision appealed from is

Reversed.

COLOR OF TITLE CLAIMS TO PUBLIC LANDS—ADVERSE POSSESSION

INSTRUCTIONS

[Circular No. 1186]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 15, 1929.

REGISTERS, UNITED STATES LAND OFFICES:

Attention is called to the act of December 22, 1928 (45 Stat. 1069), 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 of public land, not exceeding one hundred and sixty acres, has 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 not less than $1.25 per acre, cause a patent to issue for such land to any such citizen: *Provided*, That where the area so held is in excess of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres, may be patented hereunder: *Provided further*, That coal and all other minerals contained therein are hereby reserved to the United States; that said coal and other minerals shall be subject to sale or disposal by the United States under applicable leasing and mineral land laws, and permittees, lessees, or grantees of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining such deposits: *And provided further*, That no patent shall issue under the provisions of this Act for any tract to which there is a conflicting claim adverse to that of the applicant,

unless and until such claim shall have been finally adjudicated in favor of such applicant.

SEC. 2. 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 of the lands by the applicant or his predecessors in interest, and in such appraisal the Secretary shall consider and give full effect to the equities of any such applicant.

1. This act authorizes the Secretary, in his discretion to issue patents for not more than 160 acres of public land, to citizens of the United States, who have, or whose ancestors or grantors have held the land in peaceable adverse possession for more than 20 years under claim or color of title, upon payment for the land at not less than $1.25 per acre.

2. Only claims for surveyed lands will be recognized under this act. If unsurveyed land is claimed, the filing of such claim should be deferred until the land has been surveyed and the plat of survey thereof has been officially filed.

3. Applications under this act must be filed with the register of the district land office for the district in which the land thus applied for is situated; or if there is no district land office in the State where the land is situated, then the application must be filed with the Commissioner of the General Land Office, Washington, D. C.

4. No special forms of application are provided. The application must be under oath and in typewritten form, or in legible manuscript.

5. Persons applying for patent under the provisions of this act must show by affidavit that their possession, or the possession of their ancestors or grantors for the 20 years next preceding the filing of the claim has been peaceable and adverse, by setting forth the facts of the possession and not merely the conclusions, and that such application is made in good faith for their own benefit and not for the benefit of any other person.

6. If improvements have been placed upon the land applied for, the nature and value thereof should be set forth, together with the time of their construction and cost, and by whom constructed.

7. If any of the land has been reduced to cultivation, the amount of land claimed to have been so reduced, when it was so reduced, and the nature of the cultivation should be set forth.

8. If the claimant is claiming as a record owner or under color of title he will be required to file an abstract of title certified to by a competent abstractor showing the record of all conveyances of the land up to the date of the filing of the application. If he is not a record owner and no abstract of title can be furnished he will

be required to file affidavits setting forth the names of all the mesne possessors of the land, periods held by each, giving the 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.

9. 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.

10. 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 December 22, 1928, or if the land claimed is part of such a larger claim the full facts relative thereto must be shown.

11. 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.

12. 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.

13. If the land applied for has been surveyed, and is subject to purchase under this act, the register when the application is filed in a district land office, after the assignment of a serial number thereto, will note the application on his records and will promptly forward same to the Commissioner of the General Land Office. Where there is no district land office, and the application is filed directly in the General Land Office, the proper notations will be made on the records of the General Land Office. When such application has been received in the General Land Office, it will be promptly forwarded to the proper field division for appraisement in accordance with the terms of the act.

14. The appraisement shall be made 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 of the lands by the applicant or his predecessor in interest.

15. 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 applicant will be notified at once, by registered mail, that he must within 30 days from service of notice deposit with the register of the district land office, where there is a district land office in the State where the land is situated, or with the receiving clerk of the General Land Office, where there is no district land office, the appraised price or thereafter and without further notice, forfeit all rights under his application, whereupon the land will be subject to disposal under applicable laws.

16. Upon the payment of the appraised price of the land, in the district land office, when there is one in the State, or in the General Land Office, notice for publication will be issued in the following form:

Notice is hereby given that _____ of _____
(Name of applicant) (P. O. address)
has applied under the act of Congress approved December 22, 1928 (45 Stat. 1069), to purchase_____ Section_____
Township _____ Range _____ Meridian _____ State _____,
claiming under _____.
(Grounds of claim)
All persons claiming the lands adversely will be allowed until_____
_____ to file in this office, their objections to the issuance of patent under the aforesaid application, copy of objection to be served on the applicant. The appraised price of the land is _____.

Such notice shall be published at the expense of the applicant in a newspaper of general circulation, designated by the register or the commissioner, as the case may be, in the vicinity of the land applied for. If it be a daily paper, the publication must be inserted in 30 consecutive issues; if daily except Sunday, in 26; if weekly, in 5; and if semiweekly, in 9 consecutive issues.

The first day of publication must be at least 30 days before the date set in the notice before which protests shall be filed. A copy of the notice will be posted in the district land office, or in the General Land Office, as the case may be, during the entire period of publication. The applicant must file evidence showing that publication has been had for the required time, which evidence must consist of the affidavit of the publisher, accompanied by a copy of the notice published.

17. Upon submission of satisfactory proof of publication and posting as provided in the foregoing rule, if no protest or contest is pending, or no other objection appears, final certificate will be

issued. Such certificate shall bear upon its face the following: "Patent to contain reservation of coal and all other minerals, and conditions and limitations provided by the act of December 22, 1928." There will be incorporated in patents issued on such entries the following: "Excepting and reserving, however, to the United States all coal and other minerals in the lands so entered and patented, together with the right of the United States or its permittees, lessees, or grantees, to enter upon said lands for the purpose of prospecting for and mining such deposits as provided by the act of December 22, 1928."

18. The said act of December 22, 1928, impliedly repeals and supersedes the local act of June 8, 1926 (44 Stat. 709), relating only to New Mexico.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
JOS. M. DIXON,
First Assistant Secretary.

STATE OF WISCONSIN

Decided April 16, 1929

SWAMP LAND—INDIAN LANDS—WITHDRAWAL—WISCONSIN—STATUTES.

A reservation by the United States for Indians, subsequent to the swamp land grant of September 28, 1850, within a region or territory formerly occupied by them but which had theretofore been ceded to the United States, was ineffective as to swamp lands the inchoate title to which had already passed to the State.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *United States* v. *Minnesota* (270 U. S. 181), *State of Wisconsin* (19 L. D. 518), and *Stockbridge and Munsee Indians* v. *State of Wisconsin* (25 L. D. 17), cited and applied.

DIXON, *First Assistant Secretary:*

This is an appeal by the State of Wisconsin from the decision of the Commissioner of the General Land Office dated September 15, 1924, rejecting and denying its claim to NE. ¼ NE. ¼ Sec. 12, T. 39 N., R. 8 W., 4th P. M., under the swamp-land grant of September 28, 1850 (9 Stat. 519).

The tract in question is within the boundaries of the Lac Court Oreilles Indian Reservation, and the action of the commissioner rested on an opinion of the Solicitor for the Department of the Interior rendered June 29, 1922, holding that swamp lands within said reservation did not pass to the State under the grant.

It should be observed at the outset that the State's appeal was filed October 20, 1924. Action thereon was suspended by this depart-

ment February 13, 1925, pending determination of a case (*United States* v. *Wisconsin*) in the Supreme Court of the United States involving the right of the State under the swamp grant to lands of this character within Chippewa Indian Reservations. A suit involving a similar question had also been brought against the State of Minnesota. In the latter case the Supreme Court handed down a decision March 1, 1926 (270 U. S. 181), holding in substance among other things that the swamp-land act of 1850 operated as a grant *in praesenti*, and that a reservation by the United States for the Indians, subsequent to the swamp grant, within the region or territory formerly occupied by them but which had theretofore been ceded by them to the United States, was ineffective as to swamp lands the inchoate title to which had already passed to the State. In view of the decision in the latter case the bill of complaint against Wisconsin was dismissed October 4, 1926, on motion of Solicitor General Mitchell for the United States (273 U. S. 769).

The instant case is therefore ready for action. The facts may be briefly stated: By treaty of July 29, 1837 (7 Stat. 536), the Chippewa Indians ceded to the United States a large tract of land east of the Mississippi River and south of Lake Superior, including within its boundaries the parcel hereinbefore described; and by a treaty made in 1842 (7 Stat. 591) they ceded a further part of their country adjoining that ceded before. In the first treaty the Indians stipulated for "the privilege of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded * * * during the pleasure of the President of the United States." In the treaty of 1842 they were guaranteed a similar right, viz, "the right of hunting on the ceded territory with the other usual privileges of occupancy until required to remove by the President of the United States." The Indians were allowed to roam over that country and no change took place in their occupancy except as provided by the treaty of September 30, 1854 (10 Stat. 1109), though the United States had and exercised the right during that period, at will, to dispose of any portion of the ceded territory to settlers or otherwise; and it was during that period that Congress passed the act of September 28, 1850, *supra*, granting the swamp lands to the several States. By the treaty of 1854, *supra*, the Chippewas ceded a part of their territory, previously retained, in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their use "each equal in extent to three full townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President." It was agreed that one of these reservations should be a tract "on Lac Court Oreilles,"

within the territory to which the Indian title had been extinguished by the treaty of 1837, but which they had continued to occupy. The townships which composed the reservation were surveyed in 1855. The survey of township 39 north, range 8 west was approved February 20, 1856. The boundaries of the permanent reservation had not been determined at that time and none of the lands were reserved or withdrawn from sale until 1859. Withdrawals were made on November 22 of that year and on April 4, 1865, from which to select a permanent reservation. In the meantime, to wit, on November 21, 1857, the NE. ¼ NE. ¼ Sec. 12, T. 39 N., R. 8 W., was selected and claimed by the State of Wisconsin under the swamp-land act of September 28, 1850, *supra*. There is no intimation that this tract is not of the character contemplated by the granting act. In February, 1873, after "consultation with the chiefs and head men" the permanent boundaries of the reservation were agreed upon. Specific descriptions of the lands so agreed upon will be found in a pamphlet compiled by the Indian Service, "Executive Orders Relating to Indian Reservations," pages 213 *et seq.* The descriptions therein given aggregate 69,136.41 acres. All of Sec. 12, T. 39 N., R. 8 W., was selected and designated as a part of the permanent reservation. March 1, 1873, by order of the Secretary of the Interior all of the withdrawn lands not included in the permanent reservation were restored to market.

On two occasions, long before the rendition of the Solicitor's opinion [unreported] of June 29, 1922, upon a most careful review of the whole subject, the department had ruled that the State took title to the swamp lands falling within Chippewa Indian Reservations such as Lac Court Oreilles, subject to the Indian right of occupancy, but that the State's right to possession was held in abeyance until such time as the Indian's right of occupancy should be surrendered by them, otherwise ended by the United States. See *State of Wisconsin* (19 L. D. 518); *Stockbridge and Munsee Indians* v. *State of Wisconsin* (25 L. D. 17). The latter ruling was in the form of an opinion by the then Assistant Attorney General Van Devanter, approved by Secretary Bliss July 12, 1897.

On further consideration of the matter in the light of the opinion of the Supreme Court in the case of *United States* v. *Minnesota*, *supra*, the department is convinced that the original ruling was correct, and should be adhered to in determining the rights of the State. The Solicitor's opinion of June 29, 1922, will therefore no longer be followed.

The decision appealed from is

Reversed.

RELIEF OF DESERT-LAND ENTRIES—ACT OF MARCH 4, 1929

INSTRUCTIONS

[Circular No. 1188]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 19, 1929.

REGISTERS, UNITED STATES LAND OFFICES:

Your attention is directed to the act of March 4, 1929 (45 Stat. 1548), entitled "An Act To supplement the last three paragraphs of section 5 of the Act of March 4, 1915 (Thirty-eighth Statutes, page 1161), as amended by the Act of March 21, 1918 (Fortieth Statutes, page 458)," which provides:

> That where it shall be made to appear to the satisfaction of the Secretary of the Interior with reference to any lawful pending desert-land entry made prior to July 1, 1922, under which the entryman or his duly qualified assignee under an assignment made prior to the date of this Act has in good faith expended the sum of $3 per acre in the attempt to effect reclamation of the land, that there is no reasonable prospect that he would be able to secure water sufficient to effect reclamation of the irrigible land in his entry or any legal subdivision thereof, the Secretary of the Interior may, in his discretion, allow such entryman or assignee ninety days from notice within which to pay to the register of the United States Land Office 50 cents an acre for the land embraced in the entry and to file an election to perfect title to the entry under the provisions of this Act, and thereafter within one year from the date of the filing of such election to pay to the register the additional amount of $1.50 an acre, which shall entitle him to a patent for the land: *Provided*, That in case the final payment be not made within the time prescribed the entry shall be canceled and all money theretofore paid shall be forfeited.

This act applies to all pending desert-land entries made prior to July 1, 1922, under which the entryman or his duly qualified assignee under an assignment made prior to the date of this act has in good faith expended the sum of $3 per acre in the attempt to effect reclamation of the land and where there is no reasonable prospect that he would be able to secure water sufficient to effect reclamation of the irrigable land or any legal subdivision thereof.

Desert-land entries made prior to March 4, 1915, and pending March 4, 1929, are entitled to the relief granted by the act of March 4, 1915 (38 Stat. 1161), as amended, or by the provisions of this act. Desert-land entries made since March 4, 1915, and prior to July 1, 1922, and pending March 4, 1929, are entitled only to the relief provided for in this act.

In all applications for relief of desert-land entries made prior to March 4, 1915, it should be specifically stated whether the relief is sought under the provisions of the act of March 4, 1915, or under the provisions of said act of March 4, 1929.

In the case of desert-land entries made since March 4, 1915, and prior to July 1, 1922, and pending March 4, 1929, the showing as to the right to such relief must be the same as that required by paragraph 35 of the regulations of May 20, 1924, Circular No. 474 (50 L. D. 443, 466).

Applications for relief hereunder must be filed in the local land office for the district in which the land embraced in the particular entry is situated, and, after examination by the register as to statement of facts required by paragraph 35 of Circular No. 474, *supra*, and, where necessary, opportunity given applicants to supply data to cure defects, referred to the chief of field division for investigation and report. All reports by the chief of field division upon applications for relief under the provisions of this act should be made directly to the Commissioner of the General Land Office.

When any application for relief under the provisions of this act shall have been approved by the commissioner, notice, by registered mail, will be served through the proper local land office upon the claimant, of such approval; that he will be allowed 90 days from date of receipt of such notice within which to pay to the register 50 cents an acre for the land embraced in the entry and to file an election to perfect title to the entry under the provisions of this act; that he will be allowed one year from the date of the filing of such election to pay to the register the additional amount of $1.50 an acre; and that, in case the final payment be not made within the time prescribed, the entry will be canceled and all money theretofore paid will be forfeited.

Should any claimant fail to pay said 50 cents per acre and file said election within the 90-day period, the register will report such facts to the commissioner, whereupon the approved application for relief will be canceled and the case closed without further notice.

To perfect title to the entry, the claimant shall file with the register a notice of intention to do so, and the register will order the publication thereof in the same manner as in other desert-land cases and in substantially the following form:

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE AT _____,
_____, *19*____.

Notice is hereby given that _____
of _____ who, on _____ 19____ made desert-land entry, No. _____ for _____ Section _____ Township _____ Range _____, Meridian, has filed notice of his intention to complete the purchase of said land under the provisions of the act of March 4, 1929.

Any and all persons claiming adversely the above-described land or desiring for any reason to object to the completion of the purchase and final entry thereof by the applicant, should file their affidavits of protest in duplicate in

this office during the 30-day period of publication immediately following the first printed issue of this notice, otherwise the application may be allowed.

_____, Register.

Publication, proof thereof and the required additional payment of $1.50 per acre should be made within one year from the date of the filing of the above-mentioned election, it being expressly stated in said act of March 4, 1929, that said additional payment of $1.50 per acre should be paid within one year from the date of the filing of the election to perfect title to the entry under said act, with the proviso "That in case the final payment be not made within the time prescribed, the entry shall be canceled and all money theretofore paid shall be forfeited." There is no provision of law whereby extension of time to make this payment may be granted.

These acts having been performed, and there being no protest, contest, or other objection, the register will issue the final certificate and transmit it to the General Land Office with the regular returns.

Where relief has heretofore been granted in desert-land entries made prior to March 4, 1915, and such entries are intact upon the records claimants may, if they so desire, take advantage of the provisions of this act.

Except as herein set forth, all legislation relating to the relief of desert-land entries and the regulations issued thereunder are in full force and effect.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
JOS. M. DIXON,
First Assistant Secretary.

APPLICATION OF THE ENLARGED AND STOCK-RAISING HOMESTEAD ACTS TO CERTAIN OIL AND GAS LANDS

Decided April 24, 1929

OIL AND GAS LANDS—LEASE—ENTRY.

Lands in producing oil and gas fields or covered by oil and gas leases are not subject to entry under any of the public land laws.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—ENLARGED HOMESTEAD—STOCK-RAISING HOMESTEAD.

Lands in oil and gas permits or applications for permits are subject to entry under both the enlarged and stock-raising homestead laws in the absence of valid objections by the mineral claimant and upon compliance with the governing regulations.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—DISCOVERY—ISOLATED TRACT—SECRETARY OF THE INTERIOR.

The Secretary of the Interior has the discretionary authority under the act of March 9, 1928, to refuse to consummate the sale of an isolated tract embraced in an oil and gas prospecting permit or application for permit until the permittee or applicant shall have had the opportunity provided by law to discover oil or gas.

OIL AND GAS LANDS—LEASE—WITHDRAWAL—ENLARGED HOMESTEAD—STOCK-RAISING HOMESTEAD.

Lands not in a producing field or under lease, but within an oil and gas withdrawal or reservation may be entered under the enlarged homestead act, but not under the stock-raising homestead act.

DIXON, *First Assistant Secretary:*

The receipt of your [Hon. Henry E. Barbour, M. C., House of Representatives] letter of April 22, 1929, addressed to the Solicitor for this department, is acknowledged.

In said letter you request information "as to the reason for the rulings of the department which permit enlarged homestead entries but deny stock-raising homestead entries and the application of the act of March 9, 1928, to lands within producing oil or gas fields or covered by leases or prespecting permits."

On February 18, 1929, you made a like request of Secretary West, and his reply, dated February 26, 1929, which you received, is found, after careful review, to cover the subject so completely as to leave little more to be said.

Lands in producing oil and gas fields or covered by oil and gas leases *are not subject to entry under any law*, for the reason that the act of February 25, 1920 (41 Stat. 437), provides an exclusive method for the disposition not only of the minerals but of such lands.

Lands embraced in oil and gas permits or applications for permits *are* subject to entry under both the enlarged and stock-raising homestead laws in the absence of valid objections by the mineral claimant and upon compliance with the governing regulations.

The act of March 9, 1928 (45 Stat. 253), to which you refer as the Walsh Act, authorizes the Secretary of the Interior to sell any isolated tract which, in his judgment, it would be proper to expose for sale. In the exercise of the judgment and discretion so vested in it this department has determined and the regulations provide that no sale will be consummated as to any tract embraced in an application for permit or a permit until the applicant or permittee shall have had the opportunity provided by law to discover oil or gas.

Lands not in a producing field or under lease, but within an oil and gas withdrawal or reservation are subject to enlarged homestead entry, for the reason that the act of July 17, 1914 (38 Stat.

509), is held to apply to all nonmineral rights of entry created by laws in effect on that date.

Lands not in a producing field or under lease, but within an oil and gas reservation or withdrawal are not subject to stock-raising homestead entry because (1) the stock-raising act so provides; (2) the act of July 17, 1914, *supra*, is held not to apply to a later act in which the prohibition of the entry of reserved land is clearly made; (3) no land is subject to stock-raising entry unless so designated by the department and the regulations, decisions and practice of the department forbid the designation of reserved lands; (4) the Congress has, in effect, sustained the attitude of the department. See act of February 7, 1925 (43 Stat. 809), and the instructions thereunder (51 L. D. 65).

METSON v. O'CONNELL

Instructions, May 4, 1929

OIL AND GAS LANDS—PROSPECTING PERMIT—DISCOVERY—POSSESSION—DOCTRINE OF RELATION—HOMESTEAD ENTRY—DAMAGES—WAIVER.

Rights under an oil and gas prospecting permit granted under section 19 of the leasing act relate back only to the date of the filing of the permit application where the permittee was not entitled to a lease under section 18 of that act because of lack of a showing of sufficient discovery and of undisputed possession on July 1, 1919, and a homestead entryman whose entry was made prior thereto will not be required to file a waiver of right to compensation.

OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—BOND—DAMAGES.

Failure to require an oil and gas prospecting permittee to file a bond to indemnify a homestead entryman against damage to his crops and improvements as provided by section 2 of the act of July 17, 1914, does not preclude the entryman from asserting his rights in a proceeding in court under that section.

DIXON, *First Assistant Secretary:*

By letter of April 15, 1929, the Commissioner of the General Land Office has requested instructions as to whether under the particular circumstances of the case presented there should be exacted from a homestead entryman a waiver of right to compensation for the use of so much of the surface of his entry as may be necessary in prospecting for, mining and removing the mineral deposits by a mineral claimant who has been allowed to file, under the provisions of section 19 of the leasing act, an application for an oil and gas permit covering the entry.

The material facts of the case are as follows:

On August 25, 1920, W. H. Metson filed concurrently patent application, Los Angeles 033397, for all of Sec. 24, T. 11 N., R. 23 E.,

S. B. M., based upon certain oil placer locations located February 16, 1909, and application 033399 for a lease of the same section under section 18 of the act of February 25, 1920 (41 Stat. 437). He also on the same day filed a protest against certain homestead entries that had been allowed for lands in that section, among them the entry of Martin B. O'Connell, 028653, made November 10, 1916, under the act of February 19, 1909 (35 Stat. 639), with mineral reservation under the act of July 17, 1914 (38 Stat. 509), and covering the S. ½ of said Sec. 24.

All the land is included in petroleum withdrawal by Executive order of September 27, 1909, and placed in Petroleum Reserve No. 2, July 2, 1910. On December 27, 1922, the department affirmed a decision of the commissioner, requiring Metson to elect to stand on one or the other of his applications and directed that the application Metson elected to abandon be finally rejected. In response to this requirement, Metson withdrew and abandoned his application for a lease and it was finally rejected February 21, 1923. By decision of April 18, 1927 (52 L. D. 313), the department affirmed the decision of the commissioner rejecting the patent application and holding the claims involved null and void. A motion for rehearing of the decision was denied February 16, 1928, but it was therein held that the evidence was sufficient to entertain applications for reinstatement of application 033399 and a like rejected application 033400 and to consider them with a view to the issuance of prospecting permits under section 19 of the leasing act. Reinstatement of the applications 033399 and 033400 was requested March 22, 1928, and on February 23, 1929, the department approved the commissioner's letter recommending a permit for all of Sec. 24 be issued to Metson under section 19 of the leasing act. In that letter it was also stated that—

> Following the practice of the department in cases where the section 19 oil and gas applications are based on equities under placer locations made long prior to the filing of the homestead applications, no indemnity bonds for the protection of the homesteaders have been required. The matter of requiring the waiver of claim for compensation will be considered when the homestead cases are taken up for action. * * *

The question that arises on these facts is whether the section 19 permit application is to be considered prior or subsequent to the homestead entry. If prior, then the respective rights of the parties are governed by the provisions of section 29 of the leasing act under which waivers to compensation are required. Instructions of October 6, 1920, paragraph 4 (47 L. D. 437, 476).

Metson's application for a lease under section 18 of the leasing act was not erroneously, but properly, rejected under the rule that claimants should either pursue patent under the placer mining laws, or leases under the oil leasing act, but not concurrently; *Honolulu*

Consolidated Oil Company, on petition (48 L. D. 303); *Robbins* v. *Elk Basin Consol. Pet. Co.* (285 Fed. 179). Furthermore, had that application been considered on its merits, Metson would have been required to establish, as section 18 requires, that he had "drilled one or more oil or gas wells to discovery" and that the claims were initiated under the placer mining laws prior to July 3, 1910, and *claimed and possessed continuously from that time.* (Section 18, Circular No. 672, paragraph (*b*), 47 L. D. 437, 452.)

It was found as a fact by the department in its decision of April 18, 1927, *supra*, that the evidence as to discovery was not sufficient; that no efforts had been made to maintain the claims as the mining laws require, or to seek patent until almost 10 years after operation ceased; that O'Connell and other homestead entrymen there mentioned had been allowed to maintain possession, make the required residence, improvements and cultivation without interference on the part of the mineral claimant. It is, therefore, apparent from the facts that Metson would not have been entitled to a lease under section 18 of the leasing act, not only because of lack of a showing of sufficient discovery, but because he was not in undisputed possession at or prior to July 1, 1919. *Midland Oil Fields Company, Ltd.* (50 L. D. 620). And it is obvious that the action of the department in treating that application as made under section 19 and permitting its reinstatement as one under section 19, was solely based upon equitable considerations, and not because applicant was entitled as a matter of right to recognition under the provisions of that section. It is true that O'Connell has no voice as to the manner in which the Government may dispose of its reserved mineral estate in the land, but he may have a right to complain if the degree of servitude imposed upon his surface estate as appurtenant to the grant of mineral rights is not, under the facts disclosed, such as the law and regulations thereunder warrant.

Where applications to make homestead entries are filed subsequent to the permit application, the allowance of such entry is discretionary with the department (*Carlin* v. *Cassriel*, 50 L. D. 383, 386), and it may impose as a condition to the allowance of such an application a waiver of compensation for any damage caused by the mineral claimants in the free use of the surface. *Pace* v. *Carstarphen et al.* (50 L. D. 369, 371); instructions of July 2, 1925 (51 L. D. 166). But in this case the homestead entry antedates the permit application and the homestead entry may only be regarded as subordinate to the permit application upon the theory that the rights under that application relate back to the date of the mining locations upon which it is based. The doctrine of relation, however, is an equitable principle, and the courts have refused to apply it where

equity and justice do not require its application. When O'Connell made improvements and cultivation of the land, he did so with notice of the character of the adverse claim asserted at the time such improvements and cultivation were made. He took the risk of having such claims adjudged valid, but he can not be held to have foreseen and to have taken into consideration the possibility that the mineral claimants would thereafter be permitted to assert a right incompatible with the one they were at the time asserting, and that an application finally closed and rejected would be reinstated for that purpose which, upon its allowance, would carry with it as one of its incidents the right to appropriate or destroy his crops and improvements without compensation. The application of the doctrine of relation would be a manifest injustice and inequitable under the circumstances of this case. It is, therefore, held that the mineral claimant's rights must be considered as initiated on August 25, 1920, the date he filed application 033399, such holding being without prejudice to any claim for damages that the homestead claimant may assert under the provisions of section 2 of the act of July 17, 1914, *supra.*

It may be argued that the section 19 application is held as relating back to the date of location of the mining claim from the fact that no bond was required to indemnify the entryman against damage to his crops and improvements as provided by section 2 of the act of July 17, 1914. While, possibly, such a bond may be exacted as a matter of administrative practice, in view of the decision of the Supreme Court in *Kinney-Coastal Oil Company et al.* v. *Kieffer et al.* (277 U. S. 488), it would seem that the failure to exact such a bond would not preclude the entryman from asserting his rights to it in a proceeding in court, as provided by that act. The court said upon this point (p. 506)—

> The circuit court of appeals based its decision on the part of the act of 1914 which—after directing that the patent for the surface estate shall contain a reservation of the underlying oil and gas deposits, with the right to prospect for, mine and remove the same—provides that lessees of the United States may enter, occupy so much of the surface as may be required, and mine and remove the minerals, "upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages."
>
> The plaintiffs take the position that the bond given by the lessee and approved by the Secretary of the Interior when the lease was issued satisfied that provision. In this the plain words of the provision are neglected. They call for a bond to be given in a judicial proceeding wherein the damages may be ascertained and fixed. The circuit court of appeals so regarded them.

In view of what has been stated, you are instructed not to require the waiver.

STATE OF NEW MEXICO

Decided May 4, 1929

SCHOOL LAND—NEW MEXICO—ADVERSE CLAIM—WORDS AND PHRASES—STATUTES.

The expression "not otherwise appropriated" in section 6 of the enabling act of June 20, 1910, which granted to the State of New Mexico additional sections 2 and 32 in each township for the support of common schools, is to be construed to mean an appropriation adverse to the State.

SCHOOL LAND—INDEMNITY—VESTED RIGHTS—NEW MEXICO.

Pendency at the date of the enactment of the enabling act of June 20, 1910, of an indemnity school-land selection list embracing lands within designated sections granted to the State of New Mexico by section 6 of that act, is not such an appropriation as to prevent the vesting of title to those lands in the State pursuant to the grant.

DEPARTMENTAL DECISIONS CITED AND DISTINGUISHED.

Cases of *Andrew J. Billan* (36 L. D. 334), and *State of Utah* (47 L. D. 359), cited and distinguished.

WILBUR, *Secretary:*

In indemnity school-land selection lists filed May 20, 1910, under the act of June 21, 1898 (30 Stat. 484), and the acts supplementary and amendatory thereto, the then Territory of New Mexico selected lots 3 to 16, inclusive, and the S. ½ Sec. 2, and all of Sec. 32, T. 21 S., R. 35 E., N. M. P. M., New Mexico.

By decisions of April 9 and 11, 1914, the Commissioner of the General Land Office held the selection lists involved for cancellation to the extent of said Secs. 2 and 32 on the ground that title to the lands in said sections had passed to the State of New Mexico under section 6 of the act of June 20, 1910 (36 Stat. 557, 561). He cited a letter of June 28, 1913, from the department as authority for his ruling. The State did not appeal from the decisions and on June 25 and July 10, 1914, the commissioner finally canceled the lists as to the lands in Secs. 2 and 32.

On September 22, 1928, Alice G. Espe and Theodore N. Espe filed applications for permits, under section 13 of the act of February 25, 1920 (41 Stat. 437), to prospect for oil and gas upon said Sec. 2 and Sec. 32, respectively.

By decision of February 5, 1929, the commissioner held that said Secs. 2 and 32 were public land and were properly subject to prospecting permit application. After having reviewed the history briefly he said—

> It is now considered that these selections were erroneously held for cancellation, and that said indemnity school-land selections were such an appropriation of the land as defeated the school-land grant made by the act of June 20, 1910, which granted only Secs. 2 and 32 "not otherwise appropriated at the date of the passage of this act."

Upon the cancellation of said indemnity school-land selections, the lands embraced therein became a part of the public domain, subject to disposition as other public lands in accordance with departmental decision rendered in the case of the grant of Secs. 13 in Oklahoma, *Andrew J. Billan* (36 L. D. 334); and in the case of the grant of Secs. 2 in Utah (47 L. D. 359).

* * * * * * *

However, before a permit is issued on either of these applications the State should be given opportunity to be heard in the matter in view of the erroneous cancellation.

The State has appealed and applied for reinstatement of the canceled selection lists. It waives the right to potash in the land in view of the potash withdrawal of March 11, 1926, but declines to consent to reservation of oil and gas to the United States. In view of the fact that it acquiesced in the cancellation of the selections by the commissioner and thereafter used the base lands in support of other selections it now asks that said Secs. 2 and 32 be accepted as base lands for the selection of the same sections.

In its letter of June 28, 1913, hereinbefore referred to, in connection with Roswell Clear List No. 32, the department said—

Section 6 of the act of June 20, 1910 (36 Stat. 561), the enabling act by which the territory was admitted, provides:

"That in addition to sections sixteen and thirty-six, heretofore granted to the Territory of New Mexico, sections two and thirty-two in every township in said proposed State, not otherwise appropriated at the date of the passage of the Act, are hereby granted to the said State for the support of common schools; * * *."

Irrespective of the question whether the State could afterwards select other lands in lieu of Sections 2 and 32, having received title thereto by taking the same as indemnity, it is deemed an awkward and unnecessary procedure to certify these sections under indemnity selections, when they are specifically granted in place to the State by the enabling act, and then grant other lands in lieu thereof through further indemnity selections.

It is not believed that the right of the State to these sections could be endangered by settlement or other claims after the date of the present selections. The State succeeded to all the right of the territory and to the extent mentioned in the enabling act, and all valid selections would protect the rights of the State whether it took under the selections or under the act which grants these sections in place. Therefore, aside from other considerations, the mere matters of administration and bookkeeping suggest the propriety of affording the State opportunity to select other tracts in lieu of Secs. 2 and 32.

The list is accordingly returned for the action here indicated.

The department has not since taken any action which would indicate that its views have been changed. It is not apparent what basis the commissioner had for stating: "It is now considered that these selections were erroneously held for cancellation," *et cetera*. It can not be presumed that in writing said letter of June 28, 1913, the department was unmindful of the decision in the *Billan case, supra*.

The expression "not otherwise appropriated," used in the said act of June 20, 1910, must be construed to mean an appropriation *adverse* to New Mexico. There could be no good reason for requiring the State to go through with indemnity selections for sections 2 and 32 commenced prior to June 20, 1910, unless indeed technicalities of law made necessary the circuitous proceedings which the department objected to in 1913. In the *Billan case*, and in all the cases therein cited, and in the case of *State of Utah* (47 L. D. 359) there was involved the question of adverse appropriation. In the present case Congress intended to grant to the State of New Mexico sections 2 and 32 which were not reserved or adversely claimed at the date of the enabling act. In its action of June 28, 1913, the department sought to give full effect to the manifest intentions of Congress.

It is shown that lots 1, 2, 3 of said Sec. 2 have been patented under a homestead entry made in pursuance of settlement initiated prior to survey of the township in the field. It is held that title to the remainder of Sec. 2 and to all of Sec. 32 passed to the State of New Mexico under the enabling act.

The permit applications of Alice G. Espe and Theodore N. Espe were rejected under departmental order No. 337 (52 L. D. 579). The applicants thereafter filed petitions for the exercise of supervisory authority which are now pending before the department. Inasmuch as title to the land involved has passed to the State of New Mexico the permit applicants have no standing, without consideration of the oil conservation policy. Their petitions have this day been denied in separate decisions.

The decision appealed from is reversed and the case is closed.

Reversed.

STOCK DRIVEWAY WITHDRAWALS—COAL AND OTHER MINERAL LANDS EXCEPTED—ACT OF JANUARY 29, 1929

INSTRUCTIONS

[Circular No. 1189]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 4, 1929.

REGISTERS, UNITED STATES LAND OFFICES:

The act of January 29, 1929 (45 Stat. 1144), entitled "An Act To amend section 10 of an Act entitled 'An Act to provide for stock-raising homesteads, and for other purposes,' approved December 29, 1916 (Public, Numbered 290, Sixty-fourth Congress)," reads as follows:

That the following be added as an additional proviso to section 10 of an Act entitled "An Act to provide for stock-raising homesteads, and for other purposes," approved December 29, 1916 (Public, Numbered 290, Sixty-fourth Congress):

"*Provided further*, That the withdrawal from entry of lands necessary to insure access by the public to watering places reserved hereunder shall not apply to deposits of coal and other minerals in the lands so withdrawn, and that the provisions of section 9 of this Act are hereby made applicable to said deposits in lands embraced in such withdrawals heretofore or hereafter made, but any mineral location or entry made hereunder shall be in accordance with such rules, regulations, and restrictions as may be prescribed by the Secretary of the Interior."

Under authority of the provisions of the act, the following rules, regulations, and restrictions are prescribed for prospecting for minerals of the kinds subject to the United States mining laws, and the locating of mining claims upon discovery of such minerals in lands within stock driveway withdrawals heretofore or hereafter made.

All prospecting and mining operations shall be conducted in such manner as to cause no interference with the use of the surface of the land for stock driveway purposes, except such as may actually be necessary.

While a mining location will be made in accordance with the usual procedure for locating mining claims, and will describe a tract of land, having due regard to the limitations of area fixed by the mining laws, the locator will be limited under his location to the right to the minerals discovered in the land and to mine and remove the same, and to occupy so much of the surface of the claim as may be required for all purposes reasonable incident to the mining and removal of the minerals.

All excavations and other mining work and improvements made in prospecting and mining operations shall be fenced or otherwise protected to prevent the same from being a menace to stock on the land.

No watering places shall be inclosed, nor proper and lawful access of stock thereto prevented, nor the watering of stock thereat interfered with.

Prospecting for minerals and the location of mining claims on lands included in such withdrawals shall be subject to the provisions and conditions of the mining laws and the regulations thereunder (Circular No. 430, 49 L. D. 15) as modified by section 9 of the act of December 29, 1916 (39 Stat. 862).

Mining claims on lands within stock driveway withdrawals, located prior hereto and subsequent to the date of the withdrawal, may be held and perfected subject to the provisions and conditions of the act and these regulations.

Every application for patent for any minerals located subject to this act must bear on its face, before being executed by the applicant and presented for filing, the following notation:

Subject to the provisions of section 10 of the act of December 29, 1916 (39 Stat. 862), as amended by the act of January 29, 1929 (45 Stat. 1144).

Like notation will be made by the register on the final certificate issued on such a mineral application.

Patents issued on such applications will contain the added condition:

That this patent is issued subject to the provisions of the act of December 29, 1916 (39 Stat. 862), as amended by the act of January 29, 1929 (45 Stat. 1144), with reference to the disposition, occupancy and use of the land as permitted to an entryman under said act.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
JOS. M. DIXON,
First Assistant Secretary.

L. N. HAGOOD

Decided May 7, 1929

OIL AND GAS LANDS—PROSPECTING PERMIT—DISCRETIONARY AUTHORITY OF SECRETARY OF THE INTERIOR—CONSERVATION—ARBITRARY USE OF ADMINISTRATIVE POWER.

The granting of a permit to prospect for oil and gas on public lands under section 13 of the act of February 25, 1920, is, by the terms of the act, discretionary with the Secretary of the Interior, and the announcement and enforcement of a changed oil conservation policy which is made applicable to all alike can not be held to be an arbitrary use of administrative power.

DIXON, *First Assistant Secretary:*

By decision of April 2, 1929, approved by the department, the Commissioner of the General Land Office rejected the oil and gas prospecting permit application filed May 3, 1927, by L. N. Hagood under section 13 of the leasing act for lands in Ts. 6 and 7 S., R. 21 E., M. M., Montana, in accordance with the policy announced in departmental Order No. 337 of March 16, 1929 (52 L. D. 579).

The applicant has filed an appeal and motion for rehearing on the stated grounds that the order of rejection was unlawful, unauthorized, and arbitrary; that it was a usurpation of the powers of Congress; that it was retroactive, confiscatory, and a gesture of tyranny; that the act of February 25, 1920 (41 Stat. 437), was

mandatory; that the land was subject to the application, and that the applicant was lawfully entitled to a permit.

At the time the application was presented and ever since March 11, 1920, paragraph 2 of the regulations (47 L. D. 437, 438), approved by the Secretary of the Interior, under and in pursuance to section 32 of the leasing act of February 25, 1920, has provided—

* * * the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior. * * *

This conforms to the language of the statute, section 13, which is permissive, not mandatory.

No rights as against the Government were acquired by the mere filing of the permit application, and there can not justly be any charge of an arbitrary use of power in the announcement and enforcement of a changed oil conservation policy which is made applicable to all alike.

The rejection was final and the case was closed. The action taken is affirmed.

The appellant returned, unindorsed, the register's check for $10. This will be returned to the local land office for delivery to the appellant if called for, otherwise to be disposed of in accordance with governing regulations.

Affirmed.

LOCATION OF OIL SHALE PLACER CLAIMS

Instructions, May 7, 1929

MINERAL LANDS—OIL SHALE LANDS—PLACER CLAIM—MONUMENTS—VALID CLAIM—WORDS AND PHRASES—STATUTES.

One who has located a placer claim by legal subdivisions of surveyed land without actually marking of boundaries and in other respects has brought himself within the saving clauses of section 37 of the leasing act of February 25, 1920, has a valid claim within the meaning of that section as against the Government, and the Land Department will not inquire as to his compliance with the local laws and regulations specifying the manner in which the location should be marked on the ground.

DIXON, *First Assistant Secretary:*

Your [Commissioner of the General Land Office] letter to Mr. Ralph S. Kelley, Denver 038238, submitted for my approval, presents this question:

In the location of the oil shale placer claims on surveyed land in Colorado, does the failure of the locators or claimants prior to February 25, 1920, the date of the passage of the leasing act, to make a discovery and to perform certain physical acts of location, warrant the charge formulated in your letter, "That the locations of the

claims are invalid, in that no discoveries within the limits of the claims and no actual locations of the claims on the ground were made prior to February 25, 1920."

As to form, this charge combines two distinct and separate grounds of invalidity, to wit, failure to make discovery, and failure to actually locate the claims on the ground. Evidence of failure to make a discovery prior to February 25, 1920, coupled with evidence that claimants were not on said date in diligent prosecution of work leading to discovery upon claims located on account of minerals within the purview of the leasing act, has heretofore been recognized by the department as a basis for a separate and independent charge to that effect and requires no further notice here. The legal consequences of the proof of such charge is not affected whether there was or was not an actual location of the claims on the ground and the charge needs no extrinsic aids in proof of those matters in its support. It should be formulated as a separate charge.

There remains the question, whether the failure to make actual locations on the ground is a sufficient basis for a charge to that effect. As pertinent to the consideration of this question, you refer to section 3289, Compiled Statutes of Colorado (1921), which, as to placer claims, requires within 30 days from date of discovery the posting of a notice containing certain information there specified, and which requires also, " the marking of the surface boundaries with substantial posts sunk in the ground, to wit, one at each angle of the claim."

You also refer to the decision in *Reins* v. *Murray* (22 L. D. 409), which held that, " In the location of a placer claim on surveyed land, it is not necessary to mark the boundaries of the claim on the ground." As to this rule, you make the comment that it was *general* as to placer locations on surveyed land, which comment is taken to imply that there would be exceptions to the rule where the local law otherwise provided.

Putting aside for the present the effect, if any, of the provisions of the State law, it will be considered whether the department could with propriety prefer such charge based upon the requirements of section 2324, Revised Statutes, that " the location must be distinctly marked on the ground so that its boundaries may be readily traced."

The view in *Reins* v. *Murray*, that the monuments of the public surveys satisfy this requirement of the statute as to placer claims has never been overruled and has been regarded by the department as governing in any case of the location of placer claims on surveyed lands. There has been no contrary rule announced in any decision of the Supreme Court, and that court has sustained the validity of a placer location made on surveyed lands from calls and distances placed on a notice on a stump, where no attempt was made to mark

the boundaries. *McKinley Creek Mining Co.* v. *Alaska United Mining Co.* (183 U. S. 563, 569). The highest courts of the several mining States are not in agreement as to the construction of the Federal law in this respect (Lindley on Mines, section 454, and cases cited), and the department's view is in harmony with a later decision of the Supreme Court of California in *Kern Oil Co.* v. *Crawford* (76 Pac. 1111, 1113), overruling previous cases. Locators of placer claims in Colorado since the rendition of the department's decision, who did not mark the boundaries of their claims as prescribed by the State law were prior to the leasing act doubtless exposed to the peril of having their neglect taken advantage of by a rival mining locator, and of having their claims adjudged invalid in a suit between such claimants in a State or Federal court, but in view of the department's rule such locators have no right to expect an attack in adverse proceedings by the Government based upon a failure to actually mark the boundaries of the claim. It is not believed that titles to mining claims could thus now be unsettled or struck down when such claims were located on the faith of such construction of the statute by the department, by the adoption of a contrary rule. Whether the department's construction of the law is right or wrong, it has the force of a rule of property.

As between the Government and the claimant where the latter has located his placer claim by legal subdivisions of surveyed land without actually marking of boundaries and in other respects has brought himself within the saving clauses of section 37 of the leasing act, in the view of the department he has complied with the Federal statutes, and has a valid claim within the meaning of that section. The department will make no inquiry as to his compliance with the local laws and regulations specifying the manner in which the location should be marked on the ground.

For the reasons stated I must decline to approve the letter submitted.

CALIFORNIA-OREGON POWER COMPANY

Opinion, May 11, 1929

RIGHTS OF WAY—LAND DEPARTMENT—JURISDICTION.

In the administration of the various rights of way acts, the jurisdiction of the Land Department is confined to the granting of rights of way for ditches, reservoirs, and other constructed works upon the public lands.

WATER POWER—WATER RIGHT—APPROPRIATION.

The control of the flow and the appropriation and use of water, where no Government interest is involved, is governed by the local laws and customs of the State in which the stream is located.

WATER POWER—WATER RIGHT—APPROPRIATION.

One may convey water down a natural stream across tracts of public land so long as his rights to appropriate and use such water are maintained in accordance with the laws of the State affected.

WATER POWER—WATER RIGHT—DIVERSION—RECAPTURE.

The right of one to recapture waters mingled in a stream as a result of lawful diversion from another stream exists so long as the water right is maintained; such right is independent of the ownership of the land.

WATER-POWER—WATER RIGHT—APPROPRIATION.

The use of the beds of natural water courses for the conveyance of water appropriated in accordance with State laws, is generally sanctioned so long as there is no interference with the rights of others.

WATER POWER—WATER RIGHT—DIVERSION—RECAPTURE.

One who seeks to recapture in a stream waters diverted from another stream is not entitled to take out more water than was turned in, less seepage and evaporation losses.

FINNEY, *Solicitor:*

The Acting Director of the Geological Survey, in connection with a report to the Federal Power Commission on the power-site value of certain described lands in Oregon and California, has requested my opinion concerning the validity of the claim of the California-Oregon Power Company to a right to use the channel of Fall Creek for conveying water for power purposes (a) across certain revested lands of the Oregon and California Railroad Company in Oregon and (b) across certain public lands in California. The report has been requested by the power commission in connection with the determination of a question whether the lands may be restored to entry under section 24 of the Federal Water Power Act without injury to the power-site value.

The lands involved are described as follows: NW. ¼ SE. ¼ Sec. 3 and lot 4, Sec. 15, T. 41 S., R. 4 E., W. M., Oregon, of which the NW. ¼ SE. ¼ said Sec. 3 was included in Power Site Reserve No. 686 by Executive order of May 4, 1918, and lot 3, Sec. 18, T. 48 N., R. 4 W., M. D. M., California, included in Power Site Reserve No. 394 by Executive order of August 11, 1913.

The facts as set forth in the memorandum of the Geological Survey are as follows:

In 1903 the California-Oregon Power Company or its predecessor in interest built a canal from Spring Creek to Fall Creek across lands then owned by the Oregon and California Railroad Company and purchased the right of way occupied by the canal in E. ½ of NW. ¼ and NE. ¼ of SW. ¼ Sec. 3, T. 41, S., R. 4 E., Willamette Meridian, Oregon. In 1916 these lands, together with other lands in Oregon mentioned at the beginning of this memorandum, revested in the United States. The deed from the Oregon and California Railroad Company to the California-Oregon Power Company does not mention the lands in Oregon crossed by Fall Creek.

The natural channel of Fall Creek is used by the California-Oregon Power Company to convey the waters of Spring Creek from the end of the canal in NE. ¼ of SW. ¼, Sec. 3, T. 41 S., R. 4 E., W. M., Oregon, to the diversion dam for a power plant in NW. ¼ of NW. ¼, Sec. 19, T. 48 N., R. 4 W., M. D. M., California.

The California-Oregon Power Company contends that when it purchased a right of way for its canal from the Oregon and California Railroad Company, it received an implied right of way for its water down the natural channel of Fall Creek wherever that creek crossed lands owned by the Oregon and California Railroad Company. On the other hand, the deed from the railroad company to the Power company mentions only the lands crossed by the canal.

The public lands in lot 3, Sec. 18, T. 48 N., R. 4 W., M. D. M., California, crossed by Fall Creek, have always been owned by the Government. With respect to these lands, the company claims that the natural channel of a stream in California may be used for conveying water to the place of use (Civil Code of California, sec. 1413).

It appears from the map attached to the company's argument that in addition to the three noncontiguous tracts above described, title to which is in the United States, Fall Creek crosses privately-owned lands, some of which are owned by the power company. It also appears that right of way over the land affected by the dam in Spring Creek, Oregon, and the ditch from thence to the point of discharge in Fall Creek was purchased from the railroad company. These lands are as follows: E. ½ NW. ¼ and NE. ¼ SW. ¼ said Sec. 3.

Assuming that the right to cross the land with the ditch is established, the question for determination here is whether the company received an implied right of way down the natural channel of Fall Creek wherever that creek crossed lands patented to the Oregon and California Railroad Company, and afterward revested in the United States, and further whether it has a right of way in the channel of the creek across public lands.

The control of the flow and the appropriation and use of water, where no Government interest is involved, is governed by the local laws and customs of the State in which the stream is located, and in the administration of the various right of way acts the jurisdiction of this department is confined to the granting of rights of way for ditches, reservoirs and other constructed works upon the public lands.

The use of the beds of natural water courses for the conveyance of water appropriated in accordance with the State laws, is generally sanctioned, so long as there is no interference with the rights of others. An appropriator may make use of all of the natural advantages of the country and even use the channel of the same stream from which the water was appropriated, or the channel of another

stream, in conducting the water to the place of use. In order to avail himself of this use an appropriator must have the intention to recapture it, otherwise the right to use the water is lost, and in any event no more can be taken out than was turned in, less seepage and evaporation losses. The right to recapture the mingled water depends largely upon two facts, whether the right to the water is acquired by the appropriator of the same in the usual manner in the first instance for some beneficial purpose and whether at the time the water is discharged into the stream the intent to recapture it is clearly evidenced. The principles above stated seem to be well established by the weight of authority and in fact have been expressly declared by statute in some jurisdictions, notably California.

In the light of these principles, it is therefore my opinion that no title passed to the power company under the deed from the railroad company, respecting the use of the channel of Fall Creek for the conveyance of the water diverted from Spring Creek in Oregon to the point of use in California. Rights of this kind are independent of the ownership of the land. Assuming that the power company has acquired a good water right to divert the water under the Oregon law, whatever right it may have to convey same down the channel of the creek into California is merely incidental to that water right. What it has in fact is the right to recapture the water in California which has been mingled with the waters of Fall Creek at the point of discharge in Oregon so long as the water right is maintained. It has acquired no property right in the bed of the stream in the nature of a right of way. So far as the company's rights are concerned, the ownership of the lands traversed by Fall Creek, in its course between the point in Oregon where the waters from Spring Creek are discharged into it, to the point in California where such waters are diverted for power purposes, is not material, no construction works affecting such lands being involved. It seems clear that the company may continue to so convey the water down the stream and across the tracts of public land in question so long as its rights to appropriate and use such waters are maintained in accordance with the laws of the States affected.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

JOSEPH C. SAMPSON

Decided May 18, 1929

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—DRAWING—VESTED RIGHTS.

The granting of an oil and gas prospecting permit under section 13 of the leasing act being discretionary with the Secretary of the Interior, a drawing which conferred priority upon one applicant over other applicants does not confer upon the successful applicant any vested rights that preclude that officer from rejecting the application in accordance with the general oil conservation policy.

DIXON, *First Assistant Secretary:*

On June 21, 1928, Joseph C. Sampson filed an oil and gas prospecting permit application under section 13 of the leasing act of February 25, 1920 (41 Stat. 437), for certain lands in T. 1 N., R. 85 W., and T. 1 S., R. 84 W., 6th P. M., Colorado. Inasmuch as there were other simultaneous permit applications for the land a drawing was held, in accordance with Circular No. 929 (50 L. D. 387), in which Sampson became the successful applicant. In a letter of November 3, 1928, addressed to the Commissioner of the General Land Office the applicant requested that the granting of a permit on this application as well as a permit on the application hereinafter to be considered be deferred until late in the spring of 1929 on account of the inaccessibility of the region in winter.

On July 12, 1928, Sampson filed another similar permit application for certain lands in T. 1 S., R. 85 W., and again he became the successful applicant in a drawing. Agnes M. Lunde was the successful applicant for certain land opened to filing and not included in Sampson's filing. After the drawing Sampson applied to amend his application to include the land awarded to Lunde, alleging that by mistake he had failed to include the same in his application. By decision of December 18, 1928, the commissioner denied the application to amend. Sampson appealed. He filed a bond for $1,000 in connection with this application.

By decisions of March 30, 1929, approved by the department, the commissioner, pursuant to instructions approved by the Secretary of the Interior March 13, 1929 (52 L. D. 578), and in accordance with the policy announced in departmental Order No. 337 of March 16, 1929 (52 L. D. 579), rejected the two applications and closed the cases.

The applicant has appealed, contending that there was no authority for the rejection of his applications; that in paying premium upon and filing a bond in the sum of $1,000 to indemnify surface entrymen he acquired a vested interest in and under his application

"which can not lawfully be destroyed by either the President, the Secretary of the Interior, the Commissioner of the General Land Office, or even by Congress itself;" that by participating and being successful in drawings he acquired vested rights which can not be destroyed or interfered with; that he and his associate expended during the past year more than $1,000 "in employing their own geologists, mapping said land, and otherwise actively commencing the development thereof."

It is not found that the appellant has proved any equities in his favor which give him a better status than other applicants who had not received permits prior to the instructions of March 13, 1929. The drawings in which he participated were for the purpose only of determining whose application should be given priority where more than one application was filed when the lands became subject to filing applications for permits. The commissioner's letters approving the drawings merely disposed of the other applications.

At the time these applications were presented and ever since March 11, 1920, paragraph 2 of the regulations approved by the Secretary of the Interior under and pursuant to section 32 of the leasing act (47 L. D. 437, 438) has provided—

* * * the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior. * * *

This conforms to the language of the statute, section 13, which is permissive, not mandatory. The present oil conservation policy contemplates the rejection of all permit applications, unless in any cases there shall be clear and definite evidence of substantial expenditures for geological surveys or development upon the land made prior to March 12, 1929. The showing in this case is not sufficient to exempt the applications from the general order of rejection. There has been no showing to convince the department that the appellant has acquired any rights which obligate the Secretary of the Interior to grant a permit.

The appellant inclosed the register's checks for $20 and $24, the amounts paid as filing fees. These checks will be returned to the local land office for delivery upon request, otherwise they will be disposed of in accordance with governing regulations. Upon application therefor the two drawing service fees of $10 each will, provided that the Comptroller General shall approve, be returned.

The rejection of the two applications is affirmed, but if the appellant desires to make a further showing with respect to the alleged geological work he may do so. Such showing should be in the form of copies of reports of the geologists and affidavit as to the amounts expended for such geological work, dates thereof, and

any other facts connected with the geological exploration of this structure that may occur to the appellant.

Affirmed.

IDAHO POWER COMPANY

Decided May 22, 1929

WATER POWER—POWER SITE—TRESPASS—DAMAGES.

For the purpose of assessing charges for trespass upon public lands by a power company, the factor of "total capacity of power-site" within the meaning of regulation 7 of the departmental regulations of August 24, 1912 (41 L. D. 150), under the act of February 12, 1901, is determined by permanent features of stream flow such as conduits and forebays; consequently capacity of installed water wheels which is apt to change frequently with increase in market demand, replacement, or improvement in design, is not to be considered.

EDWARDS, *Assistant Secretary:*

Careful attention has been given to your [M. O. Leighton, Consulting Engineer] letter of March 19, 1929, requesting reconsideration of the department's decision of March 9, 1929, requiring the Idaho Power Company to pay, before any license issued by the Federal Power Commission be delivered, the sum of $34,794.21 as back rental charges for the years 1912 to 1927, inclusive, for the unauthorized use and occupancy of public lands by the company and its predecessors in interest, in connection with the operations of the Swan Falls and Lower Salmon hydroelectric plants on Snake River, Idaho.

Your letter was referred to the Director of the Geological Survey and to the Executive Secretary of the Federal Power Commission. As a result of these references, the department has become more fully advised as to the matters asserted by you as a basis of the request for a mitigation of charges, and has the benefit of the views of those bureaus on the merits of your arguments in support of the request.

One of your contentions, urged as a basis for equitable consideration, is that the trespassing of the Idaho Power Company persisted, first, as a result of a policy initiated and adopted by the department itself, and second, because of a policy subsequently pursued by the Federal Power Commission.

In support of the first assertion you refer to certain provisions of the act of February 15, 1901 (31 Stat. 790), and to the criticism of that act expressed by the Secretary of the Interior in a letter of April 29, 1914, to the Chairman of the House Committee on Public Lands and to the recognition by the department of the defects in then existing laws as adequate measures providing for the orderly

development of the Nation's power resources. You also allege certain specific and other instances where the Secretary of the Interior and the Secretary of Agriculture suspended summary action against power companies who were trespassing upon public lands to await the enactment of a practical law.

Objections of the Secretary to the law in the excerpt from his letter quoted by you, as the Director of the Geological Survey points out, were not to any provisions relating to compensation for occupancy and use, but to the instability of the tenure of permittees and licensees under that act, and it may be further stated, that there is nothing in the provisions of that law or of any other law of which the department is aware that suggests or creates any exception to the common law liability of those that trespass upon the lands of another. Nor is the department aware of any action in individual cases or of any practice or policy pursued by it with reference to trespasses of this character under which the trespasser could reasonably proceed on the assumption that the department intended that no charge would be made for the use and occupation of the lands, or that the trespass could be condoned. Nor is it believed that the Idaho Power Company can show that it has suffered loss by the failure to provide suitable legislation at an earlier time. It is stated in the memorandum of the Geological Survey—

> If the act of 1901 had been repealed and superseded by the Federal Water Power Act in 1914, when the then Secretary of the Interior laid before the House Committee on Public Lands his statement as to the weaknesses in the act, and had the same charges been assessed against the Idaho Power Company as are now tentatively adopted by the Federal Power Commission in connection with these plants, the Idaho Power Company would have had to pay somewhat over $2,000 per year in connection with the Lower Salmon Falls plant as compared with maximum annual compensation of $1,192 as now set up by the Geological Survey, and an annual charge of over $3,000 for the Swan Falls plant as compared with annual compensation of $1,380 now set up by the Geological Survey under the department's regulations.

As confirmatory of this statement the memorandum of the Executive Secretary of the Federal Power Commission states that the annual charge under its regulations for the year 1928 for Swan Falls project, on data given in the application, is $3,372.63, and, subject to verification and possible revision, the charge on the Lower Salmon Falls project is $2,441.16.

In support of the second assertion your letter contains these statements:

> After the passage of the Federal Power Act the Federal Power Commission adopted a policy of postponement in trespass cases. Many applications for permit or license on new properties were filed with the Commission immediately upon the enactment of the law. The Commission's staff was overwhelmed with work and the Commission took the ground that inasmuch as

the plants in trespass were operating, and performing their functions to the public, preference in treatment should be given to new projects that had been held up during the 10-year water-power hiatus, and for which there was a large public demand. Prospective applicants for license of properties already constructed were requested to postpone filing of applications. So the policy of suspension of action on water power trespass cases initiated in 1914 by the Department of the Interior was continued by the Power Commission for reasons equally sound.

The reply of the Federal Power Commission to the above assertions is as follows:

While no pressure was brought upon the Idaho Power Company or its affiliate corporation, the Utah Power & Light Company, to file applications for their projects in trespass, due to the great volume of work placed upon the Commission's staff by the flood of new applications, the policy of the Commission with respect to constructed projects was set forth in its First Annual Report, on page 14, as follows:

"In all cases where applicants are operating existing plants under any form of Federal authority the Commission proposes to suspend action upon the applications until provisions can be made for valuation. If the applicant is operating without the necessary Federal authority licenses will be issued with provision for future valuation, this course being taken in order that the investment made may have the protection afforded by a license."

Orders No. 10 "General Procedure for Administration of the Federal Water Power Act," adopted June 2, 1921, contained a statement of the same policy in the following language:

"24. Action upon applications in accordance with section 23 of the Act for projects already constructed by applicants who hold or possess permits, rights of way, or other authority heretofore granted, to be suspended until such time as the Commission has authority to employ sufficient personnel to undertake the valuations required, or until the disposition of other cases pending before the Commission makes existing personnel available."

"25. When any such applicant is without authority to maintain and operate its project, license to be issued under the conditions that valuation shall be made at the earliest practicable date, that it shall be determined as of the date of issuance of license, and that the licensee shall agree to accept and to enter upon its books as the value of its property on such date the amount determined under the provisions of section 23."

While the general policy was as above set forth, no formal demand to file applications for all projects in trespass appears to have been made on either company of this Idaho-Utah group until July 15, 1926, when such a letter was addressed to the Utah Power & Light Company. There was no expectation or intention, however, that any delays in filing application or in issuing license should release the companies of any liability for payment to the United States of charges for prior occupancy of public lands.

Application for license for the Lower Salmon Falls project was filed December 17, 1923, and for the Swan Falls project, May 9, 1924. Delay of the applicant in submitting the inventories required by the regulations, which continued until the spring of 1926, and subsequent difficulties in reaching an agreement on the method of valuation, were responsible for the long interval between dates of filing and execution of licenses on June 25, 1928.

Nothing is noticed in the regulation or statements of the policy of the Federal Power Commission that expressly or by implication requests or intimates that prospective applicants for permits or licenses should postpone the filing of their applications. On the contrary, those applicants operating without the necessary Federal authority were advised that licenses would be issued to them with provision for future valuation "in order that the investment made may have the protection afforded by a license." The plain import of the quoted portions of the commission's report and regulations is that there would be no suspension of action upon applications for licenses or permits where the applicant was operating and maintaining a project without authority to do so. Discussion of the above-stated contentions is for the purpose of showing that the facts upon which they are predicated have not been satisfactorily established. Because response is made to these contentions, it is not to be implied that the question of willful delinquency enters as a factor in the fixing of the charges. Admitting for the sake of argument, that the circumstances remove all imputation of willful delay, the demand of the department is based solely on its opinion of what is reasonable compensation for occupancy and use and does not include additional sums as penalties. It is but just and equitable that the company should pay such reasonable compensation, whether its possession was wrongful or rightful.

It remains to refer to your further contention that error has been made in computing "total capacity of the power site," within the meaning of regulation 7 of the department's regulations, approved August 24, 1912 (41 L. D. 150), and to your statement to the effect that the interpretation of the Federal Power Commission of its equivalent regulation as to power capacity is in harmony with the interpretation you place on the departmental regulation.

The Director of the Geological Survey devotes a considerable part of his memorandum to comments upon this feature of your argument. The following excerpts therefrom appear to fully present the director's views:

> With respect to net capacity Mr. Leighton contends that the available stream flow at the intake (in second-feet and in amount not to exceed the maximum hydraulic capacity of the project works) can not exceed the hydraulic capacity of the water wheels installed. The Survey maintains in line with precedents and uniform rulings from 1912 to date, that the capacity of the water wheels that a permittee may happen to install, has nothing to do with the capacity of a power site; that the phrase "hydraulic capacity of the project works" refers to such permanent features of project construction as conduit or forebay capacity and not to such temporary and changing features as water wheels, and that it was the intent of the regulation to require compensation based on intrinsic capacity of the site—that is, the value of the lands occupied and used rather than on the incomplete and insufficient use. Ample consideration

for growing power systems is provided in the regulations, first, by the use of an utilization factor representing the degree of practical utilization of the available stream flow, and secondly through the use of a sliding scale which presumed only partial use at the outset and a gradual increased installation until complete utilization was made.

The regulations under the act of 1901, which were approved on August 24, 1912 (41 L. D. 150), were drawn up following many conferences between representatives of the Secretary's office, the Forest Service, and the Geological Survey. There is no question that the framers of the regulations endeavored to set up a power capacity figure which would be equitable and one which would not depend upon a changing factor like wheel capacity. An examination of the records leading up to the formation of the regulations does not disclose that there was any thought that wheel capacity should be considered a factor in determining the capacity of a site for the purpose of collecting charges for use of Government lands.

After adverting to the fact that in permits issued under departmental regulations since 1912, wheel capacity has not been a controlling factor in determining power capacity; that more than once questions had been raised as to the meaning of the regulations; that the contention had been made heretofore that wheel capacity should enter into the available stream flow factor used in determining capacity; that the department had answered the question in only one way, and only one interpretation had been used by both the Departments of the Interior and Agriculture. The director expresses the opinion that it is not reasonable to change the interpretation now in order to relieve the company from payments—

even were the contention well founded and even though the market demand for power has been such that it has not seemed profitable for the company to install wheel capacity to utilize the entire low flow used by the Survey in its determination of power capacity under the regulations.

If there was any idea that the amount of money due for the use of lands should fluctuate with the installed wheel capacity that fact would certainly have been set forth in the permits issued in the past. Such, however, is not the case and changes in the amounts due under outstanding power permits may be had only upon a showing that there has been a permanent change in the nominal stream flow due to storage or otherwise, or by a showing of inaccuracy, insufficiency, or in applicability of records upon which such determination was made, or where it is shown that the rate is so great as to result in reduction of the margin of income to an unreasonable amount.

In regard to your reference to the Federal Power Commission's interpretation of their Regulation 1, section 15 C, the Executive Secretary of the commission states as follows:

"Sec. 15. The 'power capacity' of a project means the continued product of—

"A. The factor 0.08;

"B. The average static head in feet; and

"C. The water supply, in cubic feet per second and not in excess of the hydraulic capacity of the approved project works, estimated to be available from natural flow or from storage, or from both, for 90 per cent of the time."

Factor "C" of this rule for determining power capacity of a project corresponds quite closely to factor 3 of the rule used by the Interior Department under the act of February 15, 1901. In applying this rule, the water wheels are considered a part of the project works, whose hydraulic capacity must be determined. Note should be taken, however, of the word "approved" in this rule. In licensing an *unconstructed* project, no wheel installation of smaller capacity than the estimated capacity of the site from stream flow records would be approved as a competent development. Partial installation might be approved in steps in accordance with market demand, but the "power capacity" of the project would be determined by the available water supply. In licensing *constructed* projects, such as those under consideration, it has seemed best to accept them as completed projects, leaving future enlargement, if justified by water supply and market demand, to be taken care of in license amendments. In these cases wheel capacities occasionally limit the power rating of the site, but we have found such occurrences rare.

The method of computing charges on both completed and partially completed projects is given in Regulation 14, Sections 1, 2, and 3, of the Rules and Regulations of the Commission inclosed.

The Director of the Geological Survey in the last paragraph on page 2 of his memorandum to you of April 2, 1929, makes it clear that the Interior Department has always regarded the installed capacity of water wheels as a factor which is apt to change rather frequently with increase in market demand, replacement, improvement in design, etc., and that wheel capacity should, therefore, not be considered in determining the fixed hydraulic capacity of the project works. The view is taken that the hydraulic capacity should be determined by the more permanent works, such as conduits and forebays.

I see no impropriety in such interpretation of the Interior Department regulations, and no injustice, provided it is uniformly applied. In the Power Commission regulations, the context, from which "hydraulic capacity" is interpreted, is quite different from that of the Interior Department regulations. The operating charges are specifically based on "installed hydraulic capacity" up to the power capacity of the project (See Reg. 14, Sec. 1, A & B), and for projects accepted as completed when application is made, the "installed hydraulic capacity" must govern, if it is less than the capacity computed from water supply. Provision is made for readjustment of power capacity whenever justified by change in water supply, head, or (as in this case) limiting installed hydraulic capacity.

The reasons stated by the Geological Survey for adhering to a long-standing interpretation of the regulations, in which the Federal Power Commission sees no impropriety or injustice, are considered sufficient. I see no reason for the reduction of the charges upon equitable grounds. The request for reconsideration of the decision of March 9, 1929, is therefore denied.

CALIFORNIA DOOR COMPANY

Decided June 7, 1929

FOREST LIEU SELECTION—NATIONAL FORESTS—RELINQUISHMENT—QUITCLAIM DEED—STATUTES.

The purpose of the provision in section 1 of the act of September 22, 1922, authorizing the Commissioner of the General Land Office to issue a quit-

claim deed to an applicant who had relinquished base land to the United States and failed to receive other land in lieu thereof, was to remove the cloud on the title caused by the recorded conveyance to the United States, and the statute should be liberally construed to the end that the cloud be removed by disclaiming ownership on the part of the Government even though the applicant be unable to show clear title.

FOREST LIEU SELECTION—NATIONAL FORESTS—QUITCLAIM DEED—COURTS.

Where the Government is not prepared to declare the name of the rightful owner of the base land, the purpose of the act of September 22, 1922, will be served if the quitclaim deed authorized thereby be issued in the language of the statute, leaving to a court of competent jurisdiction the question of ownership after elimination of any possible claim on the part of the United States.

EDWARDS, *Assistant Secretary:*

The California Door Company, a corporation, has appealed from the decision of the General Land Office dated January 19, 1929, rejecting its application under the act of September 22, 1922 (42 Stat. 1017), for a quitclaim deed to the W. ½ SE. ¼ Sec. 4, T. 8 N., R. 19 W., S. B. M., California.

According to an abstract of title submitted by the applicant on September 20, 1927, it appears that the tract in question was patented to George Albitre on September 3, 1890. He reconveyed the land to the United States on April 15, 1902, with the view to a selection of other land in lieu thereof under the act of June 4, 1897 (30 Stat. 11, 36), the tract being at that time within the limits of a forest reservation. The deed whereby the land was reconveyed to the United States was recorded on the county records, but no selection in lieu thereof was ever presented. In reply to an inquiry in behalf of Albitre, the acting Assistant Commissioner of the General Land Office under date of July 5, 1917, stated in part as follows:

> The Government never having accepted the said deed, title did not pass from said Albitre who is still the owner of the land, and the United States disclaims ownership or jurisdiction over the land. If this letter is placed of record in the county in which the land lies, it is believed that it will remove any cloud from the title caused by the attempted reconveyance of the land to the United States.

That letter was recorded on November 6, 1917. Under date of August 29, 1917, Albitre deeded said tract by quitclaim to George W. Call which deed was recorded September 11, 1917. It is further shown that Call filed suit on May 24, 1918, in the Superior Court of California in and for the County of Ventura against Joe Barnes and Mary E. Barnes for possession of said tract. On December 27, 1918, judgment in that suit was rendered in favor of defendants on a finding that they had been in adverse possession thereof for more than five years prior to the commencement of the action against

them, and it was decreed that they were the owners thereof in fee simple. A mortgage on the land was given by Barnes and his wife on August 22, 1927, to secure a note for $200.

The abstract does not in any way connect the applicant with the title to this land. Its claim is based on powers of attorney given by Albitre to E. H. Kittredge on April 15, 1902, authorizing him to select other land in lieu of the tract above described and to sell the land so selected, and on a disclaimer of interest by the surviving executor of the last will and testament of E. H. Kittredge, deceased.

The said disclaimer is not sworn to nor verified by acknowledgment. It is stated therein that E. H. Kittredge purchased said tract from George Albitre on or about April 15, 1902, for a valuable consideration and that at his request the tract was reconveyed to the United States for the purpose of exchange under the act of June 4, 1897, and that in consideration of the purchase price paid to the said George Albitre, the said irrevocable powers of attorney were given to Kittredge to select other land in lieu thereof and to dispose of same; that in so acquiring the said land and other described tracts and conveying or causing them to be conveyed to the United States, Kittredge was acting for and on behalf of the California Door Company; that Kittredge died about the year 1916.

It appears that notice of the application for deed was served on Albitre and Call and no response has been made by either of them so far as shown by the record.

The said act of September 22, 1922, reads as follows:

> That where any person or persons in good faith relinquished to the United States lands in a national forest as a basis for a 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.

A report from the Forest Service shows that the tract in question does not lie within the boundaries of any national forest, and therefore the Forest Service has no knowledge of its present status.

The showing as above recited is not sufficient to warrant a finding that the applicant succeeded to the interest of Albitre in this land. But notice of the application appears to have been served upon Albitre and his transferee Call, and no objection to the issuance of deed under the act has been lodged with the department. The object of the act was to remove the cloud on the title caused by the recorded conveyance to the United States. This remedial measure should be liberally construed to the end that the said cloud may be removed by disclaiming ownership on the part of the Government, even though the applicant is unable to show clear title. In a case of this kind, where the Government is not prepared to declare the name of the owner, it is believed that the purpose of the act will be served if deed be given in the language of the statute, leaving to a court of competent jurisdiction the question of ownership after elimination of any possible claim on the part of the United States.

If this were an application under the exchange provisions of the act of September 22, 1922, it could not be accepted in any form because the United States would not be assured of a clear title. But the title to the base land is not offered in this case as basis for claim to other land. On the contrary, the Government is asked to relinquish whatever title may have vested in it by the said conveyance from Albitre.

In the case of *B. F. Felton* (52 L. D. 484), decided September 5, 1928, the department held that a quitclaim deed should not be denied under the act of September 22, 1922, on the ground that the base land had been sold for taxes at a time when the legal title was in the United States. The form in which the deed should issue in

that case was not considered, but it seems to have been assumed that it should issue in the name of Felton, the applicant to whom, according to the statement of facts, the base land had been conveyed by deed from one Armor who had made the original transfer to the United States.

In the [unreported] case of George H. Kester, decided by the department on petition October 30, 1928, following other decisions in the same case, it was held that powers of attorney to select lands under the former act of June 4, 1897, and to sell the lands selected, did not constitute a transfer of the base land so as to entitle the attorney in fact to a deed for the base land under the act of September 22, 1922. That view is adhered to in so far as it involves the right of the attorney in fact to receive a deed in his name. In dealing with such powers of attorney in connection with selections under the act of 1897 the department always took the position that any such selection should be made by or in behalf of the party who conveyed the base land. See case of *John K. McCornack* (32 L. D. 578). There is even greater reason for rejecting the contention that such powers effected a transfer of the base land to the attorney in fact.

Therefore, while the department is anxious to carry into effect the object of the remedial act of September 22, 1922, by removal of the cloud on the base land caused by the record of conveyance to the United States, it must decline to issue an instrument such as to indicate an adjudication that the party claiming the base land through the said powers of attorney acquired the legal title thereto. But, as above indicated, the showing is deemed sufficient to warrant the issuance of a deed in the name of "George Albitre, his heirs or assigns," and it is so ordered. This will relieve the claimants of any obstacle caused by the former conveyance to the United States if any further action should be taken in the courts concerning title to the premises.

The decision appealed from is modified acordingly.

Modified.

JERRY H. CONVERSE

Decided June 7, 1929

CONFIRMATION—CONTEST—STOCK-RAISING HOMESTEAD—STATUTES.

The contest or protest mentioned in the proviso to section 7 of the act of March 3, 1891, has reference to a proceeding initiated against the entry, and a mere communication of protest is not sufficient to stop the running of the statute.

COURT DECISIONS CITED AND APPLIED.

Cases of *Lane* v. *Hoglund* (244 U. S. 174), *Payne* v. *Newton* (255 U. S. 438), and *Stockley et al.* v. *United States* (260 U. S. 532), cited and applied.

EDWARDS, *Assistant Secretary:*

On July 19, 1928, Marie Magill Corby filed in the local land office at Sacramento, California, a contest against the stock-raising homestead entry of Jerry H. Converse, 020270, alleging that the entry covered certain prior valid mining claims, water rights, and mill sites belonging to her. Register's receipt on the final entry issued to Converse on July 15, 1926. The register entertained the contest, although holding that the affidavit of contest was defective and called for further showings. By decision of January 7, 1929, the commissioner dismissed the contest upon the ground that as more than two years had elapsed since the issuance of the receiver's receipt, the entry was confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095), and directed the issuance of final certificate to the entryman.

Contestant has appealed and invites attention to a telegraph message dated June 19, 1928, from her and addressed to the Commissioner of the General Land Office, reading as follows:

> I hereby protest against the entry of Jerry H. Converse for stock raising homestead entry number Sacramento naught two naught two seven naught N J A W on the ground that the entry covers mining claims owned by the undersigned and that the ground is mineral in character.

The message bears evidence it was received June 20, 1928.

The proviso to the statute above cited has reference "to a proceeding against the entry and not to some communication which at most is only suggestive of the propriety of such a proceeding and may never be made the basis of one." *Lane* v. *Hoglund* (244 U. S. 174, 178).

Under this statute it is the plain duty of the Secretary of the Interior to cause a patent to be issued when no contest or protest proceeding has been initiated and no order made in his department for the purpose of challenging the validity of the entry within two years from the issuance of the final receiver's receipt. *Lane* v. *Hoglund*, *supra; Payne* v. *Newton* (255 U. S. 438); *Stockley et al.* v. *United States* (260 U. S. 532).

The decision appealed from was right, and it must therefore be

Affirmed.

COAL LAND REGULATIONS—PARAGRAPHS 8 AND 22, CIRCULAR NO. 679, AS AMENDED, FURTHER AMENDED

[Circular No. 1193]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 11, 1929.

REGISTERS, UNITED STATES LAND OFFICES:

Paragraph 8 of the regulations of April 1, 1920, Circular No. 679 (47 L. D. 489), governing coal mining leases, permits, and licenses under the act of February 25, 1920 (41 Stat. 437), which paragraph was amended February 15, 1922, Circular No. 809 (48 L. D. 439), and March 13, 1924, Circular No. 922 (50 L. D. 320), is hereby further amended to read as follows:

8. *Minimum development.*—An actual *bona fide* expenditure for mine operation, development, or improvement purposes of the amount determined by the Secretary and stated in the lease offer hereinafter referred to is adopted as the minimum basis for granting leases, with the requirement that not less than one-third of the required investment shall be expended in development of the mine during the first year, and a like amount each year for the two 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 $10,000, the lessee shall furnish a bond, with approved corporate surety, conditioned upon compliance with the investment requirement and with the other terms of the lease. After the required investment has been made, a bond in the sum of $5,000, with approved corporate surety, conditioned upon compliance with the terms of the lease, may be substituted for the $10,000 bond.

In case of lease of a small area, where the investment to be made is $10,000 or less, the lessee shall furnish a bond, with approved corporate surety or with two qualified individual sureties, to cover both the investment and compliance with the other terms of the lease, such bond to be in half the amount of the investment to be made but in no case less than $1,000.

With bonds signed by individual sureties must be filed affidavits of justification by the sureties that each is worth, in real property not exempt from execution, double the sum specified in the undertaking, over and above his just debts and liabilities.

With such bonds must also be furnished 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. All bonds will be examined from time to time as to their sufficiency, and additional security will be required whenever deemed necessary.

Paragraph 22 of said regulations, which was amended March 13, 1924, Circular No. 922 (50 L. D. 320), is hereby further amended to read as follows:

(*g*) The applicant must furnish a bond with qualified corporate surety or with two qualified individual sureties (with evidence of qualification as provided in paragraph 8), the bond to be in the sum of $500 and conditioned upon compliance with the terms of the permit and against failure of the permittee to use reasonable precaution to prevent damage to the coal deposits or to leave the premises in a safe condition upon the termination of the permit. Bond in the sum of $1,500 will be required where the permit embraces land entered or patented with the coal reserved under the act of June 22, 1910 (36 Stat. 583), or where any part of the land is within a reclamation project. The bond may be filed with the application, which will expedite action thereon, or within 30 days after receipt of notice by the applicant that the permit will be granted when the bond is filed.

C. C. MOORE,
Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

SODIUM MINING LEASES AND PROSPECTING PERMITS—CIRCULAR NO. 699 (47 L. D. 529), SUPERSEDED

REGULATIONS

[Circular No. 1194]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 14, 1929.

REGISTERS, UNITED STATES LAND OFFICES:

SIRS: The act of Congress approved February 25, 1920, entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain" (41 Stat. 437), as amended by the act approved December 11, 1928 (45 Stat. 1019), authorizes the Secretary of the Interior, under such rules and regulations as he may prescribe, to issue prospecting permits, for a period not to exceed two years, for the exploration of the land described therein for sodium in any of the forms named in said act, and under authority thereof the following rules and regulations will govern the issuance of such permits:

1. *Qualifications of applicants.*—Permits may be issued to (*a*) citizens of the United States, (*b*) an association of such citizens, (*c*) or a corporation organized under the laws of any State or Territory thereof.

2. *Lands to which applicable.*—The permit thus issued may include not more than 2,560 acres of public lands of the United States in

reasonably compact form, by legal subdivisions if surveyed; if unsurveyed, by metes-and-bounds description.

3. *Rights under permit.*—The permit will confer upon the recipient the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium on the lands embraced therein. In the exercise of this right the permittee shall be authorized to remove from the premises only such material as may be necessary to experimental work and the demonstration of the existence of such deposits or any of them in commercial quantities.

4. *Reward for discovery.*—If the permittee within the two years specified shall discover valuable deposits of one or more of the forms of sodium as described in said act within the area covered by his permit, such discovery shall entitle him to a lease of any or all of the land embraced in the permit containing such deposits and chiefly valuable therefor, the area to be taken in compact form. The discovery of a valuable deposit of sodium under this permit shall be construed as the discovery of a deposit which yields commercial sodium in commercial quantities.

5. *Camp sites.*—In addition to land embraced in the permit the Secretary may, in his discretion, issue to the permittee, during the life of the permit, the exclusive right to use a tract of unoccupied, nonmineral public land, not exceeding 40 acres in area, for purposes connected with and necessary to the development of the deposits covered by the permit, subject to the payment of an annual rental of not less than 25 cents per acre.

6. *Form and contents of application.*—Applications for permits should be filed in the proper district land office, addressed to the Commissioner of the General Land Office, and after due notation promptly forwarded for his consideration. No specific form of application is required, but it should cover, in substance, the following points, namely:

(*a*) Applicant's name and address.

(*b*) Proof of citizenship of applicant; by affidavit of such fact, if native born; or, if naturalized, by the certificate thereof or affidavit as to time and place when issued; if a corporation, by certified copy of the articles of incorporation thereof, and showing as to residence and citizenship of its stockholders.

(*c*) A statement of all holdings by the applicant of permits and leases under the sodium provisions of this act and pending applications therefor and interests, directly or indirectly, held in such permits and leases.

(*d*) Description of the land for which the permit is desired, by legal subdivisions, if surveyed, and by metes and bounds, if unsurveyed, in which latter case, if deemed necessary, a survey sufficient more fully to identify and segregate the land may be required before

the permit is granted; also a statement whether the land is vacant and unclaimed.

(*e*) Reasons why the land is believed to offer a favorable field for prospecting.

(*f*) Proposed method of conducting exploratory operations, amount of capital available for such operations, and the diligence with which such explorations will be prosecuted.

(*g*) Statement of the applicant's experience in operations of this nature, together with references as to his character, reputation, and business standing.

7. On the receipt of the application, if found in compliance with the terms of the act, a permit will issue and the district land office be promptly notified thereof.

8. *Bonds.*—Where an application includes reserved deposits in lands theretofore entered or patented with reservation of sodium to the United States, pursuant to the act of July 17, 1914 (38 Stat. 509), or where the lands constitute a portion of a reclamation project, the applicant will be required prior to issuance of the permit to furnish a bond with qualified corporate surety in the sum of $1,000, or such other amount as may be fixed, conditioned against damage to the crops and improvements of the surface owner, or damage to the reclamation project or water supply thereof.

A bond with qualified corporate surety in the sum of $1,000, or such other amount as may be fixed, conditioned against failure of the permittee to comply with the provisions of paragraph 5 of the permit, may be required either before or after the permit is issued, where the conditions are such as to warrant requiring such bond.

9. *Form of permit.*—The form of permit issued under this act will be in substance as follows:

THE UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR.

SODIUM PROSPECTING PERMIT

Know all men by these presents, that the Secretary of the Interior, under and by virtue of the act of Congress entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," approved February 25, 1920, as amended by the act approved December 11, 1928, has granted and does hereby grant a permit to _____ of the exclusive right for a period of two years from date hereof to prospect the following-described lands _____ for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium, but for no other purpose, upon the express conditions as follows, to wit:

1. To begin the prospecting for said minerals within 90 days from date hereof and to diligently prosecute the exploration and experimental work during the period of such permit in the manner and extent as follows, to wit:

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2. To remove from such premises only such material as may be necessary to experimental work and the demonstration of the existence of such deposits in commercial quantities, to keep a record of all material removed, and to pay a royalty of 12½ per cent of the sale value at point of shipment of all material sold.

3. To afford all facility for inspection of such exploratory work on behalf of the Secretary of the Interior and to report fully when required all matters pertaining to the character, progress, and results of such exploratory work, and to that end to keep and maintain such accounts, logs, or other records as the Secretary of the Interior may require.

4. Not to assign or transfer the permit granted hereby without the express consent in writing of the Secretary of the Interior.

5. To carry out, at the expense of the permittee, all reasonable orders of the Secretary of the Interior or his authorized representatives (mining supervisors, United States Geological Survey) issued in pursuance of the operating regulations; to carry on all operations hereunder in accordance with approved methods and practice and in conformity with the operating regulations, to the satisfaction of said representatives; to take all reasonable precautions to prevent waste of or damage to mineral deposits, injury to life, health, or property, or economic waste; and to repair promptly, so far as possible, any damage to mineral deposits or mineral-bearing formations resulting from his operations.

6. To furnish such bond or bonds with qualified corporate surety as the Secretary of the Interior may at any time require, conditioned against the failure of the permittee to comply with the provisions of paragraph 5 hereof, and against damage to the crops and improvements of any surface owner entitled to such bond or damages to any reclamation project embracing any of the lands herein described.

Expressly reserving to the Secretary of the Interior the right to permit for joint or several use such easements or right of way upon, through, or in the lands covered hereby as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in said act; *and further reserving* the right and authority to cancel this instrument for failure of the permittee to exercise due diligence in the execution of the prospecting work in accordance with the terms hereof.

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

Dated_____

_____

Assistant Secretary of the Interior.

II

REGULATIONS PERTAINING TO LEASES FOR LANDS CONTAINING SODIUM

Section 24, as amended by the act of December 11, 1928 (45 Stat., 1019), authorizes the Secretary of the Interior to lease public lands containing valuable deposits of chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium. In order to carry out the provisions of the law relating to sodium leases, the following regulations are hereby prescribed:

1. *Qualifications of applicants.*—Applications for leases in the form as herein provided may be filed in the proper district land

office, addressed to the Commissioner of the General Land Office by citizens of the United States, associations of such citizens, or corporations organized under the laws of any State or Territory thereof; the qualifications of the applicant in this respect to be fully covered by the application.

2. *Area and description.*—Leases are authorized by the terms of the act for an area not exceeding 2,560 acres, but will be granted for such area as may be shown to the satisfaction of the Secretary of the Interior to contain valuable deposits of sodium, and will be limited to lands reasonably compact in form and described by legal subdivisions of the public land surveys, if surveyed, or if unsurveyed, by survey made at the expense of the applicant if the application for lease is otherwise found satisfactory.

3. *Action by register.*—Applications when filed with the district land office will be given the current serial number, promptly noted of record and transmitted to the Commissioner of the General Land Office, accompanied with a statement as to the status of the lands embraced therein. After the receipt of such applications, no applications, filings, or selections for the lands embraced therein will be permitted until so directed, except applications for leases under this act.

4. *Notice of application.*—When an application for a lease is filed in the district land office, notice thereof shall be published at the expense of the applicant in a general newspaper to be designated by the register, published in the county where the lands are situated, describing the lands embraced therein, stating the purpose of the application and that it will be submitted to the Commissioner of the General Land Office for action within 30 days from the date fixed therein, advising all adverse claimants or protestants that if they desire to object or protect any interest as against the application, prompt action to that end should be taken; and further advising the public that any other applications for lease of the same lands may be filed at any time during said period of publication without publication of notice of said second or further application, in which case applications so filed will be considered as prescribed in section 5 hereof. Proof of publication will be required prior to action by the commissioner on the application for lease.

5. *Action in General Land Office.*—On the receipt of the application or applications in the General Land Office the same will be considered, investigation made if deemed necessary, and submitted to the Secretary of the Interior with appropriate recommendation and report as to the proper action to be taken thereon, giving due consideration to the proposed effectual development of the alleged sodium deposits, and the amount of capital to be invested therein; the award of priority in case of conflicting applications to be determined

by the respective proposed investments, date of productive development proposed by the several applicants, and any equities that may exist in one or more of the applicants resulting from improvement or development under claims made under other laws.

In the award of lease of any lands or deposits hereunder the right is reserved to order a sale of the lease at public auction to the bidder offering the highest cash bonus for lease thereof on such terms as may be prescribed for lease of the lands, in which case any application for lease theretofore filed will give the applicant no priority or preference in securing a lease of the lands.

6. *Lease by permittee.*—The permittee has a preference right within the two years of his permit to file application to lease any or all of the land included in his permit, upon showing to the satisfaction of the Secretary of the Interior that he has discovered a valuable deposit of sodium thereon.

7. *Verity of statements.*—The verity of all representations contained in applications for leases shall be deemed an essential thereto, and a moving consideration to the award of a lease, if such action is taken; misrepresentations in this respect will be treated as a proper ground for proceedings in forfeiture, as provided in section 31 of the act.

8. *Lease a waiver of other claims.*—The acceptance of a lease under the provisions of this act will be construed as a waiver and relinquishment of all claims on the part of the applicant for any lands embraced within said lease and claimed under the provisions of any other law.

9. *Operations.*—Prospecting and mining operations under permits and leases will be governed by operating regulations, approved by the Secretary of the Interior. Administration of the operating regulations and supervision of operations on permits and leases will be under the direction of the Geological Survey. Before beginning operations permittees and lessees should consult with the mining supervisor of the Geological Survey for the area in which operations are to be conducted and obtain from him a copy of the operating regulations.

10. *Royalty and rentals.*—The rate of royalty will be fixed prior to the issuance of the lease, but in no case can the royalty rate be less than 2 per cent of the quantity or gross value of the output of the sodium compounds and other related products, at the point of shipment to market.

The rentals fixed by the act are to be paid annually in advance—25 cents per acre or fraction of an acre for the first calendar year or fraction thereof, 50 cents per acre for the second, third, fourth, and

fifth years, respectively, and $1 per acre for each year thereafter, such rental for any year being credited against royalties accruing for that year.

11. *Form and contents of application.*—Applications for leases must be under oath and should be filed in the proper district land office, addressed to the Commissioner of the General Land Office. No specific form of application is required, and no blanks will be furnished, but it should cover in substance the following points:

(*a*) Applicant's name and address.

(*b*) Proof of citizenship of applicant, by affidavit of such fact, if native born; if naturalized, by a certified copy of a certificate thereof in the form provided for use in public-land matters, unless such copy is on file. If the applicant is an association, each member thereof must show his qualifications as above stated; if a corporation, a certified copy of the articles of incorporation must be filed, together with a showing as to the residence and citizenship of its stockholders.

(*c*) A statement of all holdings by the applicant of permits and leases under the sodium provisions of this act, pending applications therefor, and interests directly or indirectly held in such permits and leases.

(*d*) Description of land for which the lease is desired, by legal subdivisions if surveyed, and by metes and bounds if unsurveyed, in which latter case the description should be connected to some corner of the public-land surveys where practicable, or to some permanent landmark. If the land is unsurveyed, the applicant, after he has been awarded the right to a lease, but before the issuance thereof, will be required to deposit with the district cadastral engineer of the public survey office of the district in which the land is located the estimated cost of making a survey of the lands, any balance remaining after the work is completed to be returned. This survey will be an extension of the public-land surveys over the tract applied for, the leased land to be conformed to legal subdivisions of such survey when made.

(*e*) Evidence that the land is valuable for its sodium content, except so much thereof as is necessary for the extraction and reduction of the leased minerals, with a statement as accurate as may be of the character and extent and mode of occurrence of the sodium deposits in the lands applied for.

(*f*) Proposed method, so far as determined, as to the process of mining and reduction to be adopted, the diligence with which such operations will be carried on, and the contemplated investment in reduction works and development, and the capital available therefor.

(*g*) The application shall be accompanied by a notice for publication, in duplicate, prepared for the signature of the register, in substantially the following form:

Serial No. _____.

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE AT _____,
_____, 19__.

NOTICE OF APPLICATION FOR SODIUM LEASE

Notice is hereby given that in pursuance of the act of Congress approved February 25, 1920, as amended by the act approved December 11, 1928, _____, whose post-office address is _____, has made application for sodium lease covering the following described lands: _____

Any and all persons claiming adversely any of the above-described lands are required to file their claims in this office on or before _____; otherwise their claims will be disregarded in the granting of such lease.

Other applications for lease of the described lands may be filed at any time prior to said date, in which case all applications so filed will be considered, as prescribed by section 5 of the Sodium Regulations.

_____, *Register.*

The register will fix the time within which adverse or conflicting claims may be filed at not less than 30 nor more than 40 days from first publication.

12. *Disposition of application.*—(*a*) The application will be given the current serial number by the register, will be noted on his records, and the notice for publication will be signed by him.

(*b*) One copy of the signed notice will be delivered to the applicant, who will cause the same to be published in a newspaper to be designated by the register, of general circulation, and best adapted to give the widest publicity in the county where the land is situated. If the land is in two or more counties, notice may be published in either. Notice must also be posted in the local land office during the period of publication.

(*c*) At the expiration of the period of publication the evidence of publication and posting in said office should be promptly transmitted by the register to the Commissioner of the General Land Office, with a statement of the status of the land involved as to conflicts, withdrawals, protests, and any other matters that may be necessary to determine the availability of the land or deposits therein for lease.

13. *Form of lease.*—

Serial No. _____.

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE AT _____.

SODIUM LEASE

Date—Parties.—This indenture of lease entered into in quintuplicate this _____ day of _____, 19__, by and between the

United States of America, acting in this behalf by the Secretary of the Interior, party of the first part, hereinafter called the lessor, and _____ _____, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress approved February 25, 1920 (41 Stat. 437), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," as amended by the act of December 11, 1928 (45 Stat. 1019), hereinafter referred to as the act, which is made a part hereof, witnesseth:

SECTION 1. *Purposes.*—That the lessor, in consideration of the rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to mine, remove, and dispose of all the sodium and associated minerals in, upon, or under the following-described tracts of land situated in the County of _____, State of _____, and more particularly described as follows, to-wit: _____ containing _____ acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, or reservoirs necessary to the full enjoyment hereof, together also with the right to use any timber, stone, or other materials on said land in connection with the operations to be conducted hereunder, for the period of 20 years, with preference right in the lessee to renew for successive periods of 10 years each upon such reasonable terms and conditions as the party of the first part may determine: *Provided,* That this lease shall extend only to or include any right or interest in the lands, or the minerals therein, reserved to the United States under any entry that may be allowed, or patent that may issue, or may have issued, with a reservation of minerals to the United States.

SEC. 2. In consideration of the foregoing the lessee hereby agrees:

(*a*) To invest in actual development, or improvements, upon the land leased, or for the benefit thereof, the sum of _____ dollars, of which sum not less than one-third shall be so expended during the first year succeeding the execution of this instrument and a like sum each of the two succeeding years, unless sooner expended; and submit annually, at the expiration of each year for the said period, an itemized statement of the amount and character of said expenditure during such year.

To furnish and maintain a bond with approved corporate surety in the sum of $5,000, conditioned upon the expenditure of the amount specified in (*a*) hereof, and upon compliance with the terms and provisions of this lease.

(*b*) *Royalty.*—To pay a royalty of _____ per cent of the quantity or gross value of the output of sodium compounds and other related products at the point of shipment to market. Such royalty shall be paid monthly, the royalty for each month to be paid during the next succeeding month to the register of the United States land district in which the land is situated, or if not in a land district, to the Commissioner of the General Land Office.

(*c*) *Rents.*—To pay the register of the district land office on all leases annually, in advance, beginning with the date of the execution of the lease, the following rentals: 25 cents per acre for the first calendar year or fraction thereof; 50 cents per acre for the second, third, fourth, and fifth calendar years, respectively; and $1 per acre for each and every calendar year thereafter during the continuance of the lease, such rental for any year to be credited against the royalties as they accrue for that year.

(*d*) *Taxes.*—To pay when due all taxes assessed and levied under the laws of the State upon the improvements, output of mines, or other rights, property, or assets of the lessee.

(e) *Monthly statements.*—To furnish monthly certified statements in detail in such form as may be prescribed by the lessor of the amount and value of output from the leasehold as a basis for determining amount of royalties. All books and accounts of the lessee shall be open at all times for the inspection by any duly authorized officer of the department. Falsification of such statements shall be a basis for action for the cancellation of the lease.

(f) *Plats and reports.*—To furnish annually a plat in the manner and form prescribed by the Secretary of the Interior showing all prospect and development work on the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon said leased lands, or on lands covered by permit issued under section 25 of the act, as well as any buildings, reduction works, or equipment, situated elsewhere and owned or operated in conjunction with, or as a part of, the operations conducted hereunder, accompanied by a report, in detail, as to the stockholders, business transacted, assets and liabilities of the lessee, together with a statement of the amount of sodium, and other minerals produced and secured by operations hereunder, and the cost of production thereof.

(g) *Sodium in solution.*—Where the minerals are taken from the earth in solution, such extraction shall not be within 500 feet of the outer boundaries of the land covered hereby without permission from the Secretary of the Interior, unless the adjoining lands have been patented or the title thereto otherwise vested in private owners.

(h) *Diligence—Prevention of waste—Health and safety of workmen.*—To develop and produce in commercial quantities, with reasonable diligence, the sodium and other mineral deposits susceptible of such production in the lands covered hereby; to carry out, at the expense of the lessee, all reasonable orders of the Secretary of the Interior, or, his authorized representatives (mining supervisors, United States Geological Survey), issued in pursuance of the operating regulations; to carry on all mining, reducing, refining, and other operations in accordance with approved methods and practice and in conformity with the operating regulations to the satisfaction of said representatives; to take all reasonable precaution to prevent damage to mineral deposits, injury to life, health, or property, or economic waste; to observe all State laws relative to the health and safety of workmen and employees; and to provide access at all times to mining and related productive operations for examination and inspection by authorized representatives of the lessor.

(i) *Forfeiture of lease.*—To deliver up to the lessor in good order and condition and subject to the provisions of section 5 hereof on the termination of this lease as a result of forfeiture thereof pursuant to section 31 of the act of February 25, 1920, the lands covered thereby, together with any land permission for the use of which has been granted under and pursuant to the provisions of section 25 of said act, including all fixtures, machinery, improvements, and appurtenances, together with such personal property situate on any of said lands as may be necessary or convenient for the continued operation to the full extent and capacity of the leased premises.

(k) *Reserved deposits.*—To comply with all statutory requirements where the surface of the lands embraced herein has been disposed of under laws reserving to the United States the mineral deposits therein.

(l) *Assignment.*—Not to assign or sublet, without the consent of the Secretary of the Interior, the premises covered hereby.

(m) *Excess holdings.*—To observe faithfully the provisions of section 27 of the act of February 25, 1920, as amended by the act of April 30, 1926, in so far as applicable hereto.

(*n*) *Minimum production.*—Beginning with the fourth full calendar year of the lease, except when operations are interrupted by strikes, the elements, or casualties not attributable to the lessee, to produce each year sodium or associated minerals from the premises covered hereby, to the gross value of not less than _____ dollars at the point of shipment, or to pay royalty on said gross value if the value of production be less.

SEC. 3. The lessor expressly reserves:

(*a*) *Easements and rights of way.*—The right to permit for joint or several use such easements or rights of way upon, through, or in the lands hereby leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act; and the treatment and shipment of the products thereof, by or under authority of the Government, its lessees or permittees, and for other public purposes.

(*b*) *Disposition of surface.*—The right to dispose of the surface of the land embraced herein under existing law, or laws hereinafter enacted, in so far as said surface is not necessary for use of the lessees in extracting and removing the deposits therein.

(*c*) *Monopoly and fair prices.*—Full power and authority to carry out and enforce all the provisions of section 30 of said act to insure the sale of the production of said leased lands to the United States and to the public at reasonable prices, to prevent monopoly, and to safeguard the public welfare.

SEC. 4. *Surrender and termination of lease.*—The lessee may, on consent of the Secretary of the Interior first had and obtained, surrender and terminate this lease at any time after the first four years of the term herein provided for, by giving six months' notice in writing to the lessor, and upon payment of all rents, royalties, and other debts due and payable to the lessor, and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary of the Interior that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mines or productive works or permanent improvements on the lands covered by such relinquishment.

SEC. 5. *Purchase of materials, etc., on termination of lease.*—That on the termination of this lease, by surrender or forfeiture, the lessor, his agent, licensee, or lessee, shall have the exclusive right, at the lessor's election, to purchase at any time within six months, at the appraised value thereof, any or all buildings, machinery, equipment, and tools, whether fixtures or personalty, placed by the lessee in or on the land leased hereunder, or on lands covered by permit under section 25 of the act, save and except equipment such as underground timbering, supports, shaft linings, and well casings, necessary for the preservation of the mine or other development works, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to be paid for said buildings, machinery, equipment, and tools to be purchased as aforesaid shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party thereto and the third by the two so designated), the valuation of the three or a majority of them to be conclusive; that pending such election to purchase within said period of six months none of said buildings or other property shall be removed from their normal position; that at any time within a period of 90 days after election by the lessor not to purchase or after expiration of said period of six months without election by the lessor, the lessee shall have the privilege of removing from the premises said buildings and other property except said underground equipment and structures as aforesaid.

SEC. 6. *Judicial proceedings in case of default.*—If the lessee shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at date hereof, and such default shall continue for 90 days after service of written notice thereof by the lessor, then the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease as provided in section 31 of the act. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

SEC. 7. *Heirs and successors in interest.*—It is further agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the repective parties hereto.

SEC. 8. *Unlawful interest.*—It is also further agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part of this lease, or derive any benefit that may arise therefrom, and the provisions of section 3641 of the Revised Statutes of the United States, (sec. 22, Title 41 U. S. C.), and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States, approved March 4, 1909 (35 Stat. 1109; secs. 204, 205, and 206 of Title 18, U. S. C.), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA,
By _____,
Assistant Secretary of the Interior, Lessor.
_____, *Lessee.*
_____, *Lessee.*
_____, *Lessee.*

Witnesses:
_____
_____
_____

III

USE PERMITS FOR CAMP SITE AND REFINING WORKS

Section 25 of the act of February 25, 1920, provides that in addition to areas which may be included in prospecting permits or leases, the Secretary of the Interior, in his discretion, may grant to a permittee or lessee of lands containing sodium deposits, and subject to the payment of an anuual rental of not less than 25 cents per acre, the exclusive right to use, during the life of the permit or lease, a tract of unoccupied nonmineral public land, not exceeding 40 acres in area for camp sites, refining works, and other purposes connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

In accordance with the provisions of this section the following regulations are prescribed, by which a permittee or lessee under the act may acquire the right therein granted.

1. Application may be made by the permittee or lessee identifying by serial number his permit or lease, setting forth in detail the specific reasons why it is necessary for the applicant to have the use of an additional tract of land for a camp site, refining works, or other purposes, connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

2. The application should contain a description of the lands by legal subdivisions, if surveyed, or, if not surveyed, by the approximate description thereof as it will appear when surveyed, for which the right of use is desired, together with a statement of the particular reasons why it is especially adapted thereto, either in point of location, topography, or otherwise, and that it is unoccupied, nonmineral land.

3. Use permits granted hereunder will be for indeterminate periods, dependent in that respect upon the existence of the permit or lease made the basis of the right authorized by section 25; upon the termination of such permit or lease all rights secured hereby will also cease and terminate, and such conditions shall be expressly recognized and stated in the application.

4. No blank forms of application will be furnished to applicants hereunder, but they will be guided by the foregoing as to the essential requirements of the application, which will be verified by the affidavit of the applicant.

5. The rental of not less than 25 cents per acre must be paid the register of the proper local land office as soon as applicant is notified of the allowance of the permit, and a like sum each year thereafter in advance.

IV

FORM OF USE PERMIT FOR CAMP SITE OR REFINING WORKS

The form of use permit issued under section 25 of the act of February 25, 1920, will be in substance as follows:

THE UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR.

USE PERMIT

Know all men by these presents, that the Secretary of the Interior, under and by virtue of section 25 of the act of Congress entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium, on the public domain," approved February 25, 1920, has granted to and does hereby grant to _____ the holder of _____, bearing serial

number _____, the exclusive right, so long as needed, used, and occupied, to use, during the life of the aforesaid _____, the following-described tract of land, to wit: _____, for a camp site, refining works, and other purposes connected with and necessary to the proper development and the use of the deposits covered by the aforesaid _____, all rights hereunder to cease and terminate upon the termination of the aforesaid _____, and conditioned upon the payment in advance of 25 cents per acre for the area covered hereby.

Dated, _____.

_____,
Secretary of the Interior.

V

REPEALING CLAUSE, ETC.

Repealing and saving clause.—Section 37 of the act provides that hereafter the deposits of coal, phosphate, sodium, oil, oil shale, and gas referred to and described in the act may be disposed of only in the manner provided by the act, "except as to valid claims existent at date of passage of this act, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under said laws, including discovery." As to sodium claims, those claims initiated under the preexisting law may go to patent which, at the date of the act, were valid mining locations, duly made and maintained as such on lands subject to such location at the date initiated.

Fees and commissions.—(*a*) For receiving and acting upon each application for prospecting permit or lease filed in the district land office in accordance with these regulations, there shall be paid by the applicant a fee of $2 for every 160 acres or fraction thereof in the application, such fee in no case to be less than $10, the same to be considered as earned when paid and to be credited to the compensation of the register within the limitations provided by law.

(*b*) Registers shall be entitled to a commission of 1 per cent of all moneys received in each register's office. Such commission will not be collected from the applicant or lessee in addition to the moneys otherwise provided to be paid.

It should be understood that the commissions herein provided for will not affect the disposition of the proceeds arising from operations under the act, as provided in section 35 thereof; also that such commissions will be credited on compensation of registers only to the extent of the limitation provided by law for maximum compensation of such officers.

C. C. MOORE,
Commissioner.

Approved, June 14, 1929.
JOS. M. DIXON,
Acting Secretary.

AN ACT TO PROMOTE THE MINING OF COAL, PHOSPHATE, OIL, OIL SHALE, GAS, AND SODIUM ON THE PUBLIC DOMAIN

(Public, No. 146, 41 Stat. 437)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the act known as the Appalachian forest act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further*, That citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this act.

[Section 1 of the act was amended by section 5 of the act of February 7, 1927 (44 Stat. 1057), to include deposits of potassium.]

[Secs. 2 to 22, inclusive, relate to coal, phosphate, oil and gas, oil shale, and Alaska oil proviso.]

SODIUM

SEC. 23 (as amended by act of December 11, 1928 (45 Stat. 1019)). That the Secretary of the Interior is hereby authorized, 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 chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium, in lands belonging to the United States for a period of not exceeding two years: *Provided*, That the area to be included in such a permit shall not exceed two thousand five hundred and sixty acres of land in reasonably compact form.

SEC. 24 (as amended by act of December 11, 1928 (45 Stat. 1019)). That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof have been discovered by the permittee within the area covered by his permit and that such 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 not less than 2 per centum of the quantity or gross value of the output of sodium compounds and other related products at the point of shipment to market; the lands in 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. Lands known to contain valuable deposits of one of the substances enumerated in section 23 hereof and not covered by permits or leases shall be subject to lease by the Secretary of the Interior through advertisement, com-

petitive 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. All leases under this section shall be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease, not less than 2 per centum of the quantity or gross value of the output of sodium compounds and other related products at the point of shipment to market, and the payment in advance of a rental of 25 cents per acre for the first calendar year or fraction thereof, 50 cents per acre for the second, third, fourth, and fifth calendar years, respectively; and $1 per acre per annum thereafter during the continuance of the lease, such rental for any one year to be credited against royalties accruing for that year. Leases under this section shall be for a period of twenty years, with preferential right in the lessee to renew for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior unless otherwise provided by law at the expiration of such period: *Provided*, That nothing in this act shall prohibit the mining and sale of sodium compounds under potassium leases issued pursuant to the acts of October 2, 1917 (Fortieth Statutes at Large, page 297), and February 7, 1927 (Forty-fourth Statutes at Large, page 1057), nor the mining and sale of potassium compounds as a by-product from sodium leases taken under this section: *Provided further*, That on application by any lessee the Secretary of the Interior is authorized to modify the rental and royalty provisions stipulated in any existing sodium lease to conform to the provisions of this section.

SEC. 25. That in addition to areas of such mineral land which may be included in any such prospecting permits or leases, the Secretary of the Interior, in his discretion, may grant to a permittee or lessee of lands containing sodium deposits, and subject to the payment of an annual rental of not less than 25 cents per acre, the exclusive right to use, during the life of the permit or lease, a tract of unoccupied nonmineral public land, not exceeding forty acres in area, for camp sites, refining works, and other purposes connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

GENERAL PROVISIONS APPLICABLE TO COAL, PHOSPHATE, SODIUM, OIL, OIL SHALE, GAS, AND POTASH LEASES

SEC. 26. That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit, and shall insert in every such permit issued under the provisions of this act appropriate provisions for its cancellation by him.

SEC. 27. (as amended by act of April 30, 1926 (44 Stat. 373)). 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 two thousand five hundred and sixty 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 seven thousand six hundred and eighty acres granted hereunder in any one State, and not more than two thousand five hundred and sixty 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, trusteed, 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 any wise 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.

SEC. 28. That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line operating a lease or purchasing gas or oil under the provisions of this act: *Provided further*, That no right of way shall hereafter be granted over said lands for the trans-

portation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

SEC. 29. That any permit, lease, occupation, or use permitted under this act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

SEC. 30. That no lease issued under the authority of this act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: *Provided*, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

SEC. 31. That any lease issued under the provisions of this act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this act, of the lease, or of the general regulations promulgated under this act and in force at the date of the lease; and the lease may provide for resort to

appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 32. 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: *Provided*, That nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

SEC. 33. That all statements, representations, or reports required by the Secretary of the Interior under this act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require.

SEC. 34. That the provisions of this act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, subject to such conditions as are or may hereafter be provided by such laws reserving such deposits.

SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress, known as the reclamation act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the provisions of this act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

SEC. 36. That all royalty accruing to the United States under any oil or gas lease or permit under this act on demand of the Secretary of the Interior shall be paid in oil or gas.

Upon granting any oil or gas lease under this act, and from time to time thereafter during said lease, the Secretary of the Interior shall, except whenever in his judgment it is desirable to retain the same for the use of the United States, offer for sale for such period as he may determine, upon notice and advertisement on sealed bids or at public auction, all royalty oil and gas accruing or reserved to the United States under such lease. Such advertisement and sale shall reserve to the Secretary of the Interior the right to reject all bids whenever within his judgment the interest of the United States demands; and in cases where no satisfactory bid is received or where the accepted bidder fails to complete the purchase, or where the Secretary of the Interior shall determine that it is unwise in the public interest to accept the offer of the

highest bidder, the Secretary of the Interior, within his discretion, may readvertise such royalty for sale, or sell at private sale at not less than the market price for such period, or accept the value thereof from the lessee: *Provided, however,* That pending the making of a permanent contract for the sale of any royalty, oil or gas as herein provided, the Secretary of the Interior may sell the current product at private sale, at not less than the market price: *And provided further,* That any royalty oil or gas may be sold at not less than the market price at private sale to any department or agency of the United States.

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), 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.

[Section 37 of the act was amended by section 5 of the act of February 7, 1927 (44 Stat., 1057), to include deposits of potassium.]

SEC. 38. That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States land offices on account of business transacted under the provisions of this act.

Approved, February 25, 1920.

RIGHTS OF AN ENTRYMAN WHOSE HOMESTEAD ENTRY IS PERFECTED BY HIS DESERTED WIFE

Instructions, June 17, 1929

HOMESTEAD ENTRY—DESERTED WIFE—SECOND ENTRY.

The homestead rights of an entryman whose entry is perfected by his deserted wife under the act of October 22, 1914, are exhausted to the extent of the area entered, but the fact that she was erroneously allowed to make an entry as additional to his deserted entry does not preclude him from making a second entry to the extent of his unexhausted right.

EDWARDS, *Assistant Secretary:*

You [Commissioner of the General Land Office] have informally requested instructions as to the further rights of entrymen in those cases where homestead entries are perfected by deserted wives under the provisions of the act of October 22, 1914 (38 Stat. 766).

Your inquiry arises in connection with a letter received from Mr. Jacob M. Wilson, of Newberg, Oregon, whose entry under the enlarged homestead act, embracing 200 acres, was perfected by his deserted wife.

You call attention to the fact that by decision of November 7, 1919 (unreported), on the appeal of *John R. Painter*, whose application to make a second homestead entry had been rejected, the department held—

With the appeal was filed an affidavit in which applicant set forth in detail the reasons for abandoning his wife and the prior entry, and the showing is such that the department is convinced that applicant is entitled to the benefits of the act of September 5, 1914 (38 Stat. 712).

Under date of March 7, 1929, the department instructed you that a homestead entry made by one Thomas E. Frazier and perfected by his deserted wife "remained his, and her rights under the homestead law were in no way affected thereby."

Prior to the instructions of March 7, 1929, the department considered the decision in the *Painter case*, and upon reconsideration adheres to the views expressed on the latter date.

The making of an entry under the homestead laws exhausts the maker's right to the extent of the area entered, and if he fails to perfect the entry he can be allowed to make a second entry only pursuant to an act of Congress restoring his right. The department knows of no law restoring the homestead right to a man whose entry was perfected by his deserted wife. You will treat the decision in the *Painter case* as overruled.

Wilson's right under the enlarged homestead act was exhausted as to 200 acres. He can be allowed to make a further entry under section 7 of the enlarged homestead act for 120 acres, or an entry under section 3 of the stock-raising homestead act for 440 acres, provided, of course, that the 200 acres originally entered and the area applied for shall be designated as stock-raising land. The fact that Mrs. Wilson was erroneously allowed to make an entry for 120 acres as additional to his deserted entry in no way affects his right.

KEATING GOLD MINING COMPANY, MONTANA POWER COMPANY, TRANSFEREE

Instructions, July 1, 1929

RIGHTS OF WAY—NATIONAL FORESTS—STATUTES.

The act of March 4, 1911, which authorized the granting of rights of way for a period not exceeding fifty years across and upon public lands, national forests and reservations of the United States, merely extended additional or larger grants without modifying or repealing the act of February 15, 1901, and the two acts should therefore be construed and applied in harmony.

WATER POWER—RIGHTS OF WAY—FEDERAL POWER COMMISSION—JURISDICTION—STATUTES.

With respect to rights of way over the public lands for power purposes, the acts of February 15, 1901, and March 4, 1911, were superseded by the Federal Power Act of June 10, 1920, and whenever a grant of a right of way made under either the act of 1901, or the act of 1911, shall have expired by limitation, continued use of the right of way can be authorized only under a license issued by the Federal Power Commission.

EDWARDS, *Assistant Secretary:*

With your letter of June 13, 1929, you [Director of Geological Survey] submit the papers in the case of Keating Gold Mining Company, Montana Power Company, transferee (Helena 03444), involving a right of way under the act of March 4, 1911 (36 Stat. 1235, 1253), across certain public lands in the State of Montana, which under the terms of the instrument expired on October 27, 1928.

You request instructions as to whether the grant may be renewed for a further term or whether the grantee should be called upon to apply for a license under the Federal Water Power Act of June 10, 1920 (41 Stat. 1063).

The scope and purpose of the Federal Water Power Act received the extensive and careful consideration of the Attorney General in an opinion dated May 3, 1921 (32 Ops. Atty. Gen. 525), rendered in connection with an inquiry submitted by the Secretary of Agriculture with respect to his authority to approve transfers or assignments of water power permits issued under the act of February 15, 1901 (31 Stat. 790). With respect to the Federal Water Power Act the Attorney General said—

> This Act provides a complete and detailed scheme for the development and operation under public control of all the water-power resources of the public domain, reserved and unreserved, and of all the navigable rivers under the jurisdiction of the United States. It creates a new body called the Federal Power Commission and places in its hands authority to investigate all the water-power resources of the United States and control their development in so far as the Government has jurisdiction either by reason of ownership of lands or control over waters; and it expressly repeals "all Acts or parts of Acts inconsistent with this Act." (41 Stat. 1077.)
>
> It seems clear that it was the purpose of Congress to bring under this Act all future power development within the jurisdiction of the United States and to concentrate in the hands of the Federal Power Commission all the administrative authority thereover which was in part previously distributed among the Secretaries of the Interior, Agriculture, and War. It is also clear that no further original permits, at least, were thereafter to be issued by the Secretaries. It is believed that practically all the permits issued by them are limited in time; and when they expire new licenses will be issued by the Commission and not by the Secretaries, respectively. It is therefore evident that the intent of the Act, as well as its necessary operation, is to ultimately bring under the new law and under the control of the Federal Power Commission all existing as well as all future developments.

The act of March 4, 1911, *supra*, under which the right of way here under consideration was granted, authorized the head of the department having jurisdiction to grant rights of way for a period not exceeding 50 years over, across and upon the public lands, national forests and reservations of the United States. It merely authorized additional or larger grants and did not modify or repeal

the act of February 15, 1901, and has been construed and applied in harmony with it. See Regulations (41 L. D. 454).

It appears to be well settled that this department no longer has authority to grant permits or easements under either the act of 1901 or the act of 1911 by reason of the passage of the Federal Water Power Act.

In the light of the foregoing, it seems clear that the department can neither grant a right of way to the company under the act of March 4, 1911, *supra*, for another period or extend the life of the original grant for an additional period. The interested company should, therefore, be advised that if it desires to continue the use of the right of way, appropriate application should be filed with the Federal Power Commission for a license under the Federal Water Power Act.

REGISTERS NOT AUTHORIZED TO TAKE TESTIMONY OF WITNESSES OUTSIDE OF THEIR LAND DISTRICTS

Instructions, July 17, 1929

REGISTERS—JURISDICTION.

Except where otherwise specifically provided by statute, the territorial and official jurisdiction of the register is limited by the boundaries of his land district and to those matters the care and administration of which are charged to him.

WITNESSES — TESTIMONY — OATHS — PRACTICE — REGISTERS — JURISDICTION — STATUTES.

Section 4 of the act of January 31, 1903, which authorizes the register to issue commissions to the officers designated therein to take depositions of witnesses in counties outside of his land district, does not empower him to administer oaths to such witnesses or to issue a commission to himself to take such depositions.

Instructions by Assistant Commissioner Havell of the General Land Office, Approved by Assistant Secretary Edwards, to the Register, Sacramento, California:

Reference is made to your [Register, Sacramento, California] letter of July 1, 1929, involving Sec. 36, T. 30 S., R. 23 E., M. D. M., within the exterior limits of naval reserve No. 1, California, now within your, but formerly within the Visalia land district, as to which the department, by decision dated May 8, 1925 (51 L. D. 141), ordered a hearing on the charges that the land is mineral in character containing valuable deposits of petroleum and natural gas, and 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. See also in this connection

the act of February 21, 1924 (43 Stat. 15), and Supreme Court opinion in the case of *West* v. *Standard Oil Co.* (278 U. S. 200).

In effect, and for the reasons set forth in your letter, you request that whatever depositions may be taken in the case, by any of the parties thereto, shall be taken before you instead of before United States commissioners, notaries public, judges or clerks of courts of record, or other officers authorized to administer oaths.

Under the act of January 31, 1903 (32 Stat. 790), and the regulations thereunder (32 L. D. 132), the attendance and testimony of witnesses at hearings in public land matters may be secured even though the witnesses, residing in the United States, may reside in counties outside the land district wherein the involved land is situated. Under section 4 of the act of 1903, depositions of witnesses taken thereunder may be taken before any United States commissioner, notary public, judge or clerk of a court of record. Provision is also made by Rules 20 to 32, both inclusive, of the Rules of Practice (51 L. D. 547, 552), as amended by Circular No. 1172 (52 L. D. 503), relating to Rule 28 of Practice for the taking of testimony by deposition.

In its decision ordering the hearing, the local land officers were directed to—

> 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 section 36, hereof, and by agreement of parties, or otherwise, determine upon a date for hearing, to be held at your office.

As you suggest, it may be that many depositions will be taken in this case, by the Government and by some or all of the other parties involved in the controversy, and that many of the depositions will be taken in counties within and without your land district.

Under the law (R. S. 2234), as amended by the act of January 27, 1898 (30 Stat. 234), the register—

> shall have charge of and attend to the sale of public and Indian lands within his district.

By section 2246, Revised Statutes, and act of March 3, 1925 (43 Stat. 1145), the register is authorized to 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.

Except where otherwise specifically provided by act of Congress, the territorial and official jurisdiction of the register is limited by the boundaries of his land district and to the matters, land and things therein the care and administration of which are charged to him. *Matthews* v. *Zane* (5 Cranch 92; 7 Wheat. 164). While the act of 1903 empowers the register to issue commissions to the officers

designated therein to take depositions of witnesses in counties outside of the register's land district, and in other counties, the register is not specifically enumerated among said designated officers, nor does the act confer upon him the power to administer oaths to witnesses whose testimony is taken outside of the land district, or to issue a commission to himself, or empower the Commissioner of the General Land Office or the Secretary of the Interior to issue such a commission to the register.

In the case of *United States* v. *George* (228 U. S. 14), it is stated (syllabus)—

An indictment for perjury under section 5392, Rev. Stat., cannot be based on an affidavit not authorized or required by any law of the United States.

Appreciating the excellent motive that prompted your request, I am of the opinion that if any depositions are taken in this case they must be taken in the manner and before the officers prescribed by the Rules of Practice and the act of January 31, 1903. The necessity and importance for thus proceeding in the premises at once becomes apparent when there is taken into consideration the proposition that if the testimony of the witnesses offered by way of deposition is taken before an officer not qualified to administer the oath to the witnesses, objection will probably be interposed to the competency of the testimony.

STATUS OF CERTAIN LANDS WITHDRAWN FOR ADDITION TO THE SEQUOIA NATIONAL PARK

Opinion, July 17, 1929

WITHDRAWAL—RESTORATIONS—NATIONAL PARKS.

Where a statute perpetuates a temporary withdrawal of public lands made under the act of June 25, 1910, as amended by the act of August 24, 1912, for classification and future legislation, only as to a portion of the lands withdrawn, the withdrawal remains in full force and effect as to those lands not covered by the statute until revoked by the President or by act of Congress.

WITHDRAWAL—WATER POWER—FEDERAL WATER POWER ACT—NATIONAL PARKS—STATUTES.

A withdrawal of public lands under the act of June 25, 1910, as amended by the act of August 24, 1912, for classification and in aid of future legislation having in view their inclusion within a national park, is not a reservation in the sense contemplated by the Federal Water Power Act.

FINNEY, *Solicitor:*

The acting director of the National Park Service has requested my opinion concerning the status of the area known as the Kings River Canyon Addition to Sequoia National Park, which was in-

cluded in temporary withdrawals by Executive orders, under authority of the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497). The following is quoted from the memorandum submitted:

> The lands in question are a part of the area included in temporary Executive withdrawals under dates of July 8, 1918 (No. 2906) and January 28, 1921 (No. 3395), the remainder of the lands included in these withdrawals and known as the Kern Canyon addition having been added to the park by legislative enactment under date of July 3, 1926 (44 Stat., Part 2, 818). It is now contended on the one hand that by reason of the legislative enactment under date of July 3, 1926, adding a portion of the withdrawn lands to the park, that the withdrawal under the above-mentioned Executive orders has been terminated and on the other hand it is contended that the withdrawal of the remaining portion of the area not dealt with by this legislation is still in force and effect, the same not having been specifically revoked by the President, or by an act of Congress, as required under the provisions of the act of June 25, 1910 (36 Stat. 847), pursuant to which the withdrawals were made.

Section 1 of the act of June 25, 1910, *supra*, under the provisions of which the withdrawal was made, reads as follows:

> That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Section 2 of the act, as amended by the act of August 24, 1912, *supra*, relates to exploration under the mining laws and other matters not material to the question presented.

Section 3 of the act reads as follows:

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

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

The Executive orders of July 8, 1918, and January 28, 1921, concern the same area, the first providing that the public lands in the described areas be temporarily withdrawn from settlement, location, sale or entry, subject to the provisions of the aforesaid acts in aid of pending legislation embodied in bills S. 2021 and H. R. 10929, 65th Congress, and the second that the described public lands in the State of California are hereby temporarily withdrawn subject to the conditions, provisions and limitations of said acts, for the purpose of classifying said lands and pending enactment of appropriate legislation for their proper disposition.

The act of July 3, 1926 (44 Stat. 818), entitled "An Act To revise the boundary of the Sequoia National Park, California," reads: "That the boundaries of the Sequoia National Park, California, are hereby changed as follows:" (description of boundaries is set forth and includes part of the area temporarily withdrawn under above orders). Continuing, the act reads:

> and all of those lands lying within the boundary line above described are hereby included in and made a part of the Roosevelt-Sequoia National Park; and all of those lands excluded from the present Sequoia National Park are hereby included in and made a part of the Sequoia National Forest, subject to all laws and regulations applicable to the national forests.

The lands excluded by the act and made a part of the Sequoia National Forest were lands formerly in the national park and were not involved in the above orders of withdrawal. It thus appears that in so far as the withdrawn lands are concerned, part were placed within the boundaries of Sequoia National Park by the act, but the remainder were not mentioned in the legislation.

The act of June 25, 1910, *supra*, expressly provides that:

> Such withdrawals or reservations shall remain in force until revoked by the President or by act of Congress.

The above orders of withdrawal, in so far as the Kings River Canyon area is concerned, have not been revoked by the President, nor by Congress, and it follows that the withdrawal of the area in question remains in force under the express terms of the statute.

A further memorandum has been submitted by the acting director together with a memorandum opinion rendered by the chief counsel of the Federal Power Commission in which the conclusion is reached that in view of the express provisions of the act under authority of which the reservation was made, the order is still in effect as to lands not included in the national park by the act of July 3, 1926, *supra*.

The chief counsel further expresses the opinion that the Executive order of January 28, 1921, is not operative to limit in any way the jurisdiction of the Federal Power Commission to issue preliminary permits or licenses affecting these lands. The following is quoted from the opinion:

> The status of the lands is that they are reserved for classification and since the Federal Water Power Act gives the Federal Power Commission jurisdiction over public lands and reservations, excepting only National Parks, which by the amendatory act of March 3, 1921, were excepted from the jurisdiction of the commission, I see no reason for questioning the jurisdiction of the Federal Power Commission as to the portion of lands included in the Executive order which were not made a part of the National Park by act of July 3, 1926. As to the portion of the lands included in the National Park, said act of July 3, 1926, provides:

"That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as herein constituted, shall be granted or made without specific authority of Congress."

I can not concur in the latter conclusion.

The first paragraph of the order of January 28, 1921, reads:

Under authority of the act of Congress approved June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), the following described public lands in the State of California are hereby temporarily withdrawn, subject to the conditions, provisions, and limitations of said acts, for the purpose of classifying said lands and pending enactment of appropriate legislation for their proper disposition.

It is plain that the withdrawal was made not only for the purpose of classifying the lands but also pending the enactment of appropriate legislation for their proper disposition. The conditions and limitations to which the withdrawn lands are subject are stated in section 2 of the act of June 25, 1910, as amended by the act of August 24, 1912, *supra*, as follows:

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

The plain purpose of the withdrawal was to relieve the lands from the operation of all laws under which any private rights therein might be acquired other than those prescribed by the acts of July 25, 1910 and August 24, 1912, *supra*, in order that legislation might be had for their proper disposition unaffected by any rights which might in the meantime be acquired and which might restrict

or interfere with their disposition by legislation having for its purpose the inclusion of the area within the national park as contemplated when the order was promulgated.

The Executive order did not create a reservation in the sense contemplated by the Federal Water Power Act which confers upon the commission jurisdiction to grant preliminary permits and licenses within certain reservations. It was the exercise of a power expressly delegated to the President to withdraw lands for the purposes specified in the act and for other public purposes.

It is plain that the granting of preliminary permits or licenses under the Federal Water Power Act would constitute a disposition of the lands not contemplated by the acts in question or the order of withdrawal and would be inconsistent with the purpose of securing the enactment of legislation for their proper disposition as contemplated when the order was made.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

STATE OF NEW MEXICO [1]

Decided July 19, 1929

SCHOOL LAND—WITHDRAWAL—SURVEY—VESTED RIGHTS—COMMISSIONER OF THE GENERAL LAND OFFICE—NEW MEXICO.

A withdrawal of designated school sections subsequent to survey in the field, but prior to the approval of the survey by the Commissioner of the General Land Office, prevents the vesting of title to those lands upon the approval of the survey thereof in the State of New Mexico under section 6 of the enabling act of June 20, 1910.

SCHOOL LAND—WITHDRAWAL—SURVEY—VESTED RIGHTS—RESTORATIONS—INDEMNITY—NEW MEXICO.

Where the vesting of title in the State to designated school sections in place is prevented by the withdrawal of the lands prior to the approval of the survey thereof by the Commissioner of the General Land Office, the State may await extinguishment of the reservation and restoration of the lands to the public domain, instead of taking land in lieu thereof during the withdrawal.

EDWARDS, *Assistant Secretary:*

This is an appeal by the State of New Mexico through its Commissioner of Public Lands from the decision of the Commissioner of the General Land Office dated November 3, 1928, dismissing its protest against applications for oil and gas prospecting permits filed by F. S. Donnell, Las Cruces 037185, covering all of Secs. 16, 32, and 36, T. 20 S., R. 29 E., N. M. P. M., and Elnora Donnell, Las

[1] See decision on rehearing, p. 681.

Cruces, 037186, covering Secs. 2 and 36, T. 21 S., R. 32 E., and all of Sec. 2, T. 22 S., R. 32 E., N. M. P. M.

The commissioner held that title to the lands in question had not vested in the State but still remains in the United States and his action rested upon that ground.

It appears from the record that the applications for oil and gas prospecting permits of F. S. and Elnora Donnell were on March 26, 1929, rejected by the department in accordance with the policy announced in the departmental order No. 337 of March 16, 1929 (52 L. D. 579), but the State's appeal directly raised the question as to the title to the lands and that question will be determined.

The Geological Survey has reported that the lands in controversy are not within the known geologic structure of a producing oil and gas field.

The records of the General Land Office show that these lands were withdrawn for stock driveway by departmental order of March 5, 1918; that the lands involved were surveyed in the field during May and June, 1916; that plat of survey of T. 20 S., R. 29 E., was approved March 26, 1919, and accepted by the commissioner on July 7, 1919, and that plat of survey of Ts. 21 and 22 S., R. 32 E., was approved March 22, 1919, and accepted by the commissioner on December 13, 1919.

Section 6 of the New Mexico enabling act of June 20, 1910 (36 Stat. 557, 561), reads in part as follows:

> That in addition to sections 16 and 36, heretofore reserved for the Territory of New Mexico, sections 2 and 32 in every township in said proposed State, not otherwise appropriated at the date of the passage of this act, are hereby granted to the said State for the support of common schools.

The department as well as the Federal courts have repeatedly held that a State's title to granted school sections does not take effect until the completion of the survey by acceptance of the plat thereof by the Commissioner of the General Land Office. In the case of *F. A. Hyde & Co.* (37 L. D. 164), the department held that (syllabus)—

> Title does not vest in the State of California under its school grant until the granted sections have been surveyed, and where subsequent to survey of a township in the field but prior to approval of the survey by the Commissioner of the General Land Office the township is withdrawn for forestry purposes, no rights to the school sections therein accrue to the State, and such sections do not therefore constitute a valid base for the selection of lieu lands under the exchange provisions of the act of June 4, 1897.

The Supreme Court in the case of *Heydenfeldt* v. *Daney Gold, etc. Co.* (93 U. S. 634, 640), involving lands granted to the State of Nevada for school purposes, used the following language:

* * * Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interests.

In *United States* v. *Morrison* (240 U. S. 192, 210), involving the provisions in the Federal statutes relating to sections 16 and 36 granted to the State of Oregon, it was held as follows:

We conclude that the State of Oregon did not take title to the land prior to the survey; and that until the sections were defined by survey and title had vested in the State, Congress was at liberty to dispose of the land, its obligation in that event being properly to compensate the State for whatever deficiencies resulted.

It is clear from the foregoing that title to the lands in question remains in the United States, subject, however, to the privilege of the State, accorded by section 2275, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat. 796), which allows the State to await extinguishment of the reservation and restoration of the land to the public domain and then taking the land in place, instead of taking land in lieu thereof during the period of withdrawal.

The decision of the Commissioner of the General Land Office is therefore

Affirmed.

STATE OF NEW MEXICO (ON REHEARING)

Decided September 11, 1929

SCHOOL LAND—SURVEY—VESTED RIGHTS—COMMISSIONER OF THE GENERAL LAND OFFICE—NEW MEXICO—STATUTES.

The grants of certain designated sections of public lands to the State of New Mexico for the support of common schools did not take effect until after the identification of those sections by survey, and such identification is not complete until the survey has been approved by the Commissioner of the General Land Office.

EDWARDS, *Assistant Secretary:*

By decision of July 19, 1929 (52 L. D. 679), in the above-entitled case, the department in affirmance of a decision by the Commissioner of the General Land Office, held that the State of New Mexico did not have title to certain sections 2, 16, 32, and 36 in New Mexico because said sections had been included in a stock driveway withdrawal prior to acceptance by the commissioner of the survey of

the townships involved, although survey in the field had been made prior to said withdrawal. It was also held that inasmuch as the State did not have title to the lands in question it had no valid ground of protest against oil and gas prospecting permits for said lands. On July 15, 1929, there was filed in the General Land Office a petition for intervention by one F. S. Blackmar who alleged that he had an oil and gas lease from the State for the lands involved. This petition was not assembled with the record until after the department's decision had been rendered. Under these circumstances the petition will be treated as a motion for rehearing.

In his brief in support of the motion Blackmar's attorney states:

> It is the contention of the intervener that the granting acts vested title in the Territory to the designated sections as a grant *in praesenti*, and not as a grant to take effect in future. Of course, if the grant did not take effect until the completion of the survey, then, under the authority of the *United States* v. *Morrison* (240 U. S. 192), being the case upon which the decision of the commissioner was based, there would be ground for the contention that the title of the State could be defeated by some intervening act of a public official performed under authority of law. However, the Morrison case construed a law which the Supreme Court held did not constitute a grant *in praesenti*, as the granting words were "shall be granted." The acts by which the school sections were granted to New Mexico contain the words "are hereby granted," and the Supreme Court of the United States has repeatedly held that these words constitute a grant *in praesenti*.

In its decision of July 19, 1929, the department cited the case of *Heydenfeldt* v. *Daney Gold, Etc. Co.* (93 U. S. 634), and quoted an excerpt therefrom, showing that although the Nevada enabling act provided "that sections numbered 16 and 36 in every township * * * shall be, and are hereby, granted to said State for the support of common schools," nevertheless the Supreme Court of the United States held that the grant did not take effect until after the school sections had been identified by survey. In the case of *United States* v. *Morrison*, *supra*, the court said, "We regard the decision in the Heydenfeldt case as establishing a definite rule of construction." Moreover, in the *Morrison case* it was held that a survey was incomplete until formally approved by the commissioner.

It is clear that the State of New Mexico has no title to the lands involved; that they are public lands over which the Land Department has jurisdiction.

The motion for rehearing is denied.

Motion denied.

OREGON AND CALIFORNIA RAILROAD AND COOS BAY WAGON ROAD GRANT LANDS—SALE OF TIMBER—CIRCULAR NO. 928 (50 L. D. 376), SUPERSEDED

INSTRUCTIONS

[Circular No. 1200]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 29, 1929.

REGISTERS, LAKEVIEW AND ROSEBURG, OREGON:

Under the provisions of the acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), certain lands, formerly within the Oregon and California Railroad and Coos Bay Wagon Road grants, revested in the United States. Section 2 of the act of June 9, 1916, provides for the classification of all lands revested thereunder into three classes, to wit, first, power-site lands; second, timber lands; and third, agricultural lands. Section 4 of said act of 1916, as amended by the act of May 17, 1928 (45 Stat. 597, Public No. 417), reads as follows:

The timber on lands of class two shall be sold for cash by the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, to citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States, or any State, Territory, or District thereof, at such times, in such quantities, and under such plan of public competitive bidding as in the judgment of the Secretary of the Interior may produce the best results: *Provided*, That said Secretary shall have the right to reject any bid where he has reason to believe that the price offered is inadequate, and may reoffer the timber until a satisfactory bid is received: *Provided further*, That upon application of a qualified purchaser that any legal subdivision shall be separately offered for sale such subdivision shall be separately offered before being included in any offer of a larger unit, if such application be filed within ninety days prior to such offer: *And provided further*, That said timber shall be sold as rapidly as reasonable prices can be secured therefor in a normal market.

The Secretary of the Interior shall as soon as the purchase price is fully paid by any person purchasing under the provisions of this section issue to such purchaser a patent conveying the timber and expressly reserving the land to the United States. The timber thus purchased may be cut and removed by the purchaser, his heirs or assigns, within such period and under such rules, regulations, and conditions as may be prescribed by the Secretary of the Interior, which period and conditions shall be designated in the patent; all rights under said patent shall cease and terminate at the expiration of said period: *Provided*, That in the event the timber is removed prior to the expiration of said period the Secretary of the Interior shall make due announcement thereof, whereupon all rights under the patent shall cease.

No timber shall be removed until the issuance of patent therefor. All timber sold under this Act shall be subject to the taxing power of the States apart from the land as soon as patents are issued as provided for herein.

Section 3 of the act of February 26, 1919, provides that all lands revested thereunder shall be classified and disposed of in the manner provided by the act of June 9, 1916, for the classification and disposition of the Oregon and California Railroad grant lands. The act of June 4, 1920 (41 Stat. 758), authorizes the sale of timber on lands of class one, or lands classified and withdrawn as chiefly valuable for water power sites. The act of May 17, 1928 (45 Stat. 597, Public No. 415), amending section 5 of the act of June 9, 1916, authorizes the sale of timber on lands of class three, or lands classified as agricultural, which at the time application to purchase the timber is filed have been subject to entry for a period of two years and are not embraced in an application or entry, which is held to include lands withdrawn as chiefly valuable for power sites but restored to entry subject to section 24 of the Federal Water Power Act. Pursuant to the provisions contained in said acts, the following instructions are issued to govern timber sales made hereafter on Oregon and California Railroad grant lands the title to which revested in the United States under the act of June 9, 1916, and to the Coos Bay Wagon Road grant lands reacquired under the act of February 26, 1919.

1. Prospective purchasers of timber on Oregon and California Railroad or Coos Bay Wagon Road grant land of classes one and/or two only should file application to purchase with the district cadastral engineer, 619 Post Office Building, Portland, Oregon. However any person desiring to purchase the timber on lands, the whole or any subdivision of which has been classified as of class three, or agricultural land, and restored to entry should file application to purchase, in duplicate, in the local land office of the district in which the land is located, either at Roseburg or Lakeview, Oregon. Proper blank forms to be used in applying to purchase timber and information with respect to the quality, quantity, and appraised price of timber on any given tract may be obtained from the district cadastral engineer upon request.

2. Upon receipt of an application to purchase timber involving agricultural lands, the register will note the date and hour of receipt thereof upon both the original and duplicate, the duplicate to be promptly forwarded to the district cadastral engineer with report as to the status of the land. Where application to make entry of such land is filed subsequent to the filing of the timber application, but prior to the date on which the timber is to be offered, you will allow the homestead application, if otherwise regular, noting thereon and advising the entryman that the same is subject to the right of the United States to sell the timber on the land pursuant to the timber application theretofore filed and subject also to the

right of the purchaser, his heirs or assigns, to cut and remove such timber at any time within ten years from date of issuance of the timber patent. Where application to make entry of such land is filed after the timber thereon has been offered for sale and a bid or bids received therefor you will allow the same, if otherwise regular, noting thereon and advising the entryman that the entry is subject to the right of the successful bidder for the timber on the land, his heirs or assigns, to cut and remove the same at any time within ten years from date of issuance of the timber patent. Where any homestead application has been allowed under either of the two conditions above mentioned such homestead entry, in the event of refusal for some reason to offer the timber for sale, or if offered and no bid is received or the bid received is rejected by the Secretary of the Interior, shall thereupon be free from the conditions and reservations theretofore imposed as to such timber the same as though no timber application had been filed.

3. Timber sales will be authorized in the General Land Office by one letter addressed to the Secretary of the Interior, in which all the facts appertaining to the proposed sale will be stated, accompanied by another letter, for the approval of the department, addressed to the register of the local land office where the sale is to be held, giving the names of the applicants and such other facts as may be deemed appropriate, together with authorizations to the newspapers for the publication of the notice prepared and submitted therewith for that purpose. Publication of said notice will then be made covering a period of not less than thirty (30) days in at least three newspapers of general circulation in the State of Oregon, one of which shall be in the county wherein the land is situated. If daily papers are designated the notice should be published in the Wednesday issue for five consecutive weeks; if weekly, in five consecutive issues; and if semiweekly, in either issue for five consecutive weeks. The notice as published shall announce the intention to offer at public sale, on a day and at an hour specified, at the district land office where the land is located, the timber described in such notice and shall also state the cruiser's estimate of the timber on each 40-acre tract, appraised price thereof, and the terms of sale.

4. The sale will be at public auction or outcry at the district land office of the district within which the land is situated and conducted by the register of such office.

5. The right of purchase at such sale will be limited, in accordance with the acts, to citizens of the United States, associations of such citizens and corporations organized under the laws of the United States, or any State, Territory, or district thereof. Native-born citizens should file an affidavit to that effect with the register when

making the first purchase and naturalized citizens will be required to furnish either the original certificate of naturalization, or duly certified or attested copy thereof, which copy, if of a certificate of naturalization issued after September 26, 1906, must be on the form prescribed by the Bureau of Naturalization. Corporations must furnish either the original certificate of the incorporation, a duly certified or attested copy thereof, or a certificate of the proper officer of the State, Territory, or district in which the company is incorporated, certifying as to the company's incorporation.

6. The register, before offering any portion of the timber advertised, shall advise all intending purchasers that the patent for the timber will contain a clause fixing the period within which said timber must be cut and removed by the purchaser, his heirs or assigns, at ten years and will also recite the conditions of a contract which the purchaser must enter into with the Government regarding the cutting of the timber and removal of the slash and other forest debris resulting therefrom. It should also be announced that no timber is to be removed until the issuance of a patent therefor. Before the sale inquiry should be made as to whether any person present desires the timber on any legal subdivision advertised to be separately offered before its inclusion in any offer of a larger unit, and if such request is made, the timber on the land thus designated may be so offered.

7. No timber shall be sold for less than the appraised price; and any bid may be rejected by the Secretary of the Interior, if it is by him deemed inadequate.

8. The timber shall be sold to the highest bidder, subject to the approval of the Secretary of the Interior. The entire purchase price bid must be paid on the date of sale to the register in cash, currency, or certified checks, when drawn in the manner authorized, who will issue his receipt therefor and hold the same as other "unearned moneys," until notified of the approval of the sale. Upon receipt of such notice the money shall be applied to the credit of the "Oregon and California Land Grant Fund," if for timber sold on Oregon and California Railroad land, or "The Coos Bay Wagon Road Grant Fund," if for timber sold on the Coos Bay Wagon Road grant. If for any reason a bid is rejected the register, upon receipt of notice of such rejection, will return the money.

9. Upon acceptance by the register of the local land office of a bid and before cash certificate can issue the successful bidder must, within thirty days from the date of such acceptance, 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. Said contract requires that the purchaser of the timber, his heirs or assigns, shall cut and remove the

timber and dispose of all brush, tops, lops, and other forest debris in accordance with the terms thereof and must be accompanied by a bond with proper sureties thereupon, the penalty of said bond to be of an amount to be determined in accordance with section 10 of these regulations. Blank forms to be used in executing the contract and bond as required herein have been approved by the Secretary of the Interior and copies of the same will be furnished either by the district cadastral engineer or the register of the local land office, at either Lakeview or Roseburg, Oregon. The bond shall be conditioned upon the faithful performance of the above referred to contract and upon the observance of the rules and regulations herein set forth. Bonds should be prepared and executed in accordance with the regulations of the department governing the same. Such regulations will be found with the bond.

Failure of the bidder whose bid has been accepted by the register to execute and file the required contract and bond within the specified time will be deemed sufficient ground for rejection of his bid and in the event of such failure the register will submit to the General Land Office a full report of all facts in the case, with such record evidence as may be pertinent thereto.

10. The amount of the bond required under the foregoing paragraph will be determined as follows: (*a*) $250 where the timber on a single subdivision of 40 acres, more or less is sold. (*b*) $150 for each legal subdivision where the timber on more than one but less than five legal subdivisions is sold to one party or company; provided, however, that where the total area of such subdivisions is 40 acres or less a bond in the sum of $250 will be required. (*c*) $125 for each legal subdivision where the timber on more than four legal subdivisions is sold to one party or company; provided, however, that where the total area of such subdivisions is not in excess of 160 acres but more than 40 acres, a bond in the sum of $600 will be required.

11. The register, upon the filing in his office of the required contract and bond, duly executed, will immediately issue cash certificate, if no objection be found, which certificate should give the name and address of the purchaser, proper description of the land, including area thereof, the serial and receipt numbers, amount of purchase money and commissions paid, the act under which the land revested and also the act of June 4, 1920 (41 Stat. 758), in the case of power site land and the act of May 17, 1928 (45 Stat. 597), in the case of restored agricultural land.

12. Persons who purchase timber at such sale shall be required to pay, in addition to the purchase price, a commission of one-fifth of one per centum thereof to be placed to the credit of the fund to which the purchase money is credited.

13. The register will forthwith transmit to the General Land Office, by special letter, the cash certificate issued, accompanied by the contract and bond, together with a report in duplicate of the proceedings under the sale, showing: (1) the land on which the timber was sold; (2) the names of the purchasers; and (3) the amounts received therefor, together with such other details as may seem properly appropriate thereto. As soon as the sale, contract, and bond have been approved by the department, the General Land Office will advise you of that fact, and patent will then be issued and transmitted in the usual way.

14. The register of public moneys will, in addition to his regular abstracts, render monthly, for each county, in case of timber sales therein, a separate abstract, in duplicate, Form 4–103, reporting thereon the date of the application of the money, the receipt and serial numbers, the name of the purchaser, together with a description of the land involved and the amount of purchase money, using more than one line, when necessary, for each item. Commissions should be shown on this abstract on a separate line. Notations showing the county in which the land is situated should also be made upon the receipt and papers pertaining to the sale.

15. Circulars of September 15, 1917 (46 L. D. 447), September 26, 1919 (47 L. D. 381), and April 14, 1924 (50 L. D. 376), are superseded hereby.

C. C. MOORE,
Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

RAYMOND BEAR HILL

Decided July 31, 1929

INDIAN LANDS—FORT PECK LANDS—ALLOTMENT—SELECTION—TRUST PATENT—OIL AND GAS LANDS—RESERVATIONS—STATUTES.

The provision in section 1 of the act of March 3, 1927, reserving to the Indians having tribal rights on the Fort Peck reservation in Montana the oil and gas in the tribal lands undisposed of on the date of that act, is inoperative as to allotment selections made prior to that date, but it is applicable to all such selections made subsequent thereto, the date of approval and issuance of trust patent being immaterial.

INDIAN LANDS—ALLOTMENT.

Congress has the power at any time before the right of an Indian allottee becomes vested in the land to change the manner of the allotment.

INDIAN LANDS—ALLOTMENT—VESTED RIGHTS—EQUITABLE TITLE.

The principle applicable to equitable rights of an entryman to public land is equally applicable to the equitable rights of a qualified Indian to an allotment of tribal or reservation land.

INDIAN LANDS—ALLOTMENT—SELECTION—RECORDS—PREFERENCE RIGHT—VESTED RIGHTS—EQUITABLE TITLE—PATENT.

The filing and recording of an allotment selection by a qualified Indian in the field, operates to segregate the land from other disposal, and confers upon him a preference right to the land as an allotment which, upon approval by the Land Department, vests in him an equitable right to a patent.

INDIAN LANDS—ALLOTMENT—SELECTION—RECORDS—WORDS AND PHRASES—STATUTES.

Land selected as an allotment by a qualified Indian is land "disposed of" within the contemplation of section 1 of the act of March 3, 1927, so long as the selection remains of record and no occasion arises to disturb it.

COURT AND DEPARTMENTAL DECISIONS DISTINGUISHED.

Cases of *United States* v. *Reynolds* (250 U. S. 104), and *Klamath Allotments* (38 L. D. 559), distinguished.

DIXON, *First Assistant Secretary:*

The department is in receipt of your [Commissioner of the General Land Office] request under date of May 29, 1929, for instructions relative to the form of trust patent to be issued to Raymond Bear Hill, an allottee on the Fort Peck Indian Reservation, Montana.

On schedule approved May 9, 1923, the following land was approved as an allotment to Raymond Bear Hill: E. ½ Sec. 27, T. 28 N., R. 46 E. (grazing); SE. ¼ NE. ¼ Sec. 28, T. 27 N., R. 46 E. (irrigable).

It was subsequently found that the grazing selection was in conflict with the homestead entry of Ragnwald E. Nygaard, whereupon the allotment was canceled by the department November 22, 1923, as to the grazing selection only, thus leaving the irrigable selection intact and subject to the approval of May 9, 1923. No trust patent was issued to this allottee but patents were issued June 28, 1923, to the other allottees on the schedule.

January 25, 1929, the superintendent transmitted a selection of grazing land for the allottee in lieu of the original selection which conflicted with the homestead entry, stating that the conflict did not affect the irrigable selection which he recommended be allowed to stand. The new selection of grazing land was approved by the department February 21, 1929, and your office was directed to issue to the allottee, Raymond Bear Hill, a trust patent of "applicable form" including the original irrigable selection, as follows:

NE. ¼ of Sec. 9 and SE. ¼ of Sec. 4, T. 30 N., R. 44 E., M. M., Montana, containing 320 acres (grazing); SE. ¼ NE. ¼ Sec. 28, T. 27 N., R. 46 E., M. M., Montana, containing 40 acres (irrigable).

The actual issuance of trust patent has been suspended by your office pending determination of the question as to whether the patent should contain an oil and gas reservation for the benefit of the tribe in accordance with section 1 of the act of March 3, 1927 (44 Stat. 1401), amending the Fort Peck allotment act of March 30, 1908 (35 Stat. 558), no reference having been made to said acts in letter to your office February 21, 1929. Section 1 of the act of March 3, 1927, reads in part as follows:

* * * is hereby amended by specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal lands undisposed of on the date of the approval of this Act.

As above stated, the original allotment selection of Raymond Bear Hill was approved on the May 9, 1923, schedule. The act of issuing a trust patent to the allottee would have been accomplished June 28, 1923, when the patents to the other Indians listed on the approved schedule were issued, had not the grazing selection of the allottee been in conflict with the homestead entry. However, a trust patent could have been issued on June 28, 1923, for the irrigable selection as the land was not involved in any conflict, but was and has been ever since approval of the schedule, subject to patenting to the allottee. Therefore, on May 9, 1923, the date the schedule was approved, this Indian was vested with an equitable right to a patent for the irrigable land and as this date was long prior to approval of the act of March 3, 1927, *supra*, the irrigable selection is not subject to the provisions of that act reserving the oil and gas for the benefit of the tribe. In other words, the irrigable land is not in the category of "tribal lands undisposed of on the date of approval of this act." On the other hand, as to the lieu grazing selection which was approved by the department February 21, 1929, or subsequent to the passage of the act of March 3, 1927, this tract is subject to section 1 of the act reserving the oil and gas, and the patent should issue accordingly. This selection having been made after the passage of the act, the land was, at the date of said act, in the category of undisposed of tribal lands. Such a case comes within the well-established rule that at any time before the right of an allottee becomes vested in the land, Congress has power to change the manner of its allotment. *Gritts* v. *Fisher* (224 U. S. 640); *Cherokee Intermarriage Cases* (203 U. S. 76); *Stephens* v. *Cherokee Nation* (174 U. S. 445); *Cherokee Nation* v. *Hitchcock* (187 U. S. 294); *Wallace* v. *Adams* (204 U. S. 415); *Chase* v. *United States* (261 Fed. 833).

In connection with the foregoing, it may be said generally that it is well settled that a claimant to public land who has done all that is required under the law to perfect his claim, acquires a right against

the Government and that his right to a legal title is to be determined as of that time. This rule is based on the theory that by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his and the Government holds it in trust for him, although no legal title passes until patent issues. *Wyoming* v. *United States* (255 U. S. 489); *Payne* v. *New Mexico* (255 U. S. 367); *Payne* v. *Central Pacific Railway Company* (255 U. S. 228). It would seem to follow that what is true concerning the equitable rights of an entryman to public land is also true as to the equitable rights of a qualified Indian to an allotment of tribal or reservation land. In fact, the position of a qualified Indian is stronger than that of an entryman of public land, for the reason that he has an inherent interest in the common property of his tribe.

A further request is made by you for construction of the expression, "the tribal lands undisposed of on the date of the approval of this act." (act of March 3, 1927, 44 Stat. 1401); and you ask: "Are they disposed of by allotment in the field or by the approval by the department, or by the issuance of trust patent."

The filing and recording of an allotment selection by a qualified Indian in the field, operates to segregate the land from other disposal. It gives him a prior or preference right to the land as an allotment which, upon approval by the department, vests in him an equitable right to a patent. By the filing and recording of the Indian selection, the land is necessarily withdrawn from the mass of tribal lands, and the right of the Indian becomes in its nature individual property. In this sense, that is, so long as the allotment selection remains of record and no occasion arises to disturb it, the land is "disposed of" in contemplation of the act of March 3, 1927, as it is no longer subject to other disposal or reservation. This right of the Indian is but further confirmed by approval of the department of his allotment selection, which vests in him the right to a trust patent, denominated by the courts to be an instrument or memorandum in writing to show that for a designated period the United States will hold the land allotted in trust for the benefit of the allottee or his heirs. *United States* v. *Rickert* (188 U. S. 432, 436). Under any other view than that expressed, the position would be that land taken by an Indian in allotment does not become "disposed of" or segregated from tribal status until issuance of final or fee patent, which could not have been the intention of the law, especially in view of numerous departmental and court decisions to the contrary. The rule applicable in this matter is the same as that applying to any qualified person who performs all conditions prescribed by law to secure entry of lands open thereto—the law considers that as done and virtually views the entry made. *Hy-Yu-Tse-Milkin* v. *Smith*

(194 U. S. 401). The personal property or private rights of Indians to particular lands are within the protection guaranteed by the Constitution. *Choate* v. *Trapp* (224 U. S. 665). All laws affecting or claiming to affect the rights of Indians are liberally construed in their favor.

As to whether tribal lands are disposed of "by the approval by the department or by the issuance of trust patent," it is well to refer to the case of *United States* v. *Reynolds* (250 U. S. 104), in which was approved the ruling of the department in the case of *Klamath Allotments* (38 L. D. 559), wherein it was held that the trust period under a patent issued pursuant to a selection by an Indian allottee begins to run from the issuance of the patent and not from the approval of the allotment. While not directly in point here, these cases may possibly contain an intimation at least that the vesting of rights to lands does not take place upon the making of a selection or the issuance of a certificate of selection by an agent in the field. The question primarily involved in the case of Klamath Allotments was as to the form of trust patent to be issued on a schedule of allotments just as in the present instance. The general allotment act of February 8, 1887 (24 Stat. 388), was amended by the act of May 8, 1906 (34 Stat. 182). A different form of patent is required for allotments made under the act of 1887 before passage of the amendatory act of 1906, and those made thereafter. This rendered it necessary under the situation to determine the question as to when the trust period under a patent begins to run. It was also necessary in the case of Klamath Allotments to determine the meaning of the language in the act of 1887—"to whom allotments have been *made*"—and similar language found in the amendatory act of 1906. It was held that an allotment is not "made" within the meaning of the last paragraph of the act of May 8, 1906, and for the purpose of issuing first or trust patents thereunder, until the issuance of such patents. But, obviously, what was held in either of those connections does not mean that the Indian had acquired no rights by the filing and recording of his allotment selection prior to approval thereof by the department or the issuance of trust patent, sufficient to fully justify holding that the status of the land is thereby changed from tribal to individual or private property, and consequently otherwise "disposed of" in contemplation of section 1 of the act of March 3, 1927. The *Klamath Allotments* and *Reynolds cases* do not directly cover this phase of the situation now here.

OTTO. F. VERCH

Decided August 5, 1929

HOMESTEAD ENTRY—APPLICATION.

The pendency of an application to make homestead entry does not preclude like applications by others for the same land, and if the first application be withdrawn or rejected for any reason other pending applications will receive recognition in the order of time that they were filed.

EDWARDS, *Assistant Secretary*:

At the Phoenix, Arizona, land office on November 21, 1928, Otto F. Verch applied to make homestead entry for NW. ¼ SE. ¼ Sec. 34, T. 12 S., R. 12 E., G. & S. R. M. The register suspended action on the application to await disposition of two prior applications, one (064009) by Sarah G. Marrin and the other (064141) by George H. Lieben. However, with Verch's application was filed a withdrawal of the Marrin application, whereupon the register allowed the Lieben application and rejected the application of Verch. On appeal, the Commissioner of the General Land Office, by decision dated March 15, 1929, held that as Verch's application was the first one filed after the withdrawal of the Marrin application, the application of Lieben had been erroneously allowed. However, by decision dated April 13, 1929, the commissioner vacated his decision of March 15, 1929, and held that Verch's application had been properly rejected. An appeal has been filed.

In his appeal Verch contends that the withdrawal of the Marrin application was filed for his benefit, and that the commissioner's decision of March 15, 1929, was correct and should not have been vacated.

It is well settled by a practice extending over many years that the pendency of an application to make homestead entry does not preclude like applications by others for the same land. In such cases, if the first application is withdrawn or rejected for any reason, the first junior application is then taken up for consideration, and, if allowed, all applications filed subsequent thereto must necessarily be rejected.

Withdrawals of applications, like relinquishments of entries, run only to the United States, and when filed operate to clear the record of applications to which they relate. They are not the proper objects of barter and sale and speculation, and such traffic will not be encouraged by the Land Department. *Judson Reno* (35 L. D. 254).

The fact that Verch procured the withdrawal of the Marrin application did not confer on him any rights. Lieben's application was pending when Marrin's withdrawal was filed, and was allowed pursuant to the rule that he who is first in time is first in right.

The decision appealed from is

Affirmed.

NON-INDIAN CLAIMS WITHIN INDIAN PUEBLOS IN NEW MEXICO

Opinion, August 7, 1929

INDIAN LANDS—PUEBLO GRANTS—NEW MEXICO—PUEBLO LANDS BOARD—PURCHASE.

The reports and findings of the Pueblo Lands Board created by the act of June 7, 1924, to settle and adjust conflicting claims and finally set at rest titles within the Indian pueblo grants in New Mexico, do not constitute an adjudication or final determination of title, and purchases of these lands may not be safely made unless and until the rights of claimants have become fixed in the manner provided by statute.

INDIAN LANDS—PUEBLO GRANTS—NEW MEXICO—NON-INDIAN CLAIMANTS—EVIDENCE OF TITLE—PURCHASE.

Where the rights of non-Indian claimants to lands within Indian pueblo grants in New Mexico have become fixed in the manner provided by the act of June 7, 1924, that is, either by the uncontested action of the Pueblo Lands Board, or by determination of title by a court of competent jurisdiction in an independent suit instituted by the Indians, or a like determination by the department of any contest instituted, heard, and decided in the manner provided for in the statute, the showing of title to be required in connection with the purchase of such lands by the Government for the Indians need not go beyond the proceedings in which the rights of the claimants were so fixed and determined.

INDIAN LANDS—PUEBLO GRANTS—NEW MEXICO—NON-INDIAN CLAIMANTS—PURCHASE—DEEDS—PATENT.

The conveyance of lands within the Indian pueblo grants in New Mexico purchased from non-Indian claimants under the authority of the act of June 7, 1924, should run to the respective pueblos direct to be held in the same manner and subject to the same tenure as other lands included in the original Pueblo grants, that is in communal fee simple ownership.

INDIAN LANDS—PUEBLO GRANTS—NEW MEXICO—NON-INDIAN CLAIMANTS—PATENT—RELINQUISHMENT—EVIDENCE OF TITLE.

The patents or certificates of title issued to non-Indian claimants pursuant to section 13 of the act of June 7, 1924, operate not only as a relinquishment by the United States and the Indians, but also constitute official declarations by the proper officers of the Government that all requirements preliminary to their issue have been complied with.

FINNEY, *Solicitor:*

At the suggestion of the Commissioner of Indian Affairs you [Secretary of the Interior] have requested my opinion as to what showing of title should be required in connection with proposed purchases of certain lands claimed by non-Indians within the exterior boundaries of grants made to the various Indian pueblos in New Mexico and whether or not the conveyance to be taken should run to the United States in trust for the Indians or direct to the respective pueblos.

In the determination of these questions a statement of the facts and conditions leading up to and inducing the purchases under con-

sideration may prove of assistance. The territory in which the pueblos are found and the allegiance of its inhabitants were transferred to the United States from Mexico in virtue of the Treaty of Guadalupe de Hidalgo under date of February 2, 1848 (9 Stat. 922). Within the domain so acquired were many individuals and communities claiming title to given areas under grants made during the period of Spanish sovereignty. Among such claimants were some 20 of the Indian pueblos claiming as villages or communities rather than as individuals. The lands claimed by these several pueblos vary in quantity but usually embrace about 17,000 acres. Their title, which was a communal fee, was recognized by the Mexican Government and after acquisition of this territory by the United States such title was confirmed by Congress in the act of December 22, 1858 (11 Stat. 374), pursuant to which communal fee simple patents issued to the respective pueblos for the lands claimed by them. Within the limits of the areas so granted and confirmed to the pueblos, however, many persons other than Indians have set up claims of title to specific tracts of land adverse to the pueblos, founded in some instances upon occupation under color of title antedating the acquisition of this domain by the United States, in other instances upon purchases from the governors or other tribal officers, or from individual Indians, and in still other instances the claims of title rest upon adverse possession under the local statutes of limitation. While it is not the purpose here to discuss the legal aspects of these conflicting claims, it may be pointed out that the claims adverse to the pueblos were strengthened somewhat by the earlier decisions of the courts indicating that the Pueblos in matters affecting their titles were under the jurisdiction of the local tribunals. See in this connection *United States* v. *Joseph* (94 U. S. 614), holding that the pueblos had a complete title to their lands and were not Indian tribes within the meaning of the acts of Congress prohibiting settlement on lands belonging, secured, or granted by treaty with the United States to any Indian tribe; also *United States* v. *Conway* (175 U. S. 60), holding that the act of 1858, *supra*, operated to release to the Indians all the title of the United States to the land covered by it as effectually as if it contained in terms a grant *de novo*. The claims of these non-Indians were, however, rendered less secure by the later case of *United States* v. *Sandoval* (231 U. S. 28), wherein the Supreme Court, receding to some extent from its former rulings, held that the Pueblo Indians were wards of the Government and entitled to its protection to the same extent as any other Indian community. The complicated and unsettled condition of land titles thus existing in these areas has been a source of much concern, not only to the pueblos and the adverse claimants,

but to Congress as well, and led to the passage by that body of the act of June 7, 1924 (43 Stat. 636), the primary purpose of which was to settle and adjust these conflicting claims and finally set at rest titles within the Indian pueblo grants.

Section 1 of that act provides for the institution of suits to quiet title by the Attorney General after the "Pueblo Lands Board" created by section 2 thereof has completed its investigations and made its reports and findings as to each pueblo, in which suits the statute of limitations, as set up in section 4, might be pleaded by or against the Indians. The board consisted of the Attorney General, the Secretary of the Interior, and a third member appointed by the President, each of whom might act through an assistant in all hearings, investigations, and deliberations in New Mexico. The functions of the board, as defined by the statutes, resemble closely those of a master in chancery in investigating, hearing, and determining the rights of respective parties among these pueblos. The reports and findings of the board were confined, broadly speaking, to two classes of cases, *first*, those where the board finds the title of the Indians not to have been extinguished, and with this class we are not here concerned, and *second*, those where valid title is found to exist in non-Indian claimants. As to this latter class the statute provides (section 8) that the reports of the board shall include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians. The Pueblo Lands Board, it appears, has completed its investigations and submitted its reports and findings on a number of pueblos, and in several instances recommendation was made that certain tracts, title to which was found to rest in non-Indians, be purchased for the benefit of the Indians. Pursuant thereto the matter was presented to Congress and appropriations to that end were contained in the Interior Department appropriation act of March 4, 1929 (45 Stat. 1562, 1569), and the second deficiency act of the same date (45 Stat. 1623, 1638). It is in connection with purchases under these appropriations that the questions presented in the present inquiry have arisen and the Commissioner of Indian Affairs in presenting them expresses doubt as to whether the showing of title required to be made should date from the report and findings of the Pueblo Lands Board or from the dates of the patents or certificates of title to be issued to non-Indian claimants under section 13 of the statute hereafter referred to, or whether it will be necessary to obtain abstracts of title containing a complete history of the title from its origin to the date of purchase. The commissioner also suggests:

> This office has under immediate consideration a case involving the purchase of three tracts of land within the San Felipe Pueblo, the report of the board

thereon being dated May 14, 1928. In the event that patents or certificates of title are required before purchases can be completed, apparently the patents or certificates in these cases could not be applied for prior to May 14, 1930. This condition applies to other purchases now in progress, which purchases probably could not be completed with the funds now available because of the lack of time and would have to be abandoned if it is necessary to await the issuance of patents or certificates by the Government to individual owners.

The solution of these problems is to be found in section 13 of the statute (act of June 7, 1924) which reads—

That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico, showing the lands to which the Indian title has been extinguished as in said report set out, but excluding therefrom lands claimed by or for the Indians in court proceedings then pending, and copies of said plat and field notes certified by the surveyor general of New Mexico as true and correct copies shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and interest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same. And the Secretary of the Interior within thirty days after the Indians' right to bring independent suits under this Act shall have expired, shall cause notice to be published in some newspaper or newspapers of general circulation issued, if any there be, in the county wherein lie such lands claimed by non-Indian claimants, respectively, or wherein some part of such lands are situated, otherwise in some newspaper or newspapers of general circulation published nearest to such lands, once a week for five consecutive weeks, setting forth as nearly as may be the names of such non-Indian claimants of land holdings not claimed by or for the Indians as herein provided, with a description of such several holdings, as shown by a survey of Pueblo Indian lands heretofore made under the direction of the Secretary of the Interior and commonly known as the "Joy Survey," or as may be otherwise shown or defined by authority of the Secretary of the Interior, and requiring that any person or persons claiming such described parcel or parcels of land or any part thereof, adversely to the apparent claimant or claimants so named as aforesaid, or their heirs or assigns, shall, on or before the thirtieth day after the last publication of such notice, file his or their adverse claim in the United States Land Office in the land district wherein such parcel or parcels of land are situate, in the nature of a contest, stating the character and basis of such adverse claim, and notice of such contest shall be served upon the claimant or claimants named in the said notice, in the same manner as in cases of contest of homestead entries. If no such contest is instituted as aforesaid, the Secretary of the Interior shall issue to the claimant or claimants, or their heirs or assigns, a patent or other certificate of title for the parcel or parcels of land so described in said notice; but if a contest be filed it shall proceed and be heard and decided as contests of homestead entries are heard and decided under the rules and regulations of the General Land Office pertinent thereto. Upon such contest either party may claim the benefit

of the provisions of section 4 of this Act to the same extent as if he were a party to a suit to quiet title brought under the provisions of this Act, and the successful party shall receive a patent or certificate of title for the land as to which he is successful in such proceedings. Any patent or certificate of title issued under the provisions of this Act shall have the effect only of a relinquishment by the United States of America and the said Indians.

If after such notice more than one person or group of persons united in interest makes claim in such land office adverse to the claimant or claimants named in the said notice, or to any other person or group of persons who may have filed such contest, each contestant shall be required to set forth the basis and nature of his respective claim, and thereupon the said claims shall be heard and decided as upon an original contest or intervention.

And in all cases any person or persons whose right to a given parcel or parcels of land has become fixed either by the action of the said board or the said court or in such contest may apply to the Commissioner of the General Land Office for a patent or certificate of title and receive the same without cost or charge.

Analyzing the foregoing provision of law we find that patents or certificates of title are to issue to the non-Indian claimants but only after certain things mandatorily required by the statute have been done by the Secretary of the Interior. Plats and field notes showing the lands to which the Indian title has been extinguished must be filed in the office of the surveyor general of New Mexico within two years after the filing of the reports and findings of the board and at any time within that two-year period the findings of the board are subject to attack in independent suits instituted by the Indians. (See section 3, subsection b, paragraph 2.) Further, within 30 days after the Indians' right to maintain independent suits has expired notice must be published in newspapers of general circulation for five consecutive weeks, setting forth the names of the non-Indian claimants with description of their holdings as shown by what is termed the "Joy Survey," or as may be otherwise shown or defined by the Secretary of the Interior, requiring any person or persons claiming adversely to those in whom the board found title to exist to file his or their adverse claim in the nature of a contest in the United States land office on or before the 30th day after the last publication of the notice. If no contest be filed, patent or certificate of title will issue to the claimant, but if a contest be filed it is to be heard and decided as contests of homestead entries are heard and decided, the successful party to receive a patent or certificate of title.

These statutory provisions make it plain that the reports and findings of the Pueblo Lands Board, though no doubt entitled to great weight in the consideration of questions of title to the lands covered thereby, do not constitute an adjudication or final determination of the title, and that good merchantable title can not be said to rest in the claimant unless and until his rights to the particular parcel or parcels of land claimed by him have become fixed in the manner pro-

vided by the statute, i. e., either by the uncontested action of the board, or by determination of title by a court of competent jurisdiction in an independent suit instituted by the Indians, or a like determination by the department of any contest instituted, heard and decided in the manner above indicated. Manifestly, therefore, no purchases of these lands may safely be made unless and until the rights of the claimant have been fixed or determined in some one of the ways just mentioned.

As to the showing of title required in connection with such purchases, it is to be borne in mind that we are here dealing with titles originally defective but since cured under the operation of the statute of limitations set up in section 4 of the statute, that is to say, in those cases where the board finds that the Indian title has been extinguished and that good title rests in the adverse claimant, such finding will usually be founded upon the premise that the claimant and his predecessors in interest have been in the occupation of the land for the period specified coupled with other circumstances set forth in the statute and, hence, are entitled to plead the same in bar of any adverse claim of title asserted on behalf of the Indians or others. Title of this kind, of course, does not rest upon documentary evidence but upon matters *dehors* the record which are incapable of affirmative showing in an abstract of title and must from the nature of the title itself be disclosed by evidence *aliunde*. Aside from the fact that evidence of this kind is more or less unsatisfactory, the need for requiring the same in the cases under consideration where the rights of the claimant have become fixed in the manner provided for in the statute is not apparent, and the showing of title to be required in connection with a purchase from such claimant need not, in my opinion, go back of the proceedings in which the rights of the claimant were so fixed and determined.

It is highly desirable, however, that the determination of the rights of the claimant in accordance with the requirements of the statute be placed of record and shown in the abstract, and to this end the suggestion is made that it would be well to defer the purchase of any of these lands until patent or certificate of title has issued to the claimant. This suggestion is made for the reason that such patent or certificate of title not only operates, when issued, as a relinquishment by the United States and the Indians (see section 13 above) but, in addition, such instruments, under the rule laid down by the Supreme Court of the United States in *Smelting Co.* v. *Kemp* (104 U. S. 636, 640), will constitute official declarations by the proper officers of the Government that all requirements preliminary to their issue have been complied with. In such event, of course, the abstract of title to be furnished in connection with purchases from

the patentees or certificate holders need cover only the period from the date of the patent or certificate to the time of purchase.

With regard to the character of title to be conveyed, that is, whether the conveyance should run to the United States in trust for the Indians or direct to the respective pueblos, I find that no clear direction on this point is contained in the act of 1924 or in either of the appropriation acts above referred to. It appears from the papers accompanying the submission, however, that the moneys to be used in effecting these purchases belong to the Indians as a result of appropriations made by Congress to compensate them for the loss of lands and water rights, title to which was found to have vested in non-Indian claimants, which moneys are carried in the United States Treasury to the credit of the pueblos entitled thereto. (See section 7 of the act of 1924.) Moreover, as we have seen, the tracts to be purchased were originally held by the Indians in communal fee simple ownership and are surrounded by other lands held by the Indians under the same sort of title. These considerations, in the absence of any express direction by Congress in the matter, but lead to the conclusion that the intention was to remove these non-Indian claimants by purchase of their rights and restore the lands to their original status, and I am therefore of the opinion that the conveyance in question should run not to the United States in trust for the Indians, but direct to the respective pueblos, to be held by them in the same manner and subject to the same tenure as other lands included in the original pueblo grants.

Approved:

Jos. M. Dixon,
First Assistant Secretary.

UNITED STATES v. LANGMADE AND MISTLER

Decided August 26, 1929

MILL SITE—MINERAL LANDS—PATENT—POSSESSION—OCCUPANCY—STATUTES.

While actual use or occupation of land for mining and milling purposes is the only prerequisite to patent under section 2337, Revised Statutes, yet the use must be evidenced by "outward and visible signs of the applicant's good faith," naked possession with mere intention or purpose on a certain contingency of performing acts of use or occupation not being sufficient to satisfy the statute.

MILL SITE—MINERAL LANDS—NATIONAL FORESTS—RECREATION SITES—PATENT—PUBLIC LANDS—EVIDENCE.

It is more imperative that the Land Department require from one seeking patent under a mill site location for lands within a national forest concededly containing desirable recreational areas a clear and unequivocal showing that the location is for *bona fide* mining and milling purposes than would be necessary in instances of locations on the open public domain.

MILL SITE—MINERAL LANDS—NATIONAL FORESTS—RECREATION SITES—EVIDENCE.

The fact that land in a national forest is located as a mill site under section 2337, Revised Statutes, in such manner as to give the most possible frontage on the main highway and to adjoin land owned and used for recreational and camping purposes by the applicant from which he gains his livelihood, and that the use and improvement for mining and milling purposes are meager, gives rise to serious doubt as to the good faith of the applicant in making the location.

MILL SITE—MINERAL LANDS—NATIONAL FORESTS—RECREATION SITES—EVIDENCE.

The question of relative values with respect to lands within a national forest, for instance, whether chiefly valuable as a recreational site or for mining and milling purposes, is not a crucial test of its locatibility under section 2337, Revised Statutes.

EDWARDS, *Assistant Secretary:*

June 17, 1927, R. G. Langmade and Nathan J. Mistler filed mineral application, Phoenix 061546, for the Longview lode and Longview mill-site claims situate in the Crook National Forest. The Forest Service protested against the application as to the mill site, charging—

1. That said mill site is not in actual use and has not been used heretofore for *bona fide* mining and milling purposes.

2. That said mill site is not located as to be usable for mining and milling purposes in connection with the Longview lode upon which the mill site is dependent.

3. That the land described in said mill site claim is more valuable for recreational purposes, and that the said mill site was located and being held for recreational purposes and not for *bona fide* mining and milling purposes.

By decision of April 22, 1929, the commissioner after lengthy review of the evidence adduced at a hearing on the protest, affirmed the local register in holding the charges were not sustained and dismissed the protest. Appeal has been filed by the Forest Service.

The lode and mill site were located November 13, 1922, and are about 2,000 feet apart. The lode is admitted to be a valid claim by the Government examiners, containing valuable deposits of tungsten which appear to have been mined under a former location during the World War but not since then. The improvements on the mill site appear to consist of a frame shanty, a small rock crusher such as is used in laboratories and assay offices for sampling ore, a six-horsepower gasoline engine to run the crusher, connected by 150 feet of one and two-inch pipe, with defendant Mistlers' well on adjacent land. The land is also enclosed by a fence. According to the testimony, the shanty has been used to house men to run the crusher and work on the Longview lode, and some mining tools have been kept therein. The ore crusher, placed on the land in 1924 or 1925, was borrowed from a mining company and since it was placed on the land between 400 and 500 pounds in all of ore from the Longview lode have been tested in the crusher at different times.

The defendants assert as a basis for their application for the mill site that it has been used and possessed for mining and milling purposes under the first clause of section 2337, Revised Statutes, and no claim is made that it is used as a site for a quartz mill or reduction works under the second clause thereof. The mining engineers who testified for the Government admitted that the land could be used as a mill site in connection with the Longview lode but were of the opinion that such use was hardly practicable or that there were more available advantageous sites. Witnesses for defendant testified on the contrary that there were no other available sites open to location. The second charge above stated was not sustained by the evidence and may be passed without further comment.

It is admitted that the mill site has not been so far used as a recreational site, but it is the contention of the Forest Service that the evidence establishes that the use of the mill site as above set forth is a mere colorable use and cloaks a purpose on the part of defendants to use the land as a recreational site and camping ground after they have acquired title. The evidence relied upon as indicative of this intent is, briefly, that the mill site was located after the opening of what is known as the "Superior Highway," a main artery of vehicular traffic in that part of the country and the claim is so placed on the ground as to straddle the highway and have a frontage of about 600 feet on each side of it; that defendant Mistler conducts a tourist camp and recreational site on his adjoining patented homestead of 43 acres, and where according to his own testimony, he has accommodated about 40 families at one time; that it is admitted that one-half of the mill site is suitable for camping ground; that prior to the location of the mill site an application by Mistler to have the land included in his homestead was disapproved by the Forest Service, and that part of the mill site was formerly included in an agricultural permit issued to Mistler which was subsequently canceled.

The Forest Service also insists that the inclosure of the homestead was not necessary to protect the improvements on the mill site, but it was inclosed and no trespass signs placed on the fence for the purpose of obtaining a monopoly of suitable recreational areas in the locality, which according to the district forester's testimony are extremely limited in that vicinity. He further testified a grant of a patent to the tract in question would block access to two other possible recreational sites in the forest and frustrate a purpose to provide a public camping ground for people passing over the highway.

The testimony is conflicting as to whether or not there are other suitable recreational sites along the highway in the vicinity of the mill site. Defendants Langmade and Mistler both testify that there is no intent to use the land for other than mill-site purposes, the

land now privately owned being considered sufficient for the purpose. To repel the inference that the real object of the location was to obtain additional camping grounds, through witnesses Mistler and one Rivera, evidence was offered of a proposed option, copy of which was introduced, to purchase the Longview lode and mill site for $10,000, given Rivera, who, it appears, has located certain other mining claims in the immediate locality. It was admitted by Rivera, however, that the option had not been signed, and the evidence discloses no binding agreement to sell the property or develop the mine or mill site. He stated that "I am waiting for a decision about this case before we go and spend any more money on it." In substance Rivera testified that there is a present demand for tungsten ore and that by arrangement with one O'Brien, who is building a tungsten mill at Globe, Arizona, he is to mine and ship the high-grade ore to Globe, and leave the low-grade ore on the mining claim until there is mined 1,000 or 2,000 tons, then it is intended to put up a mill; that the ore was to be assayed in Globe; that the mill site was wanted in order to obtain a right of way from the mine to the highway and that he found in bringing ore out from these claims he has to go through the mill site; that it is feasible to use the mill site for his camp because there is water there and not on the mining claim. The testimony of Rivera as a whole does not definitely indicate that he intends, if a sale is made to him, to use the mill site for a mining or milling purpose in connection with the lode to which it is appurtenant, nor that a mill is to be erected thereon, but rather that its value to his scheme of development is because of a means of access to the mining claim. There was much dispute as to the adequacy of a water supply for the mill site. Considering all the evidence as to the limited water supply in the locality, its previous appropriation and use, the quantity required to operate a mill, the fact that a small pipe line runs from defendant Mistler's well to the land is considered of little importance as a factor in rendering the land valuable for future milling purposes.

The first clause of section 2337, Revised Statutes, contemplates the actual use or occupation of the land for mining and milling purposes. Such use and occupation is the only prerequisite to patent and the use of the land for houses for workmen or the storage of tools would be a use for mining or milling purposes, but the occupation for mining and milling purposes distinguished from use must be more than naked possession; it must be shown by "outward and visible signs of the applicant's good faith" and where the applicant is not using the land he must show such an occupation by improvements or otherwise as evidences an intended use of the tract in good faith for mining and milling purposes. *Charles Lennig* (5 L. D. 190);

Sierra Grande Mining Company v. *Crawford* (11 L. D. 338); *Two Sisters Lode and Mill Site* (7 L. D. 557). To justify the issuance of a patent, the department should be satisfied that there has been a *bona fide* compliance with the law under which the location and entry were made. The act of March 4, 1915 (38 Stat. 1086, 1101), authorizing the Secretary of Agriculture to grant permits for the use of spaces for recreation or public convenience plainly indicates a policy that such recreational sites should remain under his supervision and control. It is therefore more necessary than in instances of locations on the open public domain that the department should in cases such as this where patent is sought under the mill site statute on land concededly containing desirable recreational areas in a national forest that the applicants should clearly and unequivocally show a purpose that the location is for *bona fide* mining and milling purposes.

Conceding that the use of an ore sampler and the housing of tools or workmen on the site is a utility intimately connected with mining and milling, yet these uses appear to have been intermittent and slight. Apparently all claimants would have to do would be to find other quarters for one or two workmen and remove or return the ore sampler to the owner or remove it and all evidence of improvements distinctively connected with mining would be effaced, leaving other improvements serviceable in the use of the land for recreational purposes or for the camping of travelers. As to the contemplated use by Rivera, mere intention or purpose on a certain contingency of performing acts of use or occupation thereon will not satisfy the law. *Ontario S. M. Co.* (13 C. L. O. 159).

The meager use and unsubstantial improvement of the mill site for mining and milling purposes, together with the circumstances that it is laid to cover and give as much possible frontage on the highway and so as to adjoin the land now used by claimant Mistler for recreational and camping purposes and out of which he makes his livelihood, leads to serious doubt as to the real intention in making the location and seeking title to the property. It is concluded therefore that it is not sufficiently shown that the land is used and occupied in good faith by claimants of the lode for mining and milling purposes.

It is argued in effect by the Forest Service that by virtue of certain provisions in the act of June 4, 1897 (30 Stat. 11, 34), only land in national forests chiefly valuable for mineral is subject to location and purchase under the mining laws, and that the right to locate a mill site being ancillary to the right to make and locate mining claims, the validity of a location of a mill site in the forest is dependent upon whether the land is more valuable for mill site or for recreational or other purposes for which the forests were created. The evidence in the record, however, is too indefinite to form any basis for a con-

clusion as to relative values, but if it were not so, in view of the rule in *Cataract Gold Mining Company et al.* (43 L. D. 248), which dealt with the question of the validity of mining claims in a national forest and held that if the lands contain a valuable deposit of mineral they were disposable under the mining laws notwithstanding the fact that they may possess a possible greater value for agriculture or other purposes, the question of whether the land here involved is chiefly valuable as a recreational or mill site is not considered a crucial test of its locatability under section 2337, Revised Statutes.

Good faith in the making and holding of the location not being satisfactorily shown, the commissioner's decision in so far as it sustains the validity of the application for the Longview mill site is reversed, and the application to that extent will be rejected without prejudice to any possessory right claimants may assert to the location or right to hereafter apply for patent for the mill site upon a satisfactory showing that the land is used or improved in good faith for mining and milling purposes.

Reversed.

ARIZONA POWER COMPANY

Instructions, August 29, 1929

POWER SITES—WATER POWER—PERMITS—VESTED RIGHTS—DISCRETIONARY AUTHORITY OF THE SECRETARY—STATUTES.

The only limitation upon the discretionary power of regulation conferred upon the Secretary of the Interior by the act of February 15, 1901, was that his action thereunder should not be arbitrary or unreasonable or such as would destroy valuable interests established by the permittee under the authority of his permit.

POWER SITES—WATER POWER—PERMITS—DISCRECTIONARY AUTHORITY OF THE SECRETARY.

For the Secretary of the Interior to require all who have secured permits for the use of public lands for power purposes under the act of February 15, 1901, to conform to a uniform system of regulations, or to change such regulations as he may deem proper, regardless of the time when the permission to use the land was granted, is not an arbitrary or unreasonable exercise of the power conferred upon him by that act.

EDWARDS, *Assistant Secretary:*

By letter of June 1, 1929, you [Director of the Geological Survey] direct attention to the right of way for a transmission line, Phoenix 0945, of the Arizona Power Company, approved by the department May 20, 1911, under the act of February 15, 1901 (31 Stat. 790), with the following endorsement:

The use of the right of way shown in black on the map is hereby permitted in accordance with the provisions of the act of Congress approved February

15, 1901 (31 Stat., 790), and the regulations present or future thereunder and subject to the stipulation accompanying the record.

You also advise that this is one of more than 200 permits which were granted in this manner with an endorsement on the map granting the permission subject to the provisions of the act of February 15, 1901, and future regulations thereunder.

Copy of a stipulation executed May 11, 1911, by the Arizona Power Company is submitted with your letter, whereby the company agrees to conform to any future laws and regulations with respect to power development on the public lands and consents to accept said right of way subject to the terms and conditions of the stipulation.

On August 24, 1912, and March 1, 1913 (41 L. D. 150, 532), regulations concerning rights of way through public lands for power purposes under the act of 1901 were approved by the department. These regulations, among other things, provide as follows:

(*a*) For the payment of compensation for the use of public lands by the permittee.

(*b*) For annual reports of operations under the permit to be submitted by the permittee to the Geological Survey.

(*c*) For inspection of the works of the permittee by the Geological Survey and for such reports to the Secretary as may be necessary, and

(*d*) For termination of the permit within 50 years.

Subsequently, the Federal Water Power Act of June 10, 1920 (41 Stat. 1063, U. S. Code, sections 791 to 823), was passed creating a Federal Power Commission and providing for the development of water power, the use of public lands in relation thereto, and other purposes.

You report that about 100 permits and grants were issued by the department subsequent to the regulations of August 24, 1912, and previous to the passage of the Federal Water Power Act, and that all of these permits and grants require payment of compensation by the applicant for the use of Government lands and the submission of annual reports. Annual inspections of the projects are also made.

You request instructions as to whether the regulations of March 1, 1913, and amendments thereto, which superseded the regulations of August 24, 1912, should apply to the permit issued to the Arizona Power Company. You also request general instructions as to whether these regulations should be applied to the 200 or more permits and grants of a similar character.

The act of 1901 expressly provides—

* * * That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

This clause was construed by the United States Supreme Court in the case of *Swendig* v. *Washington Water Power Co.* (265 U. S. 322), in connection with a different question, but the court recognized the fact that it was the plain intention of Congress to confer upon the Secretary of the Interior broad powers of supervision and control over permits issued under this act. In that case the court said (pp. 329, 330)—

* * * The purpose of the act is to grant to the Secretary power "to permit the use of rights of way" through the lands referred to. And, in order that control over them may be retained, it is provided that the Secretary, in his discretion, may revoke such permits.

* * * * * * *

* * * The clause above quoted should be read to promote and advance, not to defeat, the legislative purpose to permit the use of rights of way through public lands for the industries and utilities mentioned. It is included from an abundance of caution to support and safeguard the Secretary's power of revocation. It means that the permissions given shall not be deemed to confer any right that may not be revoked by him in the exercise of his discretion. There is no other enactment providing for the termination of the use of the rights of way. The right to use continues until the permission given by the Secretary is revoked by him.

As the sole power of revocation was committed to his discretion, it was within the power of the Secretary to determine that final disposal of the lands would operate to revoke the permission; and it was also within his power, by the regulation of August 24, 1912, to declare that final disposal shall not be deemed to be a revocation, but shall be subject to the right of way until such permission shall have been specifically revoked.

From the nature of the right and the discretionary power granted the Secretary, it seems clear that the permits granted were subject to such regulations as the Secretary in the public interest might deem necessary. The only limitation upon such power seems to be that such action shall not be arbitrary or unreasonable or such as would destroy valuable interests established by the permittee under the authority of the permit. It can not be said that it would be arbitrary or unreasonable for the Secretary to require all who have secured the benefit of the use of public lands for power purposes to conform to a uniform system of regulations, or to change such regulations as he may deem proper, regardless of the time when the permission to use the land was granted. In fact, out of due precaution in many cases, as pointed out in your letter, the Secretary granted the permission subject to regulations, present or future, thereunder, and in the Ari-

zona Power Company case an express stipulation to that effect was entered into.

The regulations in question have been in force for years and have been applied to many permits issued under the act of 1901. There seems to be no good reason why they should not be applied to all permittees alike. There is no right which the parties having the use of the lands prior to the promulgation of the regulations possessed at that time which would be abridged by the application of these regulations to them.

Section 23 of the Federal Water Power Act provides in part—

> That the provisions of this Act shall not be construed as affecting any permit or valid existing right of way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder.

The Federal Water Power Act provides a complete and detailed scheme for the development and operation under public control of all the water power resources of the public domain, reserved and unreserved, and of all the navigable rivers under the jurisdiction of the United States. It seems clear that it was the purpose of Congress to bring under this act all future power development within the jurisdiction of the United States and to concentrate in the hands of the Federal Power Commission all the administrative authority thereover which was in part previously distributed among the several departments. It is evident that the intent of the act, as well as its necessary operation, is to ultimately bring under the new law and under the control of the Federal Power Commission all existing, as well as all future, developments. (32 Ops. Atty. Gen. 525.)

Parties holding rights to use the lands under authority of the act of 1901 and other similar acts, are extended the right to make application for permit or license under the Federal Water Power Act. In fact, some have availed themselves of this right and have secured such licenses.

I perceive no reason why the department may not require the several permittees under the act of 1901 and similar acts to comply with the requirements of the regulations of 1913, and you are accordingly instructed that the parties in interest should be advised that after a reasonable time to be fixed by appropriate order, the said regulations will be applied to all permits issued under said acts, unless the said parties within the time specified file with the Federal Power Commission an application for license under the provisions of the Federal Water Power Act.

WIND RIVER RESERVATION—REPAYMENT OF IRRIGATION CONSTRUCTION COSTS

Opinion, September 9, 1929

INDIAN LANDS—WIND RIVER RESERVATION—WYOMING—RECLAMATION—IRRIGATION—CONSTRUCTION COSTS—LIEN—REPAYMENT—TRIBAL FUNDS.

The act of March 3, 1905, provided that the construction costs of the irrigation project on the Wind River Indian Reservation in Wyoming should be repaid in their entirety from tribal funds, and no individual obligation was imposed upon the particular Indians whose lands were to be benefited by the irrigation system.

INDIAN LANDS—WIND RIVER RESERVATION—WYOMING—RECLAMATION—IRRIGATION—CONSTRUCTION COSTS—LIEN—REPAYMENT—TRIBAL FUNDS—STATUTES.

The act of August 1, 1914, which changed the preexisting plan of requiring repayment of construction costs from tribal funds to the more equitable one that the individuals benefited should bear the burden, did not contain any provision for the creation of a lien against the lands benefited, and consequently the obligation to repay was merely a personal one imposed upon the landowner.

INDIAN LANDS—RECLAMATION—IRRIGATION—COSTS—LIEN—STATUTES.

The provision in the act of March 7, 1928, which created a first lien against irrigable lands under all irrigation projects within Indian reservations where the construction, operation and maintenance costs of such projects remained unpaid and reimbursable, had no retroactive effect to the extent of imposing a lien upon lands that had theretofore passed into private ownership free therefrom, or in any way to alter the rights and obligations of parties as fixed prior to the effective date of that act.

INDIAN LANDS—WIND RIVER RESERVATION—WYOMING—RECLAMATION—IRRIGATION—ALLOTMENT—PATENT—PURCHASER—COSTS—PAYMENT.

Where irrigable land within the Wind River Indian Reservation in Wyoming, allotted to an Indian in severalty, had been patented to him in fee subsequent to the act of August 1, 1914, but prior to the act of March 7, 1928, the liability of the Indian, and one purchasing from him, is to be divided between them in proportion to the areas brought under irrigation during their respective ownership.

INDIAN LANDS—WIND RIVER RESERVATION—WYOMING—RECLAMATION—IRRIGATION—ALLOTMENT—PATENT—PURCHASER—CONSTRUCTION COSTS—PAYMENT—STATUTES.

The liability imposed by the acts of August 1, 1914, upon an Indian allottee holding a fee patent who sells his land to a white purchaser to pay the construction costs in proportion to the acreage irrigated up to the time the Indian parted with his title, being an obligation in the form of a personal indebtedness, can not be shifted to the purchaser in the absence of an express agreement to that effect.

INDIAN LANDS—RECLAMATION—IRRIGATION—ALLOTMENT—PURCHASER—CONSTRUCTION COSTS—REPAYMENT—DELIVERY OF WATER.

Being under no obligation to deliver water free of cost, the right of the Government to require a purchaser from an Indian holder of a fee simple patent to repay such proportionate part of the irrigation construction costs as are properly assessable against land brought under irrigation subsequent to the

date of his purchase, can not be defeated by any covenant incorporated in the Indian's deed.

PRIOR SOLICITORS' OPINIONS ADHERED TO.

Solicitors' opinions of December 15, 1922 (49 L. D. 370), and November 6, 1926 (51 L. D. 613), adhered to.

FINNEY, *Solicitor:*

You [Secretary of the Interior] have requested my opinion as to the liability of Charles R. Syrie, a white man, for repayment of irrigation construction costs on lands within the Wind River irrigation project in Wyoming purchased by him from William Hamilton, an Indian allottee to whom a patent in fee had previously issued.

Mr. Hamilton, it appears, was allotted under the general allotment act of February 8, 1887 (24 Stat. 388) 100 acres of land on the Shoshone or Wind River Reservation described as the N. ½ NW. ¼ and S. ½ NE. ¼ NE. ¼ Sec. 24, T. 1 S., R. 1 E., 20 acres of which was classed as irrigable land, and the balance nonirrigable agricultural or nonirrigable grazing lands. Pursuant to a finding that the Indian was competent and upon authority of the act of May 8, 1906 (34 Stat. 182), the Secretary of the Interior on August 25, 1916, issued to the allottee a fee simple patent. Subsequently, on October 9, 1917, the allottee by warranty deed conveyed the entire allotment to Mr. Syrie together with—

All and singular the improvements of every kind and nature thereon, and in any wise appurtenant thereto, including and conveying hereby all waters appropriated for beneficial use upon and the irrigation of said lands, together with all irrigation ditches and laterals appurtenant to said lands for irrigation thereof and the use of the waters thereon; also the proportionate right to the use of water through and from the Coolidge Ditch.

While, as indicated above, but 20 acres of the land was classed as irrigable, it appears that the actual irrigable area was about 70 acres. Some conflict appears as to the area under irrigation at the time the Indian parted with his title. The Indian Office states that the allottee had developed approximately 40 acres of irrigable land at the time he was found competent to receive a fee patent, and that 35 acres thereof were then under cultivation. Mr. Syrie alleges that at the time he purchased the land approximately 70 acres were under irrigation, all of which had been farmed and irrigated during the season of 1916 and 1917, and he contends that under the then existing legislation and in virtue of the clause in his deed reproduced above, the lands passed to him free from any charge for the construction costs of the project. On the other hand, the Commissioner of Indian Affairs has taken the following position:

This office and the department has heretofore recognized paid-up water rights as to irrigation construction costs on a 20 acre tract originally allotted as irri-

gable land, in accordance with an opinion by the Attorney General dated September 2, 1921, and an opinion by the Solicitor for the Interior Department, dated December 15, 1922; but in view of the fact that a considerable portion of the remainder of the allotment, originally allotted as grazing land, has been brought under irrigation by the construction of the Wind River Irrigation Project, it has been held that such area is subject to assessment for its pro rata share of the irrigation construction costs, under the provisions of the Act of August 1, 1914, *supra*, and subsequent legislation. Since this Indian was allotted but 20 acres of irrigable land, indicating that the Government contemplated the placing of that area only under irrigation, the present owner is apparently without adequate grounds for his claim to a paid up water right for the total area now under irrigation, being approximately 70 acres.

The act of March 7, 1928 (45 Stat. 200, 210), contains the following provision:

* * * That the costs of irrigation projects and of operating and maintaining such projects where reimbursement thereof is required by laws shall be apportioned on a per acre basis against the lands under the respective projects and shall be collected by the Secretary of the Interior as required by such law, and any unpaid charges outstanding against such lands shall constitute a first lien thereon which shall be recited in any patent or instrument issued for such lands.

The above legislation, it will be observed, creates a first lien against irrigable lands under all irrigation projects where the construction, operation, and maintenance costs of such projects remain unpaid and are reimbursable and had it been in force at the time the transactions above referred to took place, it is clear that the irrigation construction costs would have been a charge running as a covenant with the land and enforcible as such against the Indian and his successors in interest. But, bearing in mind that it is beyond the power even of Congress to invade or impair vested rights (*Choate* v. *Trapp*, 224 U. S. 665), it becomes necessary to look at the situation prevailing under the prior legislation dealing with this project, particularly with respect to the rights and obligations of the parties as they then existed.

By the act of March 3, 1905 (33 Stat. 1016), ratifying an agreement previously made, the Wind River or Shoshone Indians ceded and relinquished to the United States part of their reservation retaining the right, however, for individual Indians desiring to do so, to select allotments within the ceded area. The United States was to act as trustee in the disposal of the ceded lands for the Indians and the proceeds arising from such disposition were to be paid over or expended for specific purposes, one of which as set forth in Article 4 of the agreement was—

It is further agreed that of the moneys derived from the sale of said lands the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, shall be expended under the direction of the Secretary of the Interior for the construction and extension of an irrigation system within the diminished reservation for the irrigation of the lands of the said Indians.

Anticipating receipts from sales of the ceded lands, Congress, in section 3 of the same act (page 1022) appropriated certain sums from the Treasury. The last item of these appropriations reads—

> * * * and the sum of twenty-five thousand dollars is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated, the same to be reimbursed from the proceeds of the sale of said lands, to be used in the construction and extension of an irrigation system on the diminished reserve, as provided in article four of the agreement.

Subsequent Indian appropriation acts each carried an annual appropriation for continuing the construction of an irrigation system for the benefit of the Indians of the Wind River Reservation, reimbursement of which was to be had out of the proceeds derived from sales of surplus tribal lands in accordance with the act of March 3, 1905, *supra*. In other words, the construction costs of this project were not originally imposed upon the particular Indians whose lands were benefited by the irrigation system but were to be repaid in their entirety from tribal funds.

By the act of August 1, 1914 (38 Stat. 582, 583), however, Congress changed its policy. That enactment, which was held by the former Solicitor for this department (opinion of May 25, 1920, D–47513) and the Attorney General (33 Ops. Atty. Gen. 26) to apply to Wind River, reads in part—

> * * * That all moneys expended heretofore or hereafter under this provision shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe: *Provided further*, That the Secretary of the Interior is hereby authorized and directed to apportion the cost of any irrigation project constructed for Indians and made reimbursable out of tribal funds of said Indians in accordance with the benefits received by each individual Indian so far as practicable from said irrigation project, said cost to be apportioned against such individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

The plan of requiring repayment of the construction costs of the Wind River and other projects from tribal funds was thus abandoned in favor of the more equitable one that the individuals benefited should bear the burden.

In none of this earlier legislation however, was there any provision for the creation of a lien against the lands benefited and it is clear that the lands here involved were not burdened with any such lien. The trust patent received by Hamilton, the allottee, declared, in conformity with section 5 of the general allotment act of 1887, *supra*, that the United States would hold the lands in trust for a period of 25 years with the promise to convey the fee at the end of that time "discharged of said trust and free from all charges or incumbrances whatsoever." Pursuant to this promise to convey

clear and unincumbered title, the fee patent, issued as aforesaid in 1916, recited no lien specific or otherwise for the repayment of the irrigation construction costs and the land, therefore, passed to the allottee and likewise to his purchaser free from any such charge. There being no lien, the obligation to repay was, of course, a personal one resting against the landowner. See in this connection Solicitor's opinion of December 15, 1922 (49 L. D. 370).

In this situation it is plain, I think, that the acreage allotted to the Indian as irrigable land has no importance in so far as determination of the liabilty of the respective parties is concerned. True, had the project been constructed as originally planned, that is, the cost to be paid from tribal funds, no obligation to repay would have rested on the landowner, Indian or white. But, as we have seen, the plan changed so as to shift the obligation to repay the whole cost of the project to the individuals benefited, each of whom was to pay his proportionate part of the expense for every acre irrigated whether the area so irrigated consisted of 20 acres, 40 acres, or the entire irrigable area of the allotment. The obligation being personal and not a charge against the land, the correct standard of liability as between the Indian and one purchasing from him was, in my opinion, that set forth in Solicitor's opinion of November 6, 1926 (51 L. D. 613), to the effect that such liability is to be divided between the parties according to the areas brought under irrigation during their respective ownerships. As to the acreage irrigated up to the time the Indian parted with his title, the obligation to repay was chargeable to him in the form of a personal indebtedness which could not be shifted to the shoulders of the purchaser in the absence of an express agreement to that effect. If, however, the Indian had desired water for additional areas, he would, of course, have had to assume the obligation of paying therefor. By the same token and in accord with the well-settled doctrine that one can not transfer any greater estate or interest than he himself has, the purchaser is in a like position and this would be so irrespective of any covenant that might be contained in the deed from the Indian for any breach of which the purchaser must, of course, look to his grantor, it being clear that the Government is not bound thereby.

Manifestly, therefore, under the legislation in force at the time of acquisition of title by Mr. Syrie, no lien for repayment of the irrigation construction costs rested against the land and, in the view I take, the land passed to him free from any obligation to repay any part of the construction costs assessable against such portion thereof as was then under irrigation, the obligation of making such repayment representing a personal indebtedness of the Indian which,

as indicated above, could not be shifted to the purchaser in the absence of an express agreement to that effect. This being so, I think it plain that the act of March 7, 1928, *supra*, can have no retroactive effect to the extent either of imposing a lien against the land or in any way to alter the rights and obligations of the parties. So to do would have the effect of impairing rights and obligations that had become vested and fixed under the prior legislation and this would run counter to the doctrine recognized and upheld by the court in *United States* v. *Heinrich* (12 Fed. 2d series, 938). See also *Choate* v. *Trapp*, *supra*.

In conclusion I have to advise that, in my opinion, Mr. Syrie is liable for repayment of only such proportionate part of the construction costs of the Wind River irrigation project as are properly assessable against such additional areas as may have been brought under irrigation after the acquisition of title by him. As to this acreage he is in no position to insist or demand that the Government furnish water free of costs, but it would be advisable, as suggested in Solicitor's opinion of November 6, 1926, above referred to, to require the execution of an agreement to that effect and delivery of water to such additional areas may be withheld until he agrees to pay therefor.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

LAYMAN ET AL. v. ELLIS

Decided October 16, 1929

MINERAL LANDS.

The question whether a given substance is locatable or enterable under the mining law is not to be resolved solely by the test of whether the substance considered has a definite chemical composition expressible in a chemical formula.

MINERAL LANDS.

Mineral lands include not merely lands containing metalliferous minerals, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture.

MINERAL LANDS—GRAVEL.

Gravel is such substance as possesses economic value for use in trade, manufacture, the sciences, and in the mechanical or ornamental arts, and is classified as a mineral product in trade or commerce.

MINERAL LANDS—GRAVEL—MINING CLAIM.

Lands containing deposits of gravel which can be extracted, removed and marketed at a profit are mineral lands subject to location and entry under the placer mining laws.

MINING CLAIM—MINERAL LANDS—DISCOVERY.

A placer discovery will not sustain a lode location and no right to possession of loose, scattered deposits, not rock in place, can be acquired by an attempted lode location.

MINING CLAIM—POSSESSION—HOMESTEAD ENTRY.

Land in the actual and peaceable possession of a mineral claimant in apparent good faith under claim of right to which he can acquire a valid possession or title under applicable laws, is not subject to homestead entry by another.

PRIOR DEPARTMENTAL DECISION OVERRULED.

Case of *Zimmerman* v. *Brunson* (39 L. D. 310), overruled.

EDWARDS, *Assistant Secretary:*

Joseph Thomas Ellis has appealed from a decision of the Commissioner of the General Land Office, dated April 13, 1929, holding for cancellation his homestead entry, Los Angeles 044941, allowed January 16, 1928, under section 2289, Revised Statutes, for lots 2, 11, and 13, Sec. 13, T. 16 S., R. 16 E., S. B. M., containing 68.80 acres.

On April 29, 1928, Gertrude B. Layman and Dallas E. Layman instituted a contest against the entry, alleging prior possessory rights to the land by virtue of two certain mining locations made November 30, 1925, for valuable deposits of gravel; that the locations were valid and existent at the date of said homestead entry; that by reason of the mineral character of the land and also their actual and continued possession thereof, the land was not subject to entry under the homestead law.

Upon evidence adduced at a hearing of the contest the register found that the land was valuable for its gravel deposits, the commissioner found that at least one-half of it was so valuable, but in view of the rule in *Zimmerman* v. *Brunson* (39 L. D. 310), both officers considered that they were bound to hold that lands valuable on account of sand and gravel deposits were not subject to entry under the mining laws and not excluded by reason thereof from entry under the homestead law. The register, however, held that as the land within the Gertrude B. Layman claim was actually occupied and used in good faith under color of title, at the date of the entry of Ellis, the entry to the extent of its conflict with such claim should be canceled. The commissioner's action was based upon the finding that the entry was made for the purpose of speculating on the value of the gravel deposits.

The material facts disclosed by the record appear to be as follows: Copies of the location notices show that the mining claims were located as veins or lodes and according to the dimensions permissible for lode claims, and not in conformity with legal subdivisions of the township wherein the land lies. Maps filed show the locations adjoin on the end lines, the Gertrude B. Layman claim being the

northernmost and the Dallas E. Layman claim the southernmost, and that, roughly speaking, they together cover the east half of the homestead entry and fractions of adjacent tracts to the east. The gravel deposits had been utilized before the locations in question were made, and since their location the Laymans have extracted, sold, and delivered about 40,000 cubic yards of gravel of the value of $20,000 from the Gertrude B. Layman claim for use in road and building construction on the State highway system and have installed facilities to the value of $5,000 on that claim to elevate, screen, and segregate the gravel. The gravel deposits are five feet or more thick lying under from one to three feet of mixed sand gravel and soil cover, and the process of extraction requires the removal of the cover and the screening of the gravel from the sand, the latter being discarded. The excavations are in the form of pits of 60 feet or more in width and extending practically the length of the Gertrude B. Layman claim. No gravel has been mined or removed by the Laymans from the other claim, but the testimony is uncontradicted that deposits of gravel were discovered in the post holes dug thereon. The record clearly established that the entryman at the time he made his entry had full knowledge of the nature and extent of the locations, of the Laymans' claims of title and of the actual possession and development of the Laymans but was of the opinion they were without right or color of title. Upon making entry, entryman notified the mining claimants to cease operations, but a few days later he and D. E. Layman consulted the acting register of the local land office as to the legality of an agreement between them under which Layman could remove the gravel provided he paid the entryman for it. It is said that officer was of the opinion that the rules respecting the removal of timber upon an unperfected entry by a homestead entryman was applicable to the situation, and the register appears to have advised the parties that such a sale would not be in violation of law if the proceeds of sale were applied to the improvement of the entry. Thereupon entryman and Layman entered into a written contract dated January 24, 1928, the substance of which is that Ellis allows Layman the exclusive right to work two pits of gravel on the land for seven months or until the former makes final proof, the latter to pay 15 cents per ton or 20 cents per cubic yard for all gravel hauled away, the proceeds to be used for improvement of the remainder of the entry. Layman was not to erect any buildings, allow occupancy of any building or interfere with growing crops or improvements on the land without the consent of Ellis. After this agreement was made Layman continued to mine and remove gravel from the northernmost claim and in September, 1928, Ellis peaceably took possession of a house on that claim near the workings, formerly

in possession of a stranger to this controversy, and continued in possession thereof and cleared some 15 or 20 acres of brush from parts of the entry for purposes of cultivation. As to the area affected by the contract, operations under which would entail denudation of, or material damage to the cultivable soil, the entryman will not be heard to say that such area was more valuable for cultivation, but as to the residue of surface contestant did not establish that ordinary crops of the region could not be grown thereon or that such part was more valuable for its gravel deposits. It is uncontradicted that the entryman paid substantial sums assessed upon the land by the local irrigation district and had the right to necessary water to sufficiently irrigate the same.

The contract does not warrant the inference that damage to the undisturbed cultivable soil on the entry or a substantial part thereof was contemplated by the contract. There are restrictions as to time and place therein, and provision for protection of crops and improvements. The acts recited of the entryman are consistent with a *bona fide* intent to comply with the homestead law, and where such consistency appears fraud is not presumed. The entryman had no right to sell the gravel, but although he may have committed trespass that fact would not necessarily invalidate his entry. *Litch* v. *Scott* (40 L. D. 467); *United States* v. *Brousseau* (24 L. D. 454). The principles applicable to the sale of timber by an entryman from his entry seem applicable here, and in the timber cases it has been held by the Supreme Court that the entryman can not sell timber for money except so far as it may be cut for purpose of cultivation. *Shiver* v. *United States* (159 U. S. 491). The incidental power of disposition extends only to *surplus* timber cut and removed from so much of the tract as is cleared or in clearing for cultivation. *United States* v. *Murphy* (32 Fed. 376, 385).

While the sale of the gravel was unlawful, under the facts and surrounding circumstances, bad faith in making the entry is not established.

Bad faith in making the entry not being established, the question arises whether the entry or any part thereof was invalid because of the existence of gravel deposits thereon admittedly valuable. The question is not new. In *Zimmerman* v. *Brunson*, *supra*, it was held (syllabus) that—

> Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land within which they are found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes.

Although the commissioner held that he was governed by the rule in *Zimmerman* v. *Brunson*, *supra*, he was of the opinion that valuable deposits of gravel should be held subject to appropriation under the mining law for the reason that they are valuable mineral deposits, and that the rule in that case should be modified.

Data are presented contained in publications of the Geological Survey, entitled "Mineral Resources of the United States," as evidence of the marked increase in production, use, and price of this commodity since 1909, when the decision in the *Zimmerman case* was rendered. Supplementing the data presented by the commissioner, this series of publications show that in 1909 there was sold and used in the United States 23,382,904 tons of gravel of all kinds of the value of $5,719,886, of which amount California produced 914,035 tons, valued at $169,476 (1910, Part 2, p. 602); that in 1927 the combined tonnage of building, paving and railroad ballast gravel used and sold in the United States was 103,865,930 tons, valued at $51,238,388. Of this amount California produced 2,460,072 tons of paving gravel alone of the value of $1,177,086 (1927, Part 2, pp. 160–181). The commissioner's statement also appears to be correct that "according to these tables in 1927, California produced over seven times the amount it did in 1909, the value of the 1927 production being over 26 times the value in 1909." The tables for the year 1927 also show an average value throughout the United States of all gravel sold of 67 cents per ton. A noteworthy feature in recent years is the growth in the size and number of large plants producing washed or otherwise cleaned gravel and crushed stone of standardized grading and size, bringing about keen competition between gravel and crushed stone for wide market areas in contrast to the strictly local market of a few years ago, this competition developing controversies and discussion as to zone and commodity freight rates. (1925, Mineral Resources, Part 1, p. 47.) In these publications gravel and sand have uniformly been classed as a mineral resource. They are also included in the list of useful minerals (U. S. Geological Survey Bulletins, Nos. 585, 910) and mineral supplies (U. S. Geological Survey Bulletin No. 666).

From what has been stated there can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts.

The *Zimmerman case* quotes the rule in *Pacific Coast Marble Co.* v. *Northern Pacific R. R. Co. et al.* (25 L. D. 233), frequently since applied as a test of the mineral character of land, reading as follows (p. 244):

Whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

But it was nevertheless attempted to take the deposit under consideration from under the rule, *first*, because the standard authorities have failed to classify sand and gravel as mineral, and *second*, because the deposit had no special property or characteristic giving it special value, and *third*, its chief value arose from industrial conditions peculiar to the locality where the deposit was found.

The deposit here is characterized as beach gravel. Gravel is variously defined as "fragments of rock worn by the action of air and water larger and coarser than sand" (Glossary of the Mining and Mineral Industry, U. S. Geological Survey Bulletin No. 95), as "more or less rounded stones and pebbles often intermixed with sand" (28 C. J. 824), as "sand fragments of mineral, mainly quartz" (Bayley on Mineral and Rock, p. 202). Many of the beach pebbles are composed largely of quartz, because it is the most common mineral which physically and chemically can resist the wear of wave action. Diller, Education Series of Rock Specimens (U. S. Geological Survey Bulletin No. 150, p. 57). The distinction between sand and gravel is largely one of gradation in size. (Idem 59.) As gravel is not composed always of the same mineral substances, it would not be expected that gravel would appear in a strict mineralogical classification based on definite chemical composition, but examination of the decisions of the department and the courts disclose that questions whether a given substance is locatable or enterable under the mining law are not resolved solely by the test of whether the substance considered has a definite chemical composition expressible in a chemical formula. Such a criterion would exclude a number of mineral substances of heterogeneous composition that have been declared to be subject to disposition under the placer mining law, for example, guano, granite, sandstone, valuable clays other than brick clay, which may be made up of a number of minerals and not always the same minerals.

In Lindley on Mines, section 98, after review of the adjudicated cases and rulings of the department, deductions, which seem warranted, are made as to when the mineral character of public land is established. It is stated—

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

(*a*) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(*b*) Is classified as a mineral product in trade or commerce; or—

(*c*) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

And it is demonstrated that such substance exists therein or thereon in such quantites as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

That valuable gravel deposits fall within categories (*b*) and (*c*) of Mr. Lindley can not be disputed.

Good reason also exists for questioning the statement that gravel has no special properties or characteristics giving it special value. While the distinguishing special characteristics of gravel are purely physical, notably, small bulk, rounded surfaces, hardness, these characteristics render gravel readily distinguishable by any one from other rock and fragments of rock and are the very characteristics or properties that long have been recognized as imparting to it utility and value in its natural state.

As to the third ground for exclusion in the *Zimmerman case*, it has not been shown that the gravel deposits in this case derive their value from the proximity between place of production and use, and as heretofore indicated gravel is generally recognized as having special characteristics that render it valuable generally in the mechanical arts. The conclusion, hardly justified when the decision in the *Zimmerman case* was rendered, that the value shown was one arising chiefly from exceptional and peculiar conditions in the locality where the deposit in question was found, is not warranted under present conditions.

In *Northern Pacific Railway Co.* v. *Soderberg* (188 U. S. 526, 534) it was held that the overwhelming weight of authority was to the effect that mineral lands include not merely metalliferous minerals, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture, and the opinion quotes with approval certain observations in *Midland Railway* v. *Checkley* (L. R. 4 Eq. 19), reading—

Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is *gravel*, marble, fire clay, or the like, comes within the word "mineral" when there is a reservation of the mines and minerals from a grant of land. (Italics supplied.)

In *Loney* v. *Scott* (112 Pac. 172) the Supreme Court of Oregon held that building sand worth 50 cents per cubic yard, and marketable in large quantities, as shown by the Director of the Geological Survey in his Reports of Mineral Resources, was mineral

land and subject to location under the placer mining law, and that a patent issued to a railroad company under its place land grant carried no title to such deposits then known to be embraced in a placer mining claim.

The Secretary of the Treasury has held that gravel bought as ballast is entitled to free entry as crude mineral. (25 T. D. 627.) Applying the rule in the *Pacific Coast Marble Company case*, *supra*, the department has held that land of little value for agricultural purposes, but which contains extensive deposits of volcanic ash, suitable for use in the manufacture of roofing material and abrasive soaps and having a positive commercial value for such purposes is mineral land not subject to disposition under the agricultural laws (*Bennett et al.* v. *Moll*, 41 L. D. 594); that trap rock particularly suitable, and profitably marketable as railroad ballast, is, when the land in which it is contained is chiefly valuable for such, a valuable mineral deposit (*Stephen E. Day, Jr., et al.*, 50 L. D. 489); that amphibole schist, particularly resistant to the action of water, occurring in proximity to the place of use, and with easy facilities for its transportation, and marketable at a profit for use in the building of a local jetty, was enterable under the mining law (Lee Davenport *et al.*, decided March 20, 1926, unreported); that deposits of fractured granite not serviceable as building stone suitable for rip rap on breakwaters and embankments and useful as railroad ballast and road material, which could be quarried and delivered at a profit and taken from land of no agricultural value, was subject to disposition under the mining law (Charles F. Guthridge, A. 11785, decided August 3, 1928, unreported).

It seems apparent in the *Zimmerman case* and cases based on the same reasoning that the rule in the *Pacific Coast Marble Company case* was not followed, but disregarded on unsubstantial grounds. It has been vigorously criticized by leading text writers on the mining law. (See Lindley on Mines, section 424; Snyder on Mines, section 124.) There is no logical reason in view of the latest expressions of the department why, in the administration of the Federal mining laws, any discrimination should be made between gravel and stones of other kinds, which are used for practically the same or similar purposes, where the former as well as the latter can be extracted, removed and marketed at a profit. The rule in *Zimmerman* v. *Brunson* will therefore no longer be followed but is overruled.

The evidence in the case warrants the classification of the east half of the entry, to wit, east half of lots 2, 11 and 13, as mineral in character, valuable for deposits of gravel. The entry to that extent was therefore invalid and should be cancelled.

Although the land last described was mineral in character, no valid right to possession was acquired by the Laymans by attempted location of them as lodes or veins. The deposits are loose, scattered deposits, not rock in place. It is well settled that a placer discovery will not sustain a lode location. *Cole* v. *Ralph* (252 U. S. 286, 295). The lode claimants had no rights that would prevent others entering peaceably and in good faith to avail themselves of the privileges accorded by the mining laws, *Cole* v. *Ralph*, *supra*, p. 300, but the east half of the entry being mineral in character, the entryman could acquire no right under the homestead law to such half, no matter if his entry was peaceable and with the acquiesence of the mineral claimant.

It is not shown that the entryman entered into any contract or engagements or made any valuable improvements or expenditures on the land affected by this decision in furtherance of a purpose to comply with the homestead law. He was therefore not misled to his prejudice by a reliance, if any, upon the rule in the *Zimmerman case*. No grievous wrong to him results, therefore, by the overruling of an erroneous decision. Nor was the rule in that case of such breadth and generality as to justify the conclusion that sand and gravel under any circumstances were not locatable under the mining law. It should also be mentioned that the entryman entered land in the actual and peaceable possession of the mineral claimant in apparent good faith under claim of right, to which the latter can acquire a valid possession or title under applicable laws, that is, entry upon land not subject to homestead entry. *Lindgren* v. *Shuel* (49 L. D. 653); *United States* v. *Hurliman* (51 L. D. 258, 263).

The entry will be held intact as to west half thereof; as to the east half it should be canceled.

As modified the commissioner's decision is

Affirmed.

PUBLICATION OF NOTICE OF INTENTION TO SUBMIT FINAL PROOF

INSTRUCTIONS [1]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 19, 1929.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Attention has been directed to the fact that in many cases it is necessary for registers of local offices to designate a daily paper in

[1] See paragraph 3 of Circular No. 1200 (52 L. D. 683, 685) for a change in the prior existing regulation relating to publication.—Ed.

which to publish the notices of intention to submit final proof required to be given by homestead and desert-land entrymen as well as the notices of location of scrips, warrants, certificates, and lieu selections and other cases.

The present regulations [1] require that if the register designate 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 expense of publishing such notices in either 26 or 30 issues of a daily paper is often prohibitive, and the department is of opinion that the object of publication of such notices can be accomplished by a less number of insertions. Therefore, the regulations in all cases where the law does not specifically otherwise direct are amended to provide that if the register designate a daily paper the notice should be published in the Wednesday issue for 5 consecutive weeks; if weekly, in 5 consecutive issues, and if semiweekly, in either issue for five consecutive weeks.

JOHN H. EDWARDS,
Assistant Secretary.

EX OFFICIO COMMISSIONER FOR ALASKA NOT AUTHORIZED TO APPOINT EMPLOYEES IN THE REINDEER SERVICE

Opinion, October 26, 1929

POWER OF APPOINTMENT—TEMPORARY APPOINTMENTS—SECRETARY OF THE INTERIOR—SUPERVISORY OFFICERS.

The power of appointment lodged in the head of a department by act of Congress can not be delegated to a subordinate official without clear and specific legislative authority therefor, and the only specific authority in that respect conferred upon the Secretary of the Interior is that contained in the act of May 22, 1926, which empowers that officer to delegate the appointive power to supervisory officers to make temporary or emergency appointments of persons for duty in the field, subject to later confirmation thereof by him.

POWER OF APPOINTMENT—EX OFFICIO COMMISSIONER FOR ALASKA—REINDEER SERVICE.

The act of February 10, 1927, which authorized the heads of certain departments to designate, each for his own department, an employee thereof residing in Alaska, to be ex officio Commissioner for that Territory for the department from which he is selected, makes no specific provision for the delegation of the appointive power, and an order issued by the Secretary of the Interior pursuant to that act, transferring the Reindeer Service from the Office of Education to the jurisdiction, control, and exercise of that official, does not include the power of appointment of employees in that service.

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[1] See paragraph 40 of Circular No. 541 (48 L. D. 389, 405).—Ed.

FINNEY, *Solicitor:*

There has been submitted to me for opinion the question whether Governor Parks of Alaska ex officio Commissioner for Alaska, representing the Department of the Interior, has the appointing power in respect to the Reindeer Service which was transferred to his control by the Secretary's order of October 3, 1929, pursuant to the act of February 10, 1927 (44 Stat. 1068).

The act in part (sections 1 to 4, inclusive) provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretaries of the Departments of the Interior, Agriculture, and Commerce be, and they are hereby, authorized and empowered, each for his own department, to designate an employee thereof, employed in and residing in Alaska, who shall be styled ex officio Commissioner for Alaska for the department from which he is selected and who, from the date of his designation, shall reside and maintain an office in the capital of Alaska.

SEC. 2. That each of said Secretaries shall delegate and assign to the commissioner representing his department general charge of any or all matters in Alaska under the jurisdiction of such department, or of any bureau or agency thereof, to the extent, in the manner, and subject to such supervision and control as the Secretary may deem proper and expedient.

SEC. 3. That, to the extent the respective Secretaries may determine, employees of the departments affected by this Act who are stationed in Alaska shall be placed under the direct supervision and control of the ex officio commissioner for his department, herein provided for, together with any additional force which may be detailed by the Secretary of the Interior, Agriculture, or Commerce, from the personnel of his department, should necessity therefor arise; but nothing herein contained shall be construed to authorize the employment of any additional personnel or to warrant the transfer of any clerk or other employee from one department to another, except in the manner provided by law.

SEC. 4. That the Secretaries named in section 1 hereof may transfer to the officer designated hereunder as his representative the records or transcripts of records, property (including office and field equipment), and unexpended balances of appropriations which they may deem necessary or proper to transfer to Alaska in order to carry into effect the provisions of this Act.

Under date of March 14, 1927, the Secretary of the Interior designated Governor Parks as ex officio commissioner under the provisions of said act but no specific duties were assigned to him thereunder at that time.

On October 3, 1929, the Secretary issued the following order:

Pursuant to authority conferred by act of Congress approved February 10, 1927, 44 Stat. 1068 (section 119, Title 5, Supplement 3, United States Code), effective November 1, 1929, all rights, powers, and duties pertaining to the reindeer of Alaska which are at present under the jurisdiction, administration, and control of the Bureau of Education, are hereby transferred to the jurisdiction, control, and exercise of the ex officio commissioner for Alaska, representing the Interior Department, subject, however, to the general supervision and control of the Secretary of the Interior.

The Superintendent of Reindeer (Benjamin Mozee) and his two assistants (Albert Schmidt and Joseph S. Rood) and all property including office or field equipment, records, or transcripts of records, and unexpended balances of appropriation for or in connection with such reindeer, their control or supervision, are, effective November 1, 1929, hereby transferred to the supervision and control of the ex officio commissioner for Alaska, representing the Interior Department, subject, however, to the general supervision and control of the Secretary of the Interior.

It has been held that the appointing power lodged in the head of a department by act of Congress can not be delegated to a subordinate official without clear and specific legislative authority therefor. See 4 Comp. Gen. 675 and authorities there cited. The rigor of the above rule prompted this department to seek authority to delegate the power of appointment to supervisory officers to meet emergencies and such limited authority was given by the act of May 22, 1926 (44 Stat. 620), which provides—

That the Secretary of the Interior may by appropriate regulation delegate to supervisory officers the power vested in him under section 169 of the Revised Statutes of the United States to make temporary or emergency appointments of persons for duty in the field, subject, however, to later confirmation thereof by the Secretary of the Interior.

The act of February 10, 1927, *supra*, makes no specific provision for the further delegation of the appointing power, and I find nothing in either the act or the recent order of the Secretary that could be reasonably construed as authority for the exercise of the appointing power by the ex officio commissioner beyond that contemplated in the act of May 22, 1926, *supra*.

The said order transferred only such rights, powers and duties pertaining to the reindeer of Alaska as were at that time under the jurisdiction, administration, and control of the Office of Education, and I have not found any provision of law whereby the appointing power vested in the Secretary by section 169, Revised Statutes, has been transferred to the Commissioner of Education in respect to employees of that office. I therefore conclude that the general appointing power for the said service was not delegated by the said order, and that the act of 1927, *supra*, does not contemplate such delegation. The purpose of the act would appear to be merely to authorize the consolidation of various activities in one person for local administration under the usual supervision and general control of the head of the department, and this does not imply that the local employee so designated shall exercise the important function of appointing all other employees in that service and thus supersede the head of the department in that regard.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

RIGHT OF WAY—INCREASED BURDEN

Instructions, November 2, 1929

RIGHT OF WAY—DITCHES, CANALS AND RESERVOIRS—VESTED RIGHTS—FORFEITURE.

A vested right in ditches, canals and reservoirs on public lands, acquired under sections 2339 and 2340, Revised Statutes, is not forfeited for failure to comply with rights of way statutes subsequently enacted.

RIGHT OF WAY—DITCHES, CANALS AND RESERVOIRS—VESTED RIGHTS—INCREASED BURDEN.

Ditches on a right of way over public lands that had become vested under sections 2339 and 2340, Revised Statutes, can not thereafter be augmented without consent of the owner of the servient estate where the lands would be additionally burdened to a material extent.

RIGHT OF WAY—DITCHES, CANALS AND RESERVOIRS—VESTED RIGHTS—INCREASED BURDEN—TRESPASS—DAMAGES.

The Land Department will not demand compensation on the ground of unauthorized use of public lands if the facts fail to show that an increased burden had been placed on the lands after a right of way thereover, which had become vested under sections 2339 and 2340, Revised Statutes, could have been no longer augmented except in accordance with later legislation.

COURT DECISION DISTINGUISHED.

Case of *Utah Power and Light Company* v. *United States* (243 U. S. 389), distinguished.

DIXON, *First Assistant Secretary:*

Reference is made to your [Director of the Geological Survey] letter of October 21, 1929, requesting instructions as to whether back charges should be made for use of certain lands prior to the time they were entered under the public land laws.

The tracts referred to are described as the E. ½ NE. ¼, NW. ¼ NE.¼ and W ½ SE. ¼ Sec. 28, T. 23 N., R. 3 E., M. D. M., California.

It is stated that the Federal Power Commission issued a license on October 12, 1929, to the Pacific Gas and Electric Company for a constructed power project, some of the canals of which are on public lands in power site reserve, and that one of the canals forming a part of the project crosses the tracts above described. It is further stated as follows:

> The water right was taken up and a small piece of ditch dug by Yokum in 1875. In 1876 it was sold to Moss, Sheppard, Ballard, and Bothin, and in 1876 and 1877 3 miles of ditch was dug. In 1880 it was extended to Helltown Ravine, and in 1885 to the present forebay, where the water was used for hydraulic mining. The lower end of the canal was enlarged in 1900 by Butte County Electric Power and Lighting Company and the canal was enlarged to its present size in 1905–1907 by California Gas & Electric Company.
>
> The canal has been used to convey water for power purposes since 1898. The above described lands were vacant public lands until October 26, 1926, when a selection in exchange was filed under the act of January 27, 1922, by Isaac C. Jones for the following tracts:

T. 23 N., R. 3 E., Sec. 28, E. ½ of NE. ¼, W. ½ of SE. ¼.

On the same date a soldiers additional homestead application was filed by Thomas Mulcahy for the NW. ¼ of NE. ¼ of the same section. A patent was issued to I. C. Jones on May 14, 1927, and to Thomas Mulcahy on July 2, 1927.

The above statement indicates that the canal had been constructed and used for mining purposes at least as early as the year 1895, and therefore it would appear that a vested right therein accrued under sections 2339 and 2340, Revised Statutes.

It has been held that rights acquired under these sections are not forfeited by failure to comply with later legislation granting rights of way for canals. In speaking of the nature of a right of way granted under said sections, the Supreme Court in the case of *Utah Power and Light Co.* v. *United States* (243 U. S. 389, 405) said:

> The next position taken by the defendants is that their claims are amply sustained by sections 2339 and 2340 of the Revised Statutes, originally enacted in 1866 and 1870. By them the right of way over the public lands was granted for ditches, canals and reservoirs used in diverting, storing and carrying water for "mining, agricultural, manufacturing and other purposes." The extent of the right of way in point of width or area was not stated and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record.

The court traced the history of legislation on the subject and noted that the provisions of sections 2339–2340, Revised Statutes, were found poorly adapted to rights of way for generating and distributing electric power and were superseded by the act of May 14, 1896 (29 Stat. 120), which later act was in turn superseded by the act of February 15, 1901 (31 Stat. 790). In that case it was held that the United States had the right to reasonable compensation for use of its lands without permission and contrary to its laws, but that was because no right of way had been acquired under sections 2339–2340, Revised Statutes, as the construction of the works took place after those sections had been superseded by later laws requiring the filing of maps and the approval of the Secretary of the Interior as prerequisites to the grant of right of way. That case is to be distinguished from the one here presented, as the facts are vitally different.

In respect to the enlargement of ditches on a right of way already vested, the general rule appears to be that such enlargement may not be made without consent of the owner of the servient estate where the lands would be additionally burdened to a material extent thereby. Possibly a more minute statement of the facts in this case might show a material increase of burden on the lands after the right of way could have been no longer augmented except in accordance with later legislation, but under the circumstances of the case as now presented the department finds no sufficient basis for claim of compensation for unauthorized use of the lands.

EVIDENCE OF CITIZENSHIP

INSTRUCTIONS

[Circular No. 1202]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 16, 1929.

REGISTERS, UNITED STATES LAND OFFICES:

This office is in receipt of information from the Department of Labor that under the new naturalization law (act of March 2, 1929, 45 Stat. 1512), effective July 1, 1929, all certified copies of naturalization papers are to be issued by the Commissioner of Naturalization.

As a result of conferences between officials of this office and representatives of the Bureau of Naturalization and of the Department of Labor it has been agreed that the issuance of certified copies of naturalization papers for land office purposes will be discontinued and in lieu thereof the Bureau of Naturalization will in appropriate cases and on request of this office furnish statements as to the facts of the naturalization of applicants for public lands.

In cases where it is inconvenient or impossible for an applicant to furnish evidence of citizenship or declaration of intention in the form as required by instructions of May 1, 1925, Circular No. 1005 (51 L. D. 134), you may accept a sworn statement of the applicant, giving the facts as to his citizenship status, which statement should include the date of the alleged naturalization or declaration of intention, the title and location of the court in which instituted, and, when available, the number of the document in question, if the proceeding has been had since September 26, 1906. In addition, in cases of naturalization prior to September 27, 1906, there should be given the date and place of the applicant's birth and the foreign country of which he was a citizen or subject.

The citizenship showing may be incorporated in any of the forms prescribed for use in connection with the entry of public lands. Where the necessary data have been given you will accept same and proceed with the case, leaving it to this office to secure verification of the citizenship status at the proper time.

You will furnish copies hereof to proof taking officers in your district and give publicity thereto as a matter of news.

C. C. MOORE,
Commissioner.

Approved:
JOS. M. DIXON,
First Assistant Secretary.

LEASING OF LANDS IN ALASKA FOR GRAZING LIVESTOCK—SECTIONS 4 AND 5, CIRCULAR NO. 1138 (52 L. D. 245), AMENDED

REGULATIONS

[Circular No. 1203]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 2, 1929.

MR. GEORGE A. PARKS, EX OFFICIO COMMISSIONER, JUNEAU, ALASKA;
REGISTER AND CHIEF OF FIELD DIVISION, ANCHORAGE, ALASKA;
REGISTERS AND RECEIVERS, FAIRBANKS AND NOME, ALASKA:

In order to conform to the order of the Secretary of the Interior of October 3, 1929, transferring supervision of all reindeer activities in Alaska, from the Office of Education to the ex officio Commissioner of Alaska, representing the Interior Department, subject to the general supervision and control of the Secretary of the Interior, effective November 1, 1929, the regulations governing the leasing of lands in Alaska for grazing livestock issued in pursuance of the act of March 4, 1927 (44 Stat. 1452), approved January 7, 1928, contained in Circulars Nos. 491 [1] and 1138 [2], are hereby amended by substituting for sections 3 and 4 thereof, the following:

3. After the establishment of a grazing district applications for leases may be filed in the proper district land office. Applications should be filed in duplicate except applications for reindeer grazing which should be in triplicate:

(*a*) Applications to lease lands for reindeer grazing filed by natives of Alaska or associations of such natives may be filed by the natives themselves or through a supervisor or other responsible official designated by the ex officio Commissioner of Alaska for the Department of the Interior.

(*b*) After a serial number has been assigned by the register of the district land office to an application for a lease, one copy will be forwarded to the Commissioner for the General Land Office and one to the chief of field division, Anchorage, Alaska, each copy to be accompanied by a status report. If the application is for reindeer grazing the register will attach to the triplicate copy thereof a status report and will make such disposition thereof as may be requested by the said ex officio Commissioner of Alaska.

(*c*) Applications for leases must conform substantially to the appended Form (4–469).[3]

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[1] Revision of Circular No. 491, of February 24, 1928, not published in this volume.—Ed.
[2] For Circular No. 1138, see p. 245, *ante*.—Ed.
[3] Form (4–469) omitted.

4. The chief of field division will cause an investigation to be made of all applications to lease for grazing purposes except of applications filed by natives of Alaska for reindeer grazing and report to the General Land Office as to the livestock to be grazed on the land; as to the carrying capacity of the areas sought; as to the improvements, if any, existing thereon; as to their use and occupancy and as to the feasibility of granting the lease applied for. Recommendation should also be made as to what rental should be charged and whether such charge should be deferred for any particular period.

(*a*) The said ex officio Commissioner or such official as he may designate to act for him, will make report, in duplicate, similar to that described in section 4, except as to charge for rental, on all applications to lease for reindeer grazing filed by natives of Alaska. The report will be filed in the proper district land office. The register will transmit the original copy to the General Land Office and the duplicate copy to the chief of field division.

(*b*) The chief of field division will submit to the General Land Office such report and recommendation as he may deem proper in connection with all applications to lease lands for reindeer grazing filed by natives of Alaska.

C. C. MOORE,
Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

MISSOURI PACIFIC RAILROAD COMPANY v. CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY (ON RECONSIDERATION)

Decided December 3, 1929

RAILROAD LAND—SELECTION—AGENT—DOCTRINE OF RELATION.

A subsequent appointment of an agent to select public lands for a State by the governor of the State and ratification of the acts previously performed by such agent relate back and are equivalent to a prior authority with reference to selections made by the agent prior to his appointment, and such selections are effective to defeat intervening selections made on behalf of another or others.

EDWARDS, *Assistant Secretary:*

Receipt is acknowledged of your [D. L. Phillips, Land Commissioner, Missouri Pacific Railroad Company, Little Rock, Arkansas] communication of October 18, 1929, requesting reconsideration of departmental decision of September 4, 1929, in the matter of con-

flicting selections filed by the Missouri Pacific Railroad Company and the Choctaw, Oklahoma and Gulf Railroad Company.

The decision referred to holds in substance that notwithstanding the appointment of one George B. Pugh, as agent of the State of Arkansas to select lands granted by the act of February 9, 1853 (10 Stat. 155), was not on file at the time the selections in question were made, his subsequent appointment by the governor of the State, and the governor's ratification of the acts previously performed by him, gave the selections full effect and made them good from the beginning.

Exception is taken to this ruling. You contend that the ratification of the selections made by Pugh did not make them effective as against the intervening selections made in due form for the Missouri Pacific Railroad Company.

You further state that a careful search in the office of the governor and also in the office of the secretary of state of Arkansas fails to disclose any record of the appointment of George B. Pugh as agent of the State, although it was stated in the decision referred to that the appointment was filed in the General Land Office April 1, 1929.

Notwithstanding your failure to find a record of the appointment, the instrument, as stated above, is on file in the General Land Office. The appointment was made by the governor March 21, 1929, and was duly attested by the secretary of state.

The department can not acquiesce in your contention that the subsequent ratification of the acts performed by Pugh was inoperative as against the intervening selection of the lands for the benefit of the company which you represent. It is a well-settled principle of the law of agency that when the facts connected with the doing of an act are brought to the knowledge of him on whose behalf it was so done, he may decide to sanction and confirm it and adopt it as his own; and the ratification of an act done by one assuming to be an agent relates back and is equivalent to a prior authority.

In the instant case, the record shows that Pugh's appointment as agent of the State was made to relate back to April 13, 1928, and his acts in making prior selections are, by the same instrument, expressly ratified and confirmed.

In the adjudication of State railroad grants it has been the general practice to recognize the beneficiaries to whom the grant has passed by State legislation and to honor the action of the beneficiaries without further specific authority from the State in each particular instance. The action taken by the Secretary in his letter of July 18, 1895, referred to by you, wherein the selecting company was required to furnish evidence of authority from the State was a departure from the general practice, but even in that unusual case the selecting com-

pany was given opportunity to furnish the required evidence of authority. That action was doubtless taken as a measure of precaution and further assurance that the company still retained its status as the beneficiary of the grant given by legislative act of the State.

In an analagous case where the statute required the filing of a map of general route by the governor, or by his authority, it was held that the filing of the map by the beneficiary company was sufficient, and that the omission of the governor to file a map designating the route of the road was matter of form rather than essence. See *Gilbert* v. *McGregor and Missouri River Railroad Co.* (9 Copp, 134) and *Atlantic, Gulf and West India Transit Railroad Co.* (2 L. D. 561).

In the present case we have the appointment of the agent by the governor and confirmation of the act of the agent in filing the selections, thus curing any supposed defect in the original filings.

No reason is seen for entertaining an opinion different from that heretofore expressed.

Reconsideration denied.

REFERENCE TO SECTION 29 OF THE LEASING ACT IN PATENTS FOR NONMINERAL ENTRIES—PRIOR INSTRUCTIONS MODIFIED

Instructions, December 3, 1929

HOMESTEAD ENTRY—STOCK-RAISING HOMESTEAD—PATENT—OIL AND GAS LANDS—PROSPECTING PERMIT—RESERVATION.

A final certificate and patent for nonmineral entry need not contain a reference to section 29 of the leasing act of February 25, 1920, if the oil and gas claim to the land has been finally eliminated prior to the issuance of the final certificate, notwithstanding that the reservation required by the act of July 17, 1914, or other like reservation such as that contained in the stock-raising homestead act be retained.

PRIOR DEPARTMENTAL INSTRUCTIONS MODIFIED.

Instructions of July 2, 1925 (51 L. D. 166), modified.

THE SECRETARY OF THE INTERIOR:

On July 2, 1925 (51 L. D. 166), certain instructions were given by the department as to the necessity of making a reference in the final certificates and patents issued thereon to section 29 of the leasing act. It is particularly stated in connection with such necessity that: "This is true even though the prospecting permit or lease which antedated nonmineral filing has been canceled before patent issues".

In many cases since the present oil conservation policy was put into effect the prior oil and gas permit covering the lands involved in homestead and other entries has been canceled, and in other cases upon a request for reconsideration or reclassification of the land the Survey has reported the land to be nonoil and nongas, thus

eliminating any necessity for reference to section 29, and in the latter cases as to reservation under the act of July 17, 1914.

The main object, apparently, in inserting a reference to section 29 in the final certificates and in the patents is to advise all concerned that no compensation may be obtained by the nonmineral entryman from the prior mineral claimant for damages to crops and improvements. A different condition exists as to right to compensation where oil and gas application for permit or lease is filed subsequent to the initiation of the rights by the nonmineral entryman.

Where the oil and gas permit is canceled prior to the issuance of final certificate there would seem to be no necessity for making a reference to section 29 because the prior oil and gas claimant is eliminated, in whose favor section 29 is invoked, and anyone also filing such oil and gas application thereafter would not be entitled to any protection against the entryman for damages occurring.

I believe, therefore, that the reference to section 29 should be omitted from all final certificates and patents based thereon, where it is shown that the oil and gas claim has been finally eliminated, even though the reservation under the act of July 17, 1914, be retained, or other like reservations such as those contained in the stock raising homestead entries.

This action would place these entrymen in the same position as those who have made their entries prior to initiation of any rights under the leasing act, and it seems to me that there should be no distinction under the facts stated. Furthermore, the reference to section 29 in the patent has, in such cases, no meaning, force or effect.

If you agree herewith the departmental instructions of July 2, 1925, will no longer be followed.

C. C. MOORE,
Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

ELIJAH J. MERRILL

Decided December 5, 1929

POTASH LANDS—CAMP SITE—MINERAL LANDS—DISCRETIONARY AUTHORITY OF THE SECRETARY OF THE INTERIOR—STATUTES.

The provision in the act of October 2, 1917, authorizing the Secretary of the Interior to permit the use of public land for a camp site, and other purposes connected with the proper development and use of potash deposits covered by a permit or lease issued pursuant to that act, is merely a statu-

tory privilege within the discretion of that officer to grant or deny, and does not vest in a permittee or lessee any right to demand a permit for such use.

POTASH LANDS—CAMP SITE—STATUTES.

The act of February 7, 1927, which repealed the act of October 2, 1917, did not continue the provision contained in the earlier act which authorized the Secretary of the Interior to permit the use of public land for camp site and other purposes in connection with the development of potash deposits, and consequently authority to grant a permit for such use to a holder of a potash permit or lease under the original act ceased upon the date of its repeal.

EDWARDS, *Assistant Secretary:*

This is an appeal by Elijah J. Merrill from a decision of the Commissioner of the General Land Office, dated August 26, 1929, rejecting his application for a use permit for camp site, covering lot 2, Sec. 31, T. 25 S., R. 43 E., M. D. M., in connection with his potash lease, Sacramento 020744, covering adjacent land.

The lease was granted January 2, 1924, under the act of October 2, 1917 (40 Stat. 297), which act was repealed by the act of February 7, 1927 (44 Stat. 1057), relating to the promotion of the mining of potash on public lands.

Section 3 of the act of 1917, *supra*, provided—

That in addition to areas of such mineral land to be included in prospecting permits or leases the Secretary of the Interior, in his discretion, may issue to a permittee or lessee under this Act the exclusive right to use, during the life of the permit or lease, a tract of unoccupied nonmineral public land not exceeding forty acres in area for camp sites, refining works, and other purposes connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

In accordance with the above quoted provisions, regulations were issued prescribing the conditions under which such applications could be applied for and granted. Potash regulations of March 21, 1918, Circular No. 594 (46 L. D. 323, 334, 335).

The act of 1927, *supra*, contains no provision of similar import, nor anything from which authorization to grant such permits could be deduced.

The commissioner rejected the application for lack of authority to grant it under the provisions of the later act.

The appellant contends in substance that the right to such a permit is an integral part of his rights under his lease granted under the former law; in other words, that the right to a camp site is an incidental right that flows from the grant of the lease, which he is free to exercise and which may not be rightfully or equitably denied him when the occasion and need, as now exists, arises during the term of the lease, and he is entitled to the same degree of enjoyment

of privileges in working his lease as any other lessee that was granted such permits.

The above-quoted provision for a use permit was no more than a statutory privilege which the Secretary in his discretion might grant or deny. It was not exercised before the law containing it was repealed. The lessee acquired no vested right to such permit by force of the statute.

In Cooley's Constitutional Limitations, eighth edition, page 749, it is said—

> First, it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another. Acts of the legislature, * * * cannot be regarded as opposed to fundamental axioms of legislation, "unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeal of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee."

See also Lewis' Sutherland Statutory Construction, volume 1, section 254, and cases there cited.

The grant of such a permit is not assured by the terms of the former statute, nor is the right to it expressed or implied by the terms of the lease. By the repeal of the act conferring the privilege, the power to grant it ceased. The commissioner's decision must be

Affirmed.

THOMAS MORGAN

Decided December 13, 1929

STOCK-RAISING HOMESTEAD—WATER HOLES—WATER RIGHT—WITHDRAWAL.

An Executive order withdrawing lands containing springs or water holes is ineffective as to a tract of land containing a spring the right to the use of the water in which had become vested in an individual prior to the withdrawal and had not been abandoned, relinquished or otherwise terminated in accordance with local customs, laws and decisions of the courts.

EDWARDS, *Assistant Secretary:*

This is an appeal from a decision wherein the Commissioner of the General Land Office, on June 19, 1929, rejected an original stock-raising homestead application under the act of September 5, 1914 (38 Stat. 712), for S. ½ SW. ¼ Sec. 14, S. ½ SE. ¼, SE. ¼ SW. ¼ Sec. 15, N. ½ NW. ¼, NW. ¼ NE. ¼ Sec. 23, T. 4 N., R. 103 W., 6th P. M., Colorado, containing 320 acres.

An affidavit as to springs and water holes was filed by claimant in which it was asserted that there was on the land no spring or other body of water, except a very small seep spring which furnishes only enough water for a small domestic supply, probably 250 gallons per day, and the spring is not used by the public.

On March 30, 1929, the Director of the Geological Survey, in connection with the showing as to springs and water holes, reported—

> Field investigation made last season discloses that the above described land contains a small spring which is the only available source of stock-water supply on an extensive area of open public grazing land. It further appears that the land is more valuable for this watering place than for any other purpose and accordingly it has been included in Public Water Reserve No. 107 by Order of Interpretation No. 87, signed by the Secretary March 15, 1929.

The commissioner found that the lands had been designated under the stock-raising homestead law; that the second entry showing was satisfactory; that the lands were withdrawn pursuant to Executive order of April 17, 1926; and that the order does not apply to valid settlement claims initiated prior to the date of the order and thereafter maintained in accordance with applicable law. The commissioner pointed out that the application embraces the same land included in the claimant's relinquished entry, and that in an affidavit, filed in support of his second homestead application, the deponent affirmed—

> I did not live on it. I made two reservoirs and a dug out and took possession and used it for the past five years.

The appellant averred that notwithstanding his previous statements, as a matter of fact he had resided on the land for at least three months each summer during the life of his former entry; that he had not lived there a sufficient time to make proper final proof; that he did not have a habitable house completed, but had a dugout together with a sheep wagon; that he lived on the land using the dugout and sheep wagon every summer for at least five years prior to his application; that during this time he used the land for grazing his live stock during the grazing season; that he hauled logs and had same on the land, with other material, with which to build a house during the life of his former entry, but was unable to meet the requirements because of ill health; that he has in good faith maintained settlement right and acts of ownership since date of first entry and is still maintaining claim to the land. The applicant also alleged that no other person, company, or association has ever used any of the land for grazing purposes; that he has expended $200 in permanent improvements on the land; that when he first applied for entry he did not water stock because the spring was only a seep, and by development thereof it would run not to exceed 250 gallons

of water per day; that in order to have water for stock he built two reservoirs on the land so he could catch spring runoff water and water after hard rains. Affiant further declared that the gulch in which the spring is located is a part of what is known as Cotton Wood Creek, or Cliff Creek, from which he has an adjudicated water right with a priority dating July 1, 1885, which appropriation includes more water than the drainage basin affords during most years and that this is a matter of public record in Moffat County. Petitioner contended that for more than twenty-one years last past no other person, company, or association has ever used the lands or the water for their live stock, but he has run his own stock on the lands and he has used the little water on same. The appeal was corroborated by three persons.

Section 2339, Revised Statutes, provides in part—

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

If, as asserted by Morgan, he appropriated and used the waters of the spring referred to and his right thereto was adjudicated in 1885, he had, at the date of the Executive order of April 17, 1926, and still has, a vested right to the use of such waters, unless it has been abandoned, relinquished or otherwise terminated in accordance with local customs, laws and decisions of courts. As against such a right "no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it." *Leavenworth, etc., Railroad Company* v. *United States* (92 U. S. 733); *Hastings, etc., Railroad Company* v. *Whitney* (132 U. S. 357).

This department has uniformly recognized the right of one in the situation of Morgan to acquire, under any applicable law, the subdivision upon which the well or spring is located. See *Wagoner* v. *Hanson* (50 L. D. 355); *Mitchell* v. *Ferguson* (51 L. D. 128). As to the other subdivisions sought by him, there appears to be no objection to the allowance of his application.

It is, therefore, ordered that the Executive order of April 17, 1926, be held not applicable, if and when it shall appear to the satisfaction of the Commissioner of the General Land Office that the applicant has a subsisting vested right to the waters of the spring in question.

The record is, accordingly, remanded to the General Land Office for disposition of the case in accordance herewith.

Remanded.

A. T. BESTUL (ON REHEARING)

Decided December 26, 1929

OREGON AND CALIFORNIA RAILROAD LANDS—TIMBER LANDS—EXCHANGE OF LANDS—STATUTES.

The act of May 31, 1918, which authorizes the Secretary of the Interior to exchange revested lands formerly within the grant to the Oregon and California Railroad Company with a view to the consolidation of the holdings of public timber lands is not limited to timber lands, but applies with equal force to agricultural lands, and where it is advantageous to the United States to exchange cut-over lands or lands with a reservation of the timber thereon for timbered lands, such exchange is within the provision of the statute.

EDWARDS, *Assistant Secretary:*

By decision dated September 24, 1929, the Commissioner of the General Land Office, with departmental approval, rejected the application of A. T. Bestul to exchange lots 1, 2, 7 and 8 of Sec. 26, T. 27 S., R. 11 W., W. M., Oregon, for NW. ¼ and SW. ¼ SW.¼ Sec. 15, T. 28 S., R. 12 W., W. M., Oregon, under the provisions of the act of May 31, 1918 (40 Stat. 593), as extended to reconveyed Coos Bay Wagon Road grant lands by the act of June 4, 1920 (41 Stat. 758). A motion for rehearing has been filed.

The field officer having supervision of such matters had reported that after a conference with the applicant the latter had agreed to modify his application to the extent of accepting the land and timber on the NW. ¼ Sec. 15 and the land only on the SW. ¼ SW. ¼ of the same section, and agreed to bid the appraised value for the timber on the last-described subdivision. The field officer reported that the proposed modification would equalize values, and that the exchange would result in an advantageous consolidation with adjoining Government timber holdings.

The application was rejected on the ground that the act of May 31, 1918, *supra*, did not authorize the passing of title thereunder to lands separate and apart from the timber thereon, either before or after the timber itself has been sold; that no disposition of the land itself could be made before the sale of the timber thereon, and that after the timber has been sold and removed the land must be opened to homestead entry.

The act of May 31, 1918, *supra*, provides in part—

That the Secretary of the Interior, in the administration of the Act of June ninth, nineteen hundred and sixteen, * * * is hereby authorized and empowered, in his discretion, to exchange lands formerly embraced within the grant to the Oregon and California Railroad Company and revested in the United States by said Act for other lands of approximately equal aggregate value held in private ownership, either within or contiguous to the former limits of said grant, when by such action he will be enabled thereby ad-

vantageously to consolidate the holdings of timber lands by the United States. * * *

Upon mature consideration, the department is of opinion that no objection exists to the passing of title to lands separate and apart from the timber thereon. The act of May 31, 1918, *supra*, is not limited to lands of class 2 (timber), but applies with equal force to lands of class 3 (agricultural), the only question to be determined being whether the timbered lands given in exchange are of a value equal to the grant lands sought to be acquired. If it is to the advantage of the United States to trade cut-over lands for timbered lands or to trade lands on which the timber is reserved for timbered lands, such exchange would be within the provisions of the law.

The applicant, in effect, promises (as a basis for the offering of the timber on the SW. ¼ SW. ¼ said Sec. 15) to bid the appraised price of the timber, and no reason appears why the timber should not be offered for sale.

This should be done before the exchange is consummated. It is also noted that the selected land will be subject to the conditions and reservations of section 24 of the Federal Water Power Act, Bestul having so consented.

In view of the foregoing, the modified application is approved for examination. The cruise will be made provided the applicant deposits $40 with the register of the Roseburg, Oregon, land office, pursuant to paragraph 5 of the regulations of July 17, 1918, Circular No. 611 (46 L. D. 424).

The decision of September 24, 1929, is recalled and vacated.

Motion sustained.

ANNIE KOLDEN, WIDOW OF KNUT A. KOLDEN

Decided December 31, 1929

INDIAN LANDS—FORT PECK LANDS—HOMESTEAD ENTRY—WIDOW; HEIRS; DEVISEE—PAYMENT—RELINQUISHMENT—LAND DEPARTMENT—PATENT.

Where the widow of a homestead entryman on Fort Peck Indian lands who, prior to his decease, had done everything required of him to earn legal title except to complete payments of the purchase money, applies to have the moneys paid by him credited on a reduced area, and the furnishing of a relinquishment of the remaining area would be burdensome and involve complex and expensive court proceedings because of minor heirs, the Land Department may, in the exercise of its authorized equitable administration, issue a final certificate and patent in the name of the deceased entryman for such area as had been earned; Query: Is the widow under section 2291, Revised Statutes, entitled in such case to complete payment of the purchase money and take title in her own name and right?

EDWARDS, *Assistant Secretary:*

This case is submitted by the Commissioner of the General Land Office upon a question of the sufficiency of a relinquishment filed by Annie Kolden, widow of Knut A. Kolden, deceased, of certain described lands, being a part of homestead entry, Great Falls 055088, made by the said Knut A. Kolden within the former Fort Peck Indian Reservation, Montana. The purpose of the relinquishment is to justify, under well-settled practice in the administration of Fort Peck Indian lands, a reduction of the area of a homestead entry by the transfer of payments theretofore made upon the larger tract as payment in full for the reduced area and the issuance of patent therefor. See *Virnand C. Walters* (46 L. D. 282) and paragraph 8 of instructions of April 23, 1928 (52 L. D. 352, 353).

It transpired in the instant case that the said entryman, Knut A. Kolden, had before his death submitted final proof of compliance with the ordinary provisions of the homestead law—settlement, residence, cultivation, and the presence of a habitable house on the land—but cash payments thereon had not been fully met, hence at the date of his death he had not earned the legal title. In this situation the usual proffer was made by the General Land Office to transfer the money as above stated, upon the execution of a proper relinquishment to the United States. The Commissioner of the General Land Office correctly held that the relinquishment filed by the widow was insufficient. Assuming for the sake of the argument, but not affirming, that by virtue of the provisions of section 2291, Revised Statutes, the widow of the entryman in such a case may, by payment of money due on the entry, take title to the land in her own name and right, yet it remains true in this case that she has not offered to make such payment. What she seeks to do is to relinquish part of the land and take title to the balance through the fortuitous circumstances of an administrative transfer of money paid by the entryman himself. But it is complained that the requirement that the other heirs join her in the relinquishment is burdensome and that it will involve complex and expensive court proceedings. This is obvious, there being minor heirs, and should not be insisted upon if there is a legal way out of the difficulty. There would seem to be no valid objection to a course which it is believed will do away entirely with the relinquishment as follows:

The Commissioner of the General Land Office will transfer the money as is usual in such cases, issue a final certificate and patent in the name of the deceased entryman for such land as has been thus earned, and cancel the entry as to the balance. See section 2448, Revised Statutes. This course will satisfy all rights of the widow, and relieve against the complicated and unsatisfactory

procedure now in force as to cases where the entry is not completed by the widow or heirs pursuant to section 2291, Revised Statutes. It will also settle, in so far as the Land Department is authorized to settle it, the effect of a certain deed made by the entryman to his wife after he made final proof as aforesaid, which has been recently submitted by the widow as evidence of her right to make the relinquishment heretofore required. It would also take care of any interest arising upon an unexplained mortgage on lands covered by this entry before final proof, said to have been given by the entryman to secure the payment of a debt arising upon the purchase of a farm tractor and other agricultural implements in an indefinite sum of money. A disclosure of interest in such a mortgage was given to the local officers August 8, 1918, by the Advance Rumely Thresher Company, Incorporated. Whatever may be the status of the widow under that deed or the rights of the mortgagee under the mortgage to the land earned in application of the rule of after-acquired title, it is certain that by the plain terms of said section 2448, Revised Statutes, the title to lands designated in the patent issued thereunder inures to and becomes vested in the "heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life."

Further, and generally as to such a relinquishment as is proffered in this case, it serves no purpose, except as a designation by a supposed party in interest of the land for which patent is desired. It is in no legal sense an election, because there are no legal rights involved. The entry is subject to cancellation out of hand because title has not been earned. If, therefore, in the exercise of authorized equitable administration the Land Department elects to issue a patent as above indicated, the designation of the land to be patented is a function of government, in the exercise of which a designation by a party or parties in interest may or may not be adopted. The General Land Office will proceed accordingly.

Affirmed with instructions.

STATE OF NEW MEXICO

Decided December 31, 1929

SCHOOL LANDS—INDEMNITY—SELECTION—OIL AND GAS LANDS—MINERAL LANDS—DISCOVERY—EQUITABLE TITLE—EVIDENCE.

The showing as to the mineral character of land necessary to defeat the vesting of equitable title in a nonmineral claimant at the time of the completion of his claim does not require that there must be an actual discovery of mineral, but it suffices if the known conditions as to geology, adjacent discoveries, and other indicia are such as to warrant men

prudent and experienced in such matters to make large expenditures under the belief that the land contains mineral of such quality and quantity as to render its extraction profitable.

COURT DECISION CITED AND APPLIED.

Case of *United States* v. *Southern Pacific Company et al.* (251 U. S. 1), cited and applied.

EDWARDS, *Assistant Secretary:*

By decision of July 24, 1929, the Commissioner of the General Land Office required the State of New Mexico to file oil and gas waiver as provided by the act of July 17, 1914 (38 Stat. 509) in connection with its indemnity school-land selection for the SE. ¼ SE. ¼ Sec. 1, T. 21 S., R. 33 E., N. M. M. Appeal from that action has brought the case before the department for consideration. The appeal is based on the contention that the equitable title of the State vested on August 22, 1927, when the selection of said tract was completed, it not having been classified at that time as valuable for oil and gas deposits and not known to contain such minerals. It appears, however, that the Geological Survey under date of July 10, 1929, reported to the General Land Office with respect to said tract as follows:

> The showing submitted by a firm of resident local attorneys in support of the alleged nonoil and nongas value of the land listed contains no evidence in addition to that already on file in the Geological Survey.
>
> The records of the Survey indicate that on August 22, 1927, the land described was known to be prospectively valuable for oil and gas within the intent of paragraph 12 (*c*) of the oil and gas regulations, and to that extent was properly subject to classification as oil and gas land on that date. The six affidavits transmitted with your letter of May 15, 1929, are returned herewith.

The State originally filed selection of this tract on March 9, 1915, which was canceled because of failure of the State to elect to take title with a reservation of potash to the United States. Thereafter and on May 23, 1927, the State applied for reinstatement, and on August 22, 1927, filed a waiver as to potash. After the date of the original filing, and on January 28, 1925, the State issued an oil and gas lease covering the said tract, which has been transferred for a substantial sum.

The appeal is accompanied by several affidavits designed to show that the tract was not of known value for oil or gas deposits at the date when the reinstated selection was completed, and that it is not known at this time to contain such minerals. It is contended that a dry well in the NW. ¼ SE. ¼ of Sec. 12, cornering with the tract in question, indicates that the tract is probably valueless for oil and gas, notwithstanding the existence of two producing wells which were brought in during the present year, one of which is located slightly more than one mile, and the other less than three

miles, northwest of this tract. It is also stated that there is a well about three miles southwest of this tract which was completed on August 12, 1927, as a dry hole and abandoned. It has a depth of over 4,000 feet.

It is observed that these two dry holes lie to the southwest of the tract in question while the two producing wells lie to the northwest and in line with this tract.

The appeal contends as a proposition of law that the equitable title of the State vested at the time of completion of its selection unless the land was actually known to contain valuable deposits of minerals, and that a classification of the land as being only prospectively valuable therefor does not affect the rights of the State.

The rule followed by the department in this respect is the one recognized by the Supreme Court, and which was stated in the case of *United States* v. *Southern Pacific Company et al.* (251 U. S. 1) as follows (syllabus):

> In order to establish the character of lands, in this connection, as lands valuable for oil, it is not necessary that they shall have been demonstrated to be certainly such by wells actually drilled thereon and producing oil in paying quantities after a considerable period of pumping; it suffices if the conditions known at the time of patent, as to the geology, adjacent discoveries, and other indicia upon which men prudent and experienced in such matters are shown to be accustomed to act and make large expenditures, were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end.

Upon review of the record, the department is unable to hold as a matter of law that the classification of this land by the Geological Survey was erroneous. However, in view of the fact that this classification was made after completion of the selection, a hearing is hereby directed, upon a date to be fixed by the Commissioner of the General Land Office, to determine as a question of fact whether on August 22, 1927, the land in question was known to be prospectively valuable for minerals, including oil and gas. With this modification the decision appealed from is

Affirmed.

WOODWARD TOWN SITE

Instructions, December 31, 1929

RIGHT OF WAY — ABANDONMENT — FORFEITURE — RAILROAD LANDS — MINERAL LANDS — RESERVATIONS — TOWN SITE — PATENT.

The mineral reservation contained in the last proviso to the act of March 8, 1922, is a covenant running with the land, and is applicable to lands within an abandoned or forefeited railroad right of way that have become

vested in a municipality under one of the provisions of that act, notwithstanding that deeds executed by the municipality conveying these lands fail to make such reservation.

Instructions by Commissioner Moore of the General Land Office, Approved by Assistant Secretary Edwards, to Board of Town Trustees, Woodward, Oklahoma:

October 12, and November 8, 1929, inquiries were received from Mr. M. H. Gordon as to whether or not lots 1 and 2, Block 48, and the abandoned right of way of the Panhandle Division of the Atchison, Topeka and Santa Fe Railway Company in Woodward, Oklahoma, are subject to purchase or homesteading.

The town site of Woodward embracing lands in the S. ½ Sec. 25, T. 23 N., R. 21 W., I. M., Oklahoma, was entered by the board of trustees assigned to said town site, in trust, for the occupants of said land under the act of May 14, 1890 (26 Stat. 109), Woodward cash entry No. 1. Patent issued therefor on February 24, 1894. Said patent excepted lots 1 and 2, Block 48, containing five acres and was—

subject to the right of way of the Panhandle Division of the Atchison, Topeka and Santa Fe Railroad Company.

In pursuance of section 4 of said act and the proclamation of the President of October 13, 1904 (33 Stat. 2374), said lot 1, Block 48, containing four acres, known as "Courthouse Reserve," was patented to the municipal authorities for a public park on June 30, 1906, under certificate No. 1, reservation entry, Woodward.

Lot 2, Block 1, containing one acre, in said town site, was reserved for the land office by proclamation of the President of August 19, 1893 (28 Stat. 1222, 1227). This lot is still in a state of reservation under said proclamation and is therefore not subject to disposition under the land laws. Such reserve can only be restored by the power that placed it in reservation or by an act of Congress.

The rights of said railway company to the lands within the abandoned right of way terminated on the acceptance by the United States of the relinquishment of the portion of the right of way abandoned in Sec. 25, under the provisions of the act of July 4, 1884 (23 Stat. 73). This relinquishment was accepted as of the date of March 25, 1919.

The rights of said company to the relinquished right of way within the limits of the town of Woodward inured to the municipality of Woodward under the provisions of the act of March 8, 1922 (42 Stat. 414), without the necessity of any patent or further conveyance whatsoever from the United States, with the following mineral reservation:

That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

Conveyances made of all or any portion of the abandoned or relinquished railroad right-of-way strip by parties holding same in virtue of the grant thereof to them by said act of March 8, 1922, may not and can not include the mineral deposits therein, in view of the above-mentioned mineral reservation, and this is true, as far as the United States is concerned, regardless of the absence of any mineral reservation clause in the deed or deeds conveying such abandoned or relinquished strip or any part thereof, the above-mentioned clause or provision in question being a covenant that runs with the land. It is suggested, however, if and when the municipal authorities execute deeds for any portion of said relinquished strip, claimed by them pursuant to said granting act of March 8, 1922, that there be incorporated therein a mineral reservation clause in favor of the United States substantially in the language of the above-quoted provision of law.

INDEX

Withdrawal.

Withdrawal—Continued.

Witnesses.